



Western Australia

Aboriginal Heritage Act 1972

**Aboriginal Heritage (Transitional Provisions)
Regulations 2023**

Aboriginal Heritage (Transitional Provisions) Regulations 2023

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Defined terms

Aboriginal Heritage (Transitional Provisions) Regulations 2023

Part 1 — Preliminary

1. Citation

These regulations are the *Aboriginal Heritage (Transitional Provisions) Regulations 2023*.

2. Commencement

These regulations come into operation as follows —

- (a) Part 1 (other than regulation 4) — on the day on which these regulations are published on the WA legislation website;
- (b) the rest of the regulations — on the day on which the *Aboriginal Heritage Legislation Amendment and Repeal Act 2023* section 3 comes into operation.

3. Purpose

These regulations are made for the purposes of section 71(2) of the Act.

4. Terms used

In these regulations —

2021 Act —

- (a) means the *Aboriginal Cultural Heritage Act 2021*; and
- (b) unless otherwise indicated, includes regulations made under that Act;

Aboriginal ancestral remains has the meaning that was given in section 11 of the 2021 Act;

Aboriginal object has the meaning that was given in section 11 of the 2021 Act;

ACH Council means the body referred to in section 72(2)(a) of the Act;

ACH management plan has the meaning that was given in section 137(1) of the 2021 Act;

ACH permit has the meaning that was given in section 100 of the 2021 Act;

owner, in relation to land, has a meaning affected by section 18(1) and (1a) of the Act;

repeal day means the day on which the *Aboriginal Heritage Legislation Amendment and Repeal Act 2023* section 3 comes into operation;

secret or sacred object has the meaning that was given in section 11 of the 2021 Act.

Part 2 — Local Aboriginal cultural heritage services

5. Recovery of fees by local Aboriginal cultural heritage service for services provided before repeal day

- (1) Subregulation (2) applies to a person if, before repeal day —
 - (a) the person is designated under section 37(1) of the 2021 Act; and
 - (b) the person provides services for which the person may charge a fee under section 49 of the 2021 Act; and
 - (c) the person charges a fee for the services under section 49 of the 2021 Act; and
 - (d) the fee is not paid or is not paid in full.
- (2) Despite the repeal of the 2021 Act, the person may, on or after repeal day, recover the unpaid amount as a debt due in a court of competent jurisdiction.
- (3) Subregulation (4) applies if, before repeal day —
 - (a) a person is designated under section 37(1) of the 2021 Act; and
 - (b) the person provides services for which the person may charge a fee under section 49 of the 2021 Act; and
 - (c) the person does not charge a fee for the services under section 49 of the 2021 Act.
- (4) On and after repeal day, section 49 of the 2021 Act continues to apply in relation to the services as if the 2021 Act had not been repealed.
- (5) Section 80(2)(d) of the Act applies subject to this regulation.

6. Refund of fees charged by local Aboriginal cultural heritage service before repeal day for services not provided

- (1) This regulation applies to a person if, before repeal day —
 - (a) the person is designated under section 37(1) of the 2021 Act; and
 - (b) the person charges a fee for services under section 49 of the 2021 Act; and
 - (c) the fee is paid; and
 - (d) the person does not provide some or all of the services.
- (2) Despite the repeal of the 2021 Act, the person must, within 14 days after repeal day, refund, as the case requires —
 - (a) the whole of the fee; or
 - (b) so much of the fee as is attributable to the services that were not provided.
- (3) Subregulation (2) does not apply to the amount referred to in subregulation (2)(a) or (b) to the extent that the amount was refunded before repeal day.
- (4) If the person does not comply with subregulation (2), the person who was charged the fee may recover the unrefunded amount as a debt due in a court of competent jurisdiction.
- (5) Section 80(2)(d) of the Act applies subject to this regulation.

Part 3 — Remains and objects

7. Aboriginal ancestral remains transferred to Committee

- (1) This regulation applies to Aboriginal ancestral remains that are transferred into the custody of the Committee under section 82(3) of the Act.
- (2) On and after repeal day, section 55 of the 2021 Act continues to apply in relation to the ancestral remains as if the 2021 Act had not been repealed.

8. Duty of organisations to return Aboriginal ancestral remains

- (1) In this regulation —
organisation has the meaning that was given in section 53 of the 2021 Act.
- (2) This regulation applies to an organisation that was in possession of Aboriginal ancestral remains before repeal day.
- (3) Any duty of the organisation under section 57 of the 2021 Act in relation to the ancestral remains ceases at the beginning of repeal day.

9. Secret or sacred objects transferred to Committee

- (1) This regulation applies to a secret or sacred object that is transferred into the custody of the Committee under section 83(3) of the Act.
- (2) On and after repeal day, section 63 of the 2021 Act continues to apply in relation to the object as if the 2021 Act had not been repealed.

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

- (1) In this regulation —
prescribed public authority has the meaning that was given in section 62 of the 2021 Act.
- (2) This regulation applies to a prescribed public authority that was in possession of a secret or sacred object before repeal day.
- (3) Any duty of the prescribed public authority under section 65 of the 2021 Act in relation to the object ceases at the beginning of repeal day.

Part 4 — Protected areas

11. Application for area to be declared as protected area

- (1) This regulation applies to an application made under section 72(1) or 83(1) of the 2021 Act that, immediately before repeal day, is on foot or otherwise has any effect.
- (2) At the beginning of repeal day, the application is terminated and otherwise ceases to have any effect (and, accordingly, on and after repeal day, nothing further can be done, or is to be done, on or in relation to the application).
- (3) This regulation does not affect the application of section 73 of the Act.

12. Endorsements and notations

- (1) In this regulation —
endorsement or notation means an endorsement or notation that was referred to in section 87(5) of the 2021 Act;
Registrar has the meaning that was given in section 87(1) of the 2021 Act.
- (2) No endorsement or notation can be made on or after repeal day.
- (3) If an endorsement or notation was made before repeal day, the Registrar must —
 - (a) remove the endorsement or notation; and
 - (b) make any other amendment to the certificate of title or other register or record that the Registrar considers necessary as a consequence of, or to give effect to, the removal.

Part 5 — Matters relating to offences under Part 5 of 2021 Act

13. Compensation for harm

- (1) The repeal of the 2021 Act does not affect a determination made under section 99(3) of the 2021 Act before repeal day and, accordingly, compensation is payable on and after repeal day in accordance with the determination (to the extent not paid before repeal day).
- (2) On and after repeal day, section 99 of the 2021 Act continues to apply, as if the 2021 Act had not been repealed, in relation to an offence under Part 5 Division 2 of the 2021 Act —
 - (a) that is committed before repeal day; and
 - (b) in relation to which no determination is made under section 99(3) of the 2021 Act before repeal day.
- (3) For the purposes of subregulation (2) —
 - (a) the functions of the CEO under section 99(1), (3) and (5) of the 2021 Act are functions of the chief executive officer of the Department; and
 - (b) the function of the Minister in relation to the 2021 Act under section 99(1) of the 2021 Act is a function of the Minister; and
 - (c) the function of the ACH Council under section 99(5) of the 2021 Act is a function of the Committee.
- (4) Compensation payable on or after repeal day in accordance with a determination referred to in subregulation (1), or a determination made by virtue of subregulation (2), is payable by the chief executive officer of the Department.
- (5) The maximum amount that can be set as the compensation sum in a determination made by virtue of subregulation (2) is the amount of any fine imposed as a penalty for the offence.

14. Letter of advice may be used in evidence

Without limiting section 84(1) of the Act, section 104(5) of the 2021 Act applies, as if the 2021 Act had not been repealed, in relation to any proceedings for an offence under Part 5 Division 2 of the 2021 Act that are continued or commenced as referred to in section 84(1) of the Act.

Part 6 — Section 18 consents and other authorisations, approvals and consents

Division 1 — ACH permits

15. ACH permits transitioned as s. 18 consents

- (1) This regulation applies in relation to an ACH permit that, under section 76(2) of the Act, is a consent given under section 18(3)(a) of the Act.
- (2) The following apply to the consent —
 - (a) the land that is the subject of the consent is the area that, immediately before repeal day, is detailed in the ACH permit under section 120(3)(c) of the 2021 Act;
 - (b) the purpose for which that land may be used under the consent is the carrying out of the activity that, immediately before repeal day, is detailed in the ACH permit under section 120(3)(b) of the 2021 Act.
- (3) The person who holds the ACH permit immediately before repeal day is, for the purposes of the consent, an owner of the land the subject of the consent (whether or not the person is actually an owner of that land).
- (4) A condition under section 128(1) of the 2021 Act has no effect on and after repeal day in relation to the consent (subject to subregulation (5)).
- (5) If any reporting requirements are specified in the ACH permit immediately before repeal day —
 - (a) the consent is subject to a condition that an owner of the land the subject of the consent must comply with the reporting requirements; and

- (b) for the purposes of paragraph (a) —
 - (i) any references in the reporting requirements to the ACH Council are taken to be references to the Committee; and
 - (ii) the reporting requirements apply with any other necessary modifications.

Note for this subregulation:

The condition under this subregulation is based on the condition that was under section 128(1)(b) of the 2021 Act.

- (6) If a condition, other than a condition referred to in subregulation (4), applies to the ACH permit immediately before repeal day —
 - (a) the consent is subject to the condition; and
 - (b) for the purposes of paragraph (a) —
 - (i) any references in the condition to the ACH Council are taken to be references to the Committee; and
 - (ii) the condition applies with any other necessary modifications.
- (7) For the purpose of determining under subregulation (6) whether a condition applies to the ACH permit immediately before repeal day, it does not matter if the ACH permit did not take effect before repeal day.
- (8) A condition under subregulation (5) or (6) is taken to be a condition imposed by the Minister under section 18(3)(a) of the Act, and can be amended under section 18(6A), 18A(9) or 18B(3) of the Act accordingly.
- (9) Nothing in this regulation affects the application of section 84 of the Act in relation to a contravention of a condition before repeal day.
- (10) If the ACH permit did not take effect before repeal day, the consent takes effect on the day that was specified in the

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Division 1 ACH permits

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ACH permit as was referred to in section 121(a)(ii) of the 2021 Act.

- (11) The consent expires at the end of the period of 4 years after —
- (a) if the ACH permit took effect before repeal day — the day on which the ACH permit took effect; or
 - (b) otherwise — the day on which the consent takes effect under subregulation (10).

Note for this subregulation:

The 4-year period is based on the 4-year period that was referred to in section 121(b) of the 2021 Act.

16. Applications for ACH permits transitioned as s. 18 notices

- (1) This regulation applies in relation to an application for an ACH permit that, under section 76(7) of the Act, is taken to be a notice given to the Committee under section 18(2) of the Act.
- (2) The following apply to the notice —
- (a) the land that is the subject of the notice is the area that, immediately before repeal day, is detailed in the application under section 115(2)(b) of the 2021 Act;
 - (b) the purpose for which that land is required to be used is the carrying out of the activity that, immediately before repeal day, is detailed in the application under section 115(2)(b) of the 2021 Act;
 - (c) the *Aboriginal Heritage Regulations 1974* regulation 14(2) to (7) apply as if the notice were given to the Committee on repeal day by the person who made the application for the ACH permit.
- (3) The person who made the application for the ACH permit —
- (a) is, for the purposes of the notice, an owner of the land the subject of the notice (whether or not the person is actually an owner of that land); and

- (b) if a consent is given under section 18(3)(a) of the Act in relation to the notice — is, for the purposes of the consent, an owner of the land the subject of the consent (whether or not the person is actually an owner of that land).

Division 2 — ACH management plans

17. Term used: proponent

In this Division —

proponent, for an ACH management plan, means the person who, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(i) of the 2021 Act.

18. Approvals of ACH management plans transitioned as s. 18 consents

- (1) This regulation applies in relation to an approval of an ACH management plan that, under section 77(2) of the Act, is a consent given under section 18(3)(a) of the Act.
- (2) The following apply to the consent —
- (a) the land that is the subject of the consent is the area that, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(iii) of the 2021 Act;
 - (b) the purpose for which that land may be used under the consent is the carrying out of the activity that, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(iv) of the 2021 Act.
- (3) The proponent for the ACH management plan is, for the purposes of the consent, an owner of the land the subject of the consent (whether or not the proponent is actually an owner of that land).

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Division 2 ACH management plans

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- (4) A condition under section 153 of the 2021 Act has no effect on and after repeal day in relation to the consent (subject to subregulation (5)).
- (5) If any reporting requirements are specified in the ACH management plan immediately before repeal day —
- (a) the consent is subject to a condition that an owner of the land the subject of the consent must comply with the reporting requirements; and
 - (b) for the purposes of paragraph (a) —
 - (i) any references in the reporting requirements to the ACH Council are taken to be references to the Committee; and
 - (ii) the reporting requirements apply with any other necessary modifications.

Note for this subregulation:

The condition under this subregulation is based on the condition that was under section 153(b) of the 2021 Act.

- (6) A condition under subregulation (5) is taken to be a condition imposed by the Minister under section 18(3)(a) of the Act, and can be amended under section 18(6A), 18A(9) or 18B(3) of the Act accordingly.
- (7) Nothing in this regulation affects the application of section 84 of the Act in relation to a contravention of a condition before repeal day.
- (8) If the approval of the ACH management plan did not take effect before repeal day, the consent takes effect on the day that was specified in the notice given under section 150(7) of the 2021 Act as was referred to in section 152(a) of the 2021 Act.

19. Authorisations of ACH management plans transitioned as s. 18 consents

- (1) This regulation applies in relation to an authorisation of an ACH management plan that, under section 77(2) of the Act, is a consent given under section 18(3)(a) of the Act.
- (2) The following apply to the consent —
 - (a) the land that is the subject of the consent is the area that, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(iii) of the 2021 Act;
 - (b) the purpose for which that land may be used under the consent is the carrying out of the activity that, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(iv) of the 2021 Act.
- (3) The proponent for the ACH management plan is, for the purposes of the consent, an owner of the land the subject of the consent (whether or not the proponent is actually an owner of that land).
- (4) A condition under section 167(1) of the 2021 Act has no effect on and after repeal day in relation to the consent (subject to subregulation (5)).
- (5) If any reporting requirements are specified in the ACH management plan immediately before repeal day —
 - (a) the consent is subject to a condition that an owner of the land the subject of the consent must comply with the reporting requirements; and
 - (b) for the purposes of paragraph (a) —
 - (i) any references in the reporting requirements to the ACH Council are taken to be references to the Committee; and

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Division 2 ACH management plans

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- (ii) the reporting requirements apply with any other necessary modifications.

Note for this subregulation:

The condition under this subregulation is based on the condition that was under section 167(1)(b) of the 2021 Act.

- (6) If a condition, other than a condition referred to in subregulation (4), applies to the authorisation immediately before repeal day —
 - (a) the consent is subject to the condition; and
 - (b) for the purposes of paragraph (a) —
 - (i) any references in the condition to the ACH Council are taken to be references to the Committee; and
 - (ii) the condition applies with any other necessary modifications.
- (7) For the purpose of determining under subregulation (6) whether a condition applies to the authorisation immediately before repeal day, it does not matter if the authorisation did not take effect before repeal day.
- (8) A condition under subregulation (5) or (6) is taken to be a condition imposed by the Minister under section 18(3)(a) of the Act, and can be amended under section 18(6A), 18A(9) or 18B(3) of the Act accordingly.
- (9) Nothing in this regulation affects the application of section 84 of the Act in relation to a contravention of a condition before repeal day.
- (10) If the authorisation of the ACH management plan did not take effect before repeal day, the consent takes effect on the day that was specified in the authorisation as was referred to in section 166(a)(ii) of the 2021 Act.

20. Applications for approval of ACH management plans transitioned as s. 18 notices

- (1) This regulation applies in relation to an application for approval of an ACH management plan that, under section 77(8) of the Act, is taken to be a notice given to the Committee under section 18(2) of the Act.
- (2) The following apply to the notice —
 - (a) the land that is the subject of the notice is the area that, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(iii) of the 2021 Act;
 - (b) the purpose for which that land is required to be used is the carrying out of the activity that, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(iv) of the 2021 Act;
 - (c) the *Aboriginal Heritage Regulations 1974* regulation 14(2) to (7) apply as if the notice were given to the Committee on repeal day by the person who made the application for approval of the ACH management plan.
- (3) The person who made the application for approval of the ACH management plan —
 - (a) is, for the purposes of the notice, an owner of the land the subject of the notice (whether or not the person is actually an owner of that land); and
 - (b) if a consent is given under section 18(3)(a) of the Act in relation to the notice — is, for the purposes of the consent, an owner of the land the subject of the consent (whether or not the person is actually an owner of that land).

21. Applications for authorisation of ACH management plans transitioned as s. 18 notices

- (1) This regulation applies in relation to an application for authorisation of an ACH management plan that, under section 77(11) of the Act, is taken to be a notice given to the Committee under section 18(2) of the Act.
- (2) The following apply to the notice —
 - (a) the land that is the subject of the notice is the area that, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(iii) of the 2021 Act;
 - (b) the purpose for which that land is required to be used is the carrying out of the activity that, immediately before repeal day, is identified in the ACH management plan under section 137(2)(a)(iv) of the 2021 Act;
 - (c) the *Aboriginal Heritage Regulations 1974* regulation 14(2) to (7) apply as if the notice were given to the Committee on repeal day by the person who made the application for authorisation of the ACH management plan.
- (3) The person who made the application for authorisation of the ACH management plan —
 - (a) is, for the purposes of the notice, an owner of the land the subject of the notice (whether or not the person is actually an owner of that land); and
 - (b) if a consent is given under section 18(3)(a) of the Act in relation to the notice — is, for the purposes of the consent, an owner of the land the subject of the consent (whether or not the person is actually an owner of that land).

Division 3 — Other matters

22. Previous consents under s. 18 of Act

- (1) This regulation applies to a consent under section 18 of the Act to which section 74(1) or (2) of the Act applies.
- (2) If section 325(1) of the 2021 Act applied to the consent immediately before repeal day, on and after repeal day that provision must be disregarded for the purpose of determining the duration of the consent.
- (3) If the consent was given under section 18(3)(a) of the Act subject to a condition, on and after repeal day the consent is subject to the condition as a condition under section 18(3)(a) of the Act.
- (4) If, immediately before repeal day, the consent is subject to a condition under section 18(6) of the Act as was inserted by section 340 of the 2021 Act, the condition ceases to have effect at the beginning of repeal day.
- (5) If, immediately before repeal day, the consent is subject to a condition under section 167(1) of the 2021 Act, the condition ceases to have effect at the beginning of repeal day.
- (6) Despite subregulation (3), if the consent was given under section 18(3)(a) of the Act subject to a condition that the consent is of effect only for 5 years, or any shorter period that is specified in the consent, beginning on the day on which the consent takes effect, the condition has no effect on and after repeal day.
- (7) Despite subregulation (3), if the consent was given under section 18(3)(a) of the Act subject to a condition that the consent holder must notify the Minister for Aboriginal Affairs if they become aware of any new information about Aboriginal cultural heritage in relation to the land that is the subject of the consent, the condition has no effect on and after repeal day.

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Division 3 Other matters

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- (8) Nothing in this regulation affects the application of section 74(5) of the Act to the consent.
- (9) Nothing in this regulation affects the application of section 84 of the Act in relation to a contravention of a condition before repeal day.

23. Marandoo Act area

- (1) A person to whom a consent is taken to have been given under section 78(2) of the Act is, for the purposes of the consent, an owner of the land the subject of the consent (whether or not the person is actually an owner of that land).
- (2) A consent that a person was taken to hold under section 328(1) of the 2021 Act has no effect on and after repeal day.

24. Previous other authorisations, approvals and consents

- (1) Subregulation (2) applies to an authorisation to which section 75(1) or (2) of the Act applies.
- (2) If the authorisation was given under section 16(2) of the Act subject to a condition, on and after repeal day the authorisation is subject to the condition as a condition under section 16(2) of the Act.
- (3) Subregulation (4) applies to an approval to which section 75(3) or (4) of the Act applies.
- (4) If the approval was given under the *Aboriginal Heritage Regulations 1974* regulation 7 subject to a condition, on and after repeal day the approval is subject to the condition as a condition imposed under that regulation.
- (5) Subregulation (6) applies to a consent to which section 75(5) or (6) of the Act applies.
- (6) If the consent was given under the *Aboriginal Heritage Regulations 1974* regulation 10 subject to a condition, on and

after repeal day the consent is subject to the condition as a condition imposed under that regulation.

25. Conditions under s. 18(6) of Act

(1) In this regulation —

relevant authority means any of the following —

- (a) the Minister;
- (b) the Minister in relation to the 2021 Act;
- (c) the ACH Council;

transitioned consent means any of the following —

- (a) a consent under section 18 of the Act to which section 74(1) or (2) of the Act applies;
- (b) an ACH permit that, under section 76(2) of the Act, is a consent given under section 18(3)(a) of the Act;
- (c) an approval of an ACH management plan that, under section 77(2) of the Act, is a consent given under section 18(3)(a) of the Act;
- (d) an authorisation of an ACH management plan that, under section 77(2) of the Act, is a consent given under section 18(3)(a) of the Act.

(2) This regulation applies if —

- (a) before repeal day, a person gave a notification (the **original notification**) to a relevant authority in accordance with a condition that applied to a transitioned consent; and
- (b) the person is required to give the same notification, in substance, to the Minister in accordance with a condition under section 18(6) of the Act as in force on repeal day.

(3) The original notification is taken —

- (a) to be the notification that the person is required to give as referred to in subregulation (2)(b); and

- (b) to have been given to the Minister on repeal day.

26. Application of s. 18B of Act

- (1) This regulation applies in relation to a consent given under section 18(3)(a) of the Act if —
- (a) a person —
- (i) is, for the purposes of the consent, an owner of the land the subject of the consent by virtue of regulation 15(3), 16(3)(b), 18(3), 19(3), 20(3)(b), 21(3)(b) or 23(1); but
- (ii) is not actually an owner of that land;
- and
- (b) the person ceases to use that land for the purpose for which the land may be used under the consent (the *consented purpose*), other than because of the consented purpose having been achieved.
- (2) Section 18B of the Act applies as if references in that section to a change in ownership of land the subject of a consent under section 18(3)(a) of the Act also referred to the person ceasing to use the land for the consented purpose.

27. Outstanding notices under s. 18(2) of Act

- (1) Subregulation (2) applies to a notice given under section 18(2) of the Act before repeal day by the owner of any land if the notice is not submitted under section 18(2) of the Act to the Minister before repeal day.
- (2) The *Aboriginal Heritage Regulations 1974* regulation 14(2) to (7) apply in relation to the notice as if the notice were given to the Committee on repeal day.

- (3) Subregulation (4) applies to a notice given under section 18(2) of the Act before repeal day by the owner of any land if, before repeal day —
- (a) the notice is submitted to the Minister under section 18(2) of the Act; but
 - (b) the Minister does not make a decision under section 18(3) of the Act in relation to the notice.
- (4) The *Aboriginal Heritage Regulations 1974* regulation 14(7) applies in relation to the notice as if the notice were submitted to the Minister on repeal day.

Part 7 — Defences to certain charges

28. Application of Part

- (1) This Part applies to the following offences —
 - (a) an offence under section 17 of the Act;
 - (b) an offence under the *Aboriginal Heritage Regulations 1974* regulation 7 or 10.
- (2) The provisions referred to in subregulation (1)(a) and (b) apply subject to this Part.

29. Defence based on s. 96 and 98(a) of 2021 Act

- (1) It is a defence to a charge of an offence to prove —
 - (a) that the act constituting the offence —
 - (i) is done during the period of 1 year beginning on repeal day; and
 - (ii) is, or is part of, an authorised activity;and
 - (b) that the substantial commencement condition is met.
- (2) The ***substantial commencement condition*** is met if the authorised activity referred to in subregulation (1)(a)(ii) was substantially commenced before repeal day.
- (3) The ***substantial commencement condition*** is also met if —
 - (a) the authorised activity referred to in subregulation (1)(a)(ii) can reasonably be regarded as part of a single project that consists only of —
 - (i) the authorised activity; and
 - (ii) 1 or more other authorised activities;and
 - (b) the project was substantially commenced before repeal day.

- (4) An activity is *authorised* if —
- (a) to the extent that the activity was carried out before repeal day — the carrying out of the activity was authorised under section 109 or 110 of the 2021 Act; and
 - (b) to the extent that the activity is carried out on or after repeal day — the carrying out of the activity would have been authorised under section 109 or 110 of the 2021 Act had the 2021 Act not been repealed.
- (5) For the purposes of subregulation (4)(b) —
- (a) in applying sections 109(a) and 110(a) of the 2021 Act, in the *Aboriginal Cultural Heritage Regulations 2022* Schedule 1 —
 - (i) references to the ACH Directory are to the ACH Directory as it stood immediately before repeal day; and
 - (ii) references to an approved or authorised ACH management plan are to such a plan that was approved or authorised before repeal day; and
 - (iii) references to a written approval are to a written approval given before repeal day;and
 - (b) in applying sections 109(b) and 110(b) of the 2021 Act, references to a protected area are to an area that was a protected area under the 2021 Act immediately before repeal day; and
 - (c) in applying section 110(c) of the 2021 Act —
 - (i) any due diligence assessment undertaken on or after repeal day as provided for in section 102 of the 2021 Act must be in accordance with the ACH Management Code referred to in

- section 102 of the 2021 Act as that Code was in effect immediately before repeal day; and
- (ii) the reference in section 102(a) of the 2021 Act to a protected area is to an area that was a protected area under the 2021 Act immediately before repeal day; and
 - (iii) the modifications of the *Aboriginal Cultural Heritage Regulations 2022* Schedule 1 in paragraph (a) apply.
- (6) An activity is also **authorised** if it is carried out by a person and —
- (a) before the person commenced the activity, the person made an assessment, in undertaking a due diligence assessment in relation to the carrying out of the activity, that there was no risk of harm being caused to Aboriginal cultural heritage by the activity; and
 - (b) in carrying out the activity, the person took all reasonable steps possible to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity.

Note for this subregulation:

This subregulation is based on section 98(a) of the 2021 Act.

- (7) In subregulation (6) —
- Aboriginal cultural heritage** has the meaning that was given in section 12 of the 2021 Act;
- due diligence assessment** has the meaning that was given in section 102 of the 2021 Act;
- harm** has a meaning affected by section 90 of the 2021 Act.
- (8) In applying the definition of **due diligence assessment** in subregulation (7) —
- (a) any due diligence assessment undertaken on or after repeal day as provided for in section 102 of the

2021 Act must be in accordance with the ACH Management Code referred to in section 102 of the 2021 Act as that Code was in effect immediately before repeal day; and

- (b) the reference in section 102(a) of the 2021 Act to a protected area is to an area that was a protected area under the 2021 Act immediately before repeal day; and
- (c) the modifications of the *Aboriginal Cultural Heritage Regulations 2022* Schedule 1 in subregulation (5)(a) apply.

30. Defence based on s. 98(d) of 2021 Act

- (1) It is a defence to a charge of an offence to prove —
 - (a) that the act constituting the offence —
 - (i) is done during the period of 1 year beginning on repeal day; and
 - (ii) is, or is part of, an emergency activity;and
 - (b) that the substantial commencement condition is met.
- (2) The ***substantial commencement condition*** is met if the emergency activity referred to in subregulation (1)(a)(ii) was substantially commenced before repeal day.
- (3) The ***substantial commencement condition*** is also met if —
 - (a) the emergency activity referred to in subregulation (1)(a)(ii) can reasonably be regarded as part of a response to an emergency situation that consists only of —
 - (i) the emergency activity; and
 - (ii) 1 or more other emergency activities;and
 - (b) the response to the emergency situation was substantially commenced before repeal day.

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- (4) An activity is an *emergency activity* if it is carried out in an emergency situation for the purpose of preventing or minimising 1 or more of the following —
- (a) loss of life of people;
 - (b) prejudice to the safety of people;
 - (c) harm to the health of people.

Note for this subregulation:

This subregulation is based on section 98(d) of the 2021 Act.

Part 8 — Remediation

31. Authorisations to carry out remediation if remediation order contravened

- (1) In this regulation —
remediation order has the meaning that was given in section 11 of the 2021 Act.
- (2) An authorisation under section 197(1) of the 2021 Act that is in effect immediately before repeal day continues in effect on and after repeal day as if the 2021 Act had not been repealed.
- (3) Subregulation (4) applies to a contravention of a remediation order —
 - (a) that occurs before repeal day; but
 - (b) in relation to which no authorisation is given under section 197(1) of the 2021 Act before repeal day.
- (4) On and after repeal day, section 197(1) of the 2021 Act continues to apply in relation to the contravention as if the 2021 Act had not been repealed, and an authorisation may be given in relation to the contravention accordingly.
- (5) For the purposes of subregulation (4), an authorisation may be given by the Minister.
- (6) Nothing done that is authorised by an authorisation to which subregulation (2) applies, or an authorisation given by virtue of subregulation (4), constitutes an offence against the Act.
- (7) The provisions of the Act creating, or otherwise relating to, offences apply subject to subregulation (6).
- (8) Section 80(2)(b) of the Act applies subject to this regulation.

32. Recovery of remediation costs

- (1) Section 197(2) of the 2021 Act continues to apply on and after repeal day in relation to the following costs of remediation as if the 2021 Act had not been repealed —
 - (a) costs incurred before repeal day;
 - (b) costs incurred on or after repeal day by virtue of an authorisation to which regulation 31(2) applies;
 - (c) costs incurred on or after repeal day by virtue of an authorisation given by virtue of regulation 31(4).
- (2) For the purposes of subregulation (1), proceedings under section 197(2) of the 2021 Act may be continued or commenced by the Minister.
- (3) Section 80(2)(b) of the Act applies subject to this regulation.

33. Recovery of costs by person given remediation order

- (1) Section 199 of the 2021 Act continues to apply on and after repeal day in relation to costs of compliance incurred before repeal day as if the 2021 Act had not been repealed.
- (2) Section 80(2)(b) of the Act applies subject to this regulation.

Part 9 — ACH Directory

34. Transfer of information and documents included on ACH Directory

- (1) In this regulation —
ACH Directory means the directory established under section 211 of the 2021 Act.
- (2) Subregulation (3) applies to the information and documents included on the ACH Directory immediately before repeal day to the extent that the information and documents —
 - (a) are not those to which section 81 of the Act applies; and
 - (b) are of a kind that can be recorded in a register maintained under section 38 of the Act.
- (3) On repeal day, the information and documents must be transferred to, and recorded in, a register under section 38 of the Act.

Part 10 — Securing compliance

Division 1 — Preliminary

35. Terms used

In this Part —

authorised officer means an officer of the Department authorised under regulation 36(1);

CI Act means the *Criminal Investigation Act 2006*.

Division 2 — Application of *Criminal Investigation Act 2006*

36. Authorised officers

- (1) The chief executive officer of the Department may authorise officers of the Department for the purposes of this Division.
- (2) An authorised officer is authorised to investigate offences under the 2021 Act committed before repeal day.

Note for this subregulation:

These are offences to which section 84(1) of the Act applies.

37. Authorised officers to be public officers under CI Act

- (1) For the purposes of section 9(1) of the CI Act, the authorisation of an officer of the Department under regulation 36(1) is taken to be an appointment to an office.
- (2) For the purposes of the CI Act —
 - (a) the office of authorised officer is taken to be prescribed by the Act under section 9(1)(a) of the CI Act; and
 - (b) the following powers in the CI Act are taken to be prescribed by the Act under section 9(1)(b) of the CI Act in respect of that office —
 - (i) the powers in Part 2;
 - (ii) the powers in Part 5 Division 1;

- (iii) the powers in section 33;
- (iv) the powers in section 39, except subsection (1)(f);
- (v) the powers in Part 5 Division 3, except sections 43(8)(b)(ii) and 44(2)(f) and (g)(iv);
- (vi) the powers in Part 6;
- (vii) the powers in Part 7;
- (viii) the powers in Part 13.

38. Entering Aboriginal places

- (1) In relation to the investigation of an offence by an authorised officer, section 232 of the 2021 Act applies as if the 2021 Act had not been repealed.
- (2) For the purposes of subregulation (1), in section 232 of the 2021 Act —
 - (a) the reference to section 231(1)(a) of the 2021 Act is to any provision of the CI Act that gives a power to enter a place without a warrant; and
 - (b) references to an inspector are to an authorised officer.

39. Dealing with Aboriginal ancestral remains

- (1) This Division does not authorise the seizure of Aboriginal ancestral remains.
- (2) In relation to the investigation of an offence by an authorised officer, section 242 of the 2021 Act applies as if the 2021 Act had not been repealed.
- (3) For the purposes of subregulation (2) —
 - (a) in section 242 of the 2021 Act —
 - (i) references to an inspector are to an authorised officer; and

- (ii) the reference to Part 10 Division 3 of the 2021 Act is to the CI Act; and
 - (iii) the reference to the ACH Council is to the Committee;
 - and
 - (b) if human remains are transferred into the custody of the Committee under section 242(b) of the 2021 Act — section 82(4) of the Act applies as if the human remains had been transferred into the custody of the Committee under section 82(3) of the Act (whether or not the human remains are Aboriginal ancestral remains).
- (4) If human remains transferred into the custody of the Committee under section 242(b) of the 2021 Act are Aboriginal ancestral remains, regulation 7 applies accordingly.

40. Forensic examination of Aboriginal objects

In conducting a forensic examination of an Aboriginal object under section 21 of the CI Act, an authorised officer must not dismantle, damage or destroy the object.

Division 3 — Seized things

41. Security of seized things

- (1) Section 240(1) of the 2021 Act continues to apply on and after repeal day in relation to things seized before repeal day as if the 2021 Act had not been repealed.
- (2) Section 240(1) of the 2021 Act applies in relation to things seized in the exercise of powers under the CI Act by virtue of Division 2 as if —
 - (a) the 2021 Act had not been repealed; and
 - (b) the reference to an inspector seizing a thing were to an authorised officer seizing a thing.

- (3) For the purposes of subregulations (1) and (2), the function of an inspector under section 240(1) of the 2021 Act is a function of the chief executive officer of the Department.
- (4) A person must not move, tamper or otherwise interfere with a seized thing without the approval of the chief executive officer of the Department.
Penalty for this subregulation: a fine of \$1 000.
- (5) In subregulation (4) —
seized thing means —
- (a) a seized thing (as was defined in section 221 of the 2021 Act) that was seized before repeal day; or
 - (b) a thing seized in the exercise of powers under the CI Act by virtue of Division 2.

42. Dealing with, and forfeiture of, seized things

- (1) Section 85 of the Act, and section 241 of the 2021 Act as it continues to apply under section 85 of the Act, apply with any necessary modifications in relation to things seized in the exercise of powers under the CI Act by virtue of Division 2 as those sections apply in relation to things seized before repeal day.
- (2) In section 258(1) of the 2021 Act, as it continues to apply under section 84 of the Act, references to a seized thing include a thing seized in the exercise of powers under the CI Act by virtue of Division 2.

43. Dealing with seized Aboriginal objects

- (1) This regulation applies to an Aboriginal object that is transferred into the custody of the Committee in accordance with —
- (a) an order under section 84(5)(a) of the Act; or
 - (b) a direction under section 85(4)(a) of the Act.

- (2) If the object is a secret or sacred object, section 63 of the 2021 Act applies in relation to the object as if the 2021 Act had not been repealed.

44. Application of *Criminal and Found Property Disposal Act 2006*

Section 86 of the Act, and section 259(1) of the 2021 Act as it continues to apply under section 86 of the Act, apply with any necessary modifications in relation to things seized in the exercise of powers under the CI Act by virtue of Division 2 as those sections apply in relation to things referred to in section 86(1)(a) of the Act.

Part 11 — Other matters

45. Revival of things that ceased to have effect before repeal day

- (1) This regulation applies to anything that, before repeal day, ceased to have effect under the Act by virtue of the operation of sections 4A and 4B of the Act as in force before repeal day.
- (2) On and after repeal day, the thing has the same effect under the Act as it would have had if sections 4A and 4B of the Act had never been inserted.
- (3) This regulation does not apply to the following —
 - (a) a spent protected area order, as defined in section 73(1) of the Act;
 - (b) a consent under section 18 of the Act to which section 74(1) or (2) of the Act applies or a consent referred to in section 74(3) of the Act;
 - (c) an authorisation, approval or consent to which any of section 75(1) to (6) of the Act applies or an authorisation, approval or consent referred to in section 75(7) of the Act;
 - (d) a thing that, under Part 9 of the Act or another provision of these regulations, is stated to cease to have effect at the beginning of repeal day or to have no effect on and after repeal day.

Note for this subregulation:

The things listed in this subregulation include things that are excluded from the application of this regulation because their effect on and after repeal day is specifically dealt with in Part 9 of the Act or another provision of these regulations.

46. Things previously done by or in relation to Aboriginal Cultural Material Committee

- (1) In this regulation —
former Committee means the Committee referred to in section 72(1) of the Act.
- (2) Anything done by, or in relation to, the former Committee before repeal day is, to the extent necessary or convenient for the purpose of continuing its effect on and after repeal day (including by virtue of regulation 45(2)), taken to have been done by, or in relation to, the Committee.

Examples for this subregulation:

1. An opinion formed before repeal day by the former Committee for the purposes of section 5(c) of the Act.
2. The giving of a notice under section 18(2) of the Act to the former Committee before repeal day.

47. Disclosure of information under s. 303 of 2021 Act

Section 303(5) of the 2021 Act continues to apply on and after repeal day in relation to disclosures of information made before repeal day as if the 2021 Act had not been repealed.

48. Protection from liability for wrongdoing

Despite the repeal of the 2021 Act, section 305 of the 2021 Act continues to apply, on and after repeal day, in relation to the following —

- (a) the performance or purported performance, before repeal day, of a function under the 2021 Act;
- (b) the performance or purported performance, on or after repeal day, of a function under the 2021 Act as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise.

49. Records of ACH Council

At the beginning of repeal day, the records of the ACH Council become the records of the Committee and, on and after repeal day, the Committee may hold, record, use or disclose the records for the purpose of, or in connection with, performing its functions.

50. Confidentiality

- (1) A person must not, directly or indirectly, record, disclose or make use of any confidential information except —
- (a) for the purpose of, or in connection with, performing a relevant function; or
 - (b) as required or allowed under a relevant provision; or
 - (c) for the purposes of any relevant legal proceedings; or
 - (d) with the written consent of the person to whom the information relates.

Penalty for this subregulation: a fine of \$1 000.

- (2) For the purposes of subregulation (1) —
- (a) **confidential information** is information obtained by reason of a function that the person has, or at any time had, in the administration of —
 - (i) the 2021 Act as in force before repeal day; or
 - (ii) the 2021 Act as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise;
- and
- (b) a **relevant function** is a function under —
 - (i) the Act; or

- (ii) the 2021 Act as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise;
 - and
 - (c) a **relevant provision** is a provision of —
 - (i) the Act or another written law; or
 - (ii) the 2021 Act as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise;
 - and
 - (d) **relevant legal proceedings** are legal proceedings —
 - (i) arising under the Act; or
 - (ii) arising under the 2021 Act as in force before repeal day or as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise.
- (3) Information relating to trade processes, financial information or culturally sensitive information that has been disclosed for a particular purpose under subregulation (1), or under section 306(1) of the 2021 Act before repeal day, must not be used for any other purpose by —
- (a) the person to whom the information is disclosed; or
 - (b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.
- Penalty for this subregulation: a fine of \$1 000.
- (4) In subregulation (3) —
- culturally sensitive information** has the meaning that was given in section 11 of the 2021 Act.

- (5) Subregulation (1) does not extend to the recording, disclosure or use of —
- (a) statistical or other information that could not reasonably be expected to lead to the identification of any person to whom it relates; or
 - (b) information that is already in the public domain.

51. Use of information

- (1) On and after repeal day, 2021 Act information may be held, recorded, disclosed or made use of in, or otherwise for the purposes of, the administration of the Act.
- (2) In subregulation (1) —
- 2021 Act information** means information —
- (a) obtained before repeal day in, or otherwise for the purposes of, the administration of the 2021 Act; or
 - (b) obtained on or after repeal day in, or otherwise for the purposes of, the administration of the 2021 Act as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise.
- (3) On and after repeal day, 1972 Act information may be held, recorded, disclosed or made use of in, or otherwise for the purposes of, the administration of the 2021 Act as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise.
- (4) In subregulation (3) —
- 1972 Act information** means information obtained before, on or after repeal day in, or otherwise for the purposes of, the administration of the Act.

52. References to *Aboriginal Cultural Heritage Act 2021*

If, on or after repeal day, a written law or document refers to the *Aboriginal Cultural Heritage Act 2021* the reference is taken, if the context permits, to be a reference to the *Aboriginal Heritage Act 1972*.

53. Delegations by Minister

On and after repeal day, section 13 of the Act applies to any functions of the Minister under the 2021 Act as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise.

54. Delegations by chief executive officer

- (1) Subject to subregulation (2), the chief executive officer of the Department may delegate to an officer of the Department any functions of the chief executive officer under the 2021 Act as the 2021 Act continues to apply under Part 9 of the Act, these regulations or otherwise.
- (2) The chief executive officer of the Department cannot delegate the function that the chief executive officer has under section 99(1) of the 2021 Act as that section continues to apply under regulation 13.

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Notes

This is a compilation of the *Aboriginal Heritage (Transitional Provisions) Regulations 2023*. For provisions that have come into operation see the compilation table.

Compilation table

Citation	Published	Commencement
<i>Aboriginal Heritage (Transitional Provisions) Regulations 2023</i>	SL 2023/167 1 Nov 2023	Pt. 1 (other than r. 4): 1 Nov 2023 (see r. 2(a)); r. 4 and Pt. 2-11: 15 Nov 2023 (see r. 2(b) and SL 2023/161 cl. 2)

Defined terms

*[This is a list of terms defined and the provisions where they are defined.
The list is not part of the law.]*

Defined term	Provision(s)
1972 Act information	51(4)
2021 Act.....	4
2021 Act information	51(2)
Aboriginal ancestral remains	4
Aboriginal cultural heritage	29(7)
Aboriginal object	4
ACH Council	4
ACH Directory.....	34(1)
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authorised officer	35
CI Act.....	35
confidential information.....	50(2)
consented purpose.....	26(1)
culturally sensitive information	50(4)
due diligence assessment	29(7)
emergency activity	30(4)
endorsement or notation.....	12(1)
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relevant function	50(2)
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relevant provision	50(2)
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substantial commencement condition	29(2), (3), 30(2), (3)
transitioned consent	25(1)

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