

EXPLANATORY MEMORANDUM

ABORIGINAL CULTURAL HERITAGE BILL 2021

OVERVIEW OF THE BILL

The purpose of the *Aboriginal Cultural Heritage Bill 2021* ('the proposed Act') is to replace the *Aboriginal Heritage Act 1972* ('AH Act') and the *Aboriginal Heritage (Marandoo) Act 1992* ('AHM Act').

Whilst the AH Act was considered ground breaking at its time of enactment, it is widely acknowledged that the AH Act is outdated, ineffective and no longer fit for purpose. In particular, the AH Act does not take into account the rich diversity and extent of Aboriginal cultural heritage in Western Australia, contains outdated concepts of Aboriginal cultural heritage management and has not kept up to date with native title and other advancements that recognise Aboriginal people's special connection to country.

The proposed Act establishes a contemporary framework to value and protect Aboriginal cultural heritage in the State, and incorporates a balanced approach in the management of activities that may harm Aboriginal cultural heritage, to ensure beneficial outcomes for both Aboriginal people and the wider Western Australian community.

Importantly, the proposed Act recognises the fundamental role of Aboriginal cultural heritage in the lives and wellbeing of Aboriginal people, confirms that Aboriginal people are the primary custodians of their heritage and provides a statutory role for Aboriginal people in identifying, protecting and managing their heritage.

Unlike the AH Act, which establishes a statutory committee to evaluate the importance of Aboriginal cultural heritage on behalf of the Aboriginal community, the proposed Act provides for Aboriginal people themselves to determine what qualifies as Aboriginal cultural heritage and therefore is afforded protection under the legislation.

The proposed Act provides a broad definition of Aboriginal cultural heritage that captures its living, historical and traditional nature, as well as its tangible and intangible elements. Under the proposed Act, Aboriginal cultural heritage includes Aboriginal places, Aboriginal objects, cultural landscapes and ancestral remains. The legislation recognises the immense cultural significance of Aboriginal ancestral remains and secret and sacred objects to Aboriginal people, and provides for their return – mandatory in relation to the former and as far as practicable in relation to the latter – to the Aboriginal custodians. In addition, the disturbance, removal or dealings with Aboriginal ancestral remains is also prohibited as is the sale or removal from the State of secret and sacred objects.

The legislation establishes the Aboriginal Cultural Heritage Council (ACH Council), a majority Aboriginal advisory body, to provide strategic oversight of the Aboriginal cultural heritage regime. The ACH Council's functions include providing advice to the Minister on heritage matters, designating local Aboriginal cultural heritage services (local ACH services) and approving Aboriginal cultural heritage permits ('ACH permits') and Aboriginal cultural heritage management plans ('ACH management plans'). The ACH Council also has an important role in promoting understanding and appreciation of

Aboriginal cultural heritage and developing guidelines for best practice Aboriginal cultural heritage management.

Aboriginal people are empowered to have an active role in the management of their cultural heritage through the creation of local ACH services. These incorporated local Aboriginal bodies will act as a single point of contact on Aboriginal cultural heritage matters in their area of designation, which will create certainty for both local Aboriginal people and proponents. Local ACH services will be responsible for facilitating agreement making in relation to ACH management plans and for engaging knowledge holders to ensure that their views are captured in decisions that affect their cultural heritage.

The proposed Act ensures alignment with the recognition of native title rights and interests. The new heritage regime dovetails into native title processes and recognises native title bodies, including prioritising native title prescribed bodies corporate in the designation of local ACH services and recognising agreements entered into under the *Native Title Act 1993* (Commonwealth) ('NT Act') that meet the standards of the proposed Act.

A key feature of the proposed Act is a tiered approval system that will assist proponents determine how proposed activities may be authorised and managed to avoid or minimise risk of harm to Aboriginal cultural heritage.

The new heritage regime focuses on avoidance and minimisation of risk of harm to heritage, and encourages early engagement with Aboriginal parties prior to undertaking activities that may harm Aboriginal cultural heritage. Unlike the AH Act, the proposed Act mandates notification and consultation with Aboriginal parties for Tier 2 and Tier 3 activities.

For Tier 3 activities, the proposed Act prioritises agreement-making between Aboriginal parties and proponents through the development of an ACH management plan, with the requirement that the parties must use best endeavours for a minimum period, to be specified in the regulations, to reach agreement. Where agreement is reached on an ACH management plan, the ACH Council's role is to ensure the agreed plan meets certain standards, the proponent has used best endeavours to reach agreement with Aboriginal parties, and the Aboriginal parties have given informed consent. Where these criteria are met, the role of the ACH Council is to approve the agreed management plan. It is not to determine whether it endorses the proposed management actions – this is for the parties, particularly the Aboriginal parties, to agree. The exception to this when the ACH Council is considering whether Aboriginal cultural heritage is of State significance.

Where agreement cannot be reached on an ACH management plan, the Minister makes the decision as to whether a plan should be authorised. Through this process, the ACH Council can actively assist the parties to reach agreement, but if agreement still cannot be reached, the ACH Council must make a recommendation to the Minister to authorise a specific management plan. This may be one put forward by the proponent, by the Aboriginal parties or one developed by the ACH Council itself.

All ACH permits and authorised ACH management plans issued will provide for ways to deal with new information about Aboriginal cultural heritage, allowing for the imposition or amendment of conditions when new information comes to light.

Special protection for Aboriginal cultural heritage of outstanding significance is maintained through the declaration of protected areas. Unlike the AH Act, protected areas will not be vested with the Minister for Aboriginal Affairs, thus facilitating Aboriginal people's active involvement in the protection and management of protected areas. Both Houses of Parliament are required to approve the repeal of a protected area or amendments that will reduce the area of the protected area.

The proposed Act sets out the offences in relation to unauthorised harm to Aboriginal cultural heritage. There are three levels of harm under the legislation: serious harm, material harm and harm. Strong disincentives are provided in the proposed Act against causing harm to Aboriginal cultural heritage through significant penalties for contraventions. Such offences are also supported by stronger powers to secure compliance and new Ministerial powers to issue stop activity orders, prohibition orders and remediation orders.

The legislation establishes an Aboriginal Cultural Heritage Directory (ACH Directory) which is a central depository for information and documents about Aboriginal cultural heritage in the State. This will be a planning and research tool that will be administered in a culturally appropriate manner with culturally sensitive information made available only with the explicit consent of relevant knowledge holders.

Transitional provisions of the proposed Act ensure section 18 consents either granted or requested under the AH Act, before the proposed Act receives Royal Assent (*'historical AH Act section 18 consents'*), and those granted after Royal Assent and before the AH Act is fully repealed (*'transitional AH Act section 18 consents'*), endure for a specified period.

For historical AH Act section 18 consents, the consent will expire in ten years from when the AH Act substantially no longer has effect ('transition day') where the purpose the subject of the consent has not been substantially commenced. Transitional AH Act section 18 consents will be valid for a period of 5 years with a discretionary power for the Minister to extend this for a further 5 years where special circumstances apply.

The proposed Act repeals the AHM Act, which disappplied the AH Act to an area of land in the Pilbara. This ensures a comprehensive and consistent regime of heritage protection laws across the whole State.

To achieve better transparency and certainty of processes and standards, the proposed Act provides for development of statutory guidelines and regulations required to support the administration of the new Act. The regulations will, amongst other matters, prescribe timeframes, activity categories and the form and manner of permits and plans. The Western Australian Government has committed to a co-design process to inform and guide the development of this supporting material.

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CLAUSE NOTES

Contained below is the content of the proposed Act on a clause-by-clause basis (clause notes). In the clause notes, a brief outline of the content is provided at the commencement of the notes for each Part, Division and Subdivision of the proposed Act. Where it is useful, defined terms are italicised.

Part 1 – Preliminary

This Part provides the short title, the commencement provisions, an overview of the proposed Act, the objects and the principles to be observed in pursuit of those objects, definitions, the meaning of Aboriginal cultural heritage and related terms, the interaction of the proposed Act with other State and Commonwealth legislation, provisions for binding the Crown and the application of the proposed Act in relation to certain objects, the *Native Title Act 1993* (Commonwealth) ('NT Act') and certain State legislation.

Division 1 — Introduction

This Division contains the short title of the proposed Act and the commencement provisions.

Clause 1. Short title

This clause provides the title of the proposed Act when enacted is the *Aboriginal Cultural Heritage Act 2021*.

Clause 2. Commencement

This clause sets out when different provisions of the proposed Act become operational. Part 1, which provides the commencement provisions, an overview of the proposed Act, the objects and principles of the proposed Act, definitions and the interaction with other legislation, comes into operation the day the proposed Act receives Royal Assent ('*assent day*').

Part 15 (other than Division 3), which provides immediate transitional amendments to the *Aboriginal Heritage Act 1972* ('AH Act'), comes into operation the day after *assent day*. This marks the commencement of the *transition period*, which provides that any applications (notices) for an AH Act section 18 consent received thereafter until the repeal of the AH Act shall, if granted be limited to a maximum period of 5 years ('*transitional AH Act section 18 consents*') and will be required to notify the ACH Council of any *new information about Aboriginal cultural heritage* as it is defined in the amendments.

Part 14 Division 1 (other than clauses 310 and 311), which repeals the *Aboriginal Heritage (Marandoo) Act 1992* (AHM Act), comes into operation at the same times as when Part 15 Division 3 comes into operation, which provides that the AH Act no longer applies except in relation to complete a limited range of matters. This is referred to as '*transition day*' and it is intended that on *transition day* the bulk of provisions in the proposed Act

also come into force. However, such provisions will commence on a date to be fixed by proclamation and different days may be fixed for different provisions.

Clauses 310 and 311 of the proposed Act, which repeal the AH Act and the *Aboriginal Heritage Regulations 1974* ('AH Regulations') must commence the day after 6 months from *transition day*. This marks the end of the transition period, thereafter section 18 consents under the AH Act can no longer be given.

The rest of the proposed Act will come into operation on a day, or different days, fixed by proclamation.

Provision for a stepped commencement enable the ACH Council and Government to work with stakeholders to develop the required statutory guidelines, regulations and operational policies to support the legislation, and to give all stakeholders the opportunity to familiarise themselves with the new Aboriginal cultural heritage management regime before its commencement. This will help to minimise disruptions with the transition to the new regime.

Division 2 — Overview of Act

This Division provides a guide to the general scheme and effect of the proposed Act and where to find relevant provisions. However, the overview does not limit or affect the other provisions of the proposed Act.

Clause 3. Overview of Act

This clause provides this Part is intended to give a general indication of what the proposed Act is about, to assist in identifying the relevant provisions and indicate how the proposed Act is arranged.

Clause 4. What Act is about

This clause provides the proposed Act is about valuing and protecting *Aboriginal cultural heritage* and managing activities that may *harm* that heritage. The proposed Act recognises the special interest Aboriginal people have in protecting, conserving, preserving and managing Aboriginal cultural heritage.

Clause 5. Main topics dealt with in Act and where to find them

This clause has been included to assist in locating key provisions of the proposed Act.

Clause 6. Other things dealt with in Act and where to find them

This clause has been added to assist in locating further particular provisions of the proposed Act.

Clause 7. Overview is a guide

This clause clarifies the overview is only a guide to the proposed Act and does not seek to limit or affect other provisions of the proposed Act.

Division 3 — Objects and principles

This Division provides the objects of the proposed Act and identifies two sets of principles to be observed in pursuit of the objects of the proposed Act.

Clause 8. Objects of Act

This clause identifies the objects of the proposed Act that sets out general aims and principles that help the reader to interpret the detailed provisions of the legislation. These are to recognise the importance and value of Aboriginal cultural heritage to Aboriginal people in the past, present and future and its value to the wider community; to recognise that Aboriginal people have custodianship of such heritage, as well as the living, historical and traditional nature of such heritage; to recognise, protect, conserve and preserve that heritage; to manage activities that may harm that heritage in a manner that provides clarity, confidence and certainty, and balanced and beneficial outcomes for Aboriginal people and the wider community; and to promote an appreciation of that heritage.

The objects seek to support the protection and conservation of Aboriginal cultural heritage in Western Australia and recognise the fundamental right of Aboriginal people to be involved in the process of assessment of Aboriginal cultural heritage and management of activities that may harm their cultural heritage.

The objects recognise that Aboriginal cultural heritage provides an important link for Aboriginal people to their past, present and future, and that Aboriginal cultural heritage is of great scientific, educational and historic interest and value to all Western Australians. Objects and places that are significant in terms of understanding how the first peoples of Western Australia lived on the land, and the Dreaming stories that enable today's Aboriginal people to stay connected to their culture, are an integral part of the history that makes Western Australia unique.

The clause provides there are two sets of principles to be observed in pursuit of the Act. The first set relate to Aboriginal cultural heritage detailed in clause 9 of the proposed Act. The second set relate to the management of activities that may harm Aboriginal cultural heritage detailed in clause 10 of the proposed Act.

Clause 9. Principles relating to Aboriginal cultural heritage

This clause details the principles relating to Aboriginal cultural heritage as follows: Aboriginal people should be recognised as having a living relationship with Aboriginal cultural heritage and being the primary custodians of such heritage. Accordingly, Aboriginal people should as far as practicable, be involved in the recognition, protection, conservation and preservation of that heritage and the management of activities that may cause harm to it. As far as practicable, *Aboriginal ancestral remains* and *secret or sacred objects* should be returned to Aboriginal people and be under the custodianship, possession and control of Aboriginal people.

Clause 10. Principles relating to management of activities that may harm Aboriginal cultural heritage

This clause details the principles relating to the management of activities that may harm Aboriginal cultural heritage as follows: places, objects and landscapes will have different and changing values for individual persons, groups and communities, and those values include social, spiritual, historical, scientific, economic and aesthetic values. Places and objects should be considered within the context of a *cultural landscape*. As far as practicable, in decisions about land use for the optimum benefit of the broader Western

Australian community, the values held by Aboriginal people about their cultural heritage should be prioritised in managing activities that may harm such heritage.

The principles under clauses 9 and 10 of the proposed Act have been added to assist in the pursuit of the objects of the proposed Act.

Division 4 — Interpretation

This Division provides the definition of key terms used throughout the proposed Act including the definition of *Aboriginal cultural heritage* and related terms.

Subdivision 1 — Terms Used

This Subdivision provides the definition of key terms used throughout the proposed Act.

Clause 11. Terms Used

This clause provides definitions of terms used in the proposed Act. Some of the terms defined are self-explanatory or refer to the relevant clause of the proposed Act where the meaning of the term can be determined. Of particular note the clause provides:

- **Aboriginal person** the definition of Aboriginal person is based on the legal tripartite test for Aboriginal Australian identity stated by Justice Brennan in his judgment in *Mabo v Queensland (No.2)*, in which it was stated 'Membership of the Indigenous people depends on biological descent from the Indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people'. This tripartite test for recognition of a person's identity as an Aboriginal Australian has been commonly used throughout Australia since the *Mabo* decision.
- **culturally sensitive information** means information that, in accordance with Aboriginal tradition, is not to be shared with people who are not knowledge holders for the Aboriginal cultural heritage.
- **in the interests of the State** includes for the social or economic benefit of the State, which is specified to include for the social or economic benefit of Aboriginal people, and the interests of future generations. The social benefit in the case of Aboriginal people, includes for the cultural benefit of Aboriginal people.

There are certain Ministerial decisions which must be made on the grounds of, inter alia, what is in the *interests of the State*. These decisions are:

- whether to declare an area a *protected area* under clause 81 of the proposed Act;
- whether to reverse a decision of the ACH Council in respect of an existing or proposed ACH permit under clause 131 of the proposed Act;
- whether to reverse a decision of the ACH Council refusing to approve an ACH management plan or approve the amendment of an ACH management plan under clause 155 of the proposed Act;
- whether to authorise an ACH management plan, being a management plan where the proponent and the Aboriginal party have not reached an agreement, or the management plan relates to authorising activities that

may *harm Aboriginal cultural heritage* determined to be of *State significance* under clause 165 of the proposed Act;

- whether to give a *prohibition order* under clause 188 of the proposed Act; and
- whether to extend the term of a prohibition order under clause 191 of the proposed Act.

It is intended that for these decisions it is appropriate for the Minister to also consider the broader interests of the State.

- **knowledge holder** refers to an Aboriginal person, who in accordance with Aboriginal tradition, holds particular knowledge about the Aboriginal cultural heritage in an area and has traditional rights, interests and responsibilities in respect of that heritage. In some cases, knowledge holders may be native title parties but this may not always be the case.
- **land** is defined by reference to its definition in section 3 of the *Land Administration Act 1997* where it is defined as:
 - all land within the limits of the State;
 - all marine or other waters within the limits of the State;
 - all coastal waters of the State as defined by section 3(1) of the *Coastal Waters (State Powers) Act 1980* of the Commonwealth; and
 - the sea-bed and subsoil beneath, and all islands and structures within, the coastal, marine and other waters referred to above.
- **landholder** is broadly defined and includes the holders of (and in some cases the applicants for) certain rights conferred by other State legislation.

Such landholders will be notified when the ACH Council forms a preliminary view that an area should be declared a *protected area* (see clause 77(1)(b)), or is considering whether Aboriginal cultural heritage is of State significance for the purposes of the proposed Act (see clause 175(4) of the proposed Act). Such notification provides an opportunity for landholders to make submissions to the ACH Council on the particular matter before an ACH Council determination is made.

A Part 7 order may also be given to the landholder of the area the subject of a stop activity order, a prohibition order or a remediation order.

Clause 284 of the proposed Act provides specifically for the giving of notice to landholders.

- **native title party does not** have the same meaning as under the NT Act. This is unlike a number of other terms in the proposed Act that adopt the same definition as exists in the NT Act such as, a *registered native title body corporate*, a *registered native title claimant*, *affect*, and *native title rights and interests*.

The term ‘native title party’ refers to a *registered native title body corporate* for the area as defined in the NT Act and a *registered native title claimant* for the area as defined in the NT Act.

However, it also incorporates a person who was either a *registered native title body corporate* or a *registered native title claimant* for the area, but either pursuant to an Indigenous Land Use Agreement (‘ILUA’) as defined in the NT Act and registered pursuant to the NT Act, has surrendered their native title rights and interests or whose native title rights and interests have been compulsorily acquired or extinguished.

Further, for the purposes of the proposed Act, the term ‘native title party’ includes a regional corporation for the area which was established pursuant to a *settlement ILUA*, as defined in clause 40(2) of the proposed Act. This includes:

- the six Noongar regional corporations established pursuant to the South West Native Title Settlement;
- the Yamatji Southern Regional Corporation Ltd established pursuant to the Yamatji Nation ILUA; and
- any other corporation prescribed in respect of another (future) settlement ILUA as defined in clause 40(2) of the proposed Act.

The last category enables the status of a native title party for the purpose of the proposed Act, to be assigned to a regional corporation that may arise from any further future alternative native title settlements in the State.

Terms that are specific to a section, Division or Part are generally separately defined in the relevant section, Division or Part.

Subdivision 2 — Other key terms

Clause 12. Meaning of Aboriginal cultural heritage and related terms

This clause defines *Aboriginal cultural heritage* drawing from the principles set out in the *Australia ICOMOS Burra Charter, 2013* (‘Burra Charter’) and related practice notes. It incorporates tangible and intangible elements that are important to Aboriginal people and which are recognised through cultural values (whether social, spiritual, historical, scientific or aesthetic), as part of *Aboriginal tradition*, which is defined in clause 11.

It includes an *Aboriginal place* being an area in which tangible elements of Aboriginal cultural heritage are present, an *Aboriginal object* being an object that is a tangible element of Aboriginal cultural heritage, a *cultural landscape* being a group of areas interconnected through tangible and intangible elements of Aboriginal cultural heritage, and *Aboriginal ancestral remains*.

Clause 13. Meaning of located in relation to Aboriginal cultural heritage

This clause provides Aboriginal cultural heritage is said to be *located* in an area, if the area is, or is part of, an *Aboriginal place* or *cultural landscape* or there are *Aboriginal ancestral remains* or an *Aboriginal object* in the area.

Division 5 — Other provisions of general application

This Division provides how the proposed Act binds the State, what the proposed Act does not apply to and the effect of other legislation on this proposed Act or the effect of the proposed Act on other legislation.

Clause 14. Act binds crown

This clause declares the proposed Act binds the State in all its capacities, which means that all departments and State agencies are subject to the proposed Act, as well as the Crown in all its other capacities so far as the legislative power of the Parliament permits. This means that the State, including its various governmental, commercial and industrial instrumentalities are required to comply with the proposed Act and are not immune from prosecution under the proposed Act.

Clause 15. Act does not apply to certain objects

This clause provides the proposed Act does not apply to objects that are part of a collection made and preserved by the Western Australian Museum under the *Museum Act 1969* section 9, or to those objects that were made for the purpose of sale, unless the object is or has been, a *secret or sacred object*.

This clause has been added to ensure that the proposed Act does not impact the management of cultural material held by the WA Museum, including the repatriation of such material.

Clause 16. Native title rights and interests

This clause provides that nothing in the proposed Act is intended to affect native title rights and interests (which has the same meaning as in the NT Act) other than in accordance with the NT Act, nor should anything in the proposed Act be interpreted to prejudice such rights as recognised and protected by the NT Act.

Clause 17. Coroners Act 1996 not affected

This clause provides that except for the obligation on a coroner to transfer *Aboriginal ancestral remains* to the ACH Council as provided for in clause 59 of the proposed Act, nothing in the proposed Act affects the operation of the *Coroners Act 1996* ('Coroners Act').

Clause 18. *Freedom of Information Act 1992* does not apply to culturally sensitive information

This clause provides that the *Freedom of Information Act 1992* ('FOI Act') does not apply to information, documents or other records under the proposed Act, to the extent that the FOI Act would enable or require disclosure of *culturally sensitive information*, as defined in clause 11 of the proposed Act. Certain information linked to Aboriginal cultural heritage may be culturally sensitive, as such this clause has been added to ensure that such information obtained in the administration of the proposed Act may be exempt from disclosure under the FOI Act.

Part 2 - Aboriginal Cultural Heritage Council and local Aboriginal cultural heritage services

This Part establishes the ACH Council and provides for the designation of local ACH services, and their respective functions and powers and related matters. The ACH Council will replace the Aboriginal Cultural Material Committee established under the AH Act. The ACH Council will have functions that include providing strategic oversight of the Aboriginal heritage system; promoting public awareness, understanding and appreciation of Aboriginal cultural heritage; as well as developing and implementing a range of statutory guidelines and operational policies relating to compliance with the legislation and best practice heritage management.

Importantly, the ACH Council not only makes recommendations to the Minister but is also able to make binding decisions such as the approval of an ACH permit or ACH management plan based on agreement between the proponent and the Aboriginal party, and the designation of local ACH services.

The inclusion of local ACH services is in recognition that, as far as practical, decisions about the management of Aboriginal cultural heritage should be made at the local level through the inclusion of Aboriginal people whose heritage it is. The designation of local ACH services to undertake a statutory role in facilitating consultation and agreements on ACH management plans in their area of designation encourages and supports the pursuit of self-determination of Aboriginal people across the State.

Division 1 – Interpretation

This Division provides the definition of terms relevant to this Part.

Clause 19. Terms Used

This clause provides defined terms specific to this Part which are self-explanatory. Of particular note, the definition of a *Corporations Act corporation* includes the Indigeneity requirement under the CATSI Act section 29-5.

Division 2 — Aboriginal Cultural Heritage Council

This Division establishes the ACH Council and provides for its functions and powers and related matters including access to resources, accountability, reporting, etc.

Subdivision 1 — ACH Council established

This Subdivision provides for the establishment and membership of the ACH Council.

Clause 20. ACH Council established

This clause establishes the ACH Council and provides it is an agent of the State and accordingly has the status, immunities and privileges of the State.

Clause 21. Composition of ACH Council

This clause sets out the composition of the ACH Council, which includes two Aboriginal persons appointed as chairpersons by the Minister. In recognition of Aboriginal

customary laws, the proposed Act ensures that one chairperson must hold traditional rights, interests and responsibilities in respect of women's business and the other must hold traditional rights, interests and responsibilities in respect of men's business. There must be a further 4 to 9 persons appointed as members of the ACH Council by the Minister.

The Minister is required, in accordance with the regulations of the proposed Act, to seek nominations for appointment as members of the ACH Council. The Minister must ensure the members together hold the knowledge, skills and experience that are appropriate to perform the functions of the ACH Council. The proposed Act provides that as far as practicable, the majority of members are to be Aboriginal people and the composition of the ACH Council is to be gender balanced.

ACH Council members will be selected based on their experience in Aboriginal cultural heritage matters, and demonstrated knowledge, experience, skills or qualifications in one or more relevant disciplines. The relevant disciplines may include archaeology, anthropology, engineering, ethnography, law, natural resource management, urban or regional planning and development and others.

Subdivision 2 — Functions and powers

This Subdivision provides for the functions and powers of the ACH Council.

Clause 22. Functions of ACH Council

This clause sets out the functions of the ACH Council. Primarily, the ACH Council will be responsible for providing oversight of the proposed Act.

The ACH Council has an educational function to promote public awareness and an appreciation of Aboriginal cultural heritage in Western Australia, as well as to promote the role of Aboriginal people in the recognition, protection, conservation and preservation of Aboriginal cultural heritage, the management of activities that may harm Aboriginal cultural heritage and the administration of the proposed Act.

The ACH Council also has decision-making functions in relation to;

- the designation of a local ACH service and the possible suspension or cancellation of designation of local ACH service and changes in the area the subject of a local ACH service under Division 3 Subdivision 2 of this Part;
- ACH permits and ACH management plans under Part 6 of the proposed Act; and
- endorsing ACH protection agreements under Part 8 of the proposed Act.

The ACH Council is also responsible for:

- providing advice to the Minister on any other matter related to the exercise of the Minister's powers under the proposed Act;
- providing advice and assisting with the repatriation and care of *Aboriginal ancestral remains* and *secret or sacred objects* under Part 3 of the proposed Act;
- making recommendations in relation to prohibition and remediation orders under Part 7 of the proposed Act;

- establishing and maintaining the ACH Directory under Part 9 of the proposed Act; and
- any other functions of the ACH Council under the Act or prescribed in regulations under the Act.

Clause 23. Powers of ACH Council

This clause provides the ACH Council has all the powers it needs to perform its functions.

Clause 24. Delegation by ACH Council

This clause provides the ACH Council may delegate a power or duty to a member of the ACH Council, a member of staff provided to the ACH Council under clause 25 of the proposed Act or to a committee established under clause 30 of the proposed Act.

Due to the role of the ACH Council in providing strategic oversight of the Aboriginal cultural heritage management system in Western Australia, the proposed Act recognises there are some functions that the ACH Council should not be able to delegate. These are the power or duty to:

- designate a local ACH service, under clause 36(1) of the proposed Act;
- suspend or cancel such designation, under clause 43(2) of the proposed Act;
- amend the area the subject of any such designation, under clause 44(1) of the proposed Act;
- vary the fee structure of a local ACH service, under clause 50(2) of the proposed Act;
- consider and form a preliminary view as to an application for a *protected area order*, under clause 76 of the proposed Act;
- consider and make a recommendation to the Minister as to an application for a protected area order and any conditions that might apply, under clause 79(1), (2) or (3) of the proposed Act;
- approve an ACH management plan or an amendment to such a plan, under clause 150(1), 161(1) and 169 of the proposed Act;
- assess and make a recommendation to the Minister as to the authorisation of an ACH management plan or an amendment to such a plan, under clause 162(1) of the proposed Act; and
- determine whether an application for an ACH management plan relates to Aboriginal cultural heritage that may be of *State significance*, under clause 176(1)(b) of the proposed Act.

Any delegation of a power or duty must be in writing and executed by the ACH Council, and cannot be further delegated by any person or committee who has been delegated a power or duty.

A person or committee acting under delegation is taken to be acting in accordance with the terms of the delegation, unless the contrary is shown. The power to delegate does

not limit the ability of the ACH Council to perform a function through a member of staff provided under clause 25 of the proposed Act or an agent of the ACH Council.

Subdivision 3 — Staff and assistance

This Subdivision provides for human and material resources to assist the ACH Council.

Clause 25. Facilities and Services

This clause requires the Minister to ensure the ACH Council has the facilities, services, resources and support to perform its functions. By arrangement with the department principally assisting in the administration of the proposed Act ('Department') and the ACH Council, this may include the ACH Council making use of the human and other resources of the Department.

Clause 26. Assistance

This clause permits the ACH Council, with Ministerial approval, to co-opt any person with specialist knowledge, skills or experience to assist in a particular matter. Such person may attend and contribute in meetings of the ACH Council, but cannot vote. Further, such person is entitled to be paid remuneration and allowances as decided by the Minister on the recommendation of the Public Sector Commissioner unless the person is a public service officer. The ACH Council will likely co-opt a person with special skills if those skills are not already represented on the ACH Council and a matter being considered requires a person with relevant skills, knowledge and experience. This may include Aboriginal people with cultural authority and knowledge for Aboriginal cultural heritage in particular areas.

Subdivision 4 — Accountability and financial arrangements

This Subdivision provides measures to secure the accountability of the ACH Council.

Clause 27. Minister may give directions

This clause enables the Minister to give directions to the ACH Council as to the performance of its functions and the ACH Council must give effect to such direction.

However, the Minister cannot give a direction in relation to:

- a particular person or matter;
- a particular ACH permit or an approved or authorised ACH management plan;
- an application for an ACH permit or for the approval or authorisation of an ACH management plan;
- the evaluation of the characteristics or significance of Aboriginal cultural heritage; and
- the giving of advice or making of a recommendation to the Minister;

except when directing the ACH Council under the following provisions as listed in the table under this clause:

- to provide the Minister the information made available to the ACH Council or relevant to the decision of the ACH Council in relation to a local ACH service, and the reasons for the ACH Council's decision the subject of the objection to the Minister, per clause 46(3) of the proposed Act;
- to provide the Minister the application for a protected area, along with all relevant information, if the ACH Council forms a preliminary view that no part of the area subject to an application should be declared as a protected area, per clause 78(3) of the proposed Act;
- to give notice under clause 77 of the proposed Act, as if the ACH Council had formed a preliminary view that the whole or a part of the application area for a protected area, should be declared a protected area, per clause 78(4)(b) of the proposed Act;
- to ensure that any relevant ACH permit or approved or authorised ACH management plan is amended to exclude any overlap with the area of a proposed protected area order, per clause 81(3) of the proposed Act;
- to do what is necessary to expedite the decision on an application for an ACH permit, per clause 119(5) of the proposed Act;
- to do what is necessary to expedite a decision on an application for the extension of an ACH permit, per clause 126(5) of the proposed Act;
- to provide the Minister the information made available to the ACH Council or relevant to the decision of the ACH Council to refuse to grant an ACH permit, and the reasons for the ACH Council's decision to which the objection relates, per clause 131(3) of the proposed Act;
- to do what is necessary to expedite a decision on an application for the approval of ACH management plan within the specified period in the regulations of the proposed Act, such decision, per clause 150(5) of the proposed Act;
- to provide the Minister the information made available to the ACH Council or relevant to the decision of the ACH Council to refuse to approve an ACH management plan or an amendment to such a plan, and the reasons for the ACH Council's decision to which the objection relates, per clause 155(2) of the proposed Act; and
- to do what is necessary to expedite to make a recommendation on an application for the authorisation of ACH management plan, per clause 162(6) of the proposed Act.

Any Ministerial direction to the ACH Council given under this clause, is to be laid before each House of Parliament within 14 days after giving such direction. However, this does not include the Ministerial directions listed in the table referred to above or a Ministerial direction:

- to prepare guidelines, under clause 295 of the proposed Act;
- to amend guidelines, under clause 299(1) of the proposed Act; and

- to repeal guidelines by an instrument of repeal, under clause 299(3)(b)(i) of the proposed Act.

Further, the text of any direction given under this clause must be included in the annual report submitted by the ACH Council under clause 29 of the proposed Act for the financial year in which the direction was given.

Clause 28. Minister to have access to information

This clause provides the Minister can have access to information held by the ACH Council and can have access to, make and keep copies of documents that contain such information. The clause includes definitions for *document* and *information* which apply in this clause only. *Document* is intentionally broadly defined to incorporate any medium that may record or store information and the definition of *information* provides it can be specified information or of a specified description, that relates to the functions of the ACH Council.

When the Minister makes a request to the ACH Council to give or give access to information or any document to the Minister, the Minister may make use of staff and facilities provided to the ACH Council under clause 25 of the proposed Act to obtain such information or document and give it to the Minister. The ACH Council is to comply with such request and to make staff and facilities provided to the ACH Council, available to the Minister for the purposes of giving or giving access to the requested information or documents.

Subdivision 5 — Other matters

This Subdivision provides for related matters related to the functioning of the ACH Council.

Clause 29. Annual report of ACH Council

This clause requires the ACH Council to provide an annual report to the Minister on the activities, operations and proceedings carried out by the ACH Council in each financial year, as soon as possible after 1 July and before 28 September. Such report must be prepared and dealt with in conjunction with the report required of the Department under the *Financial Management Act 2006* ('FM Act') Part 5.

Clause 30. Committees

This clause enables the ACH Council to establish, discharge, change or reconstitute committees to assist in performing its functions. This could include committees consisting of Aboriginal people with cultural authority for particular regions or areas.

In setting up such committees, the ACH Council may decide the function, membership and constitution of the committee and appoint members of the ACH Council or any other person to such committee. The committee must comply with any direction the ACH Council may give on its functions, procedures and reporting to the ACH Council. A committee may decide its own procedures provided this is consistent with any direction given by the ACH Council or the terms of any delegated responsibility or duty. The committee is required to keep minutes of meetings to the standard approved by the ACH Council and must provide the ACH Council with a copy of such minutes.

Clause 31. Procedures

This clause enables the ACH Council to determine its own procedures subject to any relevant regulations of the proposed Act.

Clause 32. Remuneration of members of ACH Council or committee

This clause provides a member of the ACH Council or a committee is entitled to be paid remuneration and allowances as decided by the Minister on the recommendation of the Public Sector Commissioner, unless the person is also a public service officer.

Clause 33. Impersonating member of ACH Council

This clause creates an offence with a maximum penalty fine of \$5,000 if any person falsely represents by words or actions that the person is a member of the ACH Council.

Division 3 — Local Aboriginal cultural heritage services

This Division provides for the designation, purpose, nature and functions of local ACH services and related matters.

Subdivision 1 — Purpose and nature of local ACH services

This Subdivision provides the purpose and nature of local ACH services.

Clause 34. Purpose of local ACH service

This clause provides the purpose of a local ACH service designated for a particular area is to provide the local ACH service functions to the area, as far as practicable. It also provides that a local ACH service may charge a fee in connection with the provision of its functions, in accordance with the approved fee structure and related matters provided in Subdivision 3 of this Division.

Clause 35. Nature of Local ACH service

This clause clarifies that a person designated as a local ACH service is not an organisation for the purposes of the *Public Sector Management Act (1994)* ('PSM Act'), nor is it subject to that Act. Further, a local ACH service is not an agent of the State and accordingly does not have the status, immunities and privileges of the State.

Subdivision 2 — Designation as local ACH service

This Subdivision provides for the designation of local ACH services.

Clause 36. ACH Council must designate local ACH service

This clause provides the ACH Council must, as far as practicable, designate a person as a local ACH service for different parts of the State and a person may be designated as a local ACH service over more than one area of the State, however the ACH Council can only designate one local ACH service for any area.

The proposed Act does not stipulate how big or small an area the local ACH service can have responsibility for, this allows one entity to deliver local ACH service functions for a number of smaller entities, who may themselves qualify to be a local ACH service for an area, but may not yet have the capacity to take on such a role, or see a benefit in a larger entity taking on the functions of a local ACH service.

The proposed Act has been built to function even in situations where there is no local ACH service. In such situations, if there is a *registered native title body corporate* for the area, proponents will need to negotiate with them when developing any ACH management plans. In the absence of local ACH service, proponents will also have to consult or notify both the relevant registered native title body corporate and knowledge holders in the area when wishing to undertake any tier 2 or tier 3 activities that may harm Aboriginal cultural heritage.

Clause 37. Designation of local ACH service

This clause provides the requirements upon which the ACH Council may designate a person as a local ACH service as follows:

1. the applicant is eligible to become a designated local ACH service for an area, being a person described in clause 40(1) of the proposed Act and has made an application to be so designated; and
2. the applicant meets the requirements set out in clause 39 of the proposed Act; and
3. the applicant has priority for designation for the area as set out in clause 40 of the proposed Act, over any other applicant or existing local ACH service, if any, that also meets the above requirements.

The ACH Council must advise the Minister in writing if it declines to designate an applicant as a local ACH service and provide reasons for the decision.

Clause 38. Application to be designated as local ACH service

This clause provides a person set out in clause 40(1) is eligible to apply to be designated a local ACH Council for an area. The application needs to be in the approved form.

Clause 39. Requirements for designation as local ACH service

This clause sets out the requirements the ACH Council is to consider and form an opinion upon, for designating an eligible applicant as a local ACH service. Additional requirements may be added through the regulations of the proposed Act.

Importantly, it is a requirement that an eligible applicant has the endorsement of any *registered native title body corporate* or *registered native title claimant* for the area or part of the area applied for. This is to promote alignment with the recognition of native title rights and interests under the NT Act. The applicant must have comprehensive knowledge of and sufficient support of the local Aboriginal community in the area and the knowledge, skills and resources to provide local ACH service functions, which are specified in clause 48 of the proposed Act.

The applicant must also include a proposed fee structure for the fees to be charged in connection with the provision of such functions. The fee structure must be reasonable and comply with the *local ACH service (fees) guidelines*. This is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, pursuant to Part 13 Division 3 Subdivision 2 of the proposed Act.

Clause 40. Order of priority of designation

This clause provides an order of priority for such designation should there be more than one applicant for an area, or part of an area, or where there is an existing local ACH service and there is a subsequent application for designation as a local ACH service, by another eligible person. In such a situation, an application by a person or an existing local ACH service who is lower ranked in priority than another applicant or a subsequent applicant, cannot be designated as a local ACH service.

For example, a *registered native title body corporate* may not feel it is ready to apply for designation of the local ACH service and may prefer to endorse another organisation to take on such a role. Some years later, the *registered native title body corporate* may decide it now has the capacity and it is ready to apply to be designated the local ACH service. Aside from demonstrating it can meet all the requirements of clause 39, the registered native title body corporate is the priority entity to be the local ACH service.

The order of priority is as follows:

- The highest priority for designation is to a *regional corporation* which was established pursuant to a *settlement ILUA*, as defined in clause 40(2) of the proposed Act. This refers to:
 - the six Noongar regional corporations established pursuant to the South West Native Title Settlement over the relevant settlement area for each corporation;
 - the Yamatji Southern Regional Corporation Ltd established pursuant to the ILUA named the Yamatji Nation Agreement over the relevant settlement area of the said ILUA; and
 - any other corporation prescribed in respect of another (future) prescribed settlement ILUA as defined in clause 40(2) of the proposed Act, under which native title rights and interests have been surrendered.

These regional corporations are given the highest priority in specific areas of the State where traditional owners have entered into alternative native title settlements with the State. These regional corporations are recognised as the entities that best represent those groups, and should be so recognised in relation to protection and management of Aboriginal cultural heritage through designation as a local ACH service.

- The next priority for designation is to a *registered native title body corporate* for the area, being a corporation which holds native title rights and interests on trust for, or acts as an agent for the common law native title holders of the area.
- The next priority for designation is to person who was a *registered native title body corporate* for the area, but has surrendered native title rights and interests in respect of the area, or such rights have been compulsorily acquired or extinguished.

The second and third priority entities acknowledge the intent to align with the recognition of native title rights and interests under the NT Act, as these entities represent persons who are (or were) recognised as native title holders for the area under the NT Act. The third priority acknowledges that where a *registered native title body corporate* exists, but

native title rights have since been surrendered or extinguished over an area, such entity should still be recognised for the purposes of Aboriginal cultural heritage protection and management through designation as a local ACH service. The priority order acknowledges the lengthy and hard-fought process that native title groups need to go through to have their rights and interests in an area of land recognised.

- The next priority for designation is for a *CATSI Act corporation* or a *Corporations Act corporation* (noting the latter must satisfy the Indigeneity requirements of the CATSI Act), but it will need to demonstrate that it represents the local Aboriginal community in the area, in the circumstances prescribed under the regulations or has members that are *knowledge holders* for the area.

In the absence of a *regional corporation* or a *registered native title body corporate*, this type of corporation is the next priority. It enables traditional owner groups to either form an appropriate entity or support an existing entity to become a local ACH service. Importantly, there is the requirement in clause 39(b) of the proposed Act which requires the endorsement of the registered native title claimant to any application.

- The lowest priority for designation is a *native title representative body* for the area, which is defined in clause 11 of the proposed Act to include a body recognised as a representative body under section 203D of the NT Act, and a native title service provider funded under section 203FE of the NT Act to perform all or specified functions of a representative body.

Such entities need not satisfy the Indigeneity requirements of the CATSI Act (although some of these organisations do), but they are organisations that specialise in the representation of Aboriginal people in matters related to native title rights and interests and are thus an appropriate body that could be designated a local ACH Service in the absence of a suitable application by a higher priority applicant. However, pursuant to clause 39(b) of the proposed Act such organisations still require the endorsement of any registered native title body corporate or claimant for the area or part of the area.

Clause 41. ACH Council must give public notice of designation

This clause provides the ACH Council must give *public notice* when a person is designated as a local ACH service. Such notice must detail the name of the local ACH service, describe the area for which the person is designated as the local ACH service, provide contact information for the local ACH service and any other information that may be specified in the regulations of the proposed Act.

The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Clause 42. Duration of designation as local ACH service for area

This clause provides the designation of a person as a local ACH service commences on the day of the public notice of the designation or as otherwise specified in the notice until, if the person is either a CATSI Act corporation or Corporations Act corporation, the corporation is deregistered or the designation is cancelled pursuant to the proposed Act.

The clause also provides that the designation of a local ACH service is not affected by an amendment to the area the subject of the local ACH service, and is taken to be designated as the local ACH service for the area as amended.

Clause 43. Suspension or cancellation of designation as local ACH service for area or part of area

This clause provides for the suspension or cancellation of a designation as a local ACH service in relation to an area or part of an area, under various circumstances:

- The ACH Council may cancel the designation of a local ACH service, upon the written request of a person designated as a local ACH service.
- The ACH Council or the Minister may give written notice to a person designated as a local ACH service of either the cancellation or the suspension of such designation for a specified period, where either the Minister or the ACH Council:
 - is satisfied the local ACH service no longer meets the requirements to be designated as the local ACH service under clause 39 of the proposed Act; or
 - is satisfied the local ACH service is no longer the highest in the order of priority for designation for the area under clause 40 of the proposed Act of those that have applied to be designated as the local ACH service; or
 - determines the local ACH service is not, as far as practicable, providing local ACH service functions for the area, as specified in clause 48 of the proposed Act and required under clause 34(a) of the proposed Act.

Such notice must set out the grounds on which the action is taken and takes effect from the day specified in the notice. However, before any action is undertaken to suspend or cancel the designation, the Minister or the ACH Council must notify the person designated as a local ACH service of the proposed action and the grounds for such action and provide a reasonable opportunity for the person to be heard on the proposed action.

Where action is taken by the ACH Council or the Minister to suspend or cancel the designation of a local ACH service, the ACH Council is required to give *public notice* of that action. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

The designation is of no effect during the period of the suspension.

Clause 44. Change to area for local ACH service

This clause provides the ACH Council may amend an area for a local ACH service, at the request of the local ACH service or initiated by the ACH Council. Where it is initiated by the ACH Council, the ACH Council must notify the local ACH service in writing of the proposed amendment, provide reasons for the proposed amendment and provide a reasonable opportunity for the local ACH service to be heard on the proposed amendment.

The ACH Council may amend the area for which the local ACH service is designated if the ACH Council is satisfied the person meets the requirements in clause 39 and is in the

order of priority for designation for the area as set out in clause 40(1) and there is no other person designated as a local ACH service for any part of the amended area.

Where the area of a local ACH service is amended, the ACH Council must give *public notice* of the amended area for which the person is designated as a local ACH service. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Clause 45. Change to local ACH service

This clause provides the ACH Council may on its own initiative or at the request of a person designated as a local ACH service, amend the name of the local ACH service or any of the details or information that was provided in the *public notice* when the person was first designated as a local ACH service.

The ACH Council must then give public notice of the amended details or information. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Clause 46. Objection to decision of ACH Council

This clause provides various circumstances when a person can object in writing to a decision of the ACH Council to the Minister within the time period prescribed in the regulations. The relevant Council decisions are:

- refusal to designate an applicant for designation as the local ACH service under clause 38 of the proposed Act;
- refusal to cancel a designation in relation to the whole or a part of the area as requested by the relevant local ACH service under clause 43(1) of the proposed Act;
- the suspension or cancellation of a local ACH service over the whole or a part of the area under clause 43(2) of the proposed Act;
- refusal to amend the area for which a local ACH service is designated in response to a request by the local ACH service under clause 44(2)(a) of the proposed Act;
- the amendment of the area for which a local ACH service is designated at the initiative of the ACH Council under clause 44(2)(b) of the proposed Act; and
- refusal to approve the variation of the fee structure of the local ACH service under clause 50(1) of the proposed Act.

Before considering the objection, the Minister must request from the ACH Council, the information that was provided to the ACH Council at the time the decision was made, which is the subject of the objection and the ACH Council's reasons for the decision. The Minister may also request from the objector any further information that is relevant to the objection, and to verify any such information by statutory declaration.

The Minister must consider the information provided by the ACH Council and any further information provided by the objector, and either confirm the decision of the ACH Council or make another decision that replaces the decision of the ACH Council. In either case, the objector is to receive written notice of the Minister's decision.

Clause 47. Notice of decision must be given

This clause provides the ACH Council must give a person who can object to a decision of the ACH Council under clause 46 of the proposed Act, written notice of that decision within 14 days after the ACH Council has made the decision. Such notice must include the reasons for the decision and a statement advising of the person's right to object to the Minister as to the decision.

Subdivision 3 — Local ACH service functions and related provisions

This Subdivision provides the functions of local ACH services and related provisions.

Clause 48. Local ACH Service functions

This clause sets out the functions of a local ACH Service. There are nine functions identified with the ability to prescribe more in regulations of the proposed Act. The functions require the person appointed as a local ACH Service to:

- engage and negotiate, as is appropriate, with *proponents* intending to carry out activities that may *harm* Aboriginal *cultural heritage* in an area and with the relevant native title parties and knowledge holders for the area, or part of the area; to make or facilitate the making of an *ACH management plan* in respect of the area;
- to provide advice to proponents about whether Aboriginal cultural heritage is located in the area and the characteristics of such heritage;
- to provide information to the ACH Council about Aboriginal cultural heritage in the area to assist the ACH Council to perform its functions and improve the accuracy of the ACH Directory;
- to make submissions to, and provide information, to the ACH Council about proposals for activities to be carried out in the area and the management of those activities to avoid, or minimise, the risk of harm to Aboriginal cultural heritage;
- to engage with other local ACH services, native title parties or knowledge holders as to Aboriginal cultural heritage that extends beyond the area of the local ACH service;
- to undertake either directly or indirectly activities to identify, maintain, conserve and preserve Aboriginal cultural heritage located in the area;
- to report to the ACH Council about matters related to the provision of the local ACH services' functions as required by the regulations;
- to undertake either directly or indirectly agreed functions in relation to protecting, preserving, conserving or managing Aboriginal cultural heritage in an approved or authorise ACH management plan; and
- any other function as specified in regulations of the proposed Act.

The clause also provides that a local ACH service must use its best endeavours to provide the above functions in a timely manner.

Clause 49. Fee for services provided by local ACH service

This clause provides a local ACH service may charge a fee for services related to its functions as a local ACH service, but it cannot charge such a fee to the Department or the ACH Council. The intent is that, if a proponent wants to undertake an activity that may impact Aboriginal cultural heritage, then reasonable costs associated with obtaining approvals to undertake this activity should be paid, this includes but is not limited to fees for services provide by local ACH services. Such fees will be stipulated by supporting guidelines, but may include services such as completing cultural heritage investigations, facilitating consultation and notification with the Aboriginal community and others.

Such fees are to be charged in accordance with either the fee structure the local ACH service had in place at the time it was designated as a local ACH service, or any subsequently approved variation to such fee structure under clause 50(2) of the proposed Act. There is an acknowledgement that the scale of fees may differ depending on the region and skillset required. The ACH Council will issue guidance around a reasonable range of fees that should be charged.

If such fee is not paid, the local ACH service may recover the fee as a debt due in court.

Clause 50. Variation of fee structure for services provided by local ACH service

This clause permits a person designated as a local ACH service to apply to the ACH Council for a variation of its fees, which the ACH Council can approve if it is satisfied that the varied fee structure is reasonable and complies with the *local ACH service (fees) guidelines*. This is a guideline prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

Subdivision 4 — Funding for local ACH services

Clause 51. Funding for local ACH services

As the proposed Act will be imposing additional functions and responsibilities on already established organisations, for example registered native title bodies corporate, this clause provides the ability for the Government to provide financial assistance to local ACH services to assist them in performing statutory functions.

This clause provides the CEO of the Department, with the written approval of the Minister, may provide funding to a local ACH service, to enable the local ACH service to provide functions in relation to the relevant area.

The CEO is to make a written determination as to the amount of money to be paid as funding to a local ACH service (the '*funding sum*') and whether such funding is to be paid in a lump sum or in periodic payments and in relation to all or part of a financial year but provided it is not for a period longer than 3 years (a '*funding period*'). Such determination is to include conditions on the funding, if any, including as to the purpose for which the funding sum is to be used, information required as to the use of funds, the provision and publication of financial statements, and the continuing satisfactory performance of the

local ACH service in providing functions for the area. Such determination must also be made in accordance with any criteria prescribed in the regulations of the proposed Act.

All such funding will also be subject to the condition that if the designation of the local ACH service is cancelled pursuant to clause 43 of the proposed Act, then a sum equivalent to the *uncommitted amount* must be paid to the ACH Council. Such amount is calculated by deducting from the amount of funding paid to the local ACH service, the amount the local ACH service has already spent or for which liability has already been incurred for the purpose of providing local ACH service functions.

The CEO must ensure the local ACH service who is paid the funding sum is given written notice of the conditions of the funding including the requirement to pay back any *uncommitted amount* upon cancellation of the designation.

Clause 52. Contravention of funding conditions

Clause 52 provides that contravention of a condition attached to the funding by a local ACH service, or formerly designated as a local ACH service, incurs a maximum penalty fine of \$10,000.

Part 3 — Rights and duties in relation to Aboriginal cultural heritage

This Part provides for rights and duties of various persons in relation to Aboriginal cultural heritage and deals with the management of Aboriginal ancestral remains and secret or sacred objects.

The proposed Act acknowledges that Aboriginal ancestral remains and secret or sacred objects are of great cultural significance to Aboriginal people, and provides that as far as practicable, Aboriginal ancestral remains and secret or sacred objects should be returned to Aboriginal custodians.

Division 1 — Preliminary

This Division provides for terms specific to this Part and that no compensation is available for any loss resulting from this Part.

Clause 53. Terms Used

This clause defines two terms for the purposes of this Part.

Custodian in relation to *Aboriginal ancestral remains* is as described in clause 55(1)(a) of the proposed Act and in relation to a secret or sacred object is as described in clause 63(1)(a).

An *organisation* does not include an individual or the WA Museum.

Clause 54. No compensation under this Part

This clause provides that no person is entitled to any compensation for loss resulting from the operation of this Part.

Division 2 — Aboriginal ancestral remains

This Division provides for dealing with Aboriginal ancestral remains.

Clause 55. Rights of Aboriginal people in relation to Aboriginal ancestral remains

This clause provides an Aboriginal person, group or community with traditional rights, interests and responsibilities in respect of an area in which *Aboriginal ancestral remains* are located or thought to have originated from, is a custodian of such ancestral remains and is entitled to possession and control of those ancestral remains, regardless of who may have possession or control of those ancestral remains prior to the commencement of this section.

Clause 56. ACH Council must be notified about Aboriginal ancestral remains

This clause provides that any individual or organisation (other than the WA Museum, see clause 15 of the proposed Act) that holds Aboriginal ancestral remains, must within the period set by the regulations of the proposed Act, give written notice to the ACH Council that they hold such ancestral remains, describe and include any relevant information about such ancestral remains including how they came to hold such ancestral remains. Failure to do so is an offence with a maximum penalty fine of \$10,000.

However, the obligation to notify the ACH Council does not apply to an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities in

respect of the Aboriginal ancestral remains, or an organisation or individual acting upon the written request of such Aboriginal person. Further, an organisation or individual do not have to give notice, if they had reasonable cause to believe, and did in fact believe, that the ACH Council was already aware that the organisation or individual is in possession of the said remains.

Clause 57. Duty of organisations to return Aboriginal ancestral remains

This clause provides that an organisation (other than the WA Museum) that has given notice to the ACH Council that it holds Aboriginal ancestral remains, must within the period set by the regulations of the proposed Act, identify a custodian of the ancestral remains. The organisation must either return the ancestral remains to a custodian, or at the request of a custodian hold the ancestral remains on behalf of the custodians, until otherwise requested by a custodian. Failure to do so is an offence with a maximum penalty fine of \$20,000. An organisation must seek the advice of the ACH Council in fulfilling the duty to return the ancestral remains.

However, it is a defence to such offence that the organisation could not, after taking reasonable steps to do so, identify a custodian for the ancestral remains and has transferred the ancestral remains to the ACH Council.

When the ancestral remains are returned to a custodian or at the request of a custodian the organisation continues to hold the ancestral remains on behalf of the custodians, the organisation must so advise the ACH Council by written notice, within the period set by the regulations of the proposed Act. Failure to do so is an offence with a maximum penalty fine of \$10,000.

Clause 58. Duty of individuals to transfer Aboriginal ancestral remains to custody of ACH Council

This clause provides that individuals that have given notice to the ACH Council that they hold Aboriginal ancestral remains, must within the period set by the regulations of the proposed Act, take reasonable steps to transfer the ancestral remains to the ACH Council. Failure to do so is an offence with a maximum penalty fine of \$20,000. Individuals must seek the advice of the ACH Council in fulfilling the duty to transfer ancestral remains to the ACH Council.

The requirement for individuals to transfer ancestral remains to the ACH Council acknowledges that individuals may not have the capacity or resources to transfer remains to the rightful custodians, and that the ACH Council would be best placed to hold on to these remains for safekeeping until the rightful custodian can be identified.

Clause 59. Transfer of Aboriginal ancestral remains by coroner

This clause relates to the amendment to the Coroners Act made under Part 16 of the proposed Act and provides that where a coroner has notified the ACH Council, pursuant to section 19B of the Coroners Act that a body is, or is likely to be Aboriginal ancestral remains, the coroner must as soon as practicable transfer such ancestral remains to the ACH Council.

Clause 60. Aboriginal ancestral remains transferred to custody of ACH Council

This clause provides when the ACH Council has custody of *Aboriginal ancestral remains* pursuant to the proposed Act, it may return the ancestral remains to a custodian of the ancestral remains, or at the request of such custodian, hold such ancestral remains in safekeeping. In instances where a custodian cannot be identified, the ACH Council may deal with the ancestral remains in a manner the ACH Council considers appropriate. This may include storing remains at a suitable keeping place until such time the rightful custodian can be identified or transferring the remains to an Aboriginal organisation for safekeeping.

Clause 61. Aboriginal ancestral remains must not be disturbed or removed

This clause provides that a person must not disturb or remove *Aboriginal ancestral remains* on land; sell, exchange or dispose of ancestral remains; remove, cause or permit the removal of ancestral remains from the State; or conceal ancestral remains. Contravention of this provision is an offence with maximum penalty fine of \$20,000.

Such offence does not apply to an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities in respect of the ancestral remains, or a person acting in accordance with this Part.

The clause provides it is a defence to the person charge with such an offence, that the person was carrying out an authorised activity under the proposed Act, or performing a function under this or another Act, or was lawfully on the land where the ancestral remains were located and did not reasonably suspect about the presence of the ancestral remains or that their actions would disturb or remove the ancestral remains. The defence also requires the person to have ceased the activity as soon as practicable after they became aware of the presence of the ancestral remains.

Division 3 — Secret or sacred objects

This Division provides for dealing with secret and sacred objects.

Clause 62. Term used: prescribed public authority

This clause defines one term specific to the purpose of this Part.

A *prescribed public authority* is any public authority other than the WA Museum and any university listed in Schedule 1 of the PSM Act, which currently lists the University of Western Australia, Murdoch University, Edith Cowan University, Curtin University and the University of Notre Dame.

Clause 63. Rights of Aboriginal people in relation to secret or sacred objects

This clause provides an Aboriginal person, group or community with traditional rights, interests and responsibilities in respect of a *secret or sacred object*, is a custodian and rightful owner of the object and entitled to possession and control of the object on and from the commencement of this clause, if the object is in the possession of a *prescribed public authority* (which is any public authority excluding the WA Museum and the Universities in Western Australia) whether immediately before, on or after the commencement of the proposed Act, irrespective of who may have previously owned or had possession of the object.

For more than 150 years, Aboriginal ancestral remains and secret or sacred objects were removed from communities for various reasons and placed in museums, universities and private collections in Australia and overseas. The proposed Act exempts the WA Museum and certain universities from returning secret or sacred objects under the proposed Act, in recognition of their proactive management and repatriation of secret or sacred objects to Aboriginal communities.

Clause 64. ACH Council must be notified about secret or sacred objects

This clause provides any person, other than the WA Museum and certain universities in Western Australia, in possession of a *secret or sacred object* must within the period set in the regulations of the proposed Act, give written notice to the ACH Council that they have possession of the object, provide a description of the object and any other relevant information about the object including how they came to be in possession of the object. Failure to do so is an offence with a maximum penalty fine of \$5,000.

However, the obligation to notify the ACH Council does not apply to an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities in respect of the secret or sacred object, or a person acting upon the written request of such Aboriginal person. The clause also does not apply to a person who reasonably believes the ACH Council was already aware that they were in possession of the object.

Clause 65. Duty of prescribed public authorities to return secret or sacred objects

This clause provides that a *prescribed public authority* (this excludes WA Museum and universities in Western Australia) that has given notice to the ACH Council that it holds a *secret or sacred object* pursuant to the previous clause, must within the period prescribed in the regulations of the proposed Act, identify a custodian of the object. Such authority must then either return the object to a custodian, or at the request of a custodian hold the object on behalf of the custodians, until otherwise requested by a custodian. Failure to do so is an offence with a maximum penalty of \$20,000. Such authorities must seek the advice of the ACH Council in fulfilling the duty to return the object.

However, it is a defence to such offence that the authority could not, after taking reasonable steps to do so, identify a custodian for the secret or sacred object in its possession and has given possession of the object to the ACH Council.

When the object is returned to a custodian, or the prescribed public authority continues to hold the object on behalf of the custodians at the request of a custodian, the authority must so advise the ACH Council by written notice within the period set by the regulations of the proposed Act. Failure to do so is an offence with a maximum penalty fine of \$10,000.

To avoid impinging on private ownership rights the proposed Act does not require all organisations and individuals to return secret or sacred objects in recognition that historically individuals and organisations may have acquired secret or sacred objects legally or via gifting from Traditional Owners.

Clause 66. Secret or sacred objects transferred to custody of ACH Council

This clause provides when the ACH Council has custody of a *secret or sacred object* under the proposed Act, it may as is appropriate, return the object to a custodian of the object, or at the request of such custodian, hold such object in safekeeping on behalf of the relevant custodians. In instances where a custodian cannot be identified, the ACH Council may deal with the object in a manner it considers appropriate. This may include storing the object at a suitable keeping place until such time the rightful custodian can be identified or transferring it to an Aboriginal organisation for safekeeping.

Clause 67. Secret or sacred objects must not be sold or removed from the State

This clause provides that a person must not sell, exchange, dispose of, conceal or remove or cause or permit to be removed from the State, any *secret or sacred object*. Contravention of this provision is an offence with a maximum penalty fine of \$20,000.

This clause does not apply to an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities in respect of the object or a person dealing with the object in accordance with this Part.

Division 4 — Duty to report Aboriginal cultural heritage to ACH council

This Division provides for a duty to report Aboriginal cultural heritage to the ACH Council.

Clause 68. Reporting Aboriginal cultural heritage

This clause provides that a person who knows or becomes aware of the existence of an *Aboriginal place*, an *Aboriginal object* or *Aboriginal ancestral remains*, must within a period specified in the regulations of the proposed Act, report it to the ACH Council. The report may be given orally or in writing. Failure to do so is an offence with a maximum penalty fine of \$10,000.

However, this clause does not apply to an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities in respect of the Aboriginal place, Aboriginal object or Aboriginal ancestral remains, or a person acting at the written request of such Aboriginal person, or a person who reasonably believes the ACH Council is already aware of the Aboriginal place, Aboriginal object or Aboriginal ancestral remains.

This exemption is included in recognition that some Aboriginal cultural heritage may be subject to culturally sensitive information, and in accordance with traditional law should not be disclosed.

This clause also enables the ACH Council to arrange for the transfer of *Aboriginal ancestral remains* or *secret or sacred objects*, which are reported to it under this clause, and that are not in the possession and control of the relevant custodian to be transferred into the custody of the ACH Council.

Part 4 — Protected areas

This Part deals with providing special protection to an area of *land* (as defined in clause 11) where Aboriginal cultural heritage of *outstanding significance* for the purposes of the Act is located, by declaring an area a *protected area*.

Aboriginal cultural heritage that is within a protected area is afforded the highest level of protection under the legislation as a declaration does not permit the making of ACH permit or ACH management plan applications over the protected area, thus preserving them from activities that may cause harm to Aboriginal cultural heritage that is present. Declarations of protected areas can include whole or parts of cultural landscapes.

An application for a protected area can only be made by a knowledge holder. If any application is not supported by the ACH Council, the applicant has a right to request further consideration by the Minister. Both Houses of Parliament are required to approve the repeal of a protected area or amendments that will reduce the area of the protected area.

Division 1 — Preliminary

This Division provides definitions of terms specific to this Division, the purpose of protected area orders and the consideration of protected area orders guidelines.

Clause 69. Terms used

This clause defines two terms specific to this Part of the proposed Act.

Application area is the area which is proposed to be made subject to a protected area order in an application for such an order.

Outstanding significance in relation to Aboriginal cultural heritage, is the standard of significance of Aboriginal cultural heritage to a relevant *knowledge holder*, or a group or community whose members are *knowledge holders* of the cultural heritage proposed to be the subject of a *protected area order*. That significance is recognised through various possible cultural values, including social, spiritual, historical, scientific or aesthetic as part of Aboriginal tradition.

Given the strength of special protections afforded to a protected area it is necessary that there is a strong threshold to be achieved to obtain such protection. It also maintains the standard established in the AH Act for protected areas which allows a consistent standard to add to existing protected areas.

Clause 70. Purpose of protected area order

This clause provides the purpose in declaring an area as a protected area is to recognise that *Aboriginal cultural heritage of outstanding significance* for the purposes of the proposed Act is *located* in the area, and to provide special protection to the area from activities that may *harm* that Aboriginal cultural heritage.

Clause 71. Protected area order guidelines must be considered

This clause provides that in order to determine whether Aboriginal cultural heritage is of outstanding significance for the purposes of the proposed Act, the factors set out in the *protected area order guidelines* must be considered.

This is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

Division 2 — Application for area to be declared as protected area

This Division provides the process for seeking a protected area order.

Clause 72. Application for area to be declared as a protected area

This clause provides that an application for a *protected area order* to the ACH Council may be made by a *knowledge holder* for the area, or on behalf of such knowledge holders. The application must be in the approved form, describe the *application area* which can be composed of several physically distinct areas, describe the characteristics of the Aboriginal cultural heritage in the application area and the *outstanding significance* of such cultural heritage to the applicant, or to a group or community of which the applicant is a member.

An area cannot be subject to a protected area order if it is already subject to an *ACH permit* or an *ACH management plan*. Accordingly, if an application area is wholly or partly subject to either an ACH permit or an ACH management plan, the application must include evidence of the agreement of either the holder of the ACH permit or the parties to the ACH management plan, to excise such overlap area from the area the subject of the ACH permit or ACH management plan. Further, the application must include any further documents or evidence, if any that are specified in the regulations of the proposed Act.

Clause 73. Further information in support of application

This clause enables the ACH Council to request in writing from the applicant further information relevant to the application for a *protected area order*, including the verification of information by statutory declaration, which is to be provided within the period specified in the written request.

Clause 74. ACH Council may refuse to consider some applications

This clause enables the ACH Council to refuse to consider or further consider an application for a *protected area order* if the application has not been made in accordance with the proposed Act, or the applicant has not complied with a request under clause 73 for further or the verification of information, or the application is substantially the same as a previous application submitted within the last 2 years and that was refused.

Clause 75. ACH Council must notify certain persons about application

This clause provides the ACH Council must give written notice of an application for a *protected area order* to each *local ACH service*, each *native title party* and each *knowledge holder* after reasonable steps have been taken to do so in accordance with the *knowledge holder guidelines*, for the whole or part of the area proposed to be subject to a protected area order.

Such notice ensures other Aboriginal persons who are not the applicant, but have traditional rights, interests and responsibilities or hold particular knowledge about the

Aboriginal cultural heritage of the application area, have an opportunity to comment on the application.

Such notice must give details of the *application area*, details as to the relevant *Aboriginal cultural heritage* to which the application relates without disclosing *culturally sensitive information* and provide the persons notified with an opportunity to make submissions to the ACH Council within the period set in the regulations of the proposed Act, as to whether the application area or part of the application area should be subject to a protected area order.

Clause 76. Preliminary assessment by ACH Council

This clause provides that once the period for receiving submissions in relation to the application for a *protected area order* has ended under clause 75 of the proposed Act, the ACH Council must, within the period specified in the regulations;

- consider the application together with any further information provided in support of the application under clause 73 of the proposed Act;
- consider any submissions received from the persons notified under clause 75 of the proposed Act;
- consider the characteristics of the Aboriginal cultural heritage and the significance of such cultural heritage to its *knowledge holders*; and
- form a preliminary view as to whether the *application area* or part of the application area should be declared a *protected area*. In forming this view, the ACH Council must be satisfied that *Aboriginal cultural heritage of outstanding significance* for the purposes of the proposed Act is located in the area.

Clause 77. Giving public notice of intention to seek that area be declared as protected area

This clause provides that if the ACH Council forms a preliminary view that an area should be declared a *protected area*, the ACH Council must give *public notice* of this and notify others of the public notice. The public notice must give details of the area the ACH Council has formed a view should be declared a protected area. Such notice must also provide an opportunity to make submissions to the ACH Council about the proposed protected area, within a period specified in the regulations of the proposed Act.

Public notice gives the broader public an opportunity to comment on the proposal. This is in recognition that the rights and interests of members of the public may be impacted by the declaration of a protected area.

The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

The other persons to be notified of the public notice are each *local ACH service*, each *native title party* and each *knowledge holder* after reasonable steps have been taken to do so in accordance with the *knowledge holder guidelines*, each *landholder*, and each public authority or any other person the ACH Council considers has an interest in the

whole or part of the area proposed to be subject to a protected area order. This is to ensure that persons with an interest in or in relation to the land is aware of the public notice, and has an opportunity to comment on the proposal.

Clause 78. Review of preliminary view of ACH Council that area not be declared as protected area

This clause provides that if the ACH Council forms a preliminary view that the area *should not* be declared a protected area, the ACH Council must give the applicant and the persons notified under clause 75(1) of the proposed Act, further written notice setting out the ACH Council's view, the reasons for that view, and include a statement the person may request in writing that the Minister consider the matter, within the period specified in the regulations of the proposed Act.

If an applicant requests the Minister to consider the matter, the Minister must direct the ACH Council to provide to the Minister the application for the protected area order, any further information provided to the ACH Council under clause 73 of the proposed Act, any submissions received by the ACH Council in response to the notice given to certain persons under clause 75(1), and information as to the basis of the ACH Council's preliminary view.

Having considered the information provided by the ACH Council, the Minister may either confirm the preliminary view of the ACH Council or if the Minister is satisfied that *Aboriginal cultural heritage of outstanding significance* for the purposes of the proposed Act is located in the whole or part of the *application area*, give a written direction to the ACH Council to give public notice as if the ACH Council had formed the preliminary view that the whole or part of the application area should be declared a protected area. If a direction is given the ACH Council is taken to have formed the preliminary view and must continue with the application process by giving public notice under clause 77.

If the Minister confirms the preliminary view of the ACH Council that the area should not be declared a protected area, the Minister must ensure that written notice of the Minister's decision is given to the applicant and each Aboriginal person notified under clause 75(1) of the proposed Act.

Division 3 — Recommendation of ACH Council

This Division provides the requirements for the ACH Council to make a recommendation to the Minister regarding an application for a protected area order.

Clause 79. Recommendation of ACH Council

This clause provides that at the end of the period for receiving submissions in relation to the application following *public notice* under clause 77(1)(a) of the proposed Act, the ACH Council must within the period specified in the regulations of the proposed Act make a recommendation to the Minister whether an area should be declared a protected area.

Such recommendation requires the ACH Council to consider the application for a *protected area order* together with any further information provided under clause 73 of the proposed Act, the submissions received in response to notices given under clauses 75 or 77 of the proposed Act, and the characteristics of the *Aboriginal cultural heritage* and its significance to the relevant *knowledge holders*.

A recommendation for a protected area order requires the ACH Council to be satisfied that the Aboriginal cultural heritage located in the area is of *outstanding significance* for the purposes of the Act and that the area requires special protection from activities that may *harm* such cultural heritage. The ACH Council must also be satisfied there are measures in place for any overlap area between the proposed protected area and the area the subject of any *ACH permit* or *ACH management plan*, to be excised from the area the subject of the ACH permit or ACH management plan, and as to any further matters that may be specified in regulations of the proposed Act.

The clause provides the ACH Council may also recommend the proposed protected area order contains conditions relating to the management of or access to the area and any other matters that may be specified in the regulations of the proposed Act. Rather than applying standard conditions on all protected areas, the proposed Act allows for the conditions to vary for protected areas on a case by case basis depending on their specific management needs and different circumstances, and taking into account native title issues. Such conditions may prohibit or limit access to the area or restrict certain activities from being undertaken.

Any recommendation by the ACH Council to the Minister must be accompanied reasons for the recommendation, the application made for the protected area order, any further information provided under clause 73 of the proposed Act, or submissions received under clauses 75 or 77 of the proposed Act.

Finally, the ACH Council must also give *public notice* of its recommendation to the Minister. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Division 4 — Decision of Minister

This Division provides for the Minister's decision making process on an application for a protected area order.

Clause 80. Minister may request further information

This clause provides that when the Minister receives a recommendation from the ACH Council whether an area should be declared a protected area, the Minister may request in writing further information from the ACH Council or any other person to assist the Minister in making a decision as to whether an area should be declared a protected area.

Clause 81. Decision of Minister

This clause provides that when the Minister receives a recommendation from the ACH Council, the Minister must consider the information the ACH Council has provided to the Minister under clause 79, the recommendation of the ACH Council and any further information received under clause 80 and make a decision as to whether an area should be declared a protected area, within the period specified in the regulations of the proposed Act.

Like the ACH Council recommendation, the decision of the Minister must be made on the grounds of whether the Minister is satisfied the Aboriginal cultural heritage located in the area is of *outstanding significance* for the purposes of the Act and that the area requires

special protection from activities that may *harm* such cultural heritage. The Minister must also be satisfied there are measures in place for any overlap area between the proposed protected area and the area the subject of any *ACH permit* or *ACH management plan*, to be excised from the area the subject of the ACH permit or ACH management plan, and as to any further matters that may be specified in regulations of the proposed Act.

However, unlike the ACH Council, the Minister is also to consider what is *in the interests of the State*, which is defined to include the social or economic benefit of the State, which includes the social or economic benefit of Aboriginal people and the interests of future generations. This takes into account that the declaration of protected areas may significantly affect the rights and interests of other landholders or persons with an interest in the area, including the restriction of access or prohibition of activities from occurring within an area.

If the Minister decides that an area should be declared as a protected area, the Minister may give any written direction necessary prior to the declaration, to amend any ACH permit or ACH management plan (under clauses 129(1) or 169(3) respectively) so as to excise any overlap with the area that is to be protected, noting that such amendment would be based on the agreement of either the ACH permit holder or the parties to the ACH management plan (under clause 72(3) or 72(4) respectively).

The Minister is also able to determine that the protection area order is subject to any condition related to the management of or access to the area or in respect of any other matter that is specified in the regulations of the proposed Act. Finally, the Minister must recommend to the Governor that the Governor declare the area to be protected area for the purposes of the proposed Act.

If the Minister decides that no part of the application area should be the subject of a protected area order, public notice of such decision is required. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Division 5 — Declaration of protected area

This Division provides the process for declaring a *protected area* after the Minister has made a decision to make such an order, or to amend or repeal such orders.

Clause 82. Protected area orders

This clause provides that after receiving a recommendation from the Minister, the Governor may by order declare an area to be a protected area for the purposes of the Act. Such order can declare that the protected area comprises several areas that are not contiguous.

The order must provide a name for the protected area, describe the boundaries of the protected area with sufficient clarity to identify the area, and state *Aboriginal cultural heritage of outstanding significance* for the purposes of the proposed Act is located in the protected area. The order must include any conditions that apply to the protected area.

Clause 83. Amending and repealing orders

This clause provides an application can be made for the amendment or repeal of a *protected area order* by either a *knowledge holder* for the protected area, or a person who wants to carry out an activity in the protected area. Such amendments can include;

- a change to the name of the protected area;
- a change to the description of the boundaries of the protected areas;
- a new condition, a change to or the removal of an existing condition of the protected area order, in relation to the management of or access to the protected area; and
- as to any other matters that may be specified in the regulations of the proposed Act.

Part 6 of the proposed Act applies to an application for an amendment to a protected area order, with the appropriate modifications and with two exceptions. This ensures that the opinions of Aboriginal people and affected parties are taken into consideration. Firstly, as specifically provided in the clause, any person who wants to carry out an activity in the protected area may apply for an amendment to a protected area order.

Secondly, this clause allows a simplified process for an application to change the name of a protected area: For such application, the requirements of clauses 75 through to clause 81 of the proposed Act do not apply, and the Governor may, on the recommendation of the Minister made under this clause, change the name of a protected area by order. However, before making such a recommendation the Minister must give notice of the proposed change of name to the persons described in clause 75(1) of the proposed Act, being each *local ACH service*, each *native title party* and each *knowledge holder* for the protected area order. The notice must provide a reasonable opportunity to make submissions to Minister about the proposed name change, and the Minister must consider such submissions made.

Clause 84. Order to correct error

This clause provides the Minister may recommend to the Governor, and the Governor may amend a protected area order by order, to correct a clerical mistake, or unintentional error or omission, the miscalculation of a figure or the misdescription of an area, activity, Aboriginal cultural heritage or other thing.

Clause 85. Repeal of protected area order, or amendment to reduce area declared as protected area

Recognising the significance of protected areas, this clause provides further protection by requiring that a protected area order can neither be repealed nor amended to reduce the area, before it is first laid before each House of Parliament and has been approved by a resolution passed by both Houses of Parliament. Scrutiny by both Houses of Parliament provides the highest level of accountability for Government decision-making

and is considered appropriate given the earlier Government decision to give special protection to Aboriginal cultural heritage of outstanding significance to Aboriginal people.

Similar provisions exist in the *Land Administration Act 1997* in relation to the reduction in the area or removal of a vesting of a class A reserves, land reserved for conservation parks or national parks, and similarly under the *Conservation and Land Management Act 1984* in relation to State forests or under the *Aboriginal Affairs Planning Authority Act 1972* in relation to boundary changes or the de-proclamation of Crown land reserved for persons of Aboriginal descent.

Clause 86. Provisions about protected area orders

This clause provides that a protected area order must be published in the *Gazette* and the CEO of the Department must ensure that *public notice* is given of the order. The order comes into effect on the day it is gazetted or on later day as specified in the order.

The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

The order is not subsidiary legislation for the purposes of the *Interpretation Act 1984* ('Interpretation Act'), however certain provisions of the Interpretation Act are deemed to apply as if it were subsidiary legislation.

Clause 87. Lodgement of notification with Registrar and modification and withdrawal of notification

This clause requires that as soon as practicable after a *protected area order* is declared by the Governor, the CEO of the Department must lodge notification of the order with the Registrar of Titles or the Registrar of Deeds and Transfers, as appropriate ('*section 82(1) notification*'). This will ensure the protected area declaration is noted on the relevant certificate of title or Crown land record to let people know that a protected area exist and what activities can be undertaken within the area and whether access to the area is restricted.

Similarly, as soon as practicable after an amendment or repeal of a protected area order is declared by the Governor, the CEO must lodge a notification with the Registrar of Titles or the Registrar of Deeds and Transfers to either amend or withdraw the earlier *section 82(1) notification*. Such notifications must be in the form approved by the relevant Registrar, include information required by the relevant Registrar and be accompanied by the required fee.

Upon lodgement of a notification, the relevant Registrar is to make an endorsement or notation on the certificate of title or register or records in respect of the land that is the subject of the order.

Division 6 — Contravention of conditions on protected area orders

Clause 88. Contravention of conditions on protected area orders

This clause provides the contravention of a condition of a protected area order is an offence with a maximum penalty fine of \$20,000. The clause also provides it is a defence

if the person did not know and the person could not know by the exercise of due diligence have known, of the condition to the protected area order.

Part 5 — Offences about harming Aboriginal cultural heritage and compensation for harm to Aboriginal cultural heritage

This Part sets out the key offences of harming Aboriginal cultural heritage and provides the defences that may apply in the charge of such offence. The proposed offences and significant penalties reflect the fundamental importance of Aboriginal cultural heritage to Aboriginal persons, the gravity of the effects of harming Aboriginal cultural heritage to Aboriginal people, and that in many cases, harm to Aboriginal cultural heritage is permanent and irreversible. Other more minor offences exist in other parts of the proposed Act.

Division 1 — Preliminary

This Division provides key concepts relevant to the offences of harming Aboriginal cultural heritages.

Clause 89. Application of Part

This clause sets out the Aboriginal cultural heritage to which this Part applies. Offences of harming Aboriginal cultural heritage apply to:

- an Aboriginal place;
- an Aboriginal object;
- Aboriginal ancestral remains; and
- Aboriginal cultural heritage located in a protected area.

Clause 90. Meaning of harm to Aboriginal cultural heritage

This clause provides that *harm* to Aboriginal cultural heritage includes to destroy or damage Aboriginal cultural heritage. The definition of harm is deliberately non-exhaustive. Accordingly, to harm Aboriginal cultural heritage could for example, include the removal of Aboriginal cultural heritage, the physical alteration of the Aboriginal cultural heritage to its detriment or degradation or potential detriment or degradation, or the physical alteration of the area to the detriment or potential detriment of the Aboriginal cultural heritage located in that area. It could also include defacing, disturbing or interfering with Aboriginal cultural heritage.

However, the clause provides that an act carried out in relation to Aboriginal cultural heritage by an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities in respect of that cultural heritage cannot harm that cultural heritage.

Clause 91. Meaning of serious harm and material harm to Aboriginal cultural heritage

The proposed Act provides different offences for causing *harm* to Aboriginal cultural heritage and causing harm that is *serious* or *material* to Aboriginal cultural heritage.

This clause provides a definition of what is serious and material in the context of harm to Aboriginal cultural heritage. Harm is serious if it is irreversible, of a high impact or on a wide scale. It also applies to any harm to Aboriginal cultural heritage located in a protected area.

Harm to Aboriginal cultural heritage that is material is harm that is neither trivial nor negligible.

Division 2 — Offences: harm to Aboriginal cultural heritage

This Division outlines the four possible offences for causing harm to Aboriginal cultural heritage, which reflect different levels of significance of harm that may be caused to Aboriginal cultural heritage and in the case of *serious harm* enables an offence even where the harm is caused by accident.

Clause 92. Serious harm to Aboriginal cultural heritage

This clause provides a person commits a crime if that persons causes *harm* to Aboriginal cultural heritage that is *serious*. The designation of an offence as a crime means it is an indictable offence. However, this offence is not a solely indictable offence as it includes a summary conviction penalty. That is, it is an either-way offence that can be prosecuted on indictment in a superior court or by summary conviction. It is the only offence that can proceed by way of indictment, all other offences are simple offences.

The penalties if convicted on indictment are higher than for a summary conviction. On indictment, an individual faces the possibility of term of imprisonment of up to 5 years or a maximum penalty fine of \$1,000,000 or both, and a daily maximum penalty fine of \$50,000 that can accumulate whilst the offence continues. There is no term of imprisonment for an offence committed by a body corporate, but the fines are ten times higher than for an individual.

On a summary conviction, the maximum term of imprisonment for an individual is 2 years or a maximum penalty fine of \$700,000 or both, and a daily maximum penalty fine of \$35,000 that can accumulate whilst the offence continues. Again, there is no term of imprisonment for an offence committed by a body corporate, but the fines are again, ten times higher than for an individual.

Clause 93. Serious harm to Aboriginal cultural heritage including by accident

This clause provides an alternative offence for *harm* to Aboriginal cultural heritage that is *serious* under clause 92. This offence can only be summarily convicted.

Under this offence, it is immaterial to criminal responsibility if the harm occurs by accident. Whilst this offence is easier to prove because it includes harm caused by accident, the penalties are reduced. There is no possible term of imprisonment and the fines are a half of the highest possible penalty that apply for a conviction to a clause 92 crime on indictment. The clause also allows a daily fine to accumulate for each day that an offence continues.

Clause 94. Material harm to Aboriginal cultural heritage

This clause provides an alternative offence to the offence of harm that is *serious* or harm that is serious including by accident, under clauses 92 and 93 respectively. This offence relates to causing *harm* to Aboriginal cultural heritage that is *material*.

The penalties are significantly lower than the penalties for harm that is *serious*, but are still significant in order to reflect the value of the harm caused. There is no possible term of imprisonment and the fines are a tenth of the highest possible penalties, being those that apply for a conviction to a clause 92 crime on indictment for harm to Aboriginal cultural heritage that is serious. The clause also allows a daily fine to accumulate for each day that an offence continues.

Clause 95. Harm to Aboriginal cultural heritage

This clause provides a further alternative offence to the offence of harm that is *serious* or harm that is serious including by accident, or harm that is *material*, under clauses 92, 93 and 94 respectively. This offence relates to causing *harm* to Aboriginal cultural heritage.

The penalties are again significantly lower than the penalties for harm that is serious, serious including by accident, or material. There is no possible term of imprisonment and the fines are a fortieth of the highest possible penalties, being those that apply for a conviction to a clause 92 crime on indictment. The clause also allows a daily fine to accumulate for each day that an offence continues.

Division 3 — Defences: Harm to Aboriginal cultural heritage

This Division provides for particular defences to causing harm to Aboriginal cultural heritage.

Clause 96. Defence of authority under Part 6 Division 4

This clause provides that it is a defence to an alleged offence under Division 2 if the carrying out of the activity that caused the *harm* was authorised under Part 6 Division 4. There are several ways that an activity can be authorised pursuant to Part 6 Division 4 and it will depend on a combination of factors: how the activity is classified pursuant to the proposed Act (whether an *exempt activity*, a *tier 1 activity*, a *tier 2 activity* or a *tier 3 activity*); whether it is carried out outside a protected area; satisfying the requirements for undertaking a *due diligence assessment* where it applies; satisfying the requirement to take all reasonable steps to ensure the activity is managed to avoid or minimise the risk of harm where it applies; and carrying out the activity in accordance with an *ACH permit* or an approved or authorised *ACH management plan*.

Clause 97. Defences that apply to in relation to protected areas

This clause provides a defence to causing *harm* to Aboriginal cultural heritage within a *protected area*, which is classified as harm that is *serious*, if the act causing the harm occurred in accordance with a *protected area order* or the regulations of the proposed Act which are applicable to the *protected area*.

For example, a condition may permit harm for the purposes of a tourism activity such as building a walking track through the area, or erecting signage to promote public awareness of the protected area and its conditions.

Clause 98. Other defences

This clause provides additional defences to the offences under Division 2 of causing harm to Aboriginal cultural heritage.

It is a defence to prove that the person that harmed the Aboriginal cultural heritage had made an assessment in undertaking a *due diligence assessment* (in accordance with the *ACH Management Code*) in relation to carrying out the activity that there was no risk that any Aboriginal cultural heritage would be harmed, and further that the person had undertaken all reasonable steps possible to avoid or minimise the risk of harm to Aboriginal cultural heritage.

It is also a defence if the activity was carried out in accordance with a Part 7 order, which is either a *stop activity order*, a *prohibition* or a *remediation order*, or in accordance with the *Coroners Act 1996* in the course of determining if human remains are *Aboriginal ancestral remains* or in an emergency situation for the purpose of preventing or minimising loss of life, prejudice to safety or harm to the health of people. This recognises that in some instances remediation orders may require certain activities to be undertaken that may fall within the definition of harm under the proposed Act.

The clause also provides for a further possible defence specified in the regulations of the proposed Act in relation to a person of a specified class, in respect of a specified situation or while undertaking a specified activity.

Division 4 — Compensation for harm to Aboriginal cultural heritage

Clause 99. Compensation for harm to Aboriginal cultural heritage

This clause provides the CEO of the Department, with the written approval of the Minister, may decide to pay compensation for *harm* caused to *Aboriginal cultural heritage*, as a consequence of the commission of an offence under Division 2 of the proposed Act. Such compensation must be paid to an *Aboriginal person*, group or community with traditional rights, interests and responsibilities in respect of the Aboriginal cultural heritage that was harmed.

The CEO is to make a written determination as to the amount of money to be paid as compensation (the '*compensation sum*'), the manner in which such compensation must be paid and the Aboriginal persons, groups or communities to whom the compensation is to be paid or between whom the compensation must be shared and the amount of each share. Such determination must also be made in accordance with any criteria prescribed in the regulations of the proposed Act.

Before making a decision to pay compensation or a determination as to the compensation sum, the CEO must seek and consider advice from the ACH Council. In seeking such advice, the CEO must set out the details of the harm to Aboriginal cultural heritage, the commission of the offence, the consequences of the offence that caused the harm, and the Aboriginal persons, groups or communities to whom the compensation sum is proposed to be paid to or shared, and the amount of respective shares, if any.

Relevantly, the funds for compensation is dealt with by clause 352, which amends the *Sentencing Act 1995* to provide that fines from the commission of an offence under Division 2 are not credited to the State Government's Consolidated Account, but rather to the Aboriginal Cultural Heritage Compensation Fund.

Part 6 — Managing activities that may harm Aboriginal cultural heritage

This Part provides how to manage activities that may harm Aboriginal cultural heritage, through the avoidance or minimisation of such risk of harm, or otherwise as authorised.

The proposed Act will replace the current “one-size fits all” section 18 process under the AH Act with a tiered land use approvals system that is sensitive to the nature of the proposed land use and the level of impact to Aboriginal cultural heritage. A list of activities falling within each tier will be prescribed in the regulations of the proposed Act and subject to co-design with stakeholders.

Division 1 — Preliminary

This Division provides definitions for key terms relevant to this Part.

Clause 100. Terms used

This clause defines terms specific to this Part. Some of the terms defined are self-explanatory or refer to relevant clause of the proposed Act where the meaning of the term can be determined. Of particular note the clause provides:

- **Aboriginal party** is a term that relates to an approved or authorised ACH management plan. It refers to an *interested Aboriginal party* (as defined in clause 135(1) of the proposed Act) that has agreed to be a party to the plan.
- **exempt activity** is an activity listed in this clause or other activities as specified in the regulations of the proposed Act. An *exempt activity* includes any construction, renovation or demolition of a residential or ancillary building on a lot of land less than 1,100 m² and developments of a prescribed type carried out in accordance with the *Planning and Development Act 2005*.

The 1100 m² size is based on lot sizes that are currently exempted from bushfire planning requirements. It recognises that owners of lots which are less than 1,100 m² in size will not have flexibility with regards to where on the lot they build, whereas owners on larger lots will have greater flexibility. Owners of lots bigger than 1,100m² will have the same obligations to not harm Aboriginal Cultural Heritage as under the AH Act, but will have greater support and guidance through activity categories prescribed in regulations, the ACH Management Code and other Guidelines that will be developed.

Exempt activities also include travel on an existing road or track; taking photographs for recreational purposes; recreational activities in a public place; some fire prevention or control activities on Crown land by a public authority; and some clearings of land permitted under the *Environmental Protection Act 1986* ('EP Act'). These are clearings permitted or authorised under the *Bush Fires Act 1954*, undertaken under the section 54 of the *Energy Operators (Powers) Act 1979* or under section 34(a), (c) or (h) of the *Fires Brigades Act 1942*.

Exempt activities are activities that can proceed without any assessment as to the impact on Aboriginal cultural heritage. These activities have been included for practical reasons and as they relate to recreational activities carried out on public land and waters, bush fire prevention and control activities and activities associated with small-scale residential developments.

- **tier 1 activity** means an activity involving no or a minimal level of ground disturbance, which will be listed in regulations of the proposed Act for the purpose of this definition.
- **tier 2 activity** means an activity involving a low level of ground disturbance, which will be listed in regulations of the proposed Act for the purpose of this definition.
- **tier 3 activity** means an activity involving a medium to high level of ground disturbance, which will be listed in regulations of the proposed Act for the purpose of this definition.

However, in the absence of any classification in the regulations as to a proposed activity or a lack of certainty as to the correct classification for a proposed activity, a proponent may request under clause 104 of the proposed Act, that the CEO of the Department confirm the proposed activity is either an *exempt, a tier 1, tier 2 or tier 3 activity*.

Clause 101. Consultation about proposed activities

Pursuant to clause 139 of the proposed Act, there is an obligation on a *proponent* seeking an *ACH management plan* in relation to a proposed *tier 2 or 3 activity*, to consult with particular persons specified in clause 107 of the proposed Act. This clause provides *part* of the standards of consultation required between the proponent and each person to be consulted as follows: -

- the proponent making a genuine attempt to contact and consult with each person to be consulted, in a timely manner;
- the proponent providing sufficient information to each person to be consulted to make the proponent's reasoning and intention clear;
- ensuring each person to be consulted has an opportunity to state their position on the proposal and the reasoning for this;
- ensuring upon request, that the proponent and each person to be consulted disclose relevant and necessary information about their respective positions;
- 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 information.

Clause 139 of the proposed Act, which imposes the obligation on a proponent to consult in relation to a proposed *ACH management plan*, requires that such consultation is in accordance with the requirements of this clause and the *consultation guidelines*.

The consultation guidelines, is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

Division 2 — Due diligence assessment

This Division provides the requirements and circumstances for undertaking a due diligence assessment.

Clause 102. Due diligence assessment

This clause defines a due diligence assessment, and provides it is to be undertaken in accordance with the *ACH Management Code*. The Code is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions, before its approval (and possible amendment) by the Minister under Part 13 Division 3 Subdivision 2 of the proposed Act.

Accordingly, to meet the requirements of a *due diligence assessment*, this clause only provides part of the requirements. The proposed Act must be read together with the *ACH Management Code*. This is important as undertaking a *due diligence assessment* (in accordance with the ACH Management Code) assists proponents to understand how their activities may harm Aboriginal cultural heritage, as well as to prevent and if not possible, minimise harm that may be caused to that heritage.

A *due diligence assessment* (undertaken in accordance with the ACH Management Code) has the purpose of enabling a proponent to make an assessment as to:

- whether the area where it is intended the proposed activity is to be carried out includes any area which is subject to a *protected area order*;
- the categorisation of the proposed activity as either a *tier 1, tier 2 or tier 3 activity*, which will determine how the proposed activity may lawfully be carried out;
- whether *Aboriginal cultural heritage* is located where it is intended the proposed activity is to be carried out;
- whether there is any risk of *harm* being caused to Aboriginal cultural heritage by the proposed activity;
- if the proposed activity is categorised as a *tier 2 activity* or a *tier 3 activity*, the persons to be notified or consulted about the proposed activities.

Clause 103. Due diligence assessment not required for exempt activity

This clause provides a *due diligence assessment* is not required for an activity listed as an *exempt activity*, as defined in clause 100 of the proposed Act. However, if the activity is an exempt activity, the *proponent* is required to ensure that the area in which the exempt activity is proposed is not located within a *protected area* (see clause 109 of the proposed Act).

Clause 104. Proponent may seek confirmation about proposed activity

Where there is uncertainty as to the correct classification for a proposed activity, this clause enables a proponent to request from the CEO of the Department written advice as to whether a proposed activity in an area is an *exempt activity, or a tier 1, tier 2 or tier 3 activity*. Such written advice from the CEO can be used in proceedings for an offence of causing *harm* to *Aboriginal cultural heritage*.

Clause 105. Responsibility for undertaking due diligence assessment

This clause clarifies that it is the responsibility of a *proponent* to undertake a *due diligence assessment*.

Clause 106. Related agreement may be used to satisfy some due diligence requirements

This clause provides steps undertaken pursuant to a *related agreement* (as defined in clause 100 of the proposed Act) for an area, to identify whether Aboriginal cultural heritage is located in the area, or to assess whether there is a risk of harm caused to Aboriginal cultural heritage in the area, *may* be used satisfy the requirement of a *due diligence assessment* referred to under clause 102(c) and (d) of the proposed Act respectively, in respect of a proposed activity by the proponent. This clause acknowledges some requirements of the proposed Act may already be provided for in other existing agreements between proponents and the relevant Aboriginal entity or persons.

However, it is noted that in undertaking a due diligence assessment under clause 102, it also needs to be in compliance with the *ACH Management Code*.

Division 3 — Persons to be notified or persons to be consulted about activities or proposed activities

This Division provides the persons to be notified or consulted about certain categories of proposed activities.

Clause 107. Persons to be notified or persons to be consulted about activities or proposed activities

Where a proponent is required under clause 113 of the proposed Act to notify persons as to a *tier 2 activity* that may *harm Aboriginal cultural heritage*, this clause provides the *persons to be notified*.

Similarly, where a proponent is required to consult persons under clause 139 of the proposed Act, as to either a *tier 2 activity* or a *tier 3 activity* that may harm Aboriginal cultural heritage, this clause provides the *persons to be consulted*.

The persons to be notified or persons to be consulted are:

- each *local ACH service* for the area or a part of the area; or
- if there is no local ACH service for the area or a part of the area, each *native title party* for the area or the part of the area and each *knowledge holder* for the area or the part of the area; or
- if there is neither a local ACH service, native title party nor any knowledge holder for the area or a part of the area, each *native title representative body* for the area or the part of the area.

In this clause, a knowledge holder means a person identified as a knowledge holder after reasonable steps have been taken to do so in accordance with the *knowledge holder guidelines*. This is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

Clause 108. Assistance to identify persons to be notified or persons to be consulted

This clause enables a proponent to request assistance from the CEO of the Department to identify the *persons to be notified* or the *persons to be consulted* about an activity the proponent intends to carry out in an area. The CEO is to provide reasonable assistance to identify such persons.

Division 4 — Authority to carry out activity that may harm Aboriginal cultural heritage

This Division provides the requirements for certain types of activities to be authorised.

Clause 109. Authority to carry out exempt activity

This clause provides a person is authorised to carry out what is properly an *exempt activity* (defined in clause 100 or as specified in the regulations of the proposed Act) that may *harm Aboriginal cultural heritage*, provided the area of the intended activity is not located within a *protected area*, being an area subject to a *protected area order*. That is, no further approval is required under the proposed Act to carry out an exempt activity.

Clause 110. Authority to carry out tier 1 activity that may harm Aboriginal cultural heritage

This clause provides the requirements for a person to be authorised to carry out what is properly a *tier 1 activity* (defined in clause 100 or as specified in the regulations of the proposed Act) that may *harm Aboriginal cultural heritage* in an area. The area of the intended activity cannot be located within a *protected area*, being an area subject to a *protected area order*.

The person is also required to undertake a *due diligence assessment* in accordance with the *ACH Management Code*.

The final requirement to be authorised to undertake a tier one activity that may *harm Aboriginal cultural heritage*, is that the person must in carrying out the activity take all reasonable steps possible to avoid or minimise the risk of harm to Aboriginal cultural heritage. This last requirement can be referred to as the duty to mitigate. Such duty applies even where pursuant to a due diligence assessment, no Aboriginal cultural heritage was identified.

Clause 111. Authority to carry out tier 2 activity that may harm Aboriginal cultural heritage

This clause provides the requirements for a person to be authorised to carry out what is properly a *tier 2 activity* (defined in clause 100 or as specified in the regulations of the proposed Act) that may *harm Aboriginal cultural heritage* in an area. The area of the intended activity cannot be located within a *protected area*, being an area subject to a *protected area order*.

The person is also required to undertake a *due diligence assessment* in accordance with the *ACH Management Code*. The final requirement to be authorised to undertake a tier 2 activity that may *harm Aboriginal cultural heritage* in an area, is that the person must carry out the activity either in accordance with an *ACH permit*, granted under Part 6 Division 5, or an approved or authorised ACH management plan under clause 151(1) and 165(1) respectively of the proposed Act.

Clause 112. Authority to carry out tier 3 activity that may harm Aboriginal cultural heritage

This clause provides the requirements for a person to be authorised to carry out what is properly a *tier 3 activity* (defined in clause 100 or as specified in the regulations of the proposed Act) that may *harm Aboriginal cultural heritage* in an area. The area of the intended activity cannot be located within a *protected area*, being an area subject to a *protected area order*.

The person is also required to undertake a *due diligence assessment* in accordance with the *ACH Management Code*. That is, if the due diligence assessment is not undertaken in accordance with the *ACH Management Code*, the activity will not be authorised and if the activity harms Aboriginal cultural heritage the defence to an offence of causing *harm to Aboriginal Cultural heritage* provided under clause 96 of the proposed Act, will not apply.

The final requirement to be authorised to undertake a tier 3 activity that may *harm Aboriginal cultural heritage* in an area, is that the person must carry out the activity either in accordance with an approved or authorised ACH management plan under clause 151(1) and 165(1) respectively of the proposed Act.

Division 5 — ACH permits

This Division provides the process for obtaining, extending, suspending or cancelling an ACH permit and imposing, amending or revoking conditions to an ACH permit.

Subdivision 1 – Notice of intention to carry out tier 2 activity

This Subdivision provides the requirement to notify when the proponent intends to carry out a *tier 2 activity* that may harm Aboriginal cultural heritage.

Clause 113. Notice of intention to carry out tier 2 activity

This clause provides that where a proponent intends to carry out a *tier 2 activity* that may *harm Aboriginal cultural heritage*, the proponent must notify in writing each of the persons to be notified under clause 107 of the proposed Act, with details of the proposed activity including its location, and provide an opportunity to the persons notified, to submit to the proponent, within a specified period in the regulations of the proposed Act, a statement as to the person's views about the risk of harm being caused to Aboriginal cultural heritage located in the area.

Where a local ACH service exists for an area, the proponent is only required to notify the local ACH service. The local ACH service will be responsible for seeking the views of the other Aboriginal persons to be notified, as set out in clause 107.

Clause 114. Notification carried out under related agreement

This clause provides the notification requirements for a *tier 2 activity*, may be carried out pursuant to a *related agreement* (defined in clause 100 of the proposed Act), to satisfy the requirement in clause 113, to the extent it complies with the requirements of clause 113.

Subdivision 2 – Grant of ACH Permit

This Subdivision provides the requirements and the process for the grant of an ACH permit.

Clause 115. Application for ACH permit

This clause sets out the requirements in an application for an ACH permit. Such application can only be made once the period for making submissions to the proponent under clause 113 of the proposed Act has ended. An application for an ACH permit must:

- be made to the ACH Council in the approved form;
- contain details of the proposed activity and the area to which the permit is intended to relate;
- identify the *Aboriginal cultural heritage* located in the area, as assessed in undertaking a *due diligence assessment* in compliance with the *ACH Management Code*, in relation to the carrying out of the proposed activity or of which the proponent is otherwise aware, and identify the characteristics of such Aboriginal cultural heritage of which the proponent is aware;
- identify whether there is a risk of *harm* being caused to Aboriginal cultural heritage as assessed under the due diligence assessment undertaken in compliance with the ACH Management Code, and if a risk of harm is identified, identify that risk and the Aboriginal cultural heritage at risk of harm;
- include details of the notice given under clause 113 of the proposed Act and details of the persons who were notified;
- include any submissions received in response to the notice given under clause 113 of the proposed Act;
- set out how the proposed activity will be managed to avoid or minimise the risk of harm being caused to Aboriginal cultural heritage, including a clear explanation of the steps, if any, that will be taken to avoid or minimise that risk. This may include steps such as engaging Aboriginal monitors to monitor ground disturbing activities;
- include any documents or information as may be required by the regulations of the proposed Act.

Clause 116. Further information in support of application

This clause enables the ACH Council to request in writing from the applicant any further information relevant to the application, or require the applicant to verify any further information by statutory declaration, to be complied with within a specified timeframe.

Clause 117. ACH Council may refuse to consider some applications

This clause provides the ACH Council may refuse to consider or consider further an application if it is not made in accordance with the proposed Act or the applicant does not comply with the request for additional information or the verification of such information as requested under clause 116 of the proposed Act.

Clause 118. ACH Council to give notice of application

This clause provides the ACH Council must, upon receipt of an application for an ACH permit, give notice of the application to each of the *persons to be notified* under clauses 107 and 113 with a copy of the application attached.

The notice must provide that a person notified, may within a period specified in the regulations, submit to the ACH Council a statement of the person's views on the proposal set out in the application. This ensures that the views of Aboriginal people are sought on the ACH permit application made following the initial notification process undertaken by the proponent under clause 113.

Clause 119. Decision of ACH Council on application for ACH Permit

This clause provides the ACH Council must assess an application for an ACH permit on the criteria listed in clause 120(1) of the proposed Act and consider any submissions made to the proponent in response to the proponent's notification under clause 113 of the proposed Act, any further information provided under clause 116 and any submissions made to the ACH Council in response to the notice of the application under clause 118.

If the ACH Council is satisfied that the application for a permit meets the criteria in clause 120(1) of the proposed Act, the ACH Council must make a decision to grant the permit. The ACH Council can only refuse to grant a permit if it is not satisfied as to the matters set out in clause 120(1). This decision must be made within the period prescribed in regulations.

However, the clock stops on the prescribed period for making a decision, from the day the ACH Council requests further information or the verification of further information from the applicant under clause 116, until the request is either complied with or the period for complying with the request, ends.

If the ACH Council fails to make a decision within the prescribed period, the applicant may request the Minister to direct the ACH Council to do anything the Minister considers necessary to expedite the matter. Such direction by the Minister to the ACH Council must be in writing and specify a period for compliance with the direction. If the ACH Council fails to comply with such direction, the Minister may stand in the place of the ACH Council and decide the application in accordance with this subdivision.

The ACH Council is to give written notice of the its decision, whether to grant the ACH permit, to the applicant and to each *person to be notified* of the activity the subject of the application, under clause 107 and 113 of the proposed Act.

Where the ACH Council refuses to grant an ACH permit, the notice to be given to the applicant is subject to the requirements of clause 132 of the proposed Act: It must be given within 14 days of the decision, provide reasons for the decision and advise of a right to object to the Minister about the decision.

Clause 120. Grant of ACH permit

This clause provides the ACH Council must grant an ACH permit only if it is satisfied as to the following:

- the proposed activity is a *tier 2 activity*;
- the area the subject of the proposed ACH permit does not include any area that is a *protected area*;
- each of the *persons to be notified* about the proposed activity under clause 113 the proposed Act has been notified;
- the applicant will take all reasonable steps possible to avoid, or minimise, the risk of *harm* being caused to *Aboriginal cultural heritage* by the activity; and
- any other matter specified in the regulations of the proposed Act.

If the ACH Council is not satisfied as to all the above matters, it cannot grant an ACH permit.

The ACH permit must be in the approved form, and include details of the permit holder, the activity to which the permit applies, the area to which the permit applies, when the permit comes into effect, the conditions of the permit and any other matters that may be specified in the regulations of the proposed Act.

Clause 121. Duration of ACH permit

This clause provides an ACH permit commences on the day it is granted or on later day if so specified in the permit, and it is of effect for a period of 4 years unless the ACH permit is either cancelled under clause 130(1)(b) or extended under clause 126(1)(c)(i) of the proposed Act.

Subdivision 3 – Extension of ACH permit

This Subdivision provides for extending the term of an ACH permit beyond 4 years.

Clause 122. Application for extension of ACH permit

This clause permits the holder of an ACH permit to apply to extend the term of the permit, but such application cannot be made later than 90 days before the permit is due to expire.

Prior to making the application for an extension of the term, the permit holder must give to the *persons to be notified* about the activity under clause 107 of the proposed Act, written notice including details of the proposed extension and provide the opportunity to submit to the permit holder, within a specified period under the regulations of the proposed Act, a statement of the person's view on the proposed extension.

The application must:

- be made to the ACH Council in the approved form;
- include details of the notice given to the persons to be notified about the activity under clause 107 of the proposed Act and the details of the persons so notified; and
- include any submissions received by the permit holder in response to such notice.

Clause 123. Further information in support of application

This clause enables the ACH Council to request in writing from the applicant any further information relevant to the application for an extension of the term of the ACH permit, or require the applicant to verify any further information by statutory declaration, to be complied with within a specified timeframe.

Clause 124. ACH Council may refuse to consider some applications

This clause provides the ACH Council may refuse to consider or consider further an application for an extension of the term of the ACH permit, if it is not made in accordance with the proposed Act or the applicant does not comply with the request for additional information or the verification of such information as requested under clause 123 of the proposed Act.

Clause 125. ACH Council to give notice of application for extension of ACH permit

This clause provides the ACH Council must, upon receipt of an application for the extension of the term of an ACH permit, give notice of the application to each of the *persons to be notified* under clauses 107 and 113 with a copy of the application attached.

The notice must provide that a person notified, may within a period specified in the regulations, submit to the ACH Council a statement of the person's views on the proposal set out in the application.

Clause 126. Decision on application for extension of ACH permit

This clause provides the ACH Council must assess each application for an extension of the term of the ACH permit in accordance with clause 120(1) of the proposed Act, as if it were an application for the grant of an ACH permit. Further, the ACH Council must consider any submissions made to the permit holder in response to the permit holder's notification under clause 122 of the proposed Act, any further information provided under clause 123 and any submissions made to the ACH Council in response to the notice of the application under clause 125.

A permit that has been extended is to be in force for a further period of two years after the day it is extended, unless it is cancelled under clause 130 of the proposed Act or further extended.

Subdivision 4 – Other matters

This Subdivision provides for other matters related to ACH permits.

Clause 127. ACH Council must be notified of transfer of ACH permit

This clause provides that where the holder of an ACH permit transfers the permit to another person, there is an obligation on both the former permit holder and the new permit holder to notify the ACH Council in writing of the transfer within the period specified in the regulations of the proposed Act. Failure to do so is an offence with a maximum penalty fine of \$10,000.

On receipt of such notice, the ACH Council must notify in writing the *persons to be notified* under clause 107 and 113 of the proposed Act, of the new permit holder.

Clause 128. Conditions

This clause provides for the conditions of an ACH permit.

It is a statutory condition of *all* ACH permits that the permit holder must notify the ACH Council if, whilst the permit is of effect, it becomes aware of any *new information about Aboriginal cultural heritage* (defined in clause 178 of the proposed Act) in the area to which the permit relates. It is a further statutory condition of any such permit, that the permit holder must comply with reporting requirements, if any, specified in the permit and any Part 7 order (subsequently) given in relation to an activity to which the permit relates.

Otherwise the ACH Council may grant or extend the term of an ACH permit, subject to any conditions the ACH Council considers appropriate to ensure the activity is managed to avoid, or minimise the risk of harm to Aboriginal cultural heritage. Once the ACH Council becomes aware of new information about Aboriginal cultural heritage in respect of the area the subject of the ACH permit by whatever means, the ACH Council may by written notice to the permit holder impose or amend a condition of the permit that it considers appropriate to ensure the activity is managed so as to avoid, or minimise, the risk of *harm* being caused to *Aboriginal cultural heritage*. Such notice is subject to the requirements of clause 132 of the proposed Act: It must be given within 14 days of the decision, provide reasons for the decision and advise of a right to object to the Minister about the decision to impose or amend a condition of the permit.

Such new or amended condition takes effect on the day specified in the notice, but cannot be set to take effect before the permit holder has a reasonable opportunity to make submissions to the ACH Council in relation to the new or amended condition in response to *new information about Aboriginal cultural heritage* or is able to take the necessary action to comply with the new or amended condition.

The ACH Council may, on its own initiative or at the request of the permit holder, by written notice to the permit holder revoke a condition of an ACH permit except the three statutory conditions that apply to all permits. Notice of such decision given to the permit holder only, is subject to the requirements of clause 132 of the proposed Act: It must be given within 14 days of the decision, provide reasons for the decision and advise of a right to object to the Minister about the decision.

The ACH Council must within the period specified in the regulations of the proposed Act, notify each of the *persons to be notified* about the activity to which the permit relates, under clause 107 and 113 of the proposed Act, as to any decision to grant or extend a permit subject to a condition, impose, amend or revoke a condition of an ACH permit.

Clause 129. Amendment of ACH permit area

This clause provides the ACH Council must at the written direction of the Minister under clause 81(3)(a) of the proposed Act amend the area the subject of an ACH permit to excise from that area, any area to be declared a *protected area* under Part 4 of the proposed Act. The ACH Council must within the period specified in the regulations of the proposed Act, give written notice of such amendment to the permit holder and each of the *persons to be notified* about the activity to which the permit relates, under clause 107 and 113 of the proposed Act.

Clause 130. Suspension or cancellation of ACH permit

This clause provides the ACH Council may, by written notice to a permit holder, suspend an ACH permit for a specified period or cancel the permit on the following grounds:

- the ACH Council is no longer satisfied as to those matters set out in clause 120(1) of the proposed Act (as required for the original grant or subsequent extension of the term of the permit); or
- the permit holder carries out an activity in the area to which the permit relates that may *harm Aboriginal cultural heritage* and is not authorised by the permit;
- The permit holder breaches conditions of the ACH permit.

Such notice must set out the grounds on which the action is taken and specify the date on which it takes effect. However, before such action is taken by the ACH Council, it must give written notice to the permit holder of the action the ACH Council proposes to take and the grounds for such action and provide a reasonable opportunity for the permit holder to be heard on the matter.

The ACH Council must give written notice of the suspension or cancellation of the ACH permit to each of the *persons to be notified* about the activity to which the permit relates, under clause 107 and 113 of the proposed Act. Notice of such decision that is given to the permit holder, is subject to the requirements of clause 132 of the proposed Act: It must be given within 14 days of the decision, provide reasons for the decision and advise of a right to object to the Minister about the decision. If an ACH permit is suspended, it is of no effect during the period of suspension.

Clause 131. Objection to decision of ACH Council

This clause provides that for certain decisions made by the ACH Council in relation to ACH permits, the applicant for the permit or the permit holder have a right to object to that decision to the Minister. The relevant decisions are:

- refusal to grant a permit under clause 119(1)(c)(ii) of the proposed Act;
- refusal to extend the term of a permit under clause 126(1)(c)(ii) of the proposed Act;
- granting or extending the term of a permit subject to conditions under clause 128(2) of the proposed Act;
- imposing a new or amending a condition on a permit under clause 128(3) of the proposed Act;
- revoking a condition on a permit under clause 128(6) of the proposed Act; or
- suspending or cancelling a permit under clause 130(1) of the proposed Act.

The objection must be made in writing within the period prescribed in the regulations of the proposed Act and the person who so objects, must also within the period prescribed in the regulations, notify each of the *persons to be notified* about the activity to which the application or permit relates, under clause 117 and 113 of the proposed Act, of the said objection.

On receiving such an objection, the Minister must direct the ACH Council to provide the Minister the information provided to the ACH Council at the time it made the relevant decision, the reasons for the decision and any other information that in the opinion of the ACH Council is relevant. The Minister may also request from the person making the objection, further information relevant to the objection or verification of such further information.

The Minister must consider the information provided by the ACH Council, any further information provided by the applicant or permit holder and either uphold the decision of the ACH Council or make another decision. The decision of the Minister is to be based upon the matters listed in clause 120(1) of the proposed Act and what *is in the interests of the State*, as defined in clause 11 of the proposed Act.

The Minister must give written notice of the Minister's decision to the applicant or permit holder and each of the persons to be notified about the activity to which the permit relates, under clauses 117 and 113 of the proposed Act. Such notice of the decision must be given within 14 days after making the decision, describe the decision and provide reasons for the decision.

Clause 132. Notice of decision must be given

This clause provides that where the ACH Council must give written notice of its decision to which the applicant or the permit holder has a right to object to the Minister (as listed in clause 131), the notice must be given within 14 days of the decision, describe the decision, provide reasons for the decision and a statement that the person has a right to object.

Clause 133. Contravention of conditions on ACH permit

This clause provides that a permit holder must comply with any condition of an ACH permit. Failure to so do is an offence with a maximum penalty fine of \$20,000.

Division 6 — ACH management plans

This Division provides the process for obtaining, extending, suspending or cancelling an ACH management plan and imposing, amending or revoking conditions to an ACH management plan.

Subdivision 1 — Preliminary

This Subdivision provides when an ACH management plan is required and the requirements of an application for the approval or authorisation of an ACH management plan.

Clause 134. When ACH management plan required

This clause provides an approved or authorised ACH management plan is required for carrying out a *tier 3 activity* that may *harm Aboriginal cultural heritage*. Generally, an ACH management plan may be approved if the *proponent* and any *interested Aboriginal party* have reached agreement on its terms, but if agreement is not reached, the proponent will need to apply to have the plan authorised. The exception to this is if the relevant Aboriginal cultural heritage is of *State significance*, the ACH management plan must be authorised even if the parties to the management plan agree on the management plan. The policy intent is that where the Aboriginal cultural heritage is of such exceptional

importance to the cultural identity of the State, it warrants special attention and intervention by Government. Further, a proponent, may choose to seek an approved or authorised ACH management plan to authorise a *tier 2 activity*, rather than applying for an ACH permit.

Clause 135. Meaning of interested Aboriginal party for ACH management plan

An *interested Aboriginal party* is a person who is entitled to become an Aboriginal party to an ACH management plan in respect of a proposed activity in an area. The *interested Aboriginal party* is:

- each *local ACH service* for the area or a part of the area;
- in the absence of a local ACH service for the area or a part of the area, each *native title party* for the area or the part of the area; *or*
- in the absence of a local ACH service and a native title party for the area or the part of the area, the *native title representative body* for the area or the part of the area.

Clause 136. Assistance to identify each interested Aboriginal party

This clause enables a proponent to request assistance from the CEO of the Department to identify each person who is an *interested Aboriginal party* for an ACH management plan. The CEO is to provide reasonable assistance to identify such persons.

Clause 137. ACH management plan

This clause sets out the requirements of an ACH management plan, which is the plan for the management of an activity that may *harm Aboriginal cultural heritage*. The said plan must:

- identify the proponent and each *Aboriginal party* (if any) to the plan;
- identify the area to which the plan relates, which must not include any area that is a *protected area*;
- identify the activity to which the plan relates;
- identify the *Aboriginal cultural heritage* located in the area the subject of the plan, as assessed in undertaking a *due diligence assessment* in accordance with the *ACH Management Code* or of which the proponent is otherwise aware, and the characteristics of that Aboriginal cultural heritage of which the proponent is aware;
- include an *ACH impact statement* as defined in clause 100 of the proposed Act;
- set out the process to be followed if, while the plan is of effect, a party to the plan becomes aware of *new information about Aboriginal cultural heritage*, as defined in clause 178 of the proposed Act, whilst the plan is of effect in the area to which the plan relates;

- set out how the proposed activity will be managed to avoid, or minimise the risk of *harm* to Aboriginal cultural heritage, including a clear explanation of the steps, if any, to be taken to avoid, or minimise that risk;
- set out the extent to which harm to Aboriginal cultural heritage is authorised;
- set out any conditions that must be complied with before, during and after the activity is carried out;
- specify the period for which the plan is to have effect; and
- including any other matters specified in the regulations of the proposed Act.

However, the plan must not include the details of any commercial arrangements between the parties to the plan.

Clause 138. Provisions in related agreement

This clause provides that a provision in a *related agreement* may be included in an ACH management plan if that provision satisfies any of the matters set out in clause 137 of the proposed Act.

Clause 139. Obligation to consult on ACH management plan

This clause imposes an obligation on a proponent to *consult* with the *persons to be consulted* under clause 107, within a reasonable time and in accordance with clause 101 and the *consultation guidelines*. The consultation guidelines are to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

Clause 140. Consultation carried out under related agreement

This clause provides consultation undertaken in accordance with a *related agreement*, may satisfy the requirements of clause 139 of the proposed Act, to the extent that such consultation complies with those requirements.

Clause 141. Proponents must take steps to identify and understand characteristics of Aboriginal cultural heritage in area

This clause provides that a proponent who intends to enter into an ACH management plan, must take reasonable steps to identify and obtain an understanding of the characteristics of the Aboriginal cultural heritage located in the area to which the proposed plan will relate. This will ensure that investigations need to be completed to a standard that adequately records all Aboriginal cultural heritage located in a management plan application area.

Clause 142. Notice about proposed ACH management plan to each interested Aboriginal party

This clause provides that after the proponent has fulfilled consultation obligations under clause 139 of the proposed Act and has satisfied the requirements to identify and understand the characteristics of Aboriginal cultural heritage located in the relevant area under clause 141, the proponent must give written notice to each interested Aboriginal party and the ACH Council, stating the proponent's intention to enter into a plan and to

use best endeavours to reach agreement with each interested Aboriginal party about the plan.

If a proposed activity covers the area of multiple local ACH services, the proponent may seek to enter into a single ACH management plan with all of the local ACH services or enter into separate plans with each local ACH service.

Clause 143. Reaching agreement about ACH management plan

This clause requires the proponent and each interested Aboriginal party to use best endeavours to reach agreement about such plan for the period specified in the regulations of the proposed Act, or any longer period agreed to by the parties or imposed by the ACH Council by written notice to the parties. The specified period in the regulations will commence 5 days after the proponent gives the said notice.

Significantly, when making an application for the authorisation of an ACH management plan under clause 157 of the proposed Act, when the proponent and the interested Aboriginal party have not been able to reach agreement, the applicant must include details of the negotiations carried out under this clause with each interested Aboriginal party, including a summary of the issues in dispute and evidence the proponent used best endeavours to reach agreement about the terms of the plan.

That is, whilst under this clause both parties are required to use best endeavours to reach agreement, in the absence of such agreement the proponent is required to demonstrate the proponent has used best endeavours.

What actions would constitute 'best endeavours' is based on what is reasonable in the statutory context and the circumstances of the situation.

Clause 144. Application for approval of ACH management plan if agreement reached

This clause provides that if agreement on an ACH management plan is reached between the parties, then an application to have the plan approved by the ACH Council may be made.

Clause 145. Application for authorisation of ACH management plan if agreement not reached

This clause provides that if agreement cannot be reached between the parties within the period provided under clause 143(2) of the proposed Act, an application for the authorisation of a proposed ACH management plan may be made.

Subdivision 2 — Approval of ACH management plan

This Subdivision provides the requirements and the process for an agreed ACH management plan to be approved. It also provides for an objection to a refusal to approve an ACH management plan or an agreed amendment to an approved ACH management plan.

Clause 146. Informed consent

This clause sets out the requirements for ensuring that where a *proponent* and each *interested Aboriginal party* have agreed to an ACH management plan, such agreement is based upon the *informed consent* of the interested Aboriginal party.

Informed consent requires the proponent to provide the interested Aboriginal party full and proper disclosure of *information* about the activity the proponent intends to carry out under the plan, which requires a clear explanation of:

- the *preferred method* the proponent intends to use to carry out the activity; and
- if applicable, each other *feasible alternative method* available to the proponent.

For each of these methods the proponent is to provide:

- a clear explanation of the risk of reasonably foreseeable *harm* being caused to *Aboriginal cultural heritage* by the activity with each method; and
- the nature of the harm to Aboriginal cultural heritage so risked by each method.

Further, in relation to the preferred method, the proponent is to provide a clear explanation as to how the activity will be managed to avoid, or minimise the risk of harm being caused to Aboriginal cultural heritage and a clear explanation of the steps, if any, that will be taken to avoid or minimise that risk.

The clause recognises that for some proposed activities, there may not be a feasible alternative method available to the proponent. However, it requires the proponent to present other methods that are capable of being done, or which are achievable in a practical sense or a reasonable option. It is implicit the feasible alternative method, is not the preferred method.

The timing of the requirement refers to the preferred and feasible methods that are available to the proponent as at the time of consulting and negotiating to reach an agreement with the relevant Aboriginal party as to an ACH management plan, as the methods must be presented during such negotiations. The management plan would detail the agreed method for the carrying out of the proposed activities that may harm Aboriginal cultural heritage.

Clause 147. Application for approval of ACH management plan

This clause provides a proponent may apply to the ACH Council for approval of an ACH management plan that has been agreed to by each *interested Aboriginal party* to the plan. Such application must:

- be made to the ACH Council in the approved form;
- include the plan agreed to by each Aboriginal party and the proponent, whose requirements are provided in clause 137 of the proposed Act;
- include evidence that each interested Aboriginal party has given *informed consent* of the plan, per the requirements of clause 146 of the proposed Act;
- include a summary of the information the proponent disclosed to each Aboriginal party under clause 146(1)(a) of the proposed Act;
- include details of the consultation required with each of the *persons to be consulted* under clauses 107 and 139 the proposed Act;

- include any responses to the proposal by each of the persons to be consulted on the proposal; and
- include any other documents or information if any, required by the regulations of the proposed Act.

Clause 148. Further information in support of application

This clause enables the ACH Council to request in writing from the applicant for the approval of an ACH management plan or each *interested Aboriginal party* to such a plan, to provide the ACH Council any further information relevant to the application, or the verification of any further information by statutory declaration, within a specified timeframe. The ACH Council may refuse to consider or consider further an application if a person does not comply with such request.

Clause 149. ACH Council may refuse to consider some applications

This clause provides the ACH Council may refuse to consider or consider further an application if it is not made in accordance with the proposed Act or the applicant does not comply with the request made under clause 148 of the proposed Act.

Clause 150. Decision of ACH Council

This clause provides the ACH Council must assess an application for an ACH management plan and any further information provided under clause 148(1) of the proposed Act, within the period specified in the regulations of the proposed Act, and make a decision to approve or refuse to approve the ACH management plan.

However, the clock stops on any specified period in the regulations, from the time the ACH Council requests further information or the verification of further information from the applicant or an *interested Aboriginal party*, until the request is complied with or the period specified for complying with the request ends.

The clock also stops on any specified period in the regulations, from the time the ACH Council gives *public notice* that the ACH Council is considering whether the relevant Aboriginal cultural heritage, within the area of a proposed ACH management plan, is of *State significance* and ending on the day the ACH Council makes a determination that the said Aboriginal cultural heritage is not of State significance.

If the ACH Council fails to make a decision within the specified period in the regulations, the applicant may request in writing that the Minister direct the ACH Council to do anything the Minister considers necessary to expedite the matter. Such direction by the Minister to the ACH Council must be in writing and specify a period for compliance with the direction. If the ACH Council fails to comply with such direction, the Minister may stand in its place and decide the application in accordance with this Subdivision.

The ACH Council is to give written notice of its decision within 14 days of its decision to approve or refuse to approve the ACH management plan, to each of the parties to the plan with reasons for the decision.

If the decision is to refuse the approval of the plan, the parties to the plan have a right to object about the decision to the Minister under clause 155. Accordingly the notice of such decision is subject to clause 156 of the proposed Act which requires that the notice

must also include a statement about the right to object. Such right to object must occur within the period prescribed by the regulations to the proposed Act.

Clause 151. Approval of ACH management plan

This clause provides the ACH Council may only approve an ACH management plan if it is satisfied as to certain matters, which are:

- that the activity to which the plan relates is an activity that may *harm Aboriginal cultural heritage*;
- that the area the plan relates to does not include any *protected area*;
- that such cultural heritage is not of *State significance* (noting that if it is of State significance, the plan must be authorised rather than approved);
- there has been consultation with each *person to be consulted* about the activity, under clause 107 of the proposed Act;
- that each *interested Aboriginal party* has given *informed consent* to the plan; and
- any other matter specified in the regulations of the proposed Act.

Clause 152. Duration of ACH management plan approval

This clause provides that an approved ACH management plan takes effect from the day of approval, unless a later date is specified in the notice of the decision to approve the plan. The plan ceases to have effect on the first of either the cancellation of the approval under clause 154(1)(b) of the proposed Act, expiry accordance with the terms of the plan, or the activities to which the plan relate are completed.

Clause 153. Conditions

This clause provides it is a statutory condition of *all* approved ACH management plans, that a party to the plan must notify the ACH Council if, whilst the approval of the plan is of effect, the party becomes aware of any *new information about Aboriginal cultural heritage* (as defined in clause 178 of the proposed Act) in the area to which the plan relates. It is also a statutory condition of any such plan, that the proponent must comply with the reporting requirements, if any specified in the plan. It is a further statutory condition of any such plan, that the carrying of any activity to which the plan relates must comply with a Part 7 order (subsequently) given in relation to the activity.

Clause 154. Suspension or cancellation of ACH management plan approval

This clause provides the Minister may, by written notice to the parties to an approved ACH management plan, suspend the plan for a specified period or cancel the approval on the following grounds:

- the Minister is not satisfied as to the matters set out in clause 151 of the proposed Act still apply; or
- the proponent carries out an activity in the area to which the ACH management plan relates that may *harm Aboriginal cultural heritage* and which is not in accordance with the plan; or
- the proponent has contravened a condition to which approval of the plan is subject.

Such notice must set out the grounds on which the action is taken and specify the date on which it takes effect.

However, before such action by the Minister, the Minister must give written notice to the parties to the approved ACH management plan, of the action the Minister proposes to take and the grounds for such action and provide a reasonable opportunity for the parties to be heard on the matter.

If an approved ACH management plan is suspended, it is of no effect during the period of suspension.

Clause 155. Objection to decision of ACH Council

This clause provides that if the ACH Council refuses to approve an ACH management plan or refuses to approve an amendment to an ACH management plan, a party to the plan, may within the period specified in the regulations of the proposed Act, object in writing to the Minister.

On receiving such an objection, the Minister must direct the ACH Council to provide the Minister the information provided to the ACH Council at the time it made its decision the subject of the objection, the reasons for the decision and any other information the ACH Council is of the opinion is relevant to the decision. The Minister may also request any of the parties to the plan to provide further information relevant to the objection or verification of such further information.

The Minister must consider the information provided by the ACH Council and any further information provided by the parties to the plan, before either upholding the decision of the ACH Council or making another decision. The decision of the Minister is to be based upon the matters listed in clause 151 of the proposed Act and what *is in the interests of the State*, as defined in clause 11 of the proposed Act.

The Minister must ensure written notice of the Minister's decision is given to each of the parties to the plan within 14 days of making the decision.

Clause 156. Notice of decision must be given

This clause provides that where the ACH Council refuses to approve an ACH management plan or refuses to approve an amendment to an ACH management plan and a party to the plan has a right to object to the Minister about the decision, the notice of the decision must be given within 14 days of the decision, provide a description of the decision and include a statement as to the person's right to object to the Minister.

Subdivision 3 — Authorisation of ACH management plan by Minister

This Subdivision provides the requirements and the process for the authorisation of an ACH management plan.

Clause 157. Application for authorisation of ACH management plan

This clause provides a proponent may apply to the ACH Council for the authorisation of an ACH management plan by the Minister if:

- the proponent intends to carry out an activity that may *harm* Aboriginal cultural heritage;

- the period specified in clause 143(2) of the proposed Act for reaching agreement on a plan has ended; and
- the proponent has not been able to reach agreement with each *interested Aboriginal party* about the terms of the plan. That is, authorisation is required if any interested Aboriginal party has not reached agreement over part of the relevant area, albeit that another interested Aboriginal party has reached agreement about one part of the relevant area.

Such application must:

- be made to the ACH Council in the approved form;
- include the plan proposed by the proponent;
- identify the each interested Aboriginal party for the plan;
- include details of the consultation with each of the *persons to be consulted* required pursuant to the proposed Act;
- include any responses to the proposal by each of the persons consulted on the proposal;
- include details of the negotiations carried out under clause 143(1) of the proposed Act with each *interested Aboriginal party* including:
 - a summary of the issues in dispute between the proponent and each *interested Aboriginal party*; and
 - evidence the proponent used best endeavours to reach agreement about the terms of the plan; and
- any other documents or information if any, required by the regulations of the proposed Act.

Clause 158. Further information in support of application

This clause enables the ACH Council to request the applicant for authorisation of an ACH management plan or an *interested Aboriginal party* for the plan, to provide the ACH Council any further information relevant to the application, or the verification of any further information by statutory declaration, within a specified timeframe.

Clause 159. ACH Council may refuse to consider some applications

This clause provides the ACH Council may refuse to consider or consider further an application if it is not made in accordance with the proposed Act or has not complied with a request under Clause 158.

Clause 160. Assistance to reach agreement on ACH management plan

This clause enables the ACH Council to assist the applicant and *each interested Aboriginal party* to reach agreement on the terms of an ACH management plan submitted for authorisation, and for that purpose may act as a mediator. The ACH Council must give notice to the proposed parties of the decision to offer to assist them to reach agreement, which remains an open offer until the date specified in the notice.

In providing such assistance the ACH Council may request the applicant or an interested Aboriginal party to submit an ACH management plan, for the consideration of the proposed parties.

If the ACH Council acts as a mediator under this clause, it must not use or disclose information it has had access to because of such assistance, except for the purpose of providing the assistance, establishing whether an interested Aboriginal party has given *informed consent* to an ACH management plan, or with the prior written consent of the person who provided the information to the ACH Council.

The ACH Council may appoint a mediator to carry out its functions under this clause in relation to assisting the proposed parties to reach agreement. Such mediator is protected from certain liability as provided in clause 305 of the proposed Act, in relation to such functions.

Clause 161. ACH Council may approve ACH management plan if agreement reached.

This clause enables the ACH Council to consider an application for the authorisation of an ACH management plan as an application for the approval a plan, if the applicant and each *interested Aboriginal party* has reached agreement on the terms of the plan and each interested Aboriginal party has agreed to be an *Aboriginal party* to the plan.

However, this clause does not apply if the ACH Council has determined that the relevant Aboriginal cultural heritage is of *State significance*, following which the application is to continue as though it were an application for the authorisation of the plan.

Clause 162. Recommendation of ACH Council

This clause provides the ACH Council must assess an application for authorisation of an ACH management plan in accordance with the matters listed in clause 163(1) of the proposed Act, and within the period specified in the regulations of the proposed Act, make a recommendation to the Minister whether to authorise the ACH management plan.

However, the clock stops on the specified period, in 3 situations: Firstly, from the day the ACH Council requests further information or the verification of further information from the applicant or an *interested Aboriginal party*, until the request is complied with or the period specified for complying with the request ends. Secondly, from the date the ACH Council gives notice of an offer to assist the parties to reach agreement under clause 160 of the proposed Act, and ending at the end of the specified period during which the offer to assist remains open. Thirdly, from the day *public notice* the ACH Council is considering whether Aboriginal cultural heritage is of *State significance* in the area the subject of the proposed ACH management plan, and ending on the day the ACH Council decides whether such cultural heritage is of State significance.

If the ACH Council fails to make a recommendation to the Minister within the specified period, the applicant may request the Minister to direct the ACH Council to do anything the Minister considers necessary to expedite the matter. Such direction by the Minister to ACH Council must specify the period for compliance with the direction and if the ACH Council fails to comply with such Ministerial direction, the Minister may make a decision on the application under clause 165(1)(b) of the proposed Act and may request further

information under clause 164 of the proposed Act without any recommendation from the ACH Council.

Clause 163. Recommendation of ACH management plan

This clause provides the ACH Council may only recommend to the Minister the authorisation of an ACH management plan if it is satisfied as to certain matters, which are:

- that the activity to which the plan relates is an activity that may *harm Aboriginal cultural heritage*;
- that the area the plan relates to does not include any part of a *protected area*;
- there has been consultation with each *person to be consulted* about the activity, under clause 107 of the proposed Act;
- the plan provides for the activity to be managed to avoid, or minimise the risk of *harm* to Aboriginal cultural heritage by the activity; and
- any other matter specified in the regulations of the proposed Act.

The ACH Council may recommend the Minister authorise an ACH management plan that was:

- included in the application by a proponent for authorisation, under clause 157(1) of the proposed Act;
- included in an application for approval, under clause 147(1) of the proposed Act, but because the Aboriginal cultural heritage was determined to be of *State significance* it requires authorisation;
- submitted or proposed by either the proponent or an interested Aboriginal party following a request from the ACH Council in the course of providing mediation assistance to reach agreement under clause 160(4);
- or another plan prepared by the ACH Council.

Clause 164. Minister may request further information

This clause provides that when the ACH Council makes a recommendation to the Minister in respect of an application for the authorisation of an ACH management plan, the Minister may request the ACH Council or any other person to provide the Minister with any further information the Minister requires to assist in making a decision whether to authorise a plan.

Clause 165. Decision of Minister

This clause provides how the Minister is to make a decision whether to authorise an ACH management plan.

If the ACH Council makes a recommendation to the Minister, the Minister must consider the application, recommendation of the ACH Council, and any further information provided to the Minister in response to the Minister's request and make a decision whether to authorise the plan included in the recommendation, authorise another plan or refuse to authorise any plan.

The Minister may decide to authorise all or a part of the area to which the application relates, all or some of the activities to which the application relate and must specify the period for which the authorisation is to have effect.

The Minister's decision must be made on the grounds of whether or not the Minister is satisfied as to the matters in clause 163(1) of the proposed Act and what *is in the interests of the State*, as defined in clause 11 of the proposed Act. In considering what *is in the interests of the State*, it is open for the Minister to consult and seek the views of other members of Executive Government in making his or her decision.

The Minister must give written notice of the Minister's decision to the applicant and each of the *persons to be consulted* about the activity to which the application relates within 14 days of making such a decision and include reasons for the decision.

Clause 166. Duration of ACH management plan authorisation

This clause provides that an authorised ACH management plan takes effect from the day that the plan is authorised, unless a later date is specified in the authorisation. The plan ceases to have effect on the first of either; the cancellation of the authorisation under clause 168(1)(b) of the proposed Act, expiry according to the plan's authorisation, or when the activities to which the plan relate are completed.

Clause 167. Conditions

This clause provides for the conditions of an authorised ACH management plan.

This clause provides it is a statutory condition of *all* authorised ACH management plans, that a party to the plan must notify the ACH Council if, whilst the approval is in effect, the party becomes aware of any *new information about Aboriginal cultural heritage* (as defined in clause 178 of the proposed Act) in the area to which the plan relates. It is also a statutory condition of all such plans, that the proponent must comply with the reporting requirements, if any specified in the notice of the decision to authorise the plan and the carrying of any activity to which the plan relates must comply with a Part 9 order (subsequently) given in relation to the activity.

The authorisation of an ACH management plan may be subject to any other condition the Minister considers appropriate to ensure the activity to which the plan relates is managed to avoid or minimise the risk of *harm to Aboriginal cultural heritage*.

Further, if the Minister becomes aware of new information about cultural heritage, by any means, the Minister may, by written notice impose a new or amend a condition as the Minister considers appropriate to ensure the activity to which the plan relates is managed to avoid or minimise the risk of harm to Aboriginal cultural heritage.

Such new or amended condition takes effect on the day specified in the notice, but cannot be before the parties to the ACH management plan have had a reasonable opportunity to make submissions to the Minister in relation to the new or amended condition or are able to take the necessary action to comply with the new or amended condition.

The Minister may at any time by written notice given to the parties to the plan, revoke a condition of a plan, but not the three statutory conditions that apply to all authorised plans.

Clause 168. Suspension or cancellation of authorisation of ACH management plan

This clause provides the Minister may, by written notice to the parties to an authorised ACH management plan, suspend the plan for a specified period or cancel the authorisation of the plan, on the grounds the Minister is either no longer satisfied as to the matters required for the authorisation of the plan under clause 163(1), or because the proponent carries out an activity in the area to which the plan relates that may *harm* Aboriginal cultural heritage and which is not in accordance with the plan, or because the proponent breaches a condition of the plan.

Such notice must set out the grounds on which the action is taken and specify the date on which it takes effect.

However, before such action by the Minister, the Minister must give written notice to the parties to the authorised ACH management plan, of the action the Minister proposes to take and the grounds for such action and provide a reasonable opportunity for the parties to be heard on the matter.

If an authorised ACH management plan is suspended, it is of no effect during the period of suspension.

Subdivision 4 - Other provisions about ACH management plans

This Subdivision provides for the approval or authorisation of an amendment to an ACH management plan, changes to the parties of such a plan and contravention of any conditions of an approved or authorised management plan.

Clause 169. Approval of amended ACH management plan

This clause permits the ACH Council to approve an amendment to an approved or authorised ACH management plan, except where clause 170 of the proposed Act applies, which is when the parties to the plan do not agree to the amendment, or there is no *Aboriginal party* to the plan or the plan relates to Aboriginal cultural heritage of *State significance*.

For the approval of an amended ACH management plan where all parties agree on the amendments, the process and requirements of Subdivision 2 of the proposed Act apply, except that the application does not need to include details of any consultation with *persons to be consulted*, nor responses to the proposal by the persons to be consulted and the ACH Council does not need to be satisfied there has been consultation with each person to be consulted.

This clause also provides that at the direction of the Minister under clause 81(3)(b) of the proposed Act, which provides for the excision of any overlap between the area the subject of a proposed protected area and the area subject to an ACH management plan, the ACH Council must approve such amendment to reduce the area the subject of the plan.

Clause 170. Authorisation of amended ACH management plan

This clause sets out the procedure for authorisation of an amendment to an approved or authorised ACH management plan, when the parties to the plan do not agree to the amendment, or there is no *Aboriginal party* to the plan or the plan relates to Aboriginal cultural heritage of *State significance*. Under such circumstances, the party may apply

for the proposed amendment to be authorised by the Minister under clause 157(1) of the proposed Act as if the amendment were a new ACH management plan.

In such circumstances, if there is an Aboriginal party to plan to be amended, clauses 142 and 143 and Subdivision 3 of the proposed Act apply, except the application does not need to include details of any consultation with *persons to be consulted* about the carrying out of the activity, nor responses to the proposal by the persons to be consulted and the Minister does not need to be satisfied there has been consultation with each person to be consulted.

However, if there is not an Aboriginal party to the plan to be amended, Subdivision 3 applies except the application does not need to include details of any consultation with *persons to be consulted* about the carrying out of the activity, nor responses to the proposal by the persons to be consulted, nor details of the negotiations between the proponent and each *interested Aboriginal party* and the Minister does not need to be satisfied there has been consultation with each person to be consulted.

Clause 171. Change to identity of parties to the ACH management plan

This clause addresses the situation where due to change in circumstances, an *Aboriginal party* to an ACH management plan no longer falls within the definition of an *interested Aboriginal party* for that plan. Such circumstances include where the Aboriginal party who is a local ACH service has their designation cancelled or suspended, or if a corporation is deregistered under the CATSI Act or Corporations Act. The person must within the prescribed period notify the ACH Council and the ACH Council may nominate another person who does fall within the definition of *interested Aboriginal party to be a party to the plan* by written notice to that person. The ACH Council may also take measures to ensure that any obligations undertaken by the Aboriginal party under the plan are discharged. A nominated interested Aboriginal party becomes an Aboriginal party to the plan when the nomination is accepted.

This clause provides that if a person is identified as an *Aboriginal party* in an ACH management plan, but is no longer an Aboriginal party the person must within the prescribed period notify the ACH Council that they are no longer an interested party and the ACH Council may nominate an *interested Aboriginal party* by written notice to that person, or itself take measures to ensure that any obligations undertaken by the Aboriginal party under the plan are discharged. A nominated interested Aboriginal party becomes an Aboriginal party to the plan when the nomination is accepted.

If the proponent for the activity the subject of the ACH management plan changes, the former proponent and the current proponent must, within the prescribed period notify the change of identity of the proponent to each Aboriginal party and the ACH Council. Failure to do so incurs a maximum penalty fine of \$10,000.

On receipt of a notification from the current proponent to the ACH Council, the current proponent is identified as the proponent of the plan.

Clause 172. Approved or authorised ACH management plan continues to have effect despite change to identity of party

This clause provides that an approved or authorised ACH management plan continues to have effect in relation to the activity, despite an Aboriginal party no longer being an

Aboriginal party to the plan or a change to the identity of the proponent of the management plan.

Clause 173. Contravention of conditions on approved or authorised ACH management plan

This clause provides that it is an offence for a party to an approved or authorised ACH management plan to fail to comply with any conditions of the plan, with a maximum penalty fine of \$100,000.

Subdivision 5 — Aboriginal cultural heritage of State significance

This Subdivision provides additional requirements if an application for an ACH management plan relates to an area which includes Aboriginal cultural heritage of State significance for the purpose of the proposed Act. *State significance*, in relation to Aboriginal cultural heritage, means that the heritage is of exceptional importance to the cultural identity of the State.

Clause 174. State significance guidelines must be considered

This clause provides that in determining whether Aboriginal cultural heritage is of State significance for the purposes of the proposed Act, the factors set out in the *State significance guidelines* must be considered. This is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

Clause 175. Notice must be given if ACH Council forms view that Aboriginal cultural heritage may be of State significance

This clause provides if the ACH Council in considering an application either for the approval or authorisation of an ACH management plan or the approval or authorisation of an amendment to a plan, forms the view the Aboriginal cultural heritage the subject of the proposed plan may be of *State significance* for the purposes of the proposed Act, the ACH Council must give *public notice* that it is considering making such a determination.

The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Such notice must give the details of the *Aboriginal cultural heritage* and the area to which the notice relates (the '*notice area*') and it must provide an opportunity for a person to submit to the ACH Council, within a specified period in the regulations of the proposed Act, a statement on the person's view on whether the Aboriginal cultural heritage should be recognised as being of State significance for the purposes of the proposed Act.

The ACH Council is required to notify certain persons that public notice has been given that it is considering whether Aboriginal cultural heritage is of State significance as follows:

- each local ACH service for the whole or a part of the notice area;
- each native title party for the whole or a part of the notice area;

- each knowledge holder for the whole or part of the notice area;
- each landholder within the notice area;
- each public authority that the Council considers has an interest in the notice area or a part of the notice area;
- any other person the ACH Council considers has an interest in the whole or part of the notice area.

For the purposes of this clause, a knowledge holder means a person identified as a knowledge holder after reasonable steps have been taken to do so in accordance with the *knowledge holder guidelines*. This is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

Clause 176. Determination about Aboriginal cultural heritage of State significance

This clause provides that at the end of the period for making submissions pursuant to the *public notice* under clause 175 of the proposed Act, the ACH Council must consider any submissions received in response to the notice, and make a determination whether the Aboriginal Cultural heritage is of *State significance*.

The ACH Council can only make a determination that the Aboriginal cultural heritage is of *State significance* after taking into consideration the factors set out in the *State Significance guidelines*.

If the ACH Council fails to make a decision within the prescribed period, the applicant may request the Minister to direct the ACH Council to do anything the Minister considers necessary to expedite the matter. Such direction by the Minister to the ACH Council must be in writing and specify a period for compliance with the direction. If the ACH Council fails to comply with such direction, the Minister may stand the place of the ACH Council, and decide the application in accordance with this Subdivision.

Clause 177. Continuation of applications

The effect of this clause is that if the ACH Council determines the Aboriginal cultural heritage the subject of an application for the approval of an ACH management plan is of *State significance*, then the application for the approval of the plan or the approval of an amendment to the plan must proceed as if it were an application for the authorisation of a plan or the authorisation of an amendment to a plan. This will require the Minister to authorise the ACH management plan so that the interests of the State can be considered.

Applications for the authorisation of a plan, or the authorisation of an amendment to a plan, continue.

Part 7 — Stop activity orders, prohibition orders and remediation orders

This Part provides the giving of stop activity, prohibition and remediation orders by the Minister.

No such orders exist under the AH Act. These orders have been added to the proposed Act to provide mechanisms to improve the protection of Aboriginal cultural heritage. Stop activity orders and prohibition orders can be used to prevent or cease an activity that may harm Aboriginal cultural heritage where the activity is not authorised or there is new information about Aboriginal cultural heritage. It is anticipated that where new information about Aboriginal cultural heritage has come to light, ACH permits and ACH management plans will have in place contingency plans to deal with new information which will not trigger the need for an order to be issued.

Stop activity orders will be limited to 60 days during which time the Council will be required to consider the matter and make a recommendation as to whether a prohibition order is required. The Council will be required to provide the opportunity for submissions to the person undertaking the activity as well as the relevant Aboriginal people. Remediation orders may be issued to allow for remediation work to be undertaken to restore impacted Aboriginal cultural heritage.

Division 1 — Preliminary

This Division provides key definitions and scope of the orders.

Clause 178. Terms used

This clause defines terms specific to this Part. Of particular note the clause provides:

- ***new information about Aboriginal cultural heritage;***
 - in relation to an area the subject of an ACH permit, means information not identified in the permit holder's application for a permit under clause 115(2)(c) of the proposed Act, about Aboriginal cultural heritage in the area or the characteristics of such cultural heritage; and
 - in relation to an area the subject of an approved or authorised ACH management plan, means information not identified in the plan under clause 137(2)(b) including in the ACH impact statement under clause 137(2)(c) of the proposed Act, about Aboriginal cultural heritage in the area or the characteristics of such cultural heritage.

Clause 179. Application of Part

This clause provides this Part applies only to Aboriginal cultural heritage which is an *Aboriginal place*, an *Aboriginal object*, *Aboriginal ancestral remains*, or located in a *protected area*.

Division 2 — Stop activity orders

This Division enables the Minister to give a stop activity order.

Clause 180. Stop activity order may be given by Minister in certain circumstances

This clause sets out the circumstances when the Minister may give a stop activity order, who it is to be given to, and when it will expire.

The Minister may give a stop activity order if the Minister is of the opinion Aboriginal cultural heritage is being harmed, or there is an imminent risk of *harm* to cultural heritage due to the carrying out of an activity, or an imminent activity that involves harm to cultural heritage, which;

- is a *tier 2 activity* or a *tier 3 activity* that is not subject to an *ACH permit* or an *ACH management plan*; or
- is located in a *protected area*; or
- is authorised under an ACH permit or ACH management plan, and there is *new information about Aboriginal cultural heritage* (as defined in clause 178 of the proposed Act) in the area where the activity is being undertaken.

A stop activity order must be given to the person who, in the opinion of the Minister, has control over the activity. Such order expires 60 days after the order is given, unless cancelled earlier under clause 203(1)(b) of the proposed Act or extended under clause 182(1) of the proposed Act. The Minister must give a copy of the order to the ACH Council immediately after it is given, to enable the ACH Council to commence its consideration of whether a *prohibition order* will be required.

The Minister is also required to give *public notice* of the order as soon as practicable after the order is given. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Clause 181. Contents of stop activity order

This clause specifies the information to be included in a stop activity order. The order must briefly state the Minister is satisfied there are grounds for the giving of the order and the basis of that opinion. The order must briefly describe the relevant Aboriginal cultural heritage and specify the measures to protect that cultural heritage from harm, or imminent risk of harm. This may include directions that the carrying out of a specified activity must stop immediately, is prohibited or that the carrying out of an activity in a particular way or for a specified period, is prohibited. The order must state the person given the order must ensure the directions are complied with and briefly describe the consequences for the failure to do so.

The order must also briefly describe how, after following the process set out under clauses 186 to 188 of the proposed Act, a *prohibition order* may be given.

The order is to specify the day on which the order will expire, which is 60 days after the day the order is given, unless it is cancelled earlier.

Clause 182. Extension of duration of stop activity order

This clause provides for extending a stop activity order beyond 60 days, only if the Minister is satisfied the ACH Council needs further time to consider whether a *prohibition order* is required. The Minister must give written notice to the person who was given the stop activity order before it expires.

As soon as practicable after the Minister gives notice of the extension of the duration of the stop activity order, the Minister must give public notice of such extension. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

There can only be one extension period for a further period of 60 days or a shorter period as specified in writing by the Minister.

Clause 183. Compliance with stop activity order

This clause provides that failure to comply with a stop activity order by the person given the order, is an offence with a maximum penalty fine of \$250,000 with an accruing daily maximum fine of \$12,500.

It also provides that after complying with a stop activity order, the person given the order, is to notify the ACH Council in writing of that compliance. Failure to do so is an offence with a maximum penalty fine of \$10,000.

Division 3 — Prohibition orders

This Division enables the Minister to give a prohibition order. Prohibition orders have the same effect as a stop activity order but they can be issued for a longer period.

Clause 184. Recommendations by ACH Council about prohibition orders under section 185(1) or 186(1)(b)

This clause enables the ACH Council to make a recommendation to the Minister to give a *prohibition order*. If the Minister has given a stop activity order, the ACH Council must make a recommendation to the Minister whether to grant a prohibition order.

Clause 185. ACH Council may make recommendation about prohibition orders in certain circumstances

This clause enables the ACH Council to recommend that the Minister give a prohibition order if the ACH Council is of the opinion Aboriginal cultural heritage is being harmed or there is a risk of such harm, and special measures are required to protect that cultural heritage. Such harm or imminent risk of harm occurs when an activity is being carried out and it is harming or involves an imminent risk of harming, or it will be carried out imminently and the activity involves a risk of harm, to Aboriginal cultural heritage.

However, such a recommendation can only be made if the harm or risk of harm is from the carrying out of an activity which:

- is a *tier 2 activity* or a *tier 3 activity* that is not subject to an *ACH permit* or an *ACH management plan*; or
- is located in a *protected area*; or
- is authorised under an ACH permit or ACH management plan, and there is *new information about Aboriginal cultural heritage* (as defined in clause 178 of the proposed Act) in the area where the activity is being undertaken.

Such recommendation may include a recommendation as to who the order is to be given, directions to be included in the order, the duration of the order and other matters that may be prescribed in the regulations.

Clause 186. ACH Council must make recommendation about prohibition order while stop activity order of effect

Whilst a *stop activity order* is in effect, the ACH Council is required to consider whether the relevant Aboriginal cultural heritage requires continued protection under a *prohibition order*, and make a recommendation to the Minister whether or not a prohibition order should be given.

The ACH Council can make a recommendation for a prohibition order if it is of the opinion that Aboriginal cultural heritage is being harmed or there is a risk of such harm, and special measures are required to protect that cultural heritage. Such harm or imminent risk of harm occurs when an activity is being carried out and it is harming or involves an imminent risk of harming, or it will be carried out imminently and the activity involves a risk of harm, to Aboriginal cultural heritage.

However, such a recommendation can only be made if the harm or risk of harm is from the carrying out of an activity which:

- is a *tier 2 activity* or a *tier 3 activity* that is not subject to an *ACH permit* or an *ACH management plan*; or
- is located in a *protected area*; or
- is authorised under an ACH permit or ACH management plan, and there is *new information about Aboriginal cultural heritage* (as defined in clause 178 of the proposed Act) in the area where the activity is being undertaken.

Such recommendation may include a recommendation as to who the order is to be given, directions to be included in the order, the duration of the order and other matters that may be prescribed in the regulations.

Clause 187. ACH Council must give notice before making recommendation about prohibition order

This clause provides that *before* the ACH Council makes any recommendation, whether under clause 185(1) or 186(1)(b) of the proposed Act, the ACH Council must give written notice to specified persons that the ACH Council is considering whether to recommend a *prohibition order*. The notice is to provide the opportunity to such persons, to make submissions to the ACH Council within the specified period in the regulations, as to the proposed recommendation to the Minister.

Such notice must contain information relevant to the decision-making of the ACH Council whether to recommend a prohibition order, details of the Aboriginal cultural heritage at risk (excluding *culturally sensitive information*, as defined in clause 11 of the proposed Act), and the activity the subject of the prohibition order and the period the proposed prohibition would apply. The notice must also provide the opportunity for making submissions to the ACH Council, within the period specified in the regulations of the proposed Act as to whether a prohibition order should be given.

The persons to be notified are any person the ACH Council believes has control over the activity and each local ACH service in the area or a part of the area where the activity is or is likely to be carried out. In the absence of a local ACH service, the ACH Council is to notify the relevant native title party and each knowledge holder, and in the absence of all these, the relevant native title representative body.

For the purpose of this clause, a knowledge holder means a person identified as a knowledge holder after reasonable steps have been taken to do so in accordance with the *knowledge holder guidelines*. This is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

The ACH Council must consider any submissions made in response to the notice.

Clause 188. Prohibition order may be given by Minister

This clause requires the Minister to consider a recommendation received from the ACH Council before making the decision to give or not give a *prohibition order*.

Such decision must be made on whether the Minister is satisfied as to the criteria for making a prohibition order as set out in clause 185(1) and (3) of the proposed Act, being the criteria considered by the ACH Council. Further, the Minister must also consider what *is in the interests of the State*, which is a defined term in clause 11 of the proposed Act.

The prohibition order is to be given to a person that in the Minister's opinion has control over the activity and is to give *public notice* of the decision as soon as practicable after the order is given. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

If the Minister does not give a prohibition order in response to a recommendation from the ACH Council, the Minister is to give notice of such decision to the persons notified of the proposal for a recommendation under clause 187(3) of the proposed Act.

Clause 189. Contents of prohibition order

This clause specifies the information to be included in a prohibition order. The order must briefly state the Minister is satisfied there are grounds for the giving of the order and the basis of that opinion. The order must specify the Aboriginal cultural heritage and specify the measures to protect that cultural heritage from harm, or imminent risk of harm. This may include directions that the carrying out of a specified activity must stop immediately, is prohibited or that the carrying out of an activity in a particular way or for a specified period, is prohibited. The order must state the person given the order must ensure the directions are complied with and briefly describe the consequences for the failure to do so.

The order is to specify that the order is unlimited in duration unless cancelled, or the day on which the order will expire, unless it is cancelled earlier or extended.

Clause 190. Compliance with prohibition order

This clause provides that failure to comply with a prohibition order is an offence with a fine of \$250,000 with an accruing daily maximum penalty fine of \$12,500.

It also provides that after complying with a prohibition order, the person given the order, is to notify the ACH Council in writing of that compliance. Failure to do so is an offence with a maximum penalty fine of \$10,000.

Clause 191. Extension of duration of prohibition order

This clause enables the Minister to extend a *prohibition order* prior to its expiry date, if it was not unlimited in duration.

Before extending the prohibition order, the Minister must give written notice of his proposal to extend the prohibition order in accordance with clause 192(1) of the proposal to extend the prohibition order, which will include an opportunity to make submissions to the Minister within a period specified in the regulations.

The Minister must consider such submissions made and be satisfied that the grounds on which the prohibition order was given still exist and that it *is in the interests of the State*, which is a defined term in clause 11 of the proposed Act, to do so.

The Minister may extend the duration of the prohibition order by written notice to the person who was given the order. The Minister must also give *public notice* of the extension of the duration of the prohibition order as soon as practicable after the order is given. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Clause 192. Notice by Minister before extension of duration of prohibition order

This clause provides the information to be specified in a notice proposing to extend a prohibition order and who must be notified.

Such notice must contain details of the proposal to extend the duration of the prohibition order, the proposed extension period and details of the Aboriginal cultural heritage excluding *culturally sensitive information* as defined in clause 11 of the proposed Act and the activity the subject of the proposed prohibition order. The notice is also to provide the opportunity to make submissions within the specified period in the regulations, about whether the prohibition order should be extended.

The persons to be notified are the person given the prohibition order, any other person who in the opinion of the Minister has control over the activity the subject of the prohibition order, and each local ACH service in the area or a part of the area where the activity is or is likely to be carried out. In the absence of a local ACH service, the ACH Council is to notify the relevant native title party and each knowledge holder, and in the absence of all these, the relevant native title representative body.

For the purpose of this clause, a knowledge holder means a person identified as a knowledge holder after reasonable steps have been taken to do so in accordance with the *knowledge holder guidelines*. This is a guideline to be prepared by the ACH Council with an opportunity for public consultation and submissions before its approval (and possible amendment) by the Minister, under Part 13 Division 3 Subdivision 2 of the proposed Act.

Division 4 — Remediation orders

This Division enables the Minister to give a remediation order. Remediation orders can be issued to allow for remediation work to be undertaken to restore impacted Aboriginal cultural heritage to its original condition. It is acknowledged that where Aboriginal cultural heritage has been completely destroyed or damaged, remedial actions may not be possible.

Clause 193. ACH Council may recommend remediation order

This clause enables the ACH Council to recommend to the Minister to issue a remediation order to a person who has control over the activity or is a *landholder* or *occupier* of the land, if the ACH Council is of the view that *harm* has been caused to *Aboriginal cultural heritage* in contravention of the proposed Act.

Clause 194. Remediation order may be given by Minister

This clause sets out the circumstances when a remediation order may be given by the Minister.

If the ACH Council has made a recommendation to the Minister to give a remediation order and the Minister is satisfied that Aboriginal cultural heritage has been harmed in contravention of the proposed Act, the Minister may give a remediation order.

The order is to be given to a person who in the Minister's opinion has control over the activity that harmed the Aboriginal cultural heritage, or is a *landholder* or *occupier* of the land, as defined in clause 11 of the proposed Act, where the activity that harmed the Aboriginal cultural heritage was carried out.

The Minister must give *public notice* of the remediation order as soon as practicable after the order is given. The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations of the proposed Act.

Clause 195. Contents of remediation order

This clause details what information must be included in a remediation order.

The order must briefly describe the relevant Aboriginal cultural heritage and state the Minister is satisfied there are grounds for the giving of the order and the basis of that opinion. The order must specify the measures to *remediate* the Aboriginal cultural heritage and the period within which such directions must be complied with and briefly describe the consequences for the failure to do so.

Clause 196. Compliance with remediation order

This clause provides that failure to comply with a remediation order is an offence with a maximum penalty fine of \$250,000 with an accruing daily maximum penalty fine of \$12,500.

It also provides that after complying with a remediation order the person to whom the order was given is to notify the ACH Council in writing of that compliance. Failure to do so is an offence with a maximum penalty fine of \$10,000.

Clause 197. Other persons may carry out remediation if order contravened

This clause enables the Minister to authorise another person to undertake the remediation if the person who was given the order fails to comply with it. The Minister may recover the cost of the remediation work from the person given the remediation order, as a debt through court action.

Clause 198. Entry to carry out remediation

This clause authorises a person to enter any land if the person is required or authorised to carry out remediation works under a remediation order, for the purposes of carrying out the remediation works. However, nothing in the Division authorises entry to any part of premises used for residential purposes, except with the consent of the occupier of the premises.

Clause 199. Recovery by person given remediation order

This clause provides that a person who complied with a remediation order the person was given, but who was not the person who harmed the Aboriginal cultural heritage the subject of the order, may recover the cost of complying with the order from the person who harmed the cultural heritage, as a debt through court action.

Division 5 — Other provisions about orders under this Part

This Division provides for additional matters that apply to orders given under this Part.

Clause 200. General matters about orders under this Part

This clause provides that any order given under this part, including any amendment, extension or cancellation of an order, must be given in writing and may be given without there being any proceedings or conviction against a person, or without having previously notified the person to whom the order is given of the proposal to make the order.

Clause 201. Directions in orders under this Part

This clause provides that directions contained in an order may be subject to any conditions specified in the order, subject to the discretion of any person specified in the order, refer to requirements specified in the regulations, or in any standards or code of practice, and may offer a choice of ways in which to comply with the order.

Clause 202. Duration of orders under this Part

This clause provides that an order takes effect when it is given to the person, until the order is either cancelled or expires in accordance with its terms or the terms of a notice under clause 182(1) or 191(2).

Clause 203. Amendment or cancellation of certain orders under this Part

This clause enables the Minister to amend a prohibition order, or cancel a stop activity, prohibition or remediation order.

Before amending or cancelling a prohibition order, the Minister must give written notice of the Minister's proposal to amend or cancel the prohibition order in accordance with clause 204 of the proposed Act (which details to whom the notice must be given and what information it must provide), and at the end of the period specified in the regulations for

making submissions in response to such notice, the Minister must consider any submissions made before making the decision.

The Minister must give notice of the decision to amend a prohibition order, or cancel a stop activity, prohibition or remediation order to each local ACH service in the area or a part of the area where the activity is or is likely to be carried out. In the absence of a local ACH service, the ACH Council is to notify the relevant native title party and each knowledge holder, and in the absence of all these, the relevant native title representative body.

Clause 204. Notification by Minister before amending or cancelling prohibition order

This clause sets out what information the notice of a proposal to amend or cancel a prohibition order is to contain and who the notice is to be given to.

The notice must contain details of the proposal to amend or cancel the prohibition order and details about the content of the prohibition order (excluding any *culturally sensitive information*, as defined in clause 11 of the proposed Act). The notice is also to provide the opportunity to such persons, to make submissions within the period specified in the regulations of the proposed Act, about whether the prohibition should be amended or cancelled as proposed.

The persons to be notified are the person who was given the prohibition order and any other person who in the opinion of the Minister has control over the activity the subject of the prohibition. Further persons to be notified are each local ACH service in the area or part of the area the subject of the prohibition order. In the absence of a local ACH service, the Minister is to notify the relevant native title party and each knowledge holder, and in the absence of all these, the relevant native title representative body.

Clause 205. Display of order under this Part

This clause provides that a person who is given an order under this Part, must display a copy of the order in a prominent place at or near the area the subject of the order.

Failing to do so is an offence with a maximum penalty fine of \$10,000 with an accruing daily maximum penalty fine of \$500.

Whilst an order is of effect, an order so displayed must not be intentionally removed, destroyed, damaged or defaced. To do so is an offence with a maximum penalty fine of \$10,000.

Part 8— Aboriginal Cultural Heritage protection agreements

This Division enables the ACH Council to endorse Aboriginal cultural heritage protection agreements which are voluntary agreements with Aboriginal parties that focus on proactive actions to recognise, protect, conserve, preserve and manage Aboriginal cultural heritage in an area. An ACH protection agreement cannot permit harm to Aboriginal cultural heritage in the area.

Clause 206. ACH protection agreement

An *ACH protection agreement* may deal with one or more of the following but is not limited to dealing with these matters:

- the recognition, protection, conservation, preservation or management of Aboriginal cultural heritage;
- the protection, maintenance or use of an *Aboriginal place*, a *cultural landscape* or *Aboriginal object*;
- rights of access to, or use of an *Aboriginal place* or an *Aboriginal object* by Aboriginal people;
- the restoration and preservation of an *Aboriginal place*, a *cultural landscape* and an *Aboriginal object*;
- any other matter specified in regulations of the proposed Act.

An agreement cannot be an *ACH protection agreement* if it deals with any activity for which an *ACH permit* or an *ACH management plan* is required, or if it is a *related agreement*.

Any person can enter into an ACH protection agreement, but it must include at least one Aboriginal person, group or community as a party.

Clause 207. Endorsement of ACH protection agreement

This clause enables an ACH protection agreement to be submitted to the ACH Council for endorsement. It must be submitted in the approved form, include a copy of the agreement for endorsement and anything else required by the regulations.

Clause 208. Further information in support of submission

This clause enables the ACH Council to request from the person who submitted an agreement for endorsement, further information relevant to the submission including the verification of information by statutory declaration. The request must specify that the request is to be complied with within the period prescribed in the regulations.

Clause 209. ACH Council may refuse to consider some submissions

This clause enables the ACH Council to refuse to consider or further consider a submission for the endorsement of an ACH protection agreement if it is not submitted in accordance with the Act or there has been a failure to comply with the request for further information or verification of information.

Clause 210. Decision ACH Council

This clause provides the ACH Council must assess any submission made under clause 207 of the proposed Act and decide whether to endorse the ACH protection agreement within the period specified in the regulations of the proposed Act. However, the clock stops on the period for making the decision from the time the ACH Council requests further information in support of the submission or the verification of information, and the date the request is complied with or the expiry of the period within which to provide such further information, whichever is the earliest.

Part 9 — Aboriginal Cultural Heritage Directory

This Part provides for the establishment, maintenance, use and access to the ACH Directory. The Directory will replace the Register of Aboriginal Places and Objects established under the AH Act. All registered Aboriginal sites and lodged Aboriginal places on the Register of Aboriginal Places and Objects will be transferred to the Directory as Aboriginal cultural heritage.

Division 1 — ACH Directory

This Division provides for the establishment and maintenance of the ACH Directory.

Clause 211. ACH Directory

This clause requires the ACH Council to establish and maintain the ACH Directory in a manner and form appropriate for the purposes of the Directory as set out in clause 212 of the proposed Act.

Clause 212. Purposes of ACH Directory

This clause provides the purposes of the ACH Directory are to assemble, organise and maintain information about *Aboriginal cultural heritage* described in clause 213 of the proposed Act, and for information and documents in the Directory to be accessible in accordance with Division 2 as a research and planning tool to assist in the consideration of Aboriginal cultural heritage by Aboriginal people, proponents or other people, and in the administration of the proposed Act.

Clauses 213. Information and documents on ACH Directory

This clause provides what type of information and documents can be included on the Directory.

The ACH Directory is to contain the information specified in the regulations in relation to:

- a *protected area*;
- a *local ACH service* for an area;
- a *native title party* for an area;
- the *knowledge holders* for a particular area and particular Aboriginal cultural heritage;
- an *ACH protection agreement* endorsed under Part 8;
- an *ACH permit*;
- an approved or authorised *ACH management plan*;
- a determination that Aboriginal cultural heritage is of *State significance* for the purposes of the Act; and
- a *Part 7 order*.

The ACH Directory is to hold information about the Aboriginal cultural heritage of the State, including a description of the characteristics of that heritage and its location. In

relation to an *Aboriginal object* and *intangible Aboriginal cultural heritage*, this includes a description to where it is thought to have originated from or any type of recording, particularly in relation to intangible Aboriginal cultural heritage. The ACH Directory can also hold any other information or documents relevant to Aboriginal cultural heritage and prescribed in the regulations, either at the request of another person or which the ACH Council considers appropriate to include in the Directory.

For Aboriginal cultural heritage to be added to the ACH Directory, it needs to be supported by a knowledge holder for that heritage. It is proposed that minimum recording standards will need to be met before Aboriginal cultural heritage is added to the Directory. The purpose of the minimum recording standards is to ensure that sufficient information as to why the heritage is important and who it is important to is captured. Unlike the AH Act there will be no statutory body responsible for determining whether Aboriginal cultural heritage is important to an Aboriginal person.

Clause 214. Accuracy of ACH Directory

This clause provides the ACH Council is to ensure the ACH Directory is as accurate and up to date as practicable and it may modify, add to or correct the Directory as may be necessary. However, the placing or removal of information is not conclusive that the content of the Directory is either up-to-date, comprehensive or accurate. Information can only be removed in accordance with clause 215 of the proposed Act.

Clause 215. Removing information and documents from ACH Directory

This clause provides the ACH Council may remove information or a document from the ACH Directory if the ACH Council is satisfied it is factually incorrect or has been placed on the Directory in error. However, before doing so the ACH Council must, to the extent it is reasonably practicable to do so, consult a *knowledge holder* for that Aboriginal cultural heritage to which the information or document relates. If this is not possible, the ACH Council must consult with the relevant *local ACH service*, or in the absence of a local ACH service, the relevant *native title party* and failing this, the relevant *native title representative body* for the area or a part of the area to which the cultural heritage relates.

Division 2 — Access to ACH Directory

This Division provides for access to information and documents on the ACH Directory.

Clause 216. Access to ACH Directory

This clause provides that access to the ACH Directory is governed by this Division, or at the discretion of the ACH Council as it considers appropriate, or in accordance with any regulations. However, information that is or documents that contain *culturally sensitive information* requires the explicit consent of a *knowledge holder* for the Aboriginal cultural heritage before the disclosure of the information to the person.

While the ACH Directory will include all information and documents about Aboriginal cultural heritage made available to the ACH Council, not all information will be publicly available. The ACH Council has a duty to ensure culturally sensitive information is secure and only made available with the consent of the relevant knowledge holders. With regard to Aboriginal cultural heritage, information that will be available to public will typically be the geographical boundary (boundary will be dithered if the heritage is subject to cultural

restrictions), information on the heritage type and who the knowledge holders are for the heritage.

Clause 217. Access for Aboriginal people

This clause requires the ACH Council to ensure access to the information and documents on the Directory is available to an Aboriginal person, group or community that has traditional rights, interests and responsibilities in relation to the Aboriginal cultural heritage to which the information or documents relates.

Clause 218. Access to information about protected areas and the management of activities

This clause requires the ACH Council to make the information and documents on the ACH Directory available to the general public to identify:

- whether an area includes any area that is part of a *protected area*;
- the conditions of a protected area;
- Aboriginal cultural heritage the ACH Council has determined under clause 176(1)(b)(i) of the proposed Act to be of *State significance* for the purposes of this Act;
- whether or not an area is the subject of an *ACH permit* or an approved or authorised *ACH management plan* and the contact details of the holder of the permit or the parties to the plan;
- a *local ACH service* for an area;
- a *native title party* for an area; and
- whether or not a *stop activity order*, a *prohibition order* or a *remediation order* applies to an area;

Clause 219. Access for proponents of activities

This clause requires the ACH Council to ensure information and documents on the ACH Directory are available to a *proponent* who intends to carry out an activity that may *harm* Aboriginal cultural heritage to the extent the information or documents relates to the activity or the Aboriginal cultural heritage at risk of harm, and to the extent the ACH Council considers the proponent requires the information and documents to comply with the requirements of the proposed Act. However, any information or document excluded by the regulations for the purpose of this clause are not available to a proponent.

Clause 220. Access for research

This clause provides the ACH Council can disclose information and documents held on the Directory are available for research purposes that relate to Aboriginal cultural heritage, provided it is appropriate to make such information or documents available for research.

Part 10 — Securing compliance

This Part provides powers for the investigation and prevention of offences and for related matters under the proposed Act. The investigation powers and inspection provisions for inspectors under the proposed Act are in line with State standards under other statutes including the *Criminal Investigation Act 2006*, the *Biodiversity Conservation Act 2016* and the *Environmental Protection Act 1986*.

Division 1 — Preliminary

This Division provides the meaning of terms relevant to this part.

Clause 221. Terms used

This clause defines terms relevant to this Part. The definitions are self-explanatory or the clause refers to another clause where the meaning of the term can be determined.

Clause 222. Reasonably suspects

This clause provides a definition of *reasonably suspects*, which is based on the definition in section 4 of the CI Act. It provides a person can reasonably suspect something, if at the time the person had grounds for suspecting the thing, which objectively are reasonable, even if those grounds are later found to be false or non-existent.

Clause 223. Thing relevant to an offence

This clause provides a definition of a *thing relevant to an offence*, which is based on the definition in section 5 of the CI Act. It provides a range of circumstances when it is reasonable to suspect that a thing is relevant to an offence, for example in relation to a thing that may be used to commit an offence, or has been obtained by committing an offence, or an offence is about to be committed in relation to a thing or it is a thing which is relevant to proving an offence.

Such thing can take any form that is, it can be material or non-material, alive (but not a human) or not alive.

Division 2 — Inspectors

This Division provides for the designation or appointment of inspectors, identity cards and related matters.

Clause 224. Inspectors

This clause enables the CEO of the Department to designate in writing a public service officer or a person employed or engaged under section 100 of the PSM Act by the Department, as an *inspector* for the purposes of the proposed Act. Such designation may be for a fixed or indefinite period and may be revoked by the CEO in writing at any time.

Clause 225. Aboriginal inspectors

This clause enables the CEO of the Department to appoint in writing, an Aboriginal person to be an *Aboriginal inspector* for an area of the State.

However, before appointing an Aboriginal inspector for a specified area for which a local ACH service is designated, the CEO must notify the local ACH service of the proposed appointment in writing and provide the local ACH service a reasonable opportunity to

make submissions to the CEO about the proposed appointment. The CEO must take into account any submissions received in response to such notification in making the decision about the appointment.

An Aboriginal inspector has, in respect of the area appointed, the powers conferred by or under the proposed Act that are specified in the appointment and to that extent is taken to be an inspector.

Such designation may be for a fixed or indefinite period and may be revoked at any time.

Clause 226. Identity cards

This clause requires the CEO of the Department to give identity cards to an inspector or Aboriginal inspector, which identifies the person as an inspector or Aboriginal inspector, and includes a recent photograph of the person. If the person is an Aboriginal inspector, the identity card must specify the area of the State for which the person is appointed and the powers conferred on the person.

A person given such an identity card must carry the identity card at all times when exercising powers or performing functions as an inspector, unless it is impracticable to do so.

When a person ceases to be an inspector or Aboriginal inspector, and fails without reasonable excuse to return their identity card, such person commits an offence with a maximum penalty fine of \$5,000.

Clause 227. Production or display of identity card

This clause provides that an inspector or Aboriginal inspector may only exercise a power conferred on them in relation to another person, if the inspector or Aboriginal inspector first produces their identity card for inspection by the other person, or the identity card is displayed and clearly visible to the other person. If for any reason it is not practicable to produce or display the identity card before exercising the power, the inspector or Aboriginal inspector may exercise the power but must produce the identity card for inspection at the first reasonable opportunity.

Clause 228. Police officers have powers of inspectors

This clause provides that for the purposes of the proposed Act, a police officer has all the powers an inspector has under the proposed Act and is taken to be an inspector.

Clause 229. Impersonating an inspector or an Aboriginal inspector

This clause provides that it is an offence for a person to falsely represent by words or conduct that the person is an inspector or Aboriginal inspector. Contravention of this has a maximum imprisonment term of 12 months or a maximum penalty fine of \$12,000 or both. This is consistent with the penalties for impersonating public officers under the *Criminal Code Act Compilation Act 1913*.

Division 3 — Inspection and related powers

This Division confers powers for inspection purposes to inspectors.

Clause 230. Purposes for which inspection may be carried out

This clause provides the purposes for which an inspector may carry out an inspection.

The powers of inspections are to establish whether there is or has been any contravention of the proposed Act or an *instrument* which is an *ACH permit*, an approved or authorised *ACH management plan*, a *protected area order*, a *stop activity order*, a *prohibition order* or a *remediation order*. Inspection powers also enable the inspection of any records kept under or for the purposes of the proposed Act, or that may be relevant to determining whether the proposed Act or any instrument has been or is being contravened, and for any other purpose specified in the regulations.

Clause 231. Power to enter places

This clause provides that for inspection purposes, and subject to clause 232 of the proposed Act, an inspector has powers to enter places at any time, provided it is not a dwelling. Clause 232 of the proposed Act, imposes additional requirements to ascertain if a place is an *Aboriginal place* and entry to such a place.

However, it is possible to enter a dwelling with the informed consent of an *occupier* of the dwelling. Such informed consent requires the inspector to inform the occupier of the powers the inspector wishes to exercise in conducting an inspection, the reasons why the inspector wants to exercise those powers, and to advise that the occupier may refuse to consent to the inspector entering the dwelling. Without such consent, an entry warrant is otherwise required to enter a dwelling.

An inspector can enter a place in accordance with an entry warrant.

Clause 232. Entering Aboriginal places

This clause provides that before entering any place (without an entry warrant), an inspector must take all reasonable steps to determine if the place is an *Aboriginal place*. If a place is an Aboriginal place, the inspector must also determine whether in accordance with *Aboriginal tradition* there are restrictions on entry to the place. If such restrictions apply, the inspector can only enter the place if the inspector is permitted to enter in accordance with Aboriginal tradition or the inspector is accompanied by a person who is permitted to enter the place in accordance with Aboriginal tradition.

However, an inspector is not required to comply with such restrictions if the inspector considers on reasonable grounds, the entry is necessary to prevent *harm* to *Aboriginal cultural heritage*.

Clause 233. Power to enter includes power to enter some other places

This clause provides that where an inspector is permitted to enter a place for an inspection under clause 231(1) of the proposed Act, but must physically pass through one or more premises in the building to access the place to be inspected, the officer may enter, but not inspect, the other premises.

Clause 234. Power to stop and enter vehicles, and ancillary powers

This clause provides that an inspector may, for inspection purposes, stop and enter vehicles other than a *mobile home*. The inspector may use any means reasonably necessary to stop a vehicle, provided such means are not likely to cause death or

grievous bodily harm to any person, whether inside or outside the vehicle. The powers also include detaining the vehicle for a reasonable period and moving the vehicle to a place suitable to conduct the inspection.

Clause 235. Application of CI Act s. 31

Section 31 of the CI Act sets out an occupier's rights in respect of entry to a place they occupy.

This clause provides that section 31 of the CI Act applies with all necessary modifications in respect of entry for inspection purposes to a place that is not a dwelling, or pursuant to an entry permit, or that requires entering premises to access another place, or entry to a vehicle other than a mobile home.

Accordingly references in the CI Act to place, includes a reference to a vehicle, reference to an occupier in the CI Act includes a reference to a person in charge of a vehicle, reference to an officer in the CI Act includes a reference to an inspector, reference to a search warrant in the CI Act is a reference to an entry warrant and a reference in the CI Act to a search is a reference to an inspection.

Clause 236. Other powers related to inspection

This clause provides what inspectors may do when inspecting a vehicle or a place. These include: take equipment reasonably necessary to carry out the inspection; make reasonable use of any equipment, facilities or services at the location of the inspection; remain in the place or vehicle for as long as it is reasonably necessary to complete the inspection; open and inspect any package, compartment, cupboard or containers; inspect any enclosure or similar structure; photograph or otherwise make a record of a place, vehicle or thing in a place or vehicle; take samples of water or soil; apply an identifier to any object; survey and mark-out land, and label anything.

Clause 237. Obtaining records

This clause provides that for inspection purposes, inspectors have broad powers to obtain a *relevant record*, which is an instrument, publication or record that contains information relevant to compliance under the proposed Act. Accordingly, an inspector is empowered to:

- direct a person who has custody or control of a relevant record to provide the record or a copy of the record;
- direct a person who has custody or control of something on which a relevant record is stored or may be stored, to make a copy or print out a copy of it;
- operate a computer or thing on which a record may be stored;
- direct a person who is or appears to be in control of a record, which the inspector reasonably suspects is a relevant record, to give the inspector anything which will enable access to the record, including anything to understand the record;
- take extracts from, make copies of, download, print out or photograph a record the inspector reasonably suspects is a relevant record;
- take reasonable measures to secure or protect a relevant record, computer or thing on which a relevant record is stored, against damage, unauthorised removal or interference.

If an inspector is given a record, the inspector must, if practicable allow the person entitled to possession of the record, to have reasonable access to the record.

Clause 238. Directions

This clause provides that for inspection purposes, an inspector may give directions to people. Accordingly, an inspector is empowered to:

- direct an occupier of a place or vehicle, or a person who appears to be in control of a thing, to give the inspector any information as to the name and address of the owner of the place, vehicle or thing, or any other information which is relevant to the inspection;
- direct an occupier of a place or vehicle to answer questions;
- direct an occupier of a place or vehicle to open or unlock anything the inspector requires access;
- direct an occupier of a place to give a plan or access to a plan of the place;
- direct an occupier of a place or vehicle, or a person who appears to be in control of a thing, to assist the inspector to carry out the inspector's functions;
- direct an occupier of a vehicle, to move the vehicle to a specified place for inspection;
- direct a person who appears in control of a consignment of goods, to move the consignment of goods to a specified place for inspection;
- direct a person who appears in control of an object, to do anything necessary to identify the object;
- direct a person who appears in control of any thing to label the thing;
- direct a person who appears in control of an object, to keep possession of that object until further directed by the inspector; and
- direct a person who appears in control of an object, to leave the object at a specified place until further directed by the inspector.

Clause 239. Seizure of thing relevant to an offence

This clause provides for the seizure of *a thing relevant to an offence*, except it does not authorise the seizure of *Aboriginal ancestral remains*. It provides the inspector may *seize a thing* if the inspector reasonably suspects:

- the thing has been unlawfully obtained;
- it is unlawfully in the possession of a person; or
- it is necessary to seize the thing to:
 - prevent it from being concealed, damaged, destroyed, interfered with or lost;
 - preserve its evidentiary value; and
 - prevent it being used in another offence under the proposed Act.

Sections 147-149 and 151 of the CI Act deal with seizing things and related matters. This clause provides that these sections of the CI Act apply with all necessary modifications in relation to the seizure of a thing under the proposed Act. Where the CI Act refers to an officer, it is a reference to an inspector. Where section 147(1) of the CI Act refers to a prescribed form, such form may be modified for the purposes of this clause.

Further, if an inspector seizes a thing under this section, the inspector must issue a receipt for the thing in the form approved by the CEO of the Department. Such receipt must be given to the *occupier* of the place or vehicle if present, or left at the place or in or on the vehicle in an envelope addressed to the occupier of the place or the vehicle, or otherwise give notice of the receipt.

Clause 240. Security of seized things

This clause provides that where an inspector seizes a thing under the proposed Act or under the CI Act, the inspector must take reasonable steps to keep the thing in a secure manner.

A person must not tamper or interfere with a seized thing without the approval of an inspector. Failure to do so incurs a maximum penalty fine of \$10,000.

Clause 241. Dealing with seized things

This clause provides that where an inspector seizes a thing, and in the opinion of the inspector the thing is likely to deteriorate if no action is taken to *deal with* it, the inspector can deal with the seized thing in accordance with the instructions of the CEO of the Department. The words *deal with* includes to preserve or treat the thing, sell it, give it away or use and destroy it.

If the seized thing is sold, the net proceeds from the sale are to be paid to the person entitled to possession of it before it was seized if a decision is later made that there will not be a prosecution in respect of the offence or a conviction is not secured. Otherwise the proceeds are credited to the ACH Account.

However, this clause does not apply to a seized thing if it is an *Aboriginal object* except that it may be transferred to the ACH Council to deal with in the manner set out in clause 66 of the proposed Act, regardless of whether it is a *secret or sacred object*.

Clause 242. Dealing with Aboriginal ancestral remains

This clause applies where an inspector finds human remains which the inspector reasonably considers may be Aboriginal ancestral remains. In such circumstances, the inspector must take reasonable steps to keep the ancestral remains in a secure manner until they can be transferred, as soon as practicable to the ACH Council to be dealt with under clause 60 of the proposed Act.

Clause 243. Forensic examination

This clause provides that where an inspector takes a sample or specimen of water or soil under clause 236(g) of the proposed Act, or finds a thing that may be seized under clause 239(2) of the proposed Act, the inspector may do or arrange for a *forensic examination* of such sample, specimen or thing, which may include if reasonably necessary, the dismantling, damaging or destroying of it. However, an *Aboriginal object* in the course of a *forensic examination* cannot be dismantled, damaged or destroyed.

The power to undertake a *forensic examination* does not extend to a thing that may contain information which is privileged as defined in section 151(1) of the CI Act until a decision under that section, as applied under clause 239(4) of the proposed Act, is made that the information is not privileged or an order has been made enabling the power to be exercised.

Division 4 — Entry warrants

This Division provides for the application and issue of entry warrants to assist inspectors in undertaking inspection purposes.

Clause 244. Applying for entry warrant

This clause provides an *inspector* may apply to a magistrate for an entry warrant authorising entry to a place or vehicle for inspection purposes, even where under Division 3 the inspector may lawfully enter the place or vehicle without a warrant. Such application needs to be made in accordance with clause 245 of the proposed Act and include any information specified in the regulations.

Clause 245. Making an application for entry warrant

This clause provides the application process for obtaining an entry warrant.

A written *application* must be made in person before a magistrate. However, where an entry warrant is urgently needed and the applicant reasonably suspects a magistrate is not available within a reasonable distance of the applicant, an application may be made by *remote communication*, which includes by telephone, fax, radio, videoconference, email and other electronic means. The magistrate may grant a warrant applied by remote communication if the magistrate agrees the circumstances justify the application by remote communication.

If the application is by remote communication and it is not practicable to send the magistrate written material, the application may be made orally, and the magistrate must make a written record of the application and the information given in support of the application.

An application must be made on oath. However, if the application is by remote communication and it is not practicable to administer an oath to the applicant, the application may be made in an unsworn form. If in these circumstances the warrant is issued, the applicant must send the magistrate an affidavit as soon as practicable, verifying the application and the information given in support of the application.

Clause 246. Further provisions relating to an application for entry warrant

This clause sets out the requirements when issuing an entry warrant pursuant to an application made by *remote communication*. The magistrate must, if practicable, send a copy of the warrant to the applicant by remote communication. Otherwise, the magistrate must send by remote communication, any information that must be included in the warrant, and the applicant must complete a form of warrant with such information and then give the magistrate a copy of the form as soon as practicable. The magistrate is then to attach the copy of the form to the original warrant and any affidavit received by the applicant, for collection by the applicant.

A copy of the original warrant sent by remote communication or the form of the warrant completed by the applicant, has the same force as the original warrant.

However, if the applicant fails to complete a form of warrant with the information that must be included in the warrant, or fails to give the magistrate a copy of the form as soon as practicable, or fails to send the magistrate an affidavit verifying the application and information supporting it, then any evidence obtained by the warrant is not admissible in any proceedings in a court or the State Administrative Tribunal.

Clause 247. Issuing entry warrant

This clause provides a magistrate may issue an entry warrant only if the magistrate is satisfied it is necessary for the inspector to enter a place or vehicle for inspection purposes. The entry warrant issued must contain information specified in this clause, including a reasonably specific description of the place or vehicle to which it relates, the purpose for which entry is required, and it must specify a period during which the warrant may be executed which must not be more than 30 days.

If a magistrate refuses an entry warrant, the magistrate must keep a record of the decision, including the reasons for the refusal.

Clause 248. Effect of entry warrant

This clause provides an entry warrant has effect according to its content and comes into force when it is issued by the magistrate. The entry warrant authorises the inspector executing the warrant to enter the place or vehicle described in the warrant, and for the inspector to exercise the powers conferred on the inspector under Division 3 of this Part.

Clause 249. Execution of entry warrant

This clause permits the entry warrant to be executed by any inspector, not solely the inspector to whom the warrant was issued. When executing a warrant, an inspector must at the request of a person apparently in charge of the place or vehicle, produce the warrant.

Division 5 — Other provisions

This Division provides for related matters.

Clause 250. Direction may be given orally or in writing

This clause provides an inspector may give a direction orally or in writing. Where it is given orally, it must be confirmed in writing within 5 business days after it is given unless

within that period the direction has been complied with or cancelled. Failure to confirm a direction in writing does not invalidate the direction.

Clause 251. Time and place for compliance with direction

This clause provides that an inspector, in giving a direction under the proposed Act, may specify the date and time when, and the place where, the direction must be complied with.

Clause 252. Contravention of directions

A person who contravenes a direction given by an inspector without reasonable excuse, is liable to a maximum penalty fine of \$10,000.

Clause 253. Exercise of power may be recorded

This clause provides an inspector may record by audio-visual or other means the exercise of a power under the proposed Act.

Clause 254. Assistance to exercise powers

This clause enables an inspector to authorise as many other persons as are reasonably necessary, to assist in exercising a power under the proposed Act. Such authorised person assisting must obey any lawful and reasonable direction given by the inspector. Such authorised person assisting in exercising a power under this Act, is taken to be performing a function under the proposed Act. Accordingly such person is subject to the protection of clause 305 of the proposed Act from liability for wrongdoing in the performance of the function.

However, such protection from liability does not extend to persons assisting the inspector where the person contravened a reasonable and lawful direction.

Clause 255. Application of CI Act s. 154 and 155

Sections 154 and 155 of the CI Act provide the circumstances when evidence which is obtained improperly may be allowed to be admitted as evidence in proceedings.

This clause provides that sections 154 and 155 of the CI Act apply with all necessary modifications to and in relation to a thing seized under clause 239(2) of the proposed Act as if references in sections 154 and 155 of the CI Act to an authorisation under that Act, was an entry warrant, similarly a reference to a power conferred by, or a requirement of the CI Act was a reference to a power conferred by or a requirement of the proposed Act.

Clause 256. Obstruction of inspector

This clause provides it is an offence to obstruct an inspector, or a person assisting an inspector, from exercising a power under the proposed Act, with a maximum penalty fine of \$20,000.

Clause 257. Self-incrimination not an excuse

This clause provides an individual cannot refuse to comply with a direction to provide information on the grounds that such information might incriminate the individual or make the individual liable to a penalty. However, any information provided in compliance with a direction is not admissible as evidence in proceedings against the individual other than proceedings for perjury or an offence under clause 304(1) of the proposed Act, which is in relation to giving false or misleading information.

Clause 258. Orders for forfeiture or disposal of seized things

This clause provides that where a court convicts a person of an offence under the proposed Act, the court may order that any seized thing that was involved in the commission of the offence be forfeited to the State, destroyed or disposed of. However, anything seized thing that is an *Aboriginal object* is to be forfeited to the State and transferred to the ACH Council to be dealt with in accordance with clause 66 of the proposed Act, regardless of whether it is a *secret or sacred object*.

Clause 259. Application of *Criminal and Found Property Disposal Act 2006*

This clause provides the *Criminal and Found Property Disposal Act 2006* applies to any seized thing unless the thing is dealt with under clause 241 of the proposed Act or is forfeited to the State under clause 258 of the proposed Act, other than an *Aboriginal object*.

The Department, when assisting the Minister in the administration of this Act, is a prescribed agency for the purposes of the *Criminal and Found Property Disposal Act 2006*.

Part 11 — Legal proceedings

This Part sets out provisions applicable to legal proceedings for the prosecution of offences; the relationship of certain persons in relationships to the commission of offences; and matters related to evidence.

Division 1 — General provisions relating to offences

This Division contains general provisions relating to offences under the proposed Act.

Clause 260. Who may commence proceedings

This clause provides that a prosecution of an offence or proceedings in respect of any other matter under the proposed Act, may be commenced by the CEO of the Department, or a person authorised by the CEO.

This clause does not limit the ability of any other person who is authorised at law to commence or conduct the prosecution of an offence.

Clause 261. Time limit for prosecution of simple offence

This clause provides a six-year time limit to commence a prosecution of a simple offence, that is, a non-indictable offence, from the date the offence was allegedly committed. The only indictable offence under the proposed Act relates to causing *harm* that is *serious*, under clause 92 of the proposed Act. For that offence, there is no time limit for a criminal prosecution.

The clause also provides a two-year time limit to commence the prosecution of a simple offence that runs from the time evidence of the alleged offence first comes to the attention of the person who commences the prosecution. In such circumstances, the prosecution notice does not need to contain particulars as to the date on which the alleged offence occurred, but is to specify the date evidence of the alleged offence first came to the attention of the person who commences the prosecution ('specified date'). This enables the commencement of a prosecution where the date of the alleged offence cannot be established.

The clause also provides that in the absence of evidence to the contrary, the *date specified* is the date on which evidence of the alleged offence first came to the attention of the person who commenced the prosecution.

In accordance with clause 21 of the *Criminal Procedure Act 2004*, the prosecution of an indictable offence (serious harm) may be commenced at any time.

Division 2 — Court may order costs and expenses

Division 2 provides additional powers to the courts.

Clause 262. Court may order costs and expenses

This clause provides a court that hears proceedings for an offence under the proposed Act, has power to make orders relating to costs and expenses that relate to a range of matters incidental to anything the subject of those proceedings. However, this clause does not affect any other power of a court to award costs or section 123 of the *Criminal Procedures Act 2004*.

Division 3 — Criminal liability of body corporate officers, employees and others

This Division provides that certain persons, including employers, officers of a body corporate, and principals have responsibilities and liabilities in relation to offences under the proposed Act.

Clause 263. Term used: officer

This clause provides that for the purposes of this Division, an *officer* has the same meaning as set out in section 9 of the Corporations Act which for example, includes any person who makes or participates in the making of decisions that affect a substantial part of the business of the corporation.

Clause 264. Liability of officers for offence by body corporate

This clause provides a table of specified offences under the proposed Act, for which if a body corporate is guilty, an *officer* of a body corporate is also guilty, if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate. In making such a determination, the court must have regard to what the officer knew or ought to have known about the commission of the offence, and whether the officer was in a position to influence the conduct of the body corporate in relation to the commission of the offence and any other relevant matter.

The offences listed under the table are:

- contravening a condition of a *funding sum* under clause 52 of the proposed Act;
- failing to notify the ACH Council of the possession of *Aboriginal ancestral remains* under clause 56 (1) of the proposed Act;
- failing to identify a custodian of Aboriginal ancestral remains, and either returning the ancestral remains to a custodian or retaining them until further requested by a custodian to be returned under clause 57 (1) of the proposed Act;
- failing to give notice to the ACH Council of returning Aboriginal ancestral remains to a custodian, or having been requested by a custodian to continue to hold such remains on behalf of the custodians until a custodian requests otherwise, under clause 57(4) of the proposed Act;
- disturbing or removing Aboriginal ancestral remains under clause 61 (1) of the proposed Act;
- failing to notify the ACH Council of the possession of a *secret or sacred Aboriginal object* under clause 64 (1) of the proposed Act;
- selling, exchanging, concealing or disposing of a *secret or sacred object*, and removing or causing or permitting the removal of a secret or sacred from the State, under clause 67 (1) of the proposed Act;
- failing to report the existence of an *Aboriginal place*, an *Aboriginal object* or *Aboriginal ancestral remains* to the ACH Council under clause 68 (1) of the proposed Act;

- contravening a condition of a *protected area order* under clause 88(1) of the proposed Act;
- causing *harm* to Aboriginal cultural heritage that is *serious* under clause 92 of the proposed Act;
- causing *harm* to *Aboriginal cultural heritage* that is *serious* including by accident under clause 93 (1) of the proposed Act;
- causing *harm* to Aboriginal cultural heritage that is *material* under clause 94 of the proposed Act;
- causing *harm* to Aboriginal cultural heritage under clause 95 of the proposed Act;
- failing to notify the ACH Council that an *ACH permit* has been transferred to another person under clause 127(1) of the proposed Act;
- contravening a condition of an *ACH permit* under clause 133 of the proposed Act;
- failing to notify each Aboriginal party and the ACH Council that the former proponent of an ACH management plan is not the current proponent for the activity to which the plan relates under clause 171(4) of the proposed Act;
- failing to comply with a condition of an approved or authorised ACH management plan under clause 173 of the proposed Act;
- failing to comply with a *stop activity order* and failing to advise the ACH Council of compliance with the said order under clause 183(1) and (2) of the proposed Act;
- failing to comply with a *prohibition order* and failing to advise the ACH Council of compliance with the said order under clause 190(1) and (2) of the proposed Act;
- failing to comply with a *remediation order* and failing to advise the ACH Council of compliance with the said order under clause 196 (1) and (2) of the proposed Act;
- failing to display a stop activity order, a prohibition order or a remediation order in a prominent place or near the area the subject of the order, and a person intentionally removing, destroying, damaging and defacing an order so displayed, under clause 205 (1) and (2) of the proposed Act;
- moving, tampering or interfering with a *seized thing* with the approval of an *inspector* under clause 240 (2) of the proposed Act;
- contravening a direction given by an inspector under clause 252 of the proposed Act;
- obstructing an inspector or a person assisting an inspector under clause 256 of the proposed Act;
- giving false or misleading information in relation to any purpose under the proposed Act under clause 304 (1) of the proposed Act;
- using certain information which was lawfully disclosed for a particular purpose, for another purpose under clause 306 (2) of the proposed Act

Clause 265. Further provisions relating to liability of officers of body corporate

This clause provides that nothing in clause 264 of the proposed Act in relation to the liability of an *officer*, affects the liability of a body corporate for any offence. Further, clause 264 does not affect the liability of an officer of a body corporate or any other person in relation to Chapters II, LVII, LVIII and LIX of *The Criminal Code* which in brief deal with parties to an offence, attempts and preparation to commit an offence, conspiracy and accessories after the fact.

This clause also provides that it is not necessary to proceed against and convict a body corporate to proceed against and convict an officer of a body corporate.

It also provides that if an officer of a body corporate is charged with an offence and claims the body corporate would have a defence if it were charged with the same offence, the onus of proving the defence is on the officer, to the same standard of proof that would apply to the body corporate. Any other defence available to the officer still applies.

Clause 266. Liability of partners

This clause clarifies that where an ACH permit is granted to a partner in relation to the activities of a partnership, all members of the partnership are taken to have the same rights and duties as the holder of the permit, whether or not any other partner is named on the permit.

Similarly, where an approved or authorised ACH management plan is granted to a partner in relation to activities of a partnership, all members of the partnership are taken to have the same rights and duties as a party to the plan, whether or not named in the plan.

Clause 267. Liability of principals for offences by agent

This clause provides that if an *agent* (being a person acting on behalf of another person) contravenes the proposed Act, the agent's *principal* is taken to have contravened the act. However, an agent cannot be an employee.

The clause provides the term agent includes someone who carries out, manages or controls an activity subject to an authorisation under Part 6 Division 4 for or on behalf of a *proponent* of the activity. It further provides an agent can be a contractor, or subcontractor or consultant acting directly or indirectly for a principal.

The clause provides the principal has a defence, if the principal proves the principal took all reasonable steps to prevent the commission of the offence by the agent. In making such a determination, the court must have regard to what the principal knew or ought to have known about the risk of the contravention, and whether the principal could, by being diligent have prevented the contravention and any other relevant matter.

It is not necessary to proceed against and convict an agent in order to proceed and convict a principal for a contravention of a provision of the proposed Act.

Clause 268. Liability of employers for offences by employee

This clause provides that when a person acting as an employee contravenes the proposed Act, the *employer* is deemed to have also contravened the proposed Act, regardless of whether the employee acted without the employer's authority or contrary to the employer's orders or instructions.

In recognition of the fact that employers in circumstances should not be held responsible for the actions of their employees, the clause provides the employer has a defence, if the employer can prove the employer took all reasonable steps to prevent the commission of the offence by the employee. In making such a determination, the court must have regard to what the employer knew or ought to have known about the risk of the contravention, whether the employer could, by being diligent, have prevented the contravention and any other relevant matter.

This clause also provides that it is not necessary to proceed against and convict an employee in order to proceed and convict an employer for a contravention of a provision of the proposed Act.

Clause 269. Liability of employees and agents

This clause clarifies that it is not a defence to a charge against a person that at the time the offence was committed, the accused person was an employee or agent of another person.

Division 4 — Evidentiary provisions

Division 4 provides evidentiary provisions that are in addition to those provided in the *Evidence Act 1906*.

Clause 270. Application of Division

This clause provides this Division applies in relation to proceedings for an offence under the proposed Act.

This clause clarifies that where this Division provides a matter is taken to be proved, it is only taken to be proved in the absence of evidence to the contrary.

This Division is in addition to and does not affect the operation of the *Evidence Act 1906*, which is the principal legislation applying to evidence in legal proceedings in Western Australia.

Clause 271. Certain matters taken to be proved if alleged in prosecution notice or indictment

This clause provides the matters listed in the table under this clause, when alleged in a prosecution notice or indictment, are taken to be proved. The matters in the table are:

- the person who commenced the proceedings is authorised to do so;
- the specified land is land of a specified description, for example: Crown land;
- on a specified day or during a specified period, a specified person was the *landholder* of specified land; and
- a document purporting to be signed or executed by the Minister, the CEO of the Department, an inspector, an Aboriginal inspector or the ACH Council was signed or executed by the Minister, the CEO, an inspector, an Aboriginal inspector or a person authorised by the ACH Council.

Clause 272. Evidence of certain matters if stated in certificate

This clause enables evidence of certain facts to be given by certificate.

It provides that a certificate purporting to be signed by the CEO of the Department stating any of the matters in the first table under this clause is without requiring proof of the CEO's signature, taken to be evidence of the facts in the certificate.

The matters in the first table are that on a specified day or during a specified period:

- a person was or was not the holder of an *ACH permit*, a party to an approved or authorised *ACH management plan* or a person given a *Part 7 order*;
- an *ACH permit*, an approved or authorised *ACH management plan*, a *protected area order* or a *Part 7 order* (all referred to as an '*instrument*') was or was not of effect;
- a specified instrument was or was subject to a specified condition;
- a *Part 7 order* contained a specified direction;
- a specified person was or was not authorised to carry out a specified activity under an *instrument*;
- a person was or was not designated a *local ACH service* for a specified area;
- a person was or was not a *native title party* for a specified area;
- a body was or was not the *native title representative body* for a specified area;
- a person was or was not an *inspector*, an Aboriginal inspector or a person authorised to assist an inspector or an Aboriginal inspector;
- a specified area did or did not include a *protected area*;
- specified *Aboriginal cultural heritage* was or was not determined under the proposed Act to be *State significance* for the purposes of the proposed Act; and
- a person held or did not hold a specified office.

The clause also provides that a certificate purporting to be signed by an authorised person stating any of the matters in the second table is, without requiring proof of the authorised person's signature, taken to be evidence of the facts in the certificate. Further, the Minister may by notice in the *Gazette* designate a person to be an authorised person for the purpose of this clause.

The matters in the second table are that on a specified day or a specified period:

- a specified place was or was not an *Aboriginal place*;
- a specified thing was or was not an *Aboriginal object*;
- a specified thing was or was not a *secret or sacred object*;
- specified human remains were or were not *Aboriginal ancestral remains*;
- a specified person was or was not a custodian of Aboriginal ancestral remains;
- a specified person was or was not a custodian of a specified secret or sacred object;
- a person was or was not a *knowledge holder* for a specified area;

However, this provisions in relation to the second table only apply if, the prosecutor has given notice to the accused of the intention to produce the certificate not less than 28 days before the certificate is to be produced as evidence in court, and the accused has not within 14 days of being so notified, requested that the evidence is given in person, rather than by certificate.

The court may make an order as to the expenses and remuneration to be paid to the CEO of the Department or the authorised person.

Clause 273. Evidence in relation to documents

This clause provides that a copy of an *ACH permit*, an approved or authorised *ACH management plan*, a *protected area order*, or a *Part 7 order* (all referred to as an '*instrument*') which is certified by the CEO of the Department to be a true copy of the said instrument as at a specified date, is taken to be proved to be a copy of the original as at that date. Further, such certified copy is admissible and has the same probative value as the original instrument.

The clause also provides that a document certified by the CEO to be a true copy of the whole or part of the ACH Directory or a specified guideline, as at a specified date or during a specified period, is taken to be proof of the content of the ACH Directory or the specified guideline as at that date or period.

Further, where a document has been signed by a delegate of the Minister, the ACH Council or the CEO, it is taken that such person was such a delegate and was authorised to sign it.

The clause also provides that a copy of a document or record obtained by an *inspector* or Aboriginal inspector whilst exercising inspection powers under Part 10 Division 3 of the proposed Act, can be admitted as evidence if the inspector or Aboriginal inspector certifies it was obtained when exercising such inspection powers.

Clause 274. Onus of proving certain matters

This clause provides that in proceedings for an offence, when a person asserts they undertook consultation in accordance with the *consultation guidelines*, or that they had a reasonable excuse for engaging in a particular conduct, that person has the onus of proving the matter.

Part 12 — Review by State Administrative Tribunal

This Part provides for the review of certain decisions by the State Administrative Tribunal.

Division 1 — Preliminary

This Division provides when the Part applies and definition of terms specific to the Part.

Clause 275. Application of Part

This clause provides this Part applies when the State Administrative Tribunal is given jurisdiction to review decisions under Division 2 of this Part.

Clause 276. Terms used

This clause provides where to locate the definition of two terms specific to the Part, being an *affected person* and *reviewable decision*, which are located in clause 277(1)(a) and (b) of the proposed Act.

Division 2 — Review by State Administrative Tribunal

This Division provides which decisions are reviewable by the State Administrative Tribunal.

Clause 277. Review of certain decisions

This clause provides a table that identifies 6 decisions made under the proposed Act which are reviewable by the State Administrative Tribunal in accordance with this Part (*'reviewable decisions'*) and the person eligible to apply for such a review (*'the affected person'*).

Any *affected person* aggrieved by a *reviewable decision*, has 28 days from the day notice of the reviewable decision is given, to apply to the State Administrative Tribunal for a review of the decision.

For the purposes of section 45(1)(b) of the *State Administrative Tribunal Act 2004* ('SAT Act'), any applicant seeking the review of a reviewable decision is to provide a copy of such application to each other *affected person* (as identified in the said table under this clause).

This clause provides that in addition to section 61 of the SAT Act, the State Administrative Tribunal may, if the Tribunal considers it is necessary to do so, order that the hearing, or part of the hearing of any such review is held in private and specify the persons who may be present at the hearing. However, such order can only be made by a legally qualified member of the Tribunal or in the absence of a legally qualified member, the presiding member.

The reviewable decisions and the relevant affected persons are:

- Minister's decision to cancel or suspend the approval of an ACH management plan under clause 154(1) of the proposed Act, by a party to the ACH management plan (that is, the proponent or an Aboriginal party);
- Minister's decision to give a stop activity order under clause 180(1) of the proposed Act, by the person given the stop activity order;

- Minister's decision to give a prohibition order under clause 188(1)(b)(i) of the proposed Act, by the person given the prohibition activity order;
- Minister's decision to extend the duration of a prohibition order under clause 191(1) of the proposed Act, by the person given the prohibition activity order;
- Minister's decision to give a remediation order under clause 194(1) of the proposed Act, by the person given the remediation order; and
- Minister's decision to amend or cancel a prohibition order under clause 203(1)(a) of the proposed Act, by the person given the prohibition order and the other persons referred to in clause 187(3)(b) to (d) of the proposed Act, being the relevant *local ACH service*, or if one does not exist, each relevant *native title party* and each relevant *knowledge holder*; and in the absence of these former persons, the relevant *native title representative party*.

Clause 278. Notice of reviewable decisions must be given

This clause provides that the decision-maker must give written notice of a *reviewable decision* within 14 days of making such decision to each person who is an *affected person* per the table in the preceding clause of the proposed Act. Such notice must include a description of the decision, reasons for the decision and provide a statement that an *affected person* who is aggrieved by the decision has a right to apply for a review of the decision to the State Administrative Tribunal under clause 277 of the proposed Act and the time period for doing so.

Part 13 — Miscellaneous

This Part provides for a range of miscellaneous matters not otherwise covered in any other Part of the proposed Act.

Division 1 — Aboriginal Cultural Heritage Account and Aboriginal Cultural Heritage Compensation Fund

This Division is about the establishment, purpose and administration of two special accounts.

Subdivision 1 — Aboriginal Cultural Heritage Account

This Subdivision is about the establishment and purpose of the ACH Account.

Clause 279. Aboriginal Cultural Heritage Account

This clause establishes the Aboriginal Cultural Heritage Account ('ACH Account'). The ACH Account is an agency special purpose account under section 16(1) of the FM Act but the Treasurer cannot give a direction in relation to the ACH Account under section 20(1) of the FM Act. The Account must be administered by the CEO of the Department.

The following monies are to be credited into the ACH Account:

- fees and charges paid or recovered under the proposed Act;
- proceeds from the sale of any seized thing under clause 241(4)(b);
- any amount equal to an uncommitted amount paid to the ACH Council under a condition imposed under clause 51(4) of the proposed Act; and
- any other amount lawfully received by or made available for the purposes of the Account.

Money in the ACH Account may be applied for the following purposes:

- the costs of the administration and enforcement of the Act, including remuneration and allowances payable under the proposed Act;
- funding to local ACH services;
- to proactively assist in the recognition, protection, conservation, preservation and management of Aboriginal cultural heritage if relevant by developing guidance materials; and
- any other purpose approved by the Minister.

Subdivision 2 — Aboriginal Cultural Heritage Compensation Fund

This Subdivision is about the establishment and purpose of the ACH Compensation Fund.

Clause 280. Aboriginal Cultural Heritage Compensation Fund

This clause establishes the Aboriginal Cultural Heritage Compensation Fund ('ACH Compensation Fund'). The ACH Compensation Fund is an agency special purpose account under section 16(1) of the FM Act but the Treasurer cannot give a direction in

relation to the ACH Compensation Fund under section 20(1) of the FM Act. The ACH Compensation Fund must be administered by the CEO of the Department.

All fines imposed under the proposed Act are to be credited into the ACH Compensation Fund, to be applied in the payment of compensation under clause 99 of the proposed Act, for harm caused to Aboriginal cultural heritage.

Subdivision 3 — Provisions relating to accounts established under this Division

This Subdivision is about the administration of the ACH Account and ACH Compensation Fund.

Clause 281. Application of Financial Management Act 2006 and Auditor General Act 2006

This clause provides the FM Act and the *Auditor General Act 2006* apply in relation to each the ACH Account and the ACH Compensation Fund, except as provided in clause 279(4) and 280(4) of the proposed Act that the Treasurer cannot give a direction under section 20(1) of the FM Act.

The administration of each account is to be considered as a service of the Department for the purposes of section 52 of the FM Act. Further, the annual report for a financial year to be prepared by the accountable authority of the Department under section 61 of the FM Act must contain information about the operation of each account, including details as to how money in each account was applied during the financial year.

Division 2 — Giving notice

This Division specifies requirements related to the giving of notices under the proposed Act.

Clause 282. Public notice

This clause provides that where *public notice* is required pursuant to the proposed Act, such notice must be published on a website maintained by or on behalf of the ACH Council, and published as specified in the regulations.

Clause 283. Giving notice generally

This clause provides a variety of means by which notice of a document may be given to a person. It also provides that any other manner may be specified in the regulations, including by electronic means or by publishing a copy of the notice.

The use of one means of giving notice at a particular time, does not prevent an alternative method to give notice to the same person at another time. It provides that failure to give a document to one person does not affect whether it is properly given to a different person.

Where notice is to be given to a partnership, notification to one partner is taken to be notification to all partners. Finally, it provides that this clause is in addition to sections 75 and 76 of the Interpretation Act.

Clause 284. Giving notice to landholder or occupier of land

This clause provides a variety of means by which notice of a document can be given to a person who is a *landholder* or *occupier* of land. Such notice can be addressed to the “landholder” or the “occupier” of the relevant land without further name or description. If there is more than one person in this classification, it is sufficient for the notice to provide it is to the landholder or occupier with the words “and other” or “and another” as appropriate.

If it is not practicable to give notice in accordance with clause 283 of the proposed Act, and there is no other provision in the proposed Act as to how a notice is to be given, the following means of notice may apply: If a notice is to be given to a landholder, it can be addressed to the landholder and giving it under clause 283 of the proposed Act to the occupier of the land, if any. Alternatively, if notice is to be given to landholder or occupier of the land, the notice may be given by addressing the notice to the person and attaching it to a conspicuous part of the land.

Clause 285. Giving certain notices

This clause provides that notices to a *landholder* or *occupier* of land or a *knowledge holder* for an area, and it is not practicable to give the notice in accordance with clause 283 of the proposed Act, the notice may be given by publishing a copy of the document as prescribed in the regulations.

A notice given under this clause can be directed to any number of landholders or occupiers of land or knowledge holders for the area and is taken to be given to all landholders, occupiers and knowledge holders for the area specified in the notice.

Clause 286. Defects in notice

This clause provides the notification of a document is neither ineffective nor improperly given because the document contained an error, misdescription or irregularity, or the way it is addressed, provided that it is not likely to mislead or in fact mislead.

Division 3 — Regulations and guidelines

This Division provides for the making of regulations under the proposed Act and the making of specified guidelines.

Subdivision 1 — Regulations

This Subdivision provides regulation making powers both generally and in relation to certain matters pursuant to the proposed Act.

Clause 287. Regulations

This clause provides the Governor may make regulations as required or permitted by the proposed Act or necessary or convenient for giving effect to the purposes of the proposed Act. Such regulations may regulate any of the matters set out in this Subdivision. This includes providing that contravention of a regulation is an offence with a maximum penalty fine of \$10,000.

Clause 288. Regulations about ACH Council and local ACH services

This clause provides power to make regulations in relation to the ACH Council, including as to membership and various aspects of running Council meetings and committees of the ACH Council. It also provides for the making of regulations in relation to local ACH services including requirements for such services to provide reports related to their statutory functions and financial matters, including the receipt of funding under clause 51 of the proposed Act.

Clause 289. Regulations about protected areas

This clause provides power to make regulations as to *protected areas*. This includes regulations as to; activities that may be carried out, are regulated or prohibited within protected areas; signage to identify the area or provide information about relevant regulations, relevant conditions and offences that relate to the protected area; and the destruction, removal or interference with such signage.

Clause 290. Regulations about ACH Directory

This clause provides power to make regulations as to the ACH Directory, including as to the form and content of the Directory, placing information and documents on the Directory, and making such documents and information available as provided in the proposed Act, including providing for copies and extracts from such information or documents.

Clause 291. Regulations about determining whether information is culturally sensitive information

This clause provides power to make regulations as to procedures to determine whether certain information is *culturally sensitive information* for the purposes of the proposed Act, including for the review of that decision.

Clause 292. Regulations about fees and charges

This clause provides a broad power to make regulations about *fees* related to services provided under the proposed Act and the recovery of costs and expenses incurred in the administration of the proposed Act. The matters that regulation may be made about include, but are not limited to the determination of fees, when fees are to be paid, the structure of fees and how they are calculated, who is liable to pay fees, when a fee is received, interest on unpaid fees, penalties and other consequences for failure to pay fees, late payment or underpayment, and the recovery of fees.

Importantly, the clause allows regulations to be made providing an application or an objection under the proposed Act does not need to be dealt with until the relevant fee has been received.

Further, the clause provides the fees specified in the regulations, may exceed the amount or the estimated amount to recover the costs to the State incurred in relation to the matter for which a fee was charged, the action or the performance of functions. However, nothing in this clause is taken to limit the scope of section 43, 45 and 45A of the Interpretation Act.

Clause 293. Other regulations

This clause provides power to make regulations as to; the making of applications under the Act; the verification of information or documentation; the exercise of powers and statutory functions by inspectors and Aboriginal inspectors under Part 10 of the proposed Act; the preparation of an ACH impact statements; publishing requirements for the giving of public notice; and the notification of documents including when notice is taken to have been given and the giving of notice by electronic means.

Subdivision 2 — Guidelines

This Subdivision provides for the making of specified guidelines pursuant to the proposed Act.

Clause 294. Guidelines

This clause enables the making of guidelines as to:

- undertaking a *due diligence assessment* for a proposed activity (unless the activity is classified as an *exempt activity*), to be known as the **ACH Management Code**,
- the carrying out of consultation required under the proposed Act if a person intends to carry a *tier 2 activity* or a *tier 3 activity* under an ACH management plan, to be known as the **consultation guidelines**;
- the identification of persons who are knowledge holders for an area, to be known as the **knowledge holders guidelines**;
- the fee structure for fees to be charged in connection with local ACH service functions, to be known as the **local ACH service (fees) guidelines**;
- the factors to be considered in determining whether Aboriginal cultural heritage is of *outstanding significance* for the purposes of the proposed Act, to be known as the **protected area order guidelines**; and
- the factors to be considered in determining whether Aboriginal cultural heritage is of *State significance* for the purposes of the proposed Act, to be known as the **State significance guidelines**;

Clause 295. Preparation of guidelines

This clause provides the ACH Council may prepare guidelines, with the approval or on the direction of the Minister.

Clause 296. Consultation on proposed guidelines

This clause provides the ACH Council must provide for public consultation on any proposed guidelines. This is to be done by giving *public notice* of the guidelines, which must include a brief description of the content of the proposed guidelines, details of where to obtain or view a copy of the proposed guidelines, and giving an opportunity for submissions to the ACH Council as to the proposed guidelines within 60 days after the notice is given.

The requirements of public notice are provided in clause 282 of the proposed Act and require publication on a website maintained by or on behalf of the ACH Council and as required by the regulations.

Further the ACH council must inform the following persons that a public notice has been given as to proposed guidelines:

- each *local ACH service* for an area in the State;
- each *native title party* for an area in the State;
- each *native title representative party* in the State;
- any public authority the ACH Council considers may have an interest in the proposed guidelines;
- any peak industry body the ACH Council considers may have an interest in the proposed guideline; and
- any other person the ACH Council considers has an interest in the guidelines.

The ACH Council is required to consider any submissions made in response to the notice given and can amend the proposed guidelines.

Clause 297. Approval of Minister

This clause enables the Minister to approve guidelines prepared by the ACH Council, with or without modifications by the Minister.

Clause 298. Provisions about guidelines

Once guidelines are approved by the Minister, this clause requires the ACH Council to publish such guidelines in the *Gazette*, after which the said guidelines come into effect on the day they are published in the *Gazette* or on a later day prescribed in the guidelines.

The clause provides that certain provisions of the Interpretation Act apply to the guidelines, as if they were subsidiary legislation. However, the guidelines themselves do not have the status of subsidiary legislation.

Clause 299. Amending or repealing guidelines

This clause provides that guidelines can be amended by the ACH Council with the approval of the Minister, or on the direction of the Minister. The process for amending guidelines is the same as for new guidelines; it requires public notice of the proposed amendments, informing specified persons of the public notice, and providing an opportunity for submissions on the proposed amendments which must be considered by the ACH Council before the guidelines are provided to the Minister for approval.

Approved guidelines can also be repealed, either by subsequent guidelines once gazetted or by an instrument of repeal. An instrument of repeal is prepared by the ACH Council with either the approval of the Minister or on the direction of the Minister, and then approved by the Minister and published in the *Gazette*.

Division 4 - General provisions

This Division provides for other general provisions.

Clause 300. No circumventing or contracting out

This clause aims to limit the circumventing or contracting out of various provisions of the proposed Act by contractual terms in private agreements, which are sometimes referred to as “gag clauses”. Such gag clauses may contractually prohibit relevant Aboriginal persons and entities from making complaints or reporting alleged offences to regulators, prohibit providing information requested by a public official, prohibit seeking a stop, prohibition or remediation order or prohibit initiating proceedings for injunctive relief or legal actions against the proponent in relation to heritage matters.

This clause aims to limit the effect of such gag clauses by providing - that any contractual term that purports to or has the effect of excluding, limiting or modifying the operation of the Act or any duty owed under the Act, or otherwise transferring such duty to another person, is of no effect. Further any purported waiver, limitation or modification of a right, remedy or benefit conferred on a person under this Act, is also of no effect.

The clause clarifies that the transfer of an ACH permit by the holder of the permit to another person referred to in clause 127, and a change of party to an approved or authorised ACH management plan, is not the transfer of a duty owed under this Act as described in this clause.

Clause 301. Delegation by Minister

This clause provides the Minister can delegate any of the Minister’s powers or duties to the ACH Council, the CEO of the Department or a person employed or engaged in the Department, except the following powers and duties:

- the appointment of members to the ACH Council under clause 21(1) of the proposed Act;
- giving a written direction to the ACH Council in respect of the ACH Council’s performance of its functions under clause 27(1) of the proposed Act;
- determining the remuneration and allowances to be paid to members of the ACH Council or any committee of the ACH Council under clause 32 of the proposed Act;
- the decision whether to suspend or cancel the designation of a local ACH service under clause 43(2) of the proposed Act;
- the decision whether Aboriginal cultural heritage is of *outstanding significance* for the purposes of the proposed Act under clause 78(4) and (5) of the proposed Act;
- the decision whether to grant a protected area order under clause 81(1) of the proposed Act;
- the decision whether to grant an ACH permit, whether to extend an ACH permit, whether to subject, impose, amend or revoke a condition on an ACH permit or whether to suspend or cancel an ACH permit, under clause 131(6) of the proposed Act;
- the decision whether to cancel the approval of an ACH management plan under clause 154(1)(b) of the proposed Act;
- the decision whether to approve an ACH management plan or an amendment to an ACH management plan under clause 155(4) of the proposed Act;

- the decision whether to authorise an ACH management plan under clause 165(1) of the proposed Act;
- the decision whether to suspend or cancel the authorisation of an ACH management plan under clause 168(1) of the proposed Act;
- the decision whether to authorise an amendment to an ACH management plan under clause 170 of the proposed Act;
- the decision whether to give a *stop activity order* under clause 180(1) of the proposed Act;
- the decision whether to extend a stop activity order under clause 182(1) of the proposed Act;
- the decision whether to give a *prohibition order* under clause 188(1) of the proposed Act;
- the decision whether to extend the duration of a *prohibition order* under clause 191(1) of the proposed Act;
- the decision whether to give a *remediation order* under clause 194(1) of the proposed Act; and
- the decision whether to amend a prohibition order or cancel any Part 7 order under clause 203(1) of the proposed Act;

Any such delegation must be in writing signed by the Minister, and cannot be further delegated the ACH Council or person who has been delegated a power or duty.

A person or the ACH Council acting under delegation is taken to be acting in accordance with the terms of the delegation, unless the contrary is shown. The power to delegate does not limit the ability of the Minister to perform a function through an officer or agent.

Clause 302. Delegation by CEO

This clause provides the CEO of the Department may delegate any power or duty of the CEO to a person employed or engaged in the Department except as follows:

- the decision to pay funding to a local ACH service under clause 51(1) of the proposed Act;
- the decision to pay compensation for harm caused to Aboriginal cultural heritage under clause 99(1) of the proposed Act; and
- providing a letter of advice as to the correct classification of a proposed activity under clause 104(3) of the proposed Act.

Any such delegation must be in writing signed by the CEO, and cannot be further delegated by any person who has been delegated a power or duty.

A person acting under delegation is taken to be acting in accordance with the terms of the delegation, unless the contrary is shown. The power to delegate in this clause does not limit the ability of the CEO to perform a function through an officer or agent.

Clause 303. CEO may disclose information

This clause provides the CEO of the Department may designate an officer of the Department to be authorised to disclose information (including *culturally sensitive information*) to an *officer of a prescribed entity*, which is related to the function of the prescribed entity, in accordance with protocols or regulations to be established for this purpose by the CEO. For the purpose of this clause, a prescribed entity is any public authority or a body or person specified in the regulations. This recognises that in some situations, public authorities need to have access to such information in order to properly carry out their functions. For example, it may be necessary to disclose information to the Environmental Protection Authority in the course of undertaking an environmental impact assessment under the EP Act.

If such information is disclosed in good faith, under this clause, there are protections from any civil or criminal liability that may arise. Further, such disclosure cannot be regarded as a breach of any duty of confidentiality or secrecy imposed by law, professional ethics, any standard or principles of conduct of employment, or unprofessional conduct.

The clause also provides that regulations may be made as to the exercise of this clause, and how such information can be disclosed, received, stored, and disposed of and any restrictions on access to the information once it is disclosed.

Clause 304. Giving false or misleading information

This clause provides an obligation not to make a statement or give information, which knowingly includes information, which is false or misleading, or through the absence of certain information, knowingly makes a false and misleading statement or gives false and misleading information, in relation to any purpose of the proposed Act. This includes in any application, the giving of a document or notice or in complying with a requirement, request or direction under the proposed Act. To do so in contravention of the proposed Act is an offence with a maximum penalty fine of \$20,000.

Clause 305. Protection from liability for wrongdoing

This clause provides that a person and the State is protected from an action in tort, for anything a person does or does not do or an omission to do anything, which was done in good faith, in the performance or purported performance, of a function under the proposed Act. The protection applies even though the thing done may have been capable of being done whether or not the proposed Act was enacted.

Clause 306. Confidentiality

This clause imposes a duty of confidentiality upon persons who have obtained information in the course of performing functions under the proposed Act and requires that such person not record, disclose or make use of such information whether directly or indirectly, except in specified circumstances. Such information can be lawfully disclosed: when required for the purposes of performing functions under the proposed Act; when required or allowed under the proposed Act or other written law; for the purposes of legal proceedings arising under the proposed Act; with the written consent of the person to whom the information relates; or in other circumstances to be specified in the regulations.

A breach of such duty of confidentiality is an offence with a maximum penalty fine of \$20,000.

Where such information is lawfully disclosed, and the information relates to trade processes, financial information or culturally sensitive information, such information cannot be used for any other purpose by the person to whom it was disclosed or by any other person who gains access to that information. Contravention of this requirement is an offence with a maximum penalty fine of \$20,000.

However, the clause does not include the use of statistical or other information that would not reveal the identification of any person to whom it relates or information which is otherwise publicly available.

Clause 307. CEO may approve forms

This clause provides that the CEO of the Department may approve forms for use under the proposed Act.

Clause 308. Laying documents before House of Parliament not sitting

This clause provides an alternative means of satisfying the requirement to cause a document to be laid in each House of Parliament, when a House of Parliament is not sitting within the period during which a document is required to be laid in Parliament. In such circumstances, the document is to be sent to the Clerk of the House before the end of the prescribed period, and it is taken to have been laid before the House and it must be recorded in the Minutes, Votes or Proceedings of the House on the following first sitting day of the House.

Clause 309. Review of Act

This clause requires the Minister to review the operation and effectiveness of the proposed Act, 5 years after this clause comes into operation, and thereafter at 5 yearly intervals. Such report is to be laid before each House of Parliament, or if a House of Parliament is not sitting then pursuant to the alternative means of meeting the requirements set out under clause 308 of the proposed Act, no later than 12 months after the requirement to undertake the review arises.

Part 14 — Repeals and transitional matters

This Part provides for the repeal of the AH Act, AH Regulations and the AH(M) Act and transitional arrangements related to the introduction of the proposed Act.

Division 1 — Repeals

This Division provides for the repeal of the AH Act, AH Regulations and the AHM Act.

Clause 310. *Aboriginal Heritage Act 1972 repealed*

This clause repeals the AH Act in its entirety. It comes into effect at the end of 6 months beginning on *transition day*, and is referred to as *repeal day*.

Clause 311. *Aboriginal Heritage Regulations 1974 repealed*

This clause repeals the AH Regulations in its entirety. It comes into effect at the end of 6 months beginning on *transition day*, and is referred to as *repeal day*.

Clause 312. *Aboriginal Heritage (Marandoo) Act 1992 repealed*

This clause repeals the AHM Act in its entirety. It comes into effect on *transition day*.

Division 2 — Transitional provisions arising from the enactment of the *Aboriginal Cultural Heritage Act 2021*

Division 2 provides for the effect of consents and approvals granted under the AH Act, the AH Regulations, both before and after the commencement of the proposed Act (*assent day*).

Subdivision 1 — Interpretation

This Subdivision provides definitions for terms specific to this Division.

Clause 313. *Terms used*

This clause provides definitions of terms used in this Division. The terms defined are self-explanatory. Of particular note the clause provides:

- ***AH Act section 18 consent*** means a consent granted under the AH Act section 18 before the AH Act is repealed, and includes an *historical AH Act section 18 consent* and a *transitional AH Act section 18 consent*.
- ***historical AH Act section 18 consent*** means a consent granted under the AH Act section 18 but excludes any *transitional AH Act section 18 consent*. It is intended to capture those consents for which notice (an application) for a section 18 consent was given to the ACMC up to and including *assent day*.
- ***transitional AH Act section 18 consent*** means a consent granted before repeal day under the AH Act section 18 in response to a notice (application) for the consent being given to the ACMC during the *transitional period*.
- ***transitional period*** means from the day after the proposed Act receives Royal assent and ending immediately before *transition day*.

Subdivision 2 — Protected areas

Due to the time in which protected areas were declared under the AH Act and the out of date mapping methods used to determine the locations during that time, there may be some spatial inaccuracies, clerical mistakes or unintentional errors made, including miscalculation of a figure or misdescription of an area, in relation to the declaration of protected area orders. The provisions in this Subdivision allow for these unintended errors to be amended and resolved.

This Subdivision allows for former protected area orders under the AH Act to be subject to the new provisions around protected areas in the proposed Act, this includes removing the former vesting of the land the subject of a former protected area order to the Minister. This Subdivision also allows for suitable conditions for the protection and management of these areas to be put in place following proclamation of the new Act.

Clause 314. Terms used

This clause provides definitions of terms used in this Subdivision. The terms defined are self-explanatory. Of particular note the clause provides:

- **AH Act protected area order** means an order made under the AH Act, declaring an *Aboriginal site* to be a protected area that is of effect immediately before *transition day*.
- **former protected area order** means an *AH Act protected area order* and it can also mean an *historical AH Act protected area order*.
- **historical protected area order** means an order published in the *Gazette* before *transition day*, which declares an area that relates to an *Aboriginal site* which was declared a protected area under an order made, or an order purportedly made, under the AH Act before *assent day*.

Clause 315. Historical protected area orders

This clause permits the Minister to recommend that the Governor may by order declare an area as a *protected area* published in the *Gazette* before *transition day*, provided the area relates to an *Aboriginal site* declared to be a protected area under an order made, or purportedly made under the AH Act before *assent day*. Such order is referred to as an *historical protected area order*. This provides an opportunity to ensure the validity of protected area order declared before assent day, but limiting the opportunity to so, up to transition day.

The clause provides that such order can declare the area comprises several areas that are physically distinct from each other. Such order must provide a name for the protected area order, describe the boundaries of the protected area order sufficient to identify it, state that Aboriginal cultural heritage of outstanding significance for the purpose of this Act is located in the protected area, and state the conditions, if any that apply to the area (or areas).

Clause 86(2) to (4) of the proposed Act apply to such an order, being provisions that clarify such an order is not subsidiary legislation but certain clauses of the Interpretation

Act apply as if it were subsidiary legislation and the CEO of the Department must ensure *public notice* of such order.

The clause provides an *historical protected area order* comes into effect immediately before transition day.

Clause 316. Continuation of former protected area orders

The clause provides that from *transition day*, a *former protected area order*, has effect as if it were a protected area order made under the proposed Act.

The clause provides clause 87 of the proposed Act applies to such orders. Accordingly, the requirement of the CEO of the Department to ensure the Registrar of Titles or the Registrar of Deeds and Transfers are notified of protected area orders under clause 87 of the proposed Act applies, unless the relevant Registrar confirms adequate notice for the purposes of clause 87 has already been given.

Immediately before transition day, the former vesting of the land the subject of a former protected area order to the Minister ceases. That is, the Minister no longer has an exclusive right to the occupation and use of such land.

Clause 317. Conditions on former protected area orders

This clause permits the Minister to recommend that the Governor may by order amend a *former protection area order* to impose a condition or conditions relating to the management of the area, access to the area or any other matters prescribed in the regulations, that has effect as if it were a protected area order made under clause 82(1) of the proposed Act. As the Minister no longer has an exclusive right to the occupation and use of land the subject of *former protection area orders*, this clause ensures the ability to manage the land continues under the proposed Act, without the need to undertake the processes which would otherwise apply to amending conditions in Part 4. The requirements of clause 86 and 87 of the proposed Act apply to an order made under this clause as if it were a protected area order under clause 82(1) of the proposed Act.

However, the ability to impose conditions on a former protection area order under this clause only applies for the period of two years from *transition day*.

Subdivision 3 — AH Act section 18 consents and AH Act approvals

This Subdivision provides for the effect of AH Act section 18 consents and approvals.

Clause 318. Terms used

This clause provides definitions of terms used in this Division. The terms defined are self-explanatory. Of particular note the clause provides:

- ***AH Act approval*** means an authorisation under the AH Act section 16(2), or an approval or consent provided in respect to the AH Regulations regulation 7 and 10 respectively.

Clause 319. AH Act section 18 consents no longer in force

This clause provides that an *AH Act section 18 consent* is *no longer in force* when the consent has expired in accordance with the terms of the consent, the specified purpose has been achieved, the owner of the land the subject of the consent cannot be identified or found, or no longer exists or has voluntarily surrendered the consent, or if it is an *historical AH section 18 consent* that has expired under clause 325 of the proposed Act.

Clause 320. AH Act approvals no longer in force

This clause provides that an *AH Act approval* is *no longer in force* when the approval has expired in accordance with the terms of the approval, the purpose or the activities for which the approval was given have been achieved or completed, the person given the approval cannot be identified or found, or no longer exists or has voluntarily surrendered the consent.

Clause 321. AH Act section 18 consents taken to be authorised ACH management plans in some circumstances

This clause provides that from *transition day*, *AH Act section 18 consent*, is taken to be the an *authorised ACH management plan*, in the following circumstances;

- in an application for a *protected area* under Part 4;
 - as to the requirement that the proponent of an authorised ACH management plan must have agreed to exclude from the area the subject of the plan, any area which overlaps with the proposed protected area and evidence of such agreement is included in the application;
 - the ACH Council is satisfied there are measures in place to excise any overlap between the area the subject of an authorised ACH management plan and the proposed protected area; and
 - the Minister may give written direction to ensure that any authorised ACH management plan is amended to excise any overlap between the area the subject of an authorised ACH management plan and the proposed protected area and approved by the ACH Council;
- in a change to the identity of the proponent for the activity to which the *authorised ACH management plan* relates;
 - as to the requirement to notify in writing the ACH Council as to the change of identity of the proponent (being the owner of land in the consent) within the period prescribed in the regulations; and
 - as to the requirement to identify the current proponent on the management plan;
 - as to the provision that such a plan continues to have effect despite any amendment to the plan to reflect the current proponent; and
- as to the provision that it is an offence to contravene a condition of an authorised ACH management plan;
- in respect of a *transitional AH Act section 18 consent* only;

- as to the ability to give a *stop activity order* if there is *harm* or an imminent risk of harm to *Aboriginal cultural heritage* and there is *new information about Aboriginal cultural heritage* in the area the subject of the consent; and
- as to the ability of the ACH Council to make a recommendation to the Minister regarding giving a *prohibition order* if there is *harm* or an imminent risk of harm to *Aboriginal cultural heritage* and there is *new information about Aboriginal cultural heritage* in the area the subject of the consent;

(For the purposes of this clause *new information about Aboriginal cultural heritage* means new information about Aboriginal cultural heritage located in the area or the characteristics of such cultural heritage that was not identified in the notice given to the ACHC under the AH Act section 18(2) or to the Minister before such consent was given.)

- in respect of the requirements of the ACH Directory to include specified information in the regulations, about *authorised ACH management plans*, and to identify areas subject to an authorised ACH management plan and the contact details of the parties to such plan;
- securing compliance for the purpose of Part 10 of the proposed Act;
- legal proceedings for the purpose of Part 11 of the proposed Act; and
- miscellaneous provisions for the purpose of Part 13 of the proposed Act.

Clause 322. AH Act section 18 consents taken to be authorisation under Part 6 Division 4 in some circumstances

This clause provides that from *transition day*, an activity being carried out in accordance with an *AH Act section 18 consent*, is taken to be an authorised activity under Part 6 Division 4 of the proposed Act, in the following circumstances only;

- in relation to providing a defence to the offence that a person must not disturb or remove *Aboriginal ancestral remains* on any land, per clause 61(3)(a)(i) of the proposed Act;
- in relation to a defence to a charge of causing *harm*, or harm that is *serious* or *material* to Aboriginal cultural heritage, per clause 96 of the proposed Act;
- in relation to giving a *stop activity order* or *prohibition order* under Part 7 in respect of activities that are not authorised under Part 6 Division 4 of the proposed Act; and
- in relation to the liability of *principals* for offences by *agents* for the purposes of clause 267(2)(a) of the proposed Act.

This clause only applies to *AH Act section 18 consent* that is in force on transition day and whilst it remains in force.

Clause 323. AH Act approvals taken to be ACH permits in some circumstances

This clause provides that from *transition day*, an *AH Act approval*, is taken to be an ACH permit under the proposed Act, in the following circumstances:

- in an application for a *protected area* under Part 4;
 - as to the requirement that the holder of an ACH permit must have agreed to exclude from the area the subject of the permit, any area which overlaps with the proposed protected area and evidence of such agreement is included in the application;
 - the ACH Council is satisfied there are measures in place to excise any overlap between the area the subject of a permit and the proposed protected area; and
 - the Minister may give written direction to ensure that any permit is amended to excise any overlap between the area the subject of an ACH permit and the proposed protected area and approved by the ACH Council;
- as to the provision that it is an offence to contravene a condition of an ACH permit;
- in respect of the requirements of the ACH Directory to include specified information in the regulations about an *ACH permit* and to identify areas subject to an ACH permit and the contact details of the holder of the permit;
- securing compliance for the purpose of Part 10 of the proposed Act;
- legal proceedings for the purpose of Part 11 of the proposed Act; and
- miscellaneous provisions for the purpose of Part 13 of the proposed Act.

For the purpose of this clause a person given an AH Act approval is taken to be the holder of the ACH permit. This clause only applies to *AH Act approval* in force on transition day and whilst it remains in force.

Clause 324. AH Act approvals taken to be authorisation under Part 6 Division 4 in some circumstances

This clause provides that from *transition day*, an activity being carried out in accordance with an *AH Act approval* is taken to be an authorised activity under Part 6 Division 4 of the proposed Act, in the following circumstances only;

- in relation to providing a defence to the offence that a person must not disturb or remove *Aboriginal ancestral remains* on any land, per clause 61(3)(a)(i) of the proposed Act;
- in relation to a defence to a charge of causing *harm*, or harm that is *serious* or *material* to Aboriginal cultural heritage, per clause 96 of the proposed Act;
- in relation to giving a *stop activity order* or *prohibition order* under Part 7 in respect of activities that are not authorised under Part 6 Division 4 of the proposed Act; and
- in relation to the liability of *principals* for offences by *agents* for the purposes of clause 267(2)(a) of the proposed Act.

This clause only applies to *AH Act approval* in force on transition day and whilst it remains in force.

Clause 325. Expiry of historical AH Act section 18 consents

This clause provides that an *historical AH Act section 18 consent*, being a consent given in response to notices (applications) received by the ACMC up to *assent day*, will expire at the end of 10 years from *transition day*, unless it is already no longer in force or the Minister makes a decision that it will not expire at the end of the ten year period.

The Minister may make such a decision if an application has been made to the Minister more than 12 months before the consent is due to expire, the Minister forms the opinion that the purpose for which the land may be used as specified in the consent has been substantially commenced, and the Minister notifies the owner of the land the subject of the consent of his decision.

Further the clause provides *transitional regulations* may be made about the manner of applying for a consent to not expire, the criteria for deciding whether the permitted land use has been substantially commenced or the notification of the decision by the Minister.

This power of the Minister can only be delegated to the ACH Council.

Clause 326. Extension of duration of transitional AH Act section 18 consents

This clause provides for extending the duration of a *transitional AH Act section 18 consent* which would otherwise expire in accordance with its terms or the AH Act.

The Minister may make such a decision if an application has been made to the Minister more than 12 months before the consent is due to expire, the Minister forms the opinion that the purpose for which the land may be used as specified in the consent is a *State significant project*, and the Minister notifies the owner of the land the subject of the consent of his decision.

However, the duration of a *transitional AH Act section 18 consent* may only be extended once, for a period of 5 years beginning from the time the consent would have otherwise expired or any shorter period specified by the Minister in writing.

Further the clause provides *transitional regulations* may be made about the manner of applying for a consent to not expire, the criteria for deciding whether the permitted purpose for which the land may be used is a *State significant project* or the notification of the decision by the Minister.

This power of the Minister cannot be delegated.

Subdivision 4 — Marandoo Act area

This subdivision provides for the repeal of the AHM Act, which disapplied the AH Act to the Marandoo Act area, whilst retaining the right of the existing proponents to continue with existing activities.

Clause 327. Terms used

This clause provides definitions of terms used in this subdivision:

- *Marandoo Act area* refers to the land described in the AHM Act 1992 Schedule 1 Part 1, Schedule 2 Part 1 and Schedule 3 Part 1 immediately before transition day.
- *owner* refers to a person or persons who immediately before transition day, is or are using the specified land for the specified purpose.
- *reduced area* means the area of land approved by the Minister by order under clause 329(1).
- *specified land* refers to the *reduced area*; or the *Marandoo Act area* if, immediately before transition day, there is no reduced area;
- *specified purpose* refers to undertaking any activity for and incidental to the exploration, mining, processing and transporting of iron ore, including, but not limited to, the construction, operation and maintenance of railways, power lines, roads and other associated infrastructure.

Clause 328. Historical AH Act section 18 consent taken to be held

This clause provides the *owner* of *specified land*, which refers either to the *Marandoo Act area* or the *reduced area* as defined in clause 327 of the proposed Act, is taken immediately before *transition day* to hold a *historical AH Act section 18 consent* to use the specified land for the *specified purpose*, also defined in clause 327.

For the purpose of the application of Subdivision 3, the historical AH Act section 18 consent is taken to have been given under the AH Act and the specified land and specified purpose is taken to be land and the purpose the subject of the historical AH Act section 18 consent and is taken to be specified in the consent.

Clause 329. Minister may approve reduced area

This clause provides the Minister may by order published in the *Gazette*, approve reducing the *Marandoo Act area*, to be referred to as the *reduced area*. However, before doing so the Minister must consult with the person using the Marandoo Act area for the *specified purpose* and the *persons to be consulted* under clause 107.

The reduced area can comprise of several areas that are physically distinct but cannot include any of the land described in Schedule 1 Parts 2 or 3, Schedule 2 Part 2 or Schedule 3 Part 2 of the AHM Act immediately before assent day.

Clause 330. Purported section 18 consents are of no effect

This clause provides that a *purported section 18 consent* which was given or purportedly given under the AH Act before the commencement of the AHM Act to use the *Marandoo Act area* for any purpose, is of no effect, and is taken to have never been valid and to have never had effect.

Subdivision 5 — Other matters

This Subdivision provides for other matters that arise from *transition day* and *repeal day*.

Clause 331. Information and documents on former register transferred to ACH Directory

This clause provides that on *transition day* the contents of the Register of Aboriginal Sites is to be transferred and included on the ACH Directory.

Clause 332. Unfinished business

This clause provides that from *transition day*, the Minister under the AH Act continues to exist for the purposes of finalising any proceedings commenced by or against the ACHC or the Minister before *transition day* and the Minister shall have all the powers necessary for that purpose.

This clause continues to apply despite the amendment or repeal of the AH Act by the proposed Act.

Clause 333. ACHC abolished

This clause provides that on *repeal day*, when the AH Act is repealed, the ACHC is abolished and any person that was a member of the ACHC ceases to be a member and the records of the ACHC are to be taken to be the records of the ACH Council.

Clause 334. Completion of things commenced

This clause provides that, except in relation to proceedings which will be finalised by the Minister as provided in clause 332 above, anything commenced to be done by the ACHC before *repeal day* may be continued by the ACH Council after *repeal day*, to the extent that it is within the functions of the ACH Council.

Clause 335. References to *Aboriginal Heritage Act 1972*

This clause provides that if any written law or document refers to the AH Act, then from *transition day* until before *repeal day* it is taken to be a reference to either the AH Act or the proposed Act or both as appropriate, where the context permits. After *repeal day*, where the context permits it only refers to the proposed Act.

Clause 336. Transitional regulations

This clause provides defined terms specific to this clause which are self-explanatory.

This clause provides a regulation making power for a *transitional matter* under the proposed Act, as may be required, necessary or convenient and to be referred to as *transitional regulations*. Such regulations may provide that specific provisions of the proposed Act or another written law does not apply to a specified matter, or applies with a specified modification.

The clause also provides that if transitional regulations provide that a specified state of affairs is to have existed or not to have existed on a day earlier than the day the regulations are published in the *Gazette*, but not earlier than *assent day*, the regulations have effect according to their terms. However, such transitional regulations are not to prejudice the rights of a person which existed prior to the publication of the regulations in the *Gazette*, nor should they impose a liability on a person in respect of any act or omission prior to the publication of the regulations in the *Gazette*. This does not apply to the State or an authority of the State.

Clause 337. *Interpretation Act 1984* not affected

This clause provides that except where this Part or *transitional regulations* expressly provide otherwise, the Interpretation Act applies in relation to the repeal of the AH Act and AHM Act and the AH Regulations provided in Division 1 of this Part.

Part 15 — *Aboriginal Heritage Act 1972* amended

This Part provides amendments specific to the AH Act that come into effect at various times, to ensure a gradual transition between the AH Act and the proposed Act before it is fully repealed under clause 310 of the proposed Act.

Division 1 — Act amended

This Division provides the purpose of this Part.

Clause 338. *Aboriginal Heritage Act 1972* amended

This clause provides this Part amends the AH Act.

Division 2 — Amendments commencing on day after assent day

This Division provides the amendments to the AH Act that occur the day after the proposed Act receives the Royal assent, also referred to as *assent day*. The main effect of these to ensure that any transitional section 18s are only valid for a five year period.

Clause 339. Section 4 amended

This clause amends the AH Act section 4 by inserting a definition of *transition day* which is consistent with the proposed Act.

Clause 340. Section 18 amended

This clause amends the AH Act section 18, by inserting new subsections (6) and (6A). These provisions apply when an owner of land applies for a consent pursuant to section 18 of the AH Act (through the giving of a notice) during the *transitional period*, which is between the day after the proposed Act receives the Royal assent until the day before *transition day*. Under these new subsections, any section 18 AH Act consent given in response to such applications is of effect for a maximum period of 5 years, or any shorter period specified in the consent, calculated from the day such consent takes effect.

Further, the new subsections impose an obligation on the owner of land to notify the Minister if the owner becomes aware of any *new information about Aboriginal Cultural Heritage*, which is defined in subsection (6A) to mean information about Aboriginal cultural heritage or the characteristics of that heritage located in the area the subject of the consent, and not identified to the Minister or the Aboriginal Cultural Material Committee ('ACMC') before the consent was given.

Division 3 — Amendments commencing on transition day

This Division provides the amendments to the AH Act that occur on *transition day*. The main effect of these changes is to ensure that only certain clauses remain operational for a limited period to enable unfinished applications to be completed.

Clause 341. Long title replaced

This clause replaces the long title of the AH Act to reflect the limited operation of the Act after *transition day* and before the repeal of the AH Act, which is the finalisation of certain applications made and notices given under the AH Act and for related purposes.

Clause 342. Section 4A and 4B inserted

This clause inserts sections 4A and 4B into the AH Act. These sections provide that from *transition day* the AH Act no longer applies, except for limited functions of the Minister, the ACMC and the Registrar under the AH Act and AH Regulations. These are to determine applications and notices made or given before *transition day* for either a section 16(2) authorisation or a section 18(2) consent under the AH Act, or applications for approvals either under regulation 7 or 10 of the AH Regulations, and to permit the making of applications to the State Administrative Tribunal for reviews of decisions under section 18(3) of the AH Act.

Part 16 — Other Acts amended

This Part provides amendments to twelve other Acts.

Clause 343. *Conservation and Land Management Act 1984* amended

This clause amends the *Conservation and Land Management Act 1984* ('CALM Act') by replacing the references to the AH Act with a reference to the proposed Act in sections 3 and 4(5)(a) of the CALM Act. The clause also replaces section 59(3)(c) of the CALM Act and also inserts section 59(3A) into the Act, which provide an updated description of when a proposed management plan must be submitted to the Minister for Indigenous Affairs, being when *Aboriginal cultural heritage* is *located* in land (as defined in the AH Act) the subject of a proposed management plan under the CALM Act.

Clause 344. *Constitution Act Amendment Act 1899* amended

This clause amends the *Constitution Act Amendment Act 1899* Schedule V Part 3 by removing the reference to the ACMC and inserting in alphabetical order in the same part of the Schedule the Aboriginal Cultural Heritage Council established under the proposed Act. Schedule V Part 3 lists the bodies, where if person is a member of such body, the membership is vacated upon that person being declared a member of the Legislative Assembly or legislative Council of Western Australia.

Clause 345. *Control of Vehicles (Off-road Areas) Act 1978* amended

This clause amends the *Control of Vehicles (Off-road Areas) Act 1978* ('COV Act') to replace the reference to an honorary warden under the AH Act in section 38(2)(e) of the COV Act, with an inspector under the proposed Act. This describes whom the Minister with responsibility for the proposed Act may appoint as an authorised person under the COV Act.

Clause 346. *Coroners Act 1996* amended

This clause amends the Coroners Act by inserting section 19B, which incorporates the definition of *Aboriginal ancestral remains* and the ACH Council under the proposed Act into the Coroners Act, and introduces a requirement upon the coroner to notify the ACH Council, if in the course of investigating a death, the coroner believes the body is or is likely to be Aboriginal ancestral remains.

Clause 347. *COVID-19 Response and Economic Recovery Omnibus Act 2020* amended

This clause amends the *COVID-19 Response and Economic Recovery Omnibus Act 2020* section 13(4)(b) by replacing the reference to the AH Act with a reference to the proposed Act.

Clause 348. *Environmental Protection Act 1986* amended

This clause amends the EP Act by adding a new subclause (5) to section 41 of the EP Act, to provide that sections 41(2) and (3) of that Act do not apply to a decision in relation to a proposal, if the decision is made under the proposed Act. This has the effect of removing any prohibition on the CEO of the Department, the ACH Council or the Minister from making a decision on any matter that may have also been referred to the Environmental Protection Authority for an assessment under Part 4 of the EP Act.

Clause 349. *Heritage Act 2018* amended

This clause amends the *Heritage Act 2018* by replacing sections 9(b), 10(a) and 12(2)(b) of that Act with provisions that are consistent with the proposed Act to ensure consistent use of terms with the proposed Act and to replace the references to the AH Act.

Clause 350. *Planning and Development Act 2005* amended

This clause amends the *Planning and Development Act 2005* by deleting example 1 in section 277(6) which referred to a section 18 consent pursuant to the AH Act, and replacing this with a reference to an ACH permit or an approved or authorised ACH management plan under Part 6 of the proposed Act.

Clause 351. *Railway (Tilley to Karara) Act 2010* amended

This clause deletes section 6 of the *Railway (Tilley to Karara) Act 2010* which deemed the contractor engaged for the construction of the railway was the owner of the land for the purposes of the AH Act. The provision will be redundant with the commencement of the proposed Act.

Clause 352. *Sentencing Act 1995* amended

This clause amends the *Sentencing Act 1995* by adding the proposed Act as an item to Schedule 1, which provides a list of Acts under which fines are not credited to the Consolidated Account, but rather to the Aboriginal Cultural Heritage Compensation Fund.

Clause 353. *State Records Act 2000* amended

This clause amends the *State Records Act 2000* (SR Act) by replacing section 76(1)(a) and (b) with a State record that contains information about Aboriginal cultural heritage as defined in clause 12 of the proposed Act and broadens paragraph (b) to any other matter related to Aboriginal Australians.