NSW EDO

DEFENDING THE ENVIRONMENT
ADVANCING THE LAW

Submission on the Draft Aboriginal Cultural Heritage Bill 2018

prepared by

EDO NSW
April 2018

About EDO NSW

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Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

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EDO NSW is part of the Environmental Defenders Offices of Australia, a national network of centres that help to protect the environment through law in their states.

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EXECUTIVE SUMMARY

The NSW Government is proposing an overhaul to Aboriginal cultural heritage laws.

Our submission on the draft Aboriginal Cultural Heritage Bill 2018 (**draft Bill**) draws on three decades of legal expertise and assistance to Aboriginal people and communities in heritage, planning and environmental law matters, including casework, legal outreach and law reform.

Since the draft Bill was released in late February 2018, EDO NSW has visited Aboriginal communities and clients in regional NSW, from the Northern Rivers to the Far West, to brief them on the draft Bill and hear their aspirations for cultural heritage protection. We have also attended Government workshops on the 2017 Consultation Paper and the draft Bill.

We would like to acknowledge the assistance of our Aboriginal Advisory Committee,[1] and all Aboriginal people and organisations that we heard from and spoke to during the consultation period, including land councils and elders groups. We have heard widely varying views on the reforms, from cautious optimism to consultation fatigue.

This experience has reinforced our concern that eight weeks of consultation on the draft Bill has not been adequate to inform Aboriginal people about the details of the reforms and listen to their concerns and possible solutions.

Following the consultation period we understand the draft Bill will be amended in response to submissions and the Government will introduce the amended Bill to Parliament soon after.

If passed by Parliament, and depending on any amendments made to this draft, the Bill will:

- establish standalone Aboriginal cultural heritage legislation with new objects or aims;
- establish a new Aboriginal Cultural Heritage Authority (**ACH Authority**) to oversee, protect and care for, and make some decisions about Aboriginal cultural heritage;
- reserve various important decisions for the Minister responsible for the new Act, including with advice and recommendations from the ACH Authority;
- create Local Consultation Panels to identify and advise the ACH Authority on local heritage matters, and to negotiate Aboriginal Cultural Heritage Management Plans (**ACH Management Plans**);
- replace Aboriginal Heritage Impact Permits (**AHIPs**) with a new, earlier assessment pathway, ACH Management Plans and a Code of Practice from the ACH Authority;
- replace the Aboriginal Heritage Information Management System (**AHIMS**) with a new information database and mapping system controlled by the ACH Authority;
- transfer a range of functions and powers from the Office of Environment and Heritage (**OEH**) to the ACH Authority, including ownership and repatriation of Aboriginal

[1] Members are: Zachary Armytage (Community Legal Centres NSW), Jason Behrendt (Chalk & Behrendt Lawyers & Consultants), Neva Collings (Orange Door Legal), Tony McAvoy SC (Frederick Jordan Chambers), Natalie Rotumah (NTSCORP Limited) and Alice Williams (Murray Lower Darling Rivers Indigenous Nations). The EDO NSW Aboriginal Advisory Committee:

- informs and advises us on environmental law issues that affect NSW Aboriginal communities;
- provides an Aboriginal perspective to our policy and law reform work;
- advises us on the adequacy of our existing measures to advise and represent Aboriginal communities and individuals about environmental legal matters; and
- advises us on protocols and procedures to ensure we operate in a culturally appropriate and respectful manner, particularly when providing services to Aboriginal clients.

objects and ancestral remains, mapping and information systems, management and approval of certain development impacts, compliance and enforcement, funding allocation, monitoring and reporting; and

- leave a range of details to be determined by future policies and regulations (including how new institutions and processes will work), following the establishment of the ACH Authority and further consultation with Aboriginal people, stakeholders and the broader NSW community.

Opportunities and concerns

The draft Bill and further consultation processes offer a genuine opportunity to improve on the inadequate and outdated approach to cultural heritage under the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**). Any reforms in this area will be complex and take time.

Improvements and opportunities in the proposals include:

- standalone legislation with new Aboriginal institutions and decision-making;
- broader recognition and definitions of Aboriginal cultural heritage, including intangible heritage;
- a new information system for mapping, monitoring and reporting;
- greater Aboriginal responsibility for heritage management and oversight, compliance and enforcement, and associated opportunities for empowerment, capacity-building, employment and self-determination.

Replacing Aboriginal Heritage Impact Permits with upfront assessment and negotiated ACH Management Plans also has positive potential. This relies on clear assessment triggers across a wide scope of development categories and activities, equitable voices and accountable decision-making.

All of these positive aspects will only be effective with full and proper resourcing, cultural legitimacy, and sufficient Aboriginal control.

EDO NSW also has a number of key concerns that should be addressed before the Bill is introduced in to Parliament. These include:

- excessive ministerial powers and open-ended discretions – such as for 'declaring' ACH;
- lack of any public information or discussion of major resourcing questions – in particular how (and whether) the ACH Authority and Local Panels will be fully resourced to fulfil their functions, and build Aboriginal capacity to carry out all of those functions;
- lack of clarity and explanation of how new definitions will be implemented in practice, including the level of protection for declared ACH, and the practicalities of registering intangible ACH;
- exclusion of major projects from standard assessment pathways and harm offences;
- lack of clarity around which projects and activities will need to follow the assessment pathway;

- a clear imbalance in review and appeal rights that favours developers or landowners, without according the same level of procedural fairness to Aboriginal people whose heritage is affected, contrary to the aims of the reforms and draft Bill.

Structure of this submission

In this submission, EDO NSW comments on six priority issues in the draft Bill that should be addressed before the Bill is introduced to Parliament, followed by detailed analysis of the 10 parts of the draft Bill and its schedules. We make comments and **recommendations** throughout the submission.

The first part of this submission highlights six priority issues to be addressed:

1. **New definition of Aboriginal cultural heritage – and how it applies**
2. **New Aboriginal institutions - adequate resourcing and membership**
3. **Critical decisions are left to the Minister, with excessive discretion**
4. **Exemption of major projects from protection standards and harm offences**
5. **Up-to-date mapping system**
6. **Aboriginal people deserve fair and equitable review and appeal rights.**

The second part of this submission is organised under the structure of the Draft Bill:

Part 1 Preliminary

Part 2 Aboriginal Cultural Heritage Authority and Local Consultation Panels

Part 3 Aboriginal cultural heritage declarations and information

Part 4 Conservation of Aboriginal cultural heritage

Part 5 Aboriginal cultural heritage regulatory system

Part 6 Financial provisions

Part 7 Regulatory compliance mechanisms

Part 8 Investigation powers

Part 9 Criminal and civil proceedings

Part 10 Miscellaneous

Schedules to the Draft Bill.[2]

[2] The draft Bill contains five Schedules:
Schedule 1 Members and procedure of the Board of the ACH Authority
Schedule 2 Amendment of Heritage Act 1977
Schedule 3 Amendment of National Parks and Wildlife Act 1974
Schedule 4 Amendment of other Acts and instruments
Schedule 5 Savings, transitional and other provisions.

EDO NSW Key Recommendations

Some of the key **recommendations** in our submission include the following:

- Before the Bill is introduced to Parliament, consult further with Aboriginal people about the definitions and their practical effect and interpretation throughout the draft Bill.

- Before the Bill is introduced to Parliament, provide transparent information on:
    - resourcing of new Aboriginal bodies including the Aboriginal Cultural Heritage Authority (**ACH Authority**) and Local Consultation Panels (**Local Panels**); and
    - how Aboriginal views have been fully considered to ensure membership of these bodies have cultural legitimacy and independence from the Minister.

- Consistent with the aims of the reforms and the draft Bill, more decisions should be made by the new ACH Authority rather than the Minister for Aboriginal Cultural Heritage. In particular:
    - Aboriginal cultural heritage declarations,
    - interim protection orders,
    - codes of practice (for exemptions to harm offences) and
    - approval of ACH maps (as distinct from the mapping method).

- Key decisions must be informed by mandatory decision-making criteria (including ministerial decisions that we say the ACH Authority should hold).

- The Bill must be clearer and more robust on the process and consequences of declaration of ACH, and the protections that apply to declared ACH.

- We support the development of up-to-date mapping and information services controlled and maintained by a new ACH Authority. This must be well-resourced.

- The Bill needs to clarify when its impact assessment pathways do or do not apply.

- The ACH Authority and Local Panels must have sufficient time and resources to review (and autonomy to determine) integrated development applications.

- ACH management plans and harm offences should apply to major projects, smaller government infrastructure and resource exploration activities.

- Scope of protection and harm offences should extend to sites of Aboriginal significance that are known but not 'declared' (in addition to Aboriginal objects, ancestral remains and declared ACH), particularly if they are newly uncovered or have been nominated for a declaration but not yet determined.

- Amend the draft Bill to give merit appeal rights to Aboriginal people and groups (and rights to join and be heard at legal proceedings), including in relation to:
    - ACH management plans (this is particularly important where a Local Panel has not agreed to the draft plan);
    - refusals to declare ACH; and
    - refusals to make interim protection orders.

- Alternatively, to ensure rights and privileges are equitable, proposed merit appeal rights for developers and landholders must be removed from the draft Bill.

BACKGROUND TO THE REFORMS

The draft proposals build on several years of consultation. The NSW Government issued a Consultation Paper, *A proposed new legal framework – Aboriginal cultural heritage in NSW*, in September 2017.[3] The Consultation Paper sets out five aims of the proposed new system:

A. ***Broader recognition of Aboriginal cultural heritage values*** *– by recognising in law a more respectful and contemporary understanding of Aboriginal cultural heritage*
B. ***Decision making by Aboriginal people*** *– by creating a new governance structures that gives Aboriginal people legal responsibility for and authority over Aboriginal cultural heritage*
C. ***Better information management*** *– improving outcomes for Aboriginal cultural heritage through new information management systems and processes that are overseen by Aboriginal people*
D. ***Improved protection, management and conservation of Aboriginal cultural heritage*** *– by providing broader protection and more strategic conservation of Aboriginal cultural heritage values*
E. ***Greater confidence in the regulatory system*** *– by providing better upfront information to support assessments, clearer consultation processes and timeframes, and regulatory tools that can adapt to different types of projects.*

In February 2018 the Government released a draft Bill to give effect to these reforms – the draft *Aboriginal Cultural Heritage Bill 2018*. The Draft Bill proposes a new framework for the regulation of Aboriginal cultural heritage to give effect to these aims. This would include a new ACH Authority led by Aboriginal people.

The Draft Bill establishes things like:

- Legally defining Aboriginal cultural heritage (**ACH**) (p. 3)
- Who can make decisions about ACH (p.7)
- Recording information about ACH (p. 12)
- Procedures for harming ACH (p. 15)
- Offences and penalties for harming ACH without permission (p. 24)
- Mechanisms for protecting ACH (p. 28)
- Funding matters (p. 38)

Consultation period

The Draft Bill and consultation paper are on public exhibition until **20 April 2018**. While this period includes a two-week extension, we consider that an eight-week consultation on the draft Bill is far too short for Aboriginal people and groups to properly consider the Bill.

If the Bill becomes the law

Community feedback is likely to result in changes to the Draft Bill before it is introduced to NSW Parliament. If it is passed by both Houses of Parliament (with or without amendments) the ACH Bill will become law. The Government will then make a Regulation to support the new Act. The Regulation will contain a lot of the detail about how the new system operates, and will benefit from further detailed consultation with Aboriginal people. The new system would be established in stages – it is important to note that the new scheme would potentially not commence for a number of years as adequate time is needed to establish key bodies such as the Local panels and key supporting instruments, policies, codes etc.
Over time, cultural heritage provisions would move from the NPW Act to the new *ACH Act.*

[3] (**Consultation Paper**): http://www.environment.nsw.gov.au/research-and-publications/publications-search/a-proposed-new-legal-framework-aboriginal-cultural-heritage-in-nsw, accessed April 2018.

A. Priority issues to address before the Bill is introduced to Parliament

EDO NSW considers there are six key issues with the new proposed laws that the NSW Government should address and clarify before it introduces a further Bill to Parliament:

1. **New definition of Aboriginal cultural heritage – and how it applies**
2. **New Aboriginal institutions are welcome – adequate resourcing and membership legitimacy are crucial**
3. **Critical decisions are left to the Minister, with excessive discretion**
4. **Exemption of major projects from protection standards and harm offences**
5. **Up-to-date mapping system is essential and holds promise**
6. **Aboriginal people deserve fair and equitable review and appeal rights.**

Further analysis and recommendations are outlined in the second part of this submission.

1. New definition of Aboriginal cultural heritage – and how it applies

The new definition of Aboriginal cultural heritage encompasses tangible and intangible aspects. In addition to Aboriginal objects, places and ancestral remains, cultural heritage is defined to include 'living, traditional or historical practices, representations, expressions, beliefs, knowledge or skills' and 'the associated environment, landscapes… and materials' that 'Aboriginal people recognise as part of their culture and identity.'[4]

The Draft Bill proposes that intangible heritage (including intellectual creation or innovation) can be registered to limit its commercial use by agreement with the registered knowledge holders.[5] The practical challenges of protecting intangible heritage will benefit from hearing from Aboriginal people and other experts in the field, and understanding Aboriginal needs and aspirations in this area.

Expanding the current definition of Aboriginal cultural heritage and recognising that this heritage belongs to Aboriginal people are positive steps in the Draft Bill.[6] However, we are concerned that the consultation process and timeframes have not given Aboriginal people sufficient information or opportunities to understand how (and whether) these definitions translate to protections in the Bill – including 'declarations' of Aboriginal cultural heritage (such as important places and landscapes), the mapping of heritage, and offences for harm. These concerns are briefly discussed in other priority issues, and in our detailed analysis below.

The Draft Bill would also grant Aboriginal people greater autonomy over their own cultural heritage by transferring ownership, care and protection of certain objects and ancestral remains to the ACH Authority, on Aboriginal peoples' behalf.[7] The actual mechanisms for transferring ownership, and for repatriation, will require further engagement and sensitivity, recognising local Aboriginal groups with intimate connections to that heritage.

[4] Draft Bill clause 4.
[5] Draft Bill clause 38.
[6] Draft Bill clause 3(a)(i) and s 4.
[7] Draft Bill clause 24(1).

Before the Bill is introduced we **recommend** consulting closely with Aboriginal people about the definitions and their practical effect and interpretation throughout the draft Bill.

2. New Aboriginal institutions – adequate resourcing and membership legitimacy

The ACH Authority and Local Consultation Panels have the potential to increase Aboriginal representation and responsibility in positive and ground-breaking ways. Their varied roles and significant responsibilities make resourcing, expertise and cultural legitimacy essential to their success.

Given the nature of the consultation, at the time of reviewing the draft Bill, it remains unclear how the ACH Authority, Local Panel members and support bodies are nominated and appointed to represent the diverse views of Aboriginal communities. This is open to consultation, and it is important that Aboriginal views take precedence. Consultation notes say the Minister will formally appoint Authority members through a 'community-driven process'.[8] However, the Draft Bill also enables the Minister to remove members at will.[9] The Bill needs more safeguards to support Aboriginal trust in the Authority's independence.

The ACH Authority would be responsible for upfront oversight of Management Plans, and back-end investigation and enforcement action. It must be adequately resourced to reject unacceptable impacts and respond promptly to offences.[10]

Local Consultation Panels would play a key role in the new framework. Their resourcing needs to be clarified and resolved as a priority. Well-resourced Local Panels could fully participate in management plan negotiations, informed by technical knowledge as required. Local Panels must have sufficient time, staff and expertise to independently conduct their roles. This would create an equal balance of power with well-resourced and experienced development proponents.

However, we are concerned that indicative timeframes in the draft Bill and consultation materials are inadequate to their purpose – such as 10 days for the ACH Authority to consider whether a proponent's Assessment Report has complied with the ACH Assessment Pathway Code of Practice (**ACHAP Code**). Other timeframes are delegated to regulations.

We **recommend** transparent information be immediately provided on resourcing these new Aboriginal bodies; and information on ensuring their membership has cultural legitimacy and independence from the Minister, based on Aboriginal views during the consultation process.

3. Critical decisions are left to the Minister, with excessive discretion

The Draft Bill leaves the Minister with too much discretion around pivotal decisions. This does not sit well with the aims of the Draft Bill (s. 3) or the wider reforms, which include 'B. Decision-making by Aboriginal people'.

Under the Draft Bill, as now, the Minister would decide whether to approve 'Declared' Aboriginal Cultural Heritage, based on the ACH Authority's recommendations.[11] The

[8] Draft Bill clauses 8 and 15.
[9] Draft Bill, Schedule 1 clause 5(2).
[10] Draft Bill clause 121(1). The Authority may also be exposed to significant costs from inequitable developer appeal rights (see 6/7 below).
[11] Draft Bill clause 18(1).

Minister's discretion is absolute. There are no binding criteria to consider. Unlike other decisions there is no timeframe for the Minister to make a declaration. We know from experience that without clear accountability, cultural heritage nominations can take years to process. Finally, there are no merit appeal rights if Aboriginal people are not satisfied with the decision. While the Draft Bill protects Aboriginal objects, ancestral remains and Aboriginal places currently listed against harm,[12] anything else is ultimately subject to the Minister's discretion.

The proposed process for declaring Aboriginal heritage may reflect the discretionary approach of the NSW *Heritage Act 1977*, but a 40-year-old European heritage law is not an up-to-date model for Aboriginal heritage protection. The Bill needs to reflect modern best practice, and meet the aims of the reforms to give Aboriginal people genuine control over their cultural heritage.

Similarly, the Authority may only *recommend* that the Minister issue an 'interim protection order' to protect a heritage area facing threats from development.[13] The Minister still holds ultimate discretion. Landholders would have rights to appeal against an interim protection order, but Aboriginal groups could not appeal if the Minister refused to issue one.[14]

Other ministerial powers relate to finalising maps, overriding conservation agreements, and making codes or regulations for additional defences.'[15]

On a positive note, we welcome the ACH Authority's responsibility for compliance and enforcement more generally under the Bill, and that the Authority itself may issue short-term 'stop work orders' to prevent or suspend actions that may breach the ACH Act. The Authority could also issue remedial orders to repair harm, investigate breaches and bring criminal or civil enforcement proceedings.

Overall, we **recommend** that the ACH Authority should have the power to declare heritage based on clear criteria, and to issue the full suite of protection orders. Best practice laws would also afford due process, procedural fairness and equity for landowners *and* Aboriginal people. In these areas the Draft Bill leaves room for improvement.

4. Exemption of major projects from protection standards and harm offences

The Draft Bill continues the current approach of exempting major development proposals from standard assessment pathways, management plans and harm offences.[16] This includes State Significant Development such as mining, gas and heavy industry, and State Significant Infrastructure such as ports, pipelines, major road and rail.

This is a major problem with the draft Bill, and a source of uncertainty and worry for Aboriginal people. Without earlier engagement and better upfront planning, major projects will continue to cause long-term impacts, disputes and anguish at the loss of Aboriginal heritage. Many of our clients can attest to these concerns, and they have been strongly expressed at the Government's workshops, despite the limited information available.

[12] Draft Bill clauses 39-41; Schedule 5 clause 3.
[13] Draft Bill clause 78(1).
[14] Draft Bill clause 83.
[15] Draft Bill clauses 20, 34, 35, 41, 43 respectively.
[16] Draft Bill clauses 42, 60(2). See also pp 39-40 of the Government ACH Consultation Paper (2017).

We understand that the ACH Authority will be consulted on major project assessment (as the OEH is now), but the Draft Bill does not clearly set out the process for the community to understand this or give feedback. As a limited first step, we welcome the proposal that the Secretary of the Department of Planning will not be able to 'step in' to make decisions on ACH environmental assessment requirements in place of the ACH authority for major projects. However, broader problems remain with the proposal to exempt major projects from ACH Management Plans, including lack of transparent process and local involvement.

Nor is there a clear reason for exempting major projects from offence provisions. In our view, if it is accepted that major projects can be prosecuted for unauthorised pollution, the same standard should apply to unauthorised harm to Aboriginal heritage.

We **recommend** the draft Bill be amended to require a strong, upfront role for Aboriginal participation in decision-making on the largest and highest-risk development proposals. We also **recommend** that major projects be subject to the Bill's offences for unauthorised harm. These processes are in greatest need of transparency, good planning, accountability and oversight to avoid and minimise harm.

The Bill also needs to clarify how the staged assessment pathways and management plans will apply to government works and other infrastructure, mining and gas exploration ('Part 5 activities' under planning law), and the expanding field of 'complying development'.[17] As a starting point, any activity that could destroy or diminish heritage values deserves scrutiny.

5. Up-to-date mapping system is essential

To work out what areas are known or likely to have heritage values, a new Aboriginal Cultural Heritage Information System is proposed to replace the existing AHIMS database.

Importantly, the ACH Authority will administer the new mapping system, and Local Panels will provide the draft maps.[18] A proposed binary map would highlight areas where Aboriginal cultural heritage exists or is likely to be found. These sensitive areas will alert developers to the need to contact the Local Panel, follow the staged assessment pathway, and if impacts are likely, negotiate an ACH management plan.[19]

Behind the maps, a restricted access database and a public portal controlled by the ACH Authority are proposed to protect sensitive and confidential information.[20]

The new mapping system is an integral part of the reforms. Its security and accuracy must be well established so that Aboriginal communities feel culturally safe about sharing the location of their heritage.

We consider it reasonable that the ACH Authority develop the mapping method with expert cultural heritage and technical assistance. It may also be reasonable that the Minister approve the mapping method on the ACH Authority's recommendation. However, it does not seem necessary that the Minister also approve the ACH map itself, as well as the method.

[17] Draft Bill clause 60 (and Note to that clause). Complying development requires private certifier approval under the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.
[18] Draft Bill clause 20.
[19] Draft Bill clause 55.
[20] Draft Bill clause 19(3).

We **support** the development of up-to-date mapping and information services controlled and maintained by a new Aboriginal Cultural Heritage Authority. This will require significant short- and long-term investment and resourcing. We **recommend** that the Government share its preliminary work on mapping improvements; identify and discuss likely investment required; and identify and manage risks early, in concert with Aboriginal people, supported by other experts.

6. Aboriginal people deserve fair and equitable review and appeal rights

If a development proponent and Local Panel can't reach agreement on an ACH management plan in time, the proponent can request the ACH Authority to approve the plan in any case, after advice from both sides.[21] If the proponent is still unhappy with the Authority's decision (or if a decision isn't made on time), the Draft Bill gives them a further right to challenge the Authority's refusal in the Land and Environment Court.[22] This permits a non-Aboriginal court to review and remake the Aboriginal Authority's decision.[23] It also gives development proponents two avenues of review and appeal that are not available to the owners or custodians of Aboriginal heritage that is threatened by development.

Yet Aboriginal groups might equally disapprove of the ACH Authority's decision on a management plan, particularly if the Local Panel did not agree to it, or needed more time to decide. It is unfair and unjustified that Aboriginal groups have fewer rights than development proponents under the Draft Bill. Protecting cultural heritage should have at least the same priority as development interests. This would recognise, as the Draft Bill otherwise aims to do,[24] that cultural heritage is intrinsic to Aboriginal people's identity and wellbeing, and contributes to the richness of NSW heritage as a whole. The revised Bill must be fairer to Aboriginal people to avoid perpetuating power imbalances entrenched in the current system.

We **recommend** that the draft Bill be amended to give Aboriginal people and groups, including but not limited to Local Consultation Panels, equitable merit appeal rights regarding decisions to approve an ACH management plan. This is particularly important where the Local Panel has not agreed to the plan.

We also **recommend** greater access to merit appeal rights for Aboriginal people and groups regarding decisions under the Bill more generally (for example, where a decision-maker refuses to make a declaration of ACH, or to issue an interim protection order).

[21] Draft Bill clause 49(3)(a).
[22] Draft Bill clause 52(1).
[23] Draft Bill clause 54(4).
[24] Draft Bill clause 3(a)(ii).

B. Detailed comments on Draft Aboriginal Cultural Heritage Bill

In this part of the submission, each part of the bill is addressed by identifying the proposal, our analysis, and recommendations for strengthening the Bill.

1. PRELIMINARY (Objects and definitions)

Aims of the Draft Bill

Proposal

The Draft Bill has several objects or aims. This is what the law seeks to achieve.

The proposed objects are:

- To recognise that ACH belongs to Aboriginal people and to establish a legislative framework that reflects Aboriginal people's responsibility for and authority over ACH.
- To recognise that ACH is a living culture that is intrinsic to the wellbeing of Aboriginal people.
- To establish effective processes for conserving and managing ACH.
- To provide for the collection and use of information about ACH.
- To promote understanding of and respect for ACH among all NSW people.
- To enable and support voluntary actions that conserve Aboriginal heritage

Analysis

We generally support the new aims of the draft Bill, subject to the views of Aboriginal people.

Recommendations

We recommend the objects should include:

- 'to protect ACH' (this could include certain purposes, for example, firstly for the wellbeing of present and future generations of Aboriginal people and secondly for the purpose of conserving, recognising and contributing to the richness of NSW heritage), and
- 'to empower Aboriginal people to make decisions about their cultural heritage', and
- Identify the reasons for '…collection and use of information about' ACH, which should include conservation, recognition, protection, and avoiding and minimising harm.

Definitions of 'Aboriginal cultural heritage' (ACH) and other key terms

Proposal

While ACH means different things to different people, the Draft Bill proposes to give a legal meaning to ACH. Clause 4 defines ACH as:

"*Living, traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with the associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity.*"

The Draft Bill also defines certain aspects of ACH (cl. 4), some of which are noted below.

1. *Aboriginal object*

Any object, article or material evidence that relates to the habitation of land in NSW by Aboriginal people. This:

- may or may not be connected with particular land
- can relate to habitation before or at the same time as the occupation of land by other people.

2. *Aboriginal ancestral remains*

Bodily remains of deceased Aboriginal persons, but does *not* include:

- Bodily remains buried in a cemetery in which non-Aboriginal people are buried
- Bodily remains being treated or examined for forensic purposes

3. *Intangible Aboriginal cultural heritage*

Any practices, representations, expressions, beliefs, knowledge or skills comprising ACH. This generally corresponds to the first line of the ACH definition set out above. It:

- includes intellectual creation or innovation of Aboriginal people based on or derived from ACH
- does not include Aboriginal objects, Aboriginal ancestral remains or any other tangible materials comprising ACH.

4. *Declared Aboriginal cultural heritage*

The draft Bill does not include an upfront definition of 'declared ACH'. However, a note to clause 4 states that landscapes, other places, tangible materials related to Aboriginal life or historical events, as well as objects and ancestral remains can be 'declared' by the Minister to comprise Aboriginal cultural heritage.[25] While clause 18 sets out a process, the draft Bill is less explicit about the consequences and protections that result from a declaration.

Analysis

The definition of ACH is broad – recognising practices, beliefs, knowledge as well as landscapes, environments and objects.

The ACH definition may be used positively to inform the mapping of ACH (discussed below).

However, the protective measures in the Draft Bill (e.g. harm offences, or limiting use of intangible heritage) do not apply to everything that meets the ACH definition. The Bill's protections only apply to:

- Aboriginal objects,
- Aboriginal ancestral remains,
- **declared** ACH, such as a significant Aboriginal place or landscape, and
- **registered** intangible ACH.

[25] Draft Bill, Note to clause 4 (emphasis added):
Under section 18, a landscape or other place having Aboriginal cultural heritage significance, and tangible material relating to Aboriginal life or historical events (in addition to Aboriginal objects and ancestral remains) may be declared to comprise Aboriginal cultural heritage.

The framing of the definitions and protections in the draft Bill mean that, if ACH is **not** an Aboriginal object or Aboriginal ancestral remains, it must be **declared or registered** before it attracts legal protection.

Problems could arise if one aspect of ACH is protected but not another. For example, remains and objects within a burial ground will be protected by the harm offences, but the burial ground as a whole may not be, unless it has been declared to be ACH. This is discussed in relation to protections and harm offences further below.

Recommendations

ACH definitions

- Ensure that Aboriginal voices are given priority in defining Aboriginal cultural heritage (**ACH**), and that the legal effect of the definitions (including any changes) are well understood.
- The definition of ACH significance should refer to 'or' past generations, instead of 'and' past generations', to clarify that significance to present and future generations is sufficient. The policy intent is to ensure the meaning is broad enough to account for difficulties in establishing significance to past generations (even though present or future significance can be established), often due to disruption of past connections and imperfect information.

Intangible ACH

- The intent of proposed protections for intangible cultural heritage must be clear (i.e. what is the source of current or potential harm, and what is the best solution to this?)
- Consider Aboriginal people's experience, expertise and aspirations in this area, and the evidence of relevant intellectual property experts who assist Aboriginal people.

Declared ACH

- The Bill should include an upfront definition of *Declared Aboriginal Cultural Heritage* which refers to the provisions that provide for Declarations (Part 3, draft clause 18). Further recommendations on declared ACH are outlined below.

2. ABORIGINAL CULTURAL HERITAGE AUTHORITY & LOCAL CONSULTATION PANELS

ACH Authority (establishment, management and functions)

Proposal

The Draft Bill proposes to establish a new Aboriginal representative body – the Aboriginal Cultural Heritage Authority (**ACH Authority**) – which will be responsible for making key decisions and recommendations about ACH.

The ACH Authority will, in turn, establish Local ACH Consultation Panels (Local Panels) – either for a particular area of the State or a particular aspect of Aboriginal cultural heritage or both.

The ACH Authority will be a NSW Government agency. It will be managed by a board of Aboriginal people appointed by the Minister. Once appointed, the Board can exercise its powers independently of the Minister's direction or control. The Authority will be able to employ staff and appoint Committees to assist it with its functions.

The ACH Authority will have several important functions, *some* of which are:

- Making recommendations to the Minister on the declaration of ACH (cl. 18)
- Registering intangible ACH (cl. 36)
- Responsible for care of Aboriginal objects and ancestral remains (cll. 24-27)
- Entering ACH Conservation Agreements (cll. 28-35)
- Overseeing ACH assessment reports (cl. 59)
- Determining to approve or refuse ACH Management Plans (cl. 49)

Analysis

In the Draft Bill, the Minister appoints the members of the ACH Authority. We note the Government is consulting on how members are selected, with particular weight to Aboriginal views.

We support the proposal that this appointment should be a 'community driven' process (as a Consultation Note states). However, as the draft Bill stands, there is broad discretion as to how Minister appoints the Authority's executive members. It does not specify formal appointment of members. More on this is likely to be set out in the Bill when introduced to Parliament, or in subsequent regulations.

We are concerned that the Minister can remove an Authority member from office at any time.[26] The independence of the ACH Authority will be at risk if board members can be removed in this way.

Recommendations

We **strongly recommend** that the ACH Authority should hold additional decision-making responsibilities under the draft Bill. In particular:

- to approve ACH declarations (draft Bill, clause 18)

[26] Draft Bill Schedule 1, clause 5(1)(d), 5(2), and clause 7 in relation to removing the Chair or Deputy.

- to make interim protection orders (clauses 78-79)
- to approve ACH maps (as distinct from the 'mapping method') (clause 20)
- codes of practice or 'strategic assessments' that if adopted may authorise activities and exemptions for harm (clause 43).

In relation to governance matters, we **recommend:**

- the preferred ACH Authority governance model be driven by Aboriginal groups;
- the Bill require that members of the ACH Authority Board are formally appointed, after a clear process that is driven by Aboriginal people;
- discretion for the Minister to remove or demote members of the ACH Authority be deleted from Schedule 1;[27]
- ACH Authority members should only be removed by resignation, expiry of term, death or incapacity, reasonable suspicion of impropriety, or by democratic process. Criteria could be clarified in the regulation.

Local ACH Consultation Panels

Proposal

Local Panels will be set up by the ACH Authority and the members will be appointed by the ACH Authority. The Local Panels may be established in relation to an area or a particular aspect of ACH (such as intangible ACH), or both.

The role of the Local Panels is to advise the ACH Authority in relation to the area or aspect of ACH they are responsible for, including:

- Recommendations for the declaration of ACH
- Proposed ACH Conservation Agreements (discussed further below)
- ACH Management Plans (discussed further below)
- The repatriation of Aboriginal objects or Aboriginal ancestral remains
- Preparing draft ACH maps.

The membership and operation of the Local Panels will be in accordance with procedures developed by the ACH Authority.

Analysis

A lot of information and procedure is not yet clear, as it will be up to the ACH Authority to develop procedures for the establishment, membership and operation of the Local Panels. Community trust in the appointment of Local Panels, and sufficient resourcing to do their job, will be major factors in the success or failure of the proposed system.

Recommendations

We **recommend** that the Bill and regulations:

- recognise the need to represent a range of relevant local views and cultural knowledge for Local Panels, and this may go beyond existing local bodies;
- recognise and clarify the diversity of potential sources of strong cultural heritage expertise and supporting roles by a range of Aboriginal organisations, including Aboriginal Land Councils, Elders Groups, Native Title and Traditional Owner bodies.

[27] (clauses 5(1)(d) and 5(2); 7(1)(a) and 7(2))

Ministerial responsibilities

Proposal

As proposed, the Minister has broad powers under many different parts of the Draft Bill, including:

- the ability to appoint and dismiss the board members of the ACH Authority.
- the final say on:
    - what ACH is 'declared' for protection (aside from objects and ancestral remains)
    - whether to issue an interim protection order to unprotected areas
    - the contents of ACH maps
    - the ACH Authority's funding allocation strategy (which would include state budget appropriations).

Analysis

The Minister will have a lot of power over ACH and there is a significant risk that the draft Bill will not reflect Aboriginal people's authority over and responsibility for ACH as intended.

The Minister's decision-making powers are often completely discretionary, with few if any criteria to guide decision-making.

Examples of highly discretionary decisions include declaring ACH, appointing and dismissing ACH Authority members, signing off on the ACH map and its methodology, issuing interim protection orders and making codes or regulations to authorise harm to ACH.

It is unclear which Minister will have responsibility for the ACH Act. This is up to the Government of the day. There is no requirement that the Minister be an Aboriginal person.

The sum of ministerial powers and developers' appeal rights means that there are very few protections for heritage that are actually finally determined by Aboriginal people. If broad Ministerial discretion and proponent merit appeal rights are retained, there is a high risk that Aboriginal people may become 'intermediaries' that do the hard work of assessing Aboriginal cultural heritage significance, but their conclusions and decisions may be overridden by the Minister or the Court.

Recommendations

This submission proposes a range of solutions to remove or constrain ministerial discretion and to improve the fairness and equity of appeal rights (see comments on Part 5 below).

We **recommend** that:

- the draft Bill be revised to reduce both the range of responsibilities and the level of discretion given to the Minister, with specific analysis throughout this submission; amd
- the Bill be amended to place a general duty on the Minister to exercise his or her powers and functions in order to achieve the Bill's objects (this duty could potentially extend to all decision-makers under the Bill).

3. ABORIGINAL CULTURAL HERITAGE DECLARATIONS AND INFORMATION

Declarations of Aboriginal Cultural Heritage

Proposal

The Minister responsible for the ACH Act can make declarations of Aboriginal cultural heritage. This is done on the recommendation of the Aboriginal Cultural Heritage Authority (ACH Authority).

Importantly, declarations can apply to landscapes or other places that have ACH significance. ACH declarations will be vital to the effective protection of ACH at the landscape scale because the harm offences in the Draft Bill only apply to Aboriginal objects, Aboriginal ancestral remains and declared ACH.

The Minister can also declare that any tangible material relating to Aboriginal life or historical events is ACH.

In making a declaration, the Minister can specify activities that may be carried out despite the declaration.

Analysis

Declared ACH appears to be the centrepiece of protection and conservation mechanisms.

We strongly support the continued recognition of significant Aboriginal places and broader recognition of landscapes and connections between tangible and intangible heritage, such as songlines.

However, the declaration provisions are one area where the draft Bill requires significant amendment. We are highly concerned at the level of discretion and lack of detail in the declaration process. We propose a range of measures to strengthen ACH declarations and to better meet the aims of the reforms and the draft Bill.

Problems with clause 18 of the draft Bill include:

- Decisions about ACH significance would still be made by a (likely) non-Aboriginal Minister. We consider this conflicts with the objects of the Draft Bill (clause 3(i)-(ii)).

- The Minister's decision to declare ACH is completely discretionary. The Minister '<u>may</u>, on the recommendation of the ACH Authority' declare ACH. There is no decision-making framework or criteria in the Draft Bill to guide the Minister's decision.

- There is no timeframe for the Minister to make a decision once he or she receives a recommendation to declare ACH. It could take years for a declaration to be made.

- Harm offences will only be effective in protecting ACH if timely declarations are made, as the proposed offences apply only to objects, remains or declared ACH.

- There is no nomination process in the draft Bill, or a right to have nominations considered. It appears that such a process has been deferred to regulations.

- There are no criteria for the ACH Authority in deciding whether to recommend a declaration (although we note and support consultation requirements, such as consulting the landholder, that apply before the Authority recommends a declaration).

- There is no automatic protection (such as a interim protection order by default) to prevent harm to relevant ACH while a valid nomination is being assessed.

- The Draft Bill is unclear as to the consequences of declaration (i.e. how declared ACH is protected). Implicitly, the main consequences appear to be:

    - identification on ACH maps,
    - harm offences will apply, and
    - proposals that may impact declared ACH may need an ACH management plan (and more detailed scrutiny via the ACH assessment pathway).

- The Consultation Paper states that declared ACH will have high levels of protection (p 30), but nothing in the Bill requires this. There are also no explicit higher penalties for harming declared ACH, and the 'significance' of the heritage is not explicit factor in sentencing (cl. 130).

- There is no detail on transparency or requirements to give reasons for decisions.

- If the Minister refuses to declare ACH, no Aboriginal person or body can appeal that decision on the merits. The only appeal option is judicial review – where a legal error in the decision-making process is alleged. This would be almost impossible in practice, as there are no decision-making criteria in the draft Bill.

- The Minister's power to specify activities that can be carried out despite a declaration of ACH could undermine the declaration as a whole, unless it is limited to certain purposes or ACH Authority recommendations.[28]

Recommendations

- The ACH Authority should have the power and duty to determine a declaration of ACH (approve or refuse) instead of the Minister. This is consistent with the aims of the reforms and the draft Bill.[29]

- The Bill should include a clear right for any Aboriginal person or group (including a Local Panel) to nominate a place or other matter as declared ACH.

- The Bill should include a clear obligation on the ACH Authority (or Minister) to consider and determine nominations that are validly made (i.e. made in accordance with the process under the Act and regulations).

- The Bill should explicitly provide for interim protection of ACH nominated for declaration, either by request, or on the ACH Authority's preliminary determination.

[28] In turn, activities specified in the Minister's declaration, which may be carried out despite the declaration (clause 18(2)), are exempt from the harm offences (draft Bill clause 45).
[29] In particular, see Consultation Paper, Aim B. 'Decision-making by Aboriginal people'. The draft Bill's objects (i) and (ii) recognise that ACH belongs to Aboriginal people, that Aboriginal people are responsible for their heritage, and that ACH is 'intrinsic to the well-being of Aboriginal people' (cl. 3).

- The Bill should include clear and mandatory considerations in determining whether to approve or refuse a declaration. In particular:
    - the decision must be made in accordance with or to achieve the Act's objects;
    - the decision-maker must consider the nomination application and the Aboriginal cultural heritage *significance*[30] of the nominated place, landscape or other heritage;
    - if a 'recommendation' model is adopted, the decision-maker must consider the ACH Authority's recommendation report;
    - the decision-maker must consider any submissions made by:[31]
        - (a) any relevant Local ACH Consultation Panel,
        - (b) the landholders of any land concerned,
        - (c) any public or local authority that manages or controls any land concerned,
        - (d) the owners of any object or other material concerned, and
        - (e) members of the public, with particular weight given to the submissions of Aboriginal persons and groups regarding significance, and any evidence of the need for protection that a declaration would provide.

- The Bill should include mandatory timeframes in which to make a determination to approve or refuse a declaration of ACH. The period would vary with the final model for declaration.[32]

- The Bill should provide for a 'deemed refusal' once this consideration period expires (whether automatic or after a further request from the nominating entity). A deemed refusal would trigger a right of applicants to appeal to the Land and Environment Court to determine the matter in place of the decision-maker (i.e. merits appeal).

- While we recommend the ACH Authority be the decision-maker on ACH declarations, if the Minister retains the declaration power – then the draft Bill should be amended to give a merit appeal right to Aboriginal people and groups (including the nominator or relevant Local Panel) to challenge a refusal by the Minister to declare a matter as ACH (including a deemed refusal). Appeal rights should have to be exercised within six months.

- The Bill should require reasons for declaration decisions to be issued, and notified to the nominating person or body, to affected landholders and other interested parties. The regulations should prescribe sensitive and culturally safe publication procedures.

- The Bill should clarify the consequences of a declaration and give effect to the Consultation Paper's proposal to provide elevated protection for declared ACH (p 30). For example, consequences of declaration should include:

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[30] The draft Bill defines *Aboriginal cultural heritage significance*, with reference to intergenerational conservation values, including spiritual, social, historic, scientific or aesthetic significance (clause 4).
[31] (a) to (d) reflect the proposed consultation requirements on the ACH Authority under draft cl. 18(4).
[32] For example:

- If determinations are made by the ACH Authority directly (as we propose), this mandatory period could be longer, with reference to the date of the nomination application (with a limited ability for the Authority to 'stop the clock' to request further information from the nominator).
- On the other hand, if the declaration process involves an ACH Authority recommendation to the Minister (as the draft Bill proposes), the mandatory period should be shorter, with reference to the date of the Authority's recommendation. For example, we consider an upper limit of 90 days would be workable (assuming some form of provisional or interim protection).

This is analogous to the use of timeframes in the *Heritage Act 1977* (NSW).

- clear outright protection of the significance and declared ACH values from harm (importantly, this should include protection from major projects);
- triggering requirements for ACH Management Plans that demonstrably avoid and minimise harm;
- considering specific offence provisions for harming declared ACH;
- ensuring that existing Aboriginal places declared under the NPW Act are given at least equivalent or greater protection in the Bill.[33]

- Consider whether structurally the Declaration of ACH should be located within Part 4 of the draft Bill, on *Conservation of Aboriginal Cultural Heritage.* If there is a preferred policy rationale for locating Declaration separately (with information and mapping under Part 3) this could be clarified.

ACH information system and ACH Maps

Proposal

An online information portal will contain information about ACH, including maps that plot the location of ACH. This information will help inform land-use planning and development proposals (clause 20). Sensitive information will be kept on a restricted database that only certain people will be able to access (clause 19).

Analysis

Our key concerns with mapping are that:

- the Draft Bill requires that the Minister approve the ACH maps prepared by Consultation Panels and finalised by the ACH Authority (s. 20(5)) (as distinct from approving the mapping *method,* s. 20(4)); and
- the Minister 'may, from time to time, approve of the amendment or replacement of ACH maps' (without clearly qualifying the scope of this power).

This raises a significant risk that the maps could become a politicised document instead of a culturally and scientifically accurate representation of cultural heritage in NSW. In turn, this means the ACH Assessment Pathway may not be triggered.

In principle we **support** a well-funded, up-to-date system controlled and maintained by a new ACH Authority, to improve on current tools and systems. There are real concerns about the quality and completeness of the existing AHIMS database.

We note that there is a risk that publishing the location of ACH could lead to its deliberate harm. Trust in the system will rely on good information security, audit and access rules. These will be determined under future regulations, and guidelines from the ACH Authority.

The draft Bill proposes that ACH Maps are prepared by Local Panels and the ACH Authority. However, the Minister has the final say on whether a map is published on the online portal.

[33] We support carrying over existing Aboriginal places as declared ACH (draft Bill, Schedule 5 cl. 3).

Recommendations

We **recommend**:

- deleting the words 'approved by the Minister and' in s. 20(5) – but retaining the requirement to publish the ACH maps on the online portal/information system;
- that, if oversight or peer review of mapping quality is required, this be done by an independent expert body with appropriate expertise, not a Minister (clause 20 could require maps be referred to this body before they are published);

However, if the Minister retains the power to approve the ACH map, we **recommend**:

- the Bill should contain obligations on the Minister to ensure that the map accurately depicts known or likely ACH values (and is kept up to date); and
- the Bill should require that the Minister is informed by the best available information, in particular the ACH Authority's recommendations.

We further **recommend** that the Government:

- include an explicit offence for the unauthorised access, collection, use or disclosure of culturally sensitive information held on the ACH information system;
- share any preliminary work on mapping improvements, and identify and discuss the likely investment required; and
- identify and manage risks early, in concert with Aboriginal people, supported by other experts.

ACH Strategic Plans

Proposal

Local Panels can prepare draft ACH Strategic Plans which will be finalised by the ACH Authority.

ACH Strategic Plans identify local priorities and can be used to inform planning and resourcing decisions. They can relate to:

- ACH conservation and management
- Access to ACH
- Public awareness of ACH
- Intergenerational knowledge transfer.

Public authorities must consider any relevant ACH Strategic Plans when exercising their functions.

Analysis

ACH Strategic Plans would enable more coordinated planning for conserving and celebrating heritage.

The requirement for public authorities to consider ACH Strategic Plans may mean, for example, that local councils or Roads & Maritime Services would have to take account of such Plans when planning road infrastructure. This would be a positive development, provided the obligation is sufficiently clear and properly integrated into the NSW Planning

Act assessment procedures (eg: agencies would need to demonstrate how they have considered a plan where relevant).

Recommendations

We **support** the proposal for ACH Strategic Plans.

We **recommend**:

- The Planning Act and the draft Bill should be amended to ensure a clear connection between ACH strategic plans and plan-making under Part 3 of the Planning Act.

- Planning directions issued by the Planning Minister should require planning authorities to consider ACH strategic plans when they are proposing new or amended environmental planning instruments such as State Environmental Planning Policies (**SEPPs**) and Local Environment Plans (**LEPs**).

State of ACH Reports, and ACH annual reports

Proposal

The ACH Authority must prepare a report on the state of ACH in NSW within 5 years of the commencement of the ACH Act and every 3 years after that.

The report will be tabled in Parliament so it will be publicly available. It will cover things like:

- An assessment of the status of ACH – taking into account matters impacting on ACH, cumulative impacts and any conservation outcomes
- An analysis of the costs and benefits of conserving ACH
- An assessment of the outlook for ACH
- An assessment of the regulatory framework (including the Act)

Separate to this, the ACH Authority must submit an annual report covering matters set out in the regulations.

Analysis

This information will keep communities and the government informed about ACH, particularly trends. The information may also be useful in terms of supporting calls to strengthen the Act.

A potential governance issue with the State of ACH Report is that the ACH Authority may be put in a position of evaluating its own performance (by analogy, this is also the case with the State of the Environment Report prepared by the NSW EPA).

We consider it is appropriate that the ACH Authority perform this role, but it may enhance accountability by either: requiring public submissions, appointing an arms-length panel, or clarifying that reviews of the ACH Authority's performance would be dealt with separately.

Recommendations

To promote transparency and accountability, we **recommend** the following be considered:

- whether the Bill should require the ACH Authority to hold public consultation with Aboriginal people for the purpose of preparing the State of ACH Report (or whether consultation should be left to the ACH Authority's discretion); or
- whether the Bill should enable the ACH Authority to delegate State of ACH reporting to an expert panel appointed by the Authority.

4. CONSERVATION OF ABORIGINAL CULTURAL HERITAGE

Ownership and care arrangements (clauses 28-35)

Proposal

If the Bill becomes law, all Aboriginal objects that are currently the property of the NSW Government will become the property of the ACH Authority, on behalf of Aboriginal people.

Part 4 Div. 1 sets out a process to repatriate ACH to appropriate people at the local level.

The Draft Bill carries over obligations to notify the Government – now the ACH Authority – about ACH that was previously unknown (such as newly discovered sites or objects). It is an offence not to comply.

Analysis

Returning Aboriginal objects to the care and control of an Aboriginal body – the ACH Authority – reflects Aboriginal people's responsibility for and ownership of ACH, in accordance with the Draft Bill's aim.

The offence for failing to report unexpected finds of ACH is a Tier 3 monetary penalty (clause 27), which is an insufficient deterrent to illegal non-reporting.

Recommendations

We **recommend**:

- ownership and care arrangements be responsive to the needs of local Aboriginal communities – further detail is needed to clarify how arrangements would work;
- increasing the penalty for not reporting a discovery of ACH to at least Tier 2.

ACH conservation agreements (clauses 24-27)

Proposal

The ACH Authority can enter into an agreement with the owners of land for the purpose of conserving ACH that exists on the land. ACH Conservation Agreements can provide for the ongoing protection of ACH by restricting development on the land, requiring certain conservation activities to be carried out or allowing certain people to access the land.

Analysis

ACH Conservation Agreements are a positive step as they provide landholders with a unique opportunity to protect and recognise the ACH on their land. Although voluntary to enter into, the Agreements are binding once made so they can provide strong protection for ACH.

The Draft Bill empowers the ACH Authority, and not the Minister, to enter ACH Conservation Agreements. This reflects the objects of the Draft Bill to recognise Aboriginal people's responsibility for and authority over ACH.

ACH Conservation Agreements are likely to require the ACH Authority to provide financial, technical or other assistance to the owner of the land so the scheme will need to be adequately funded.

The biggest potential weakness of ACH Conservation Agreements is they can be varied or terminated at the Minister's discretion (without landholder consent) to allow for mining or petroleum activities (including coal seam gas), and other developments by public authorities (draft Bill clauses 31 and 34).

Recommendations

We **support** the ACH Authority's powers to enter into ACH conservation agreements with landholders.

We **recommend**:

- Deleting the clauses that permit mining and gas development to override ACH conservation agreements (cl. 31(7))

- If this is not accepted, we recommend amending clause 31(7) to only apply to past grants of licences. The Minister for ACH and the Minister for Resources should be required to take all reasonable steps to avoid impacts on ACH protected by a conservation agreement before exercising powers (if any) to vary or terminate an Agreement.

- Increase safeguards regarding public authority development on land with an ACH conservation agreement (cl. 34). For example, give the ACH Authority the power to approve such developments; or require prior consideration of the Authority's advice.

- Where another Minister's consent is required to permit a conservation agreement on public land, the ACH Bill should require that Minister to take into account the positive and negative impacts on Aboriginal cultural heritage before deciding whether or not to grant permission (cl. 29(5)-(6)).

Agreements for use of registered intangible ACH for commercial purposes (clauses 36-38)

Proposal

The ACH Authority will be able to assess applications and register intangible ACH. Before the ACH Authority can register intangible ACH, it must be satisfied that:

- the heritage is not widely known to the public and should be protected from unauthorised commercial use, and
- the heritage complies with the registration requirements in the regulations (yet to be developed).

The ACH Authority will also need to consult any relevant Local Panel.

Once registered, only the registered holders of the intangible ACH can use the ACH for commercial purposes. The registered holders can enter agreements with others to authorise the commercial use of the ACH.

Analysis

The inclusion of intangible ACH is a new concept for NSW laws.

The intangible ACH provisions reflect the aims of the Bill to recognise that ACH belongs to Aboriginal people and that Aboriginal people should have authority over ACH, and that ACH is a living culture.

However, the practical challenges of protecting intangible heritage will benefit from hearing from Aboriginal people and other experts in the field, and understanding Aboriginal needs and aspirations in this area, to make sure any such protections are fit for purpose.

Complexities around shared heritage, public knowledge and sensitive information will need to be further discussed and worked through.

Recommendations

We **recommend** the Government closely consider the practicalities and issues raised with the proposed model for registering intangible cultural heritage, to ensure that the system and drafting of the Bill's provisions are workable in practice.

We **support** decisions on intangible cultural heritage being made by an Aboriginal body rather than a non-Aboriginal Minister.

5. ABORIGINAL CULTURAL HERITAGE REGULATORY SYSTEM

The draft Bill would insert a general clause into the preliminary part of the Planning Act. That clause states that the ACH assessment pathway in the Draft Bill applies to certain development assessment under Part 4 of the *Environmental Planning and Assessment Act 1979* (**Planning Act**).[34]

The main ways that the ACH Act would interact with the Planning Act are set out in Part 5 of the draft Bill. Part 5 also sets out the broader regulatory framework for ACH. This includes:

- definitions and scope of application (i.e. what ACH is protected) (Division 1),
- harm offences and defences (Division 2),
- ACH Management Plans (Division 3),
- staged ACH assessment pathway for applicable development (Division 4), and
- 'Special procedures' for certain development applications (Division 5).

ACH to which Part 5 applies, and Definitions (clauses 39-40)

Proposal

Clause 39 is important to defining the scope of what kinds of ACH are protected by the regulatory framework of authorisations and offence provisions in the draft Bill. This is generally limited to three categories – Aboriginal objects, ancestral remains and 'declared' ACH.

Clause 40 sets out the definitions for Part 5 of the draft Bill. Most importantly this includes the definition of 'harm' to ACH. In summary, 'harm' means:

> (a) destroy or damage,
> (b) move from the land it is connected with,
> (c) lose the item when it is assigned for care and custody, or
> (d) otherwise harm the significance[35] of the object, remains or other declared ACH.
> Importantly, harm also includes acts of disrespect. That is:
>
> *any act… (other than the expression of an opinion or belief) that demonstrates disrespect for the significance to Aboriginal people of the object, remains or other declared heritage.*

[34] Draft Bill, Schedule 4, part 4.1 (amendments to the *Environmental Planning and Assessment Act*):

[1] Section 5BB

Insert after section 5AA:

5BB Application of Division 4 of Part 5 of Aboriginal Cultural Heritage Act 2018

This Act has effect subject to the provisions of Division 4 of Part 5 of the *Aboriginal Cultural Heritage Act 2018* that relate to the operation of this Act in connection with the assessment of whether certain proposed development will harm Aboriginal cultural heritage.

Note. That Division contains additional requirements with respect to assessments for development applications under Part 4 (other than for State significant development or complying development).

[35] Under s. 4 of the Draft Bill, *significance* means of significance to Aboriginal people or communities for conservation for present and future generations and in respect of past generations. It includes any such spiritual, social, historic, scientific or aesthetic significance.

Analysis

Harm offences only apply to objects, remains and declared heritage

It is important to note that not everything that meets the upfront definition of 'Aboriginal cultural heritage' is automatically protected. In our experience of the consultation process and explanatory documents, this point has not been fully explained or emphasised.

Under Part 5 of the Draft Bill, harm offences only apply to three categories of Aboriginal cultural heritage:

- Aboriginal objects;
- Aboriginal ancestral remains; and
- declared ACH under Part 3 of the Draft Bill (including existing 'Aboriginal places'[36]).

On a positive note, the definition of 'harm' and its scope of application means it is an offence to harm Aboriginal objects and remains *whether or not* they are 'declared' Aboriginal cultural heritage.

On the other hand, the limitation on 'harm' to the three categories above means there is no separate offence to harm *undeclared sites or areas of significance* – such as rock art sites or ceremonial sites. Such sites may be 'undeclared' because, for example:

- they are newly uncovered;
- they are not publicly identified due to cultural sensitivity (e.g. lack of trust);
- the Minister has refused to declare them as ACH; or
- the Minister has failed to declare ACH before the harm is imminent or done.

Under the Draft Bill, harm to 'undeclared' significant areas could only be treated as 'objects' for the purposes of prosecuting or restraining harmful conduct.[37]

Finally, including *acts of disrespect* as 'harm' may be intended to replace the existing 'desecration' offence under the NPW Act. To date there has been no prosecution for the offence of desecration in NSW. The term 'desecrate' is not defined in the NPW Act, and is not used in the Draft Bill. However, it is used in Victoria's 2006 Act and the Commonwealth's 1984 Act. While there is no consistent definition, desecration can mean treating ACH in a way that is inconsistent with its Aboriginal significance.

We make recommendations below, in concert with other provisions on the harm offences.

Harming Aboriginal cultural heritage—offences (clauses 41-45)

Proposal

Offences and defences for harming ACH are in Division 2 of Part 5 of the Draft Bill.

As discussed above, the harm offences in the Draft Bill apply to declared ACH and to Aboriginal objects and Aboriginal ancestral remains. This is similar in scope to the NPW Act (s. 86).

[36] The Consultation Paper and draft Bill (Sch. 5) note that Aboriginal places will be carried over as 'declared' ACH.

[37] Stop work orders or interim protection orders could also possibly apply but only if action would contravene the Act.

The Draft Bill builds on amendments to the NPW Act in 2010, by significantly increasing maximum penalties and bringing the enforcement system further up-to-date.

We note that the Draft Bill does not include *aggravated offence provisions* currently are in the NPW Act.[38] However, considerations of commercial gain are a sentencing factor.

Harming ACH is an offence whether or not the person knew their actions affected Aboriginal heritage.

Tier 1 offence – if the person knew the affected object, remains or place was ACH

Clause 41(1) provides a Tier 1 (most serious) offence that relies on proving the defendant knew about the ACH, and was either intentional or reckless in harming it. The maximum penalty for a Tier 1 offence is $1.65 million for a corporation and $330,000 for an individual (cl. 119).

If the prosecution fails to prove the elements of this offence, the Court can still record a conviction for the strict liability harm offence below (cl. 41(3)).

The 2013 *Ausgrid* case is an example where the judge described the harm as 'negligent', as 'there was a complete absence of any intention or premeditation to harm the engraving.'[39]

We note the Victorian *Aboriginal Heritage Act 2006* has separate offences for knowledge, recklessness, negligence and strict liability (ss. 27-28).

Tier 2 offence – strict liability for harm, whether or not the person knew it was ACH

Section 41(2) provides a Tier 2 'strict liability' offence. This means the defendant's knowledge or state of mind is not relevant to establishing the offence.[40] The maximum penalty is $660,000 for a corporation and $132,000 for an individual.

Defences to harm (cll. 42-45)

As would be expected, the draft Bill provides a defence for acts authorised by an ACH Management Plan (clause 42). This is equivalent to the current defence of complying with an AHIP. However, a Note to clause 42 states that major projects will be exempt from the need for an ACH management plan to authorise harm.[41]

We comment on exemptions, 'low environmental impact' and code-based activities below.

[38] Defined to include (NPW Act s. 86(3)):
(a) that the offence was committed in the course of carrying out a commercial activity, or
(b) that the offence was the second or subsequent occasion on which the offender was convicted of an offence under this section….
[39] *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51 (***Ausgrid***).
[40] State of mind still affects the level of seriousness for sentencing purposes: 'A strict liability offence that is committed intentionally, negligently or recklessly will be objectively more serious than one committed accidentally' (Pepper J in *Ausgrid* (2013) at 64.
[41] See also words to this effect in the OEH Consultation Paper (2017), pp 39-40.

Analysis

Major projects exemption

We are highly concerned that major projects are to be excluded from the offences of causing unauthorised harm to Aboriginal cultural heritage in the draft Bill. It is well-known that major projects (SSD and SSI) cause some of the most significant and irreversible impacts to cultural heritage, and for that reason should not be excluded from the new offence regime.

In practice, if major projects continue to be excluded, this means the ACH Authority will *not* be able to bring offence proceedings (and may not be able to issue stop work orders, remediation orders or other compliance mechanisms) against a long list of major developments (generally over a threshold of capital investment value, such as $30 million).[42] This submission lists the many types of major projects that would be exempt at **Appendix A**.

Major projects should not be exempt from unauthorised harm offences.

Our other key concerns about the proposed harm offences are:

- Harm offences apply only to Aboriginal objects, ancestral remains and *declared* ACH (such as Aboriginal places, and landscapes declared as significant[43] under the Bill). This means significant but 'undeclared' heritage can only be protected from harm as an 'object' or 'ancestral remains', and not as a whole site or area.

- It is unclear whether, when and how the ACH Bill's harm offences apply to development activities that may be exempt from the assessment pathways or ACH management plans under the Draft Bill. Important categories include:
    - major projects (SSD and SSI) – noting the proposal that these will be exempt,
    - complying development,
    - government infrastructure, and resource exploration (both currently assessed by an agency without development consent under Part 5 of the Planning Act).

- It is possible that the requirement to prove 'recklessness' is an additional factor that may complicate prosecution beyond what is currently required under the NPW Act.[44]

- The draft Bill does not draw sufficient attention to the requirements or process for mandatory reporting discoveries of undeclared heritage (clause 27). The obligation to report unexpected finds of ACH will also be important for development proponents and consent authorities acting under SEPPs and other planning instruments.

- The defences in the Draft Bill permit the regulations to exclude actions that have a 'low environmental impact', and possible code-based activities (clause 43), without safeguards involving the ACH Authority or public consultation.

[42] See further the *State Environmental Planning Policy (State and Regional Development) 2011*.
[43] Draft ACH Bill 2018, s. 18(1). See also *Aboriginal cultural heritage* definition, s. 4.
[44] See NPW Act s. 86(1): 'A person must not harm or desecrate an object that the person knows is an Aboriginal object.'

Recommendations

We **recommend** the following to broaden and clarify the draft Bill's offence provisions:

- Major projects should be subject to all offences under the ACH Bill, whether or not State Significant Development (SSD) and Infrastructure (SSI) require ACH management plans. The Bill should include a section or Division that clearly extends harm offences, stop work orders and interim protection orders to major projects.
- If the Planning Secretary's Environmental Assessment Requirements do require that an ACH management plan (or similar) be in place for major projects (see consultation notes[45]), the Bill's offences for unauthorised harm to ACH should apply to those projects and plans;
- The Bill should also clarify that the harm offences apply to unauthorised harm caused by exempt and complying development, and 'Part 5 activities' under the Planning Act;
- The Bill must include safeguards in relation to defences for low-impact or code-based activities, including public consultation, and requiring ACH Authority decisions or recommendations as a prerequisite to any exemptions from harm offences;
- Clarify that it is an offence under the Act to breach a condition of an ACH management plan – equivalent to the current offence of failing to comply with an AHIP condition under the NPW Act;[46]
- Broaden the harm offences in Part 5 to protect 'undeclared' Aboriginal cultural heritage areas (e.g. which may be known but not declared) in addition to objects, ancestral remains and declared ACH;[47]
- Consider whether a separate Tier 1 offence should apply to harming Aboriginal cultural heritage in a manner that is 'negligent'. Alternatively, clarify the meaning of 'recklessness' (or any requirements for proving this, beyond proof of knowledge); and
- Consider the need for additional or 'aggravated' offences for harming *declared* ACH, to reflect the policy intent of higher levels of protection for declared ACH.[48]

Authorising low-impact activities, Codes of Practice or 'strategic assessments' (cl. 43)

Proposal

The Draft Bill permits the regulations to exclude actions that have a 'low environmental impact', and possible future code-based activities introduced via the regulations (s. 43). A list of the existing 'low impact' exemptions under the NPW Act is at Appendix B to the 2017 Consultation Paper.

However these exemptions will be up to the Minister to enact, and there is no clear role for the ACH Authority to recommend or agree to the codes or regulations. By contrast, the NPW

[45] As contemplated by the Consultation Notes to the Draft Bill (see Note to s. 60).
[46] *National Parks and Wildlife Act 1974* (NSW), s. 90J.
[47] The existence of undeclared areas may still be defined by reference to objects, ancestral remains or other declared ACH in or near the site; or be known by a nomination that is yet to be determined.
[48] See NSW Government Consultation Paper (Sept. 2017), p 30.

Act includes safeguards around 'low impact' exemptions and regulations that involve the OEH Chief Executive of and the Aboriginal Cultural Heritage Advisory Committee.[49]

Analysis

We are concerned at the significant proposal that the regulations (which are yet to be drafted or consulted on) 'may provide for additional defences by reference to acts done in accordance with codes of practice *made by the Minister* or adopted by the regulations' (clause 43(2), emphasis added).

A consultation note below clause 43 states the Government is also considering whether or not the ACH regulations should provide for 'large-scale strategic assessments' as a tool in place of site-by-site ACH Management Plans, assessments and authorisations. There is no indication of decision-making criteria for the community to give feedback on.

Given the high-level, open-ended nature of these proposals, there is a high risk that Codes of Practice made by the Minister (instead of the ACH Authority) could sideline ACH Authority processes and ACH Management Plans.

Recommendations

We **recommend** the following options for Codes of Practice or 'strategic assessments':

- Any such regulations and codes should not be introduced with the Bill (i.e. delete clause 43(2) and do not provide for codes or strategic assessment in the Bill); or
- Codes should be made by the ACH Authority, not the Minister (amend clause 43(2));
- If the Minister retains the Code-making power despite our recommendation, the Bill should require that any such Codes (or strategic assessments) must only be made on the ACH Authority's recommendation, or with the Authority's concurrence,[50] and after consultation with Aboriginal people.

ACH management plans (clauses 46-53)

Proposal

ACH management plans are a key concept in the system, and would replace Aboriginal Heritage Impact Permits (**AHIPs**). ACH management plans are intended to bring forward ACH impact assessment and negotiation processes to occur prior to any development consent. This is positive compared to the wholly unsatisfactory AHIP process.

The Draft Bill describes an ACH management plan as:[51]

- A plan approved by the ACH Authority,
- following assessment and negotiation between the proponent and the relevant Local Consultation Panel,
- that ***authorises harm*** to Aboriginal cultural heritage to which Part 5 applies (i.e. Aboriginal objects, ancestral remains, or other 'declared' ACH),
- where the harm arises as a result of the proponent's activities.

[49] *National Parks and Wildlife Act 1974* (NSW), s. 87(5)-(7).
[50] Concurrence is effectively a co-approval power. It can provide a 'second check' on decision-making processes that may balance different portfolios or public interests.
[51] Paraphrasing draft Bill clause 46(1).

ACH management plans provide a defence to harm offences. They 'may' include measures to conserve ACH or minimise harm. Once agreed (or if agreement cannot be reached and the proponent requests approval), the ACH Authority may decide whether to approve or refuse the management plan.

Analysis

We support the ACH Authority deciding whether or not to approve an ACH Management Plan, rather than the Minister. This reflects the draft Bill's aim to recognise Aboriginal people's responsibility for and authority over ACH.

However, only the development proponent can appeal to the Land and Environment Court against the ACH Authority's decision (discussed below).

Purpose of ACH management plans

We are concerned that s. 46(1) implies that the nature and purpose of ACH management plans is essentially to 'authorise harm'. By comparison, the *Biodiversity Conservation Act 2016* emphasises a principle of upfront avoidance and harm minimisation.

An ACH management plan '*may* include measures to conserve or minimise harm to' ACH (cl. 46(3)).

Negotiations to arrive at an ACH management plan are 'to be conducted in accordance with the ACH Code of Practice' to ensure certain outcomes (cl. 48). However, the detail of this code is yet to be developed.

Decision to approve or refuse ACH management plans

In determining whether to approve a management plan under clause 49, the ACH authority '(4) … is to have regard to the objects of this Act, the impact on the Aboriginal community and the proponent of approving or not approving a plan and the public interest.'

The same decision criteria are likely to be applied by the Land and Environment Court if a proponent exercises its merit appeal rights under clause 52.

While we make some recommendations on these criteria below, in principle we support the inclusion of decision criteria, noting that many clauses and decisions in the draft Bill do not.

There is no requirement in the draft Bill that the ACH Authority to publish reasons for its decision. A statement of reasons would be likely to improve public transparency of decisions.

Management plans for single, multiple or classes of proponents

An ACH management plan may specify a single proponent *or class of proponents* authorised to harm ACH in accordance with the Plan (clause 46(2)). This suggests that a proposed Plan could authorise 'coal seam gas exploration companies' or 'graziers' etc.

Plans that refer to 'classes' may in some cases be more efficient than multiple or repeated negotiations, but also pose significant risks and questions around who the negotiating parties would be, what harm is authorised and whether a particular person fits into the class. To avoid blanket application of inappropriate rules, or inappropriate reliance on a plan by unknown parties, such management plans should at the very least specify precisely the ACH being impacted, and require that the Local Panel authorise a person's reliance on the plan.

Compensation for harm

ACH Management Plans are likely to include a financial contribution to compensate for the harm to ACH. This could provide an unwanted incentive for the ACH Authority to enter ACH Management Plans to finance its functions. It is important that the ACH Authority receives adequate funding from other sources to avoid such perverse incentives.

Recommendations

With regard to the purpose of ACH management plans, we **recommend**:

- protection, conservation and harm minimisation are added as part of the 'Nature and purpose' of Management Plans under cl. 46(1).
- 'measures to conserve or minimise harm to' ACH, at a minimum, *must* be included in a Management Plan. (E.g. see similar terms used in cl. 57).

We **support** the reference to the objects of the Act and good faith negotiations in cl. 48.[52] We also **recommend:**

- inserting harm avoidance and minimisation as an additional basis of negotiation under cl. 48(2); and
- that negotiations are conducted so as to ensure intergenerational equity for access to heritage.[53]

On decision criteria for ACH Management Plans, we make the following **recommendations** (clause 49):

- We support the explicit reference to the *objects* of the proposed ACH Act. However, we **recommend** strengthening the test from 'have regard to' the objects, to requiring decisions be made 'in accordance with' or 'in order to achieve' the objects of the Act. This should be separated out from other factors the decision-maker has 'regard' to.
- As an alternative way to prioritise the objects, the Authority could have 'regard' to the list of other considerations in clause 49(4) 'in order to achieve the objects of the Act'.
- The Draft Bill does not explicitly require that the ACH Authority consider the advice of the proponent, or the Local Panel. Clause 49(3) only says they *may provide advice.* We **recommend** the ACH Authority be required to consider such advice (particularly when the Local Panel is not the party requesting review).
- Requiring the ACH Authority to provide statement of reasons for decisions on plans.

We **recommend** the ACH Authority and Local Panels must receive adequate funding, to avoid perverse incentives to enter management plans that destroy heritage.

Finally we **recommend** the Government consider reordering Part 5, so that the Division on ACH management plans comes after the ACH assessment pathway (instead of before). Alternatively, a note could be included explaining that the assessment comes before management plan negotiations.

[52] (Negotiation of plans by proponents and Local ACH Consultation Panel).
[53] This would reflects the proposed definition of ACH significance in s. 4 of the Draft Bill.

Appeal and review rights regarding ACH management plans (clause 52)

> *…gaining public confidence requires 'all manner of people' to have confidence that they will be able to utilise the legal system. And… like all people… Aboriginal and Torres Strait Islander peoples, have a genuine need for the protection of the law and must be provided reasonable access to it.*
>
> - The Hon T. F. Bathurst AC, Chief Justice of NSW, 2017[54]

Proposal

If the ACH Authority refuses to approve an ACH Management Plan, the development proponent can appeal to the Land and Environment Court (as a merits appeal). The Court can either agree with the ACH Authority (uphold the refusal of the management plan), or overturn the Authority's decision and approve the management plan (with or without amendments).

By contrast, if a local Aboriginal person is unhappy with the decision of the Local Panel or the ACH Authority to enter an ACH Management Plan, they cannot challenge that decision on the merits.

Analysis

Development proponents effectively get two extra opportunities to secure a favourable outcome for ACH Management Plans, with rights to seek ACH Authority approval where plans are not agreed by the Local Panel, and then a further appeal right to the Court. Aboriginal people, including the Local Panel, have no such rights.

In our view the imbalance of appeal rights is one of the most concerning aspects of the Draft Bill. It entrenches the systemic power of developers and private landholders over Aboriginal voices in decision-making, and erects barriers to Aboriginal access to justice that are contrary to the objects of the Draft Bill. In our view, it does not reflect a 'more inclusive legal system' such as the one envisaged by the Chief Justice of NSW, cited above.

There are additional consequences to the proposed model beyond questions of fairness.

One relates to cost. Allowing proponents to appeal ACH Authority decisions on the merits will lead to the ACH Authority incurring significant legal fees as it defends its decisions in Court. More resources spent on defending decisions means less resources for actual cultural heritage protection.

Another consequence of lopsided appeal rights relates to systemic outcomes. The ACH Authority may be reluctant to take a strong stance on protection because they don't want to be taken to Court by a well-resourced developer. Yet there is no similar concern of being taken to Court by Aboriginal representatives. This imbalance creates a risk that decisions determining ACH Management Plans may favour the development proponent.

There should be equitable merit appeal rights for relevant Aboriginal people in relation to ACH Management Plans, or no merit appeal rights for developers. If both sides (or neither side) can appeal the decision, the playing field is levelled and the decision-maker can focus on the merits of the decision and not the likelihood of having to defend that decision in Court.

[54] 'Doing right by "all manner of people": Building a more inclusive legal system', Speech to the Opening of Law Term Dinner, 1 February 2017.

Recommendations

To address the imbalance in appeal rights under the draft Bill and to introduce appropriate safeguards, we **recommend:**

- **Equitable appeal rights** – There should be *equitable* merit appeal rights for relevant Aboriginal people in relation to approval of ACH Management Plans (and refusal of interim protection orders), or *no merit appeal rights* for developers and non-Aboriginal landholders.
- **Scope of Aboriginal appeal rights** – The consultations should seek Aboriginal people's advice on the scope of people to whom these appeal rights would apply. A starting point for discussion would be:
    - The Local Panel that undertook negotiations[55] (see cl. 48); or
    - A list of bodies similar to those who can be registered holders of intangible cultural heritage, including LALCs, Local Panels and others (see cl. 37).[56]
- **Clear rights to join appeals** – If developers' merit appeal rights are retained (cl. 52), at a minimum the Draft Bill should give rights to Aboriginal people to 'join' or be heard at a developer's merits appeal in Court (as an opposing party).[57] Aboriginal 'joinder' rights and rights to be heard should also apply to appeals against a stop work order or interim protection order (to argue why protections should apply).
- **Limit scope of ACH Management Plans and evidence in review and appeals** – Section 49(3)(a) should be amended to prevent developers from presenting their own preferred version of an ACH Management Plan to the ACH Authority (or the Court, under s. 52), which the Consultation Panel has not reviewed. There should also be limits to a developer's ability to introduce new evidence (e.g. anthropologist's report) that has not been before the Consultation Panel.
- **Mandatory mediation** – The Draft Bill should prescribe mediation or conciliation as *mandatory* prior to any review or appeal (clause 51).
- **ACH expertise** –The Draft Bill should include amendments that require all appeals under the ACH Act to be heard by a judge and at least one commissioner with expertise in Aboriginal cultural heritage (similar to proceedings related to Aboriginal land rights). Amend the *Land and Environment Court Act 1979* (NSW) as required.[58]

[55] We do not consider the Local Panel's legal status is a barrier to Panels having merit appeal rights.

[56] Namely:

(a) a Local ACH Consultation Panel,
(b) a LALC,
(c) a board of management under Division 6 of Part 4A of the *National Parks and Wildlife Act 1974*,
(d) a registered native title body corporate under the *Native Title Act 1993* of the Commonwealth or a person registered under that Act as holding native titlerights and interests,
(e) an Aboriginal and Torres Strait Islander corporation registered under the*Corporations (Aboriginal and Torres Strait Islander) Act 2006* of the Commonwealth,
(f) any other Aboriginal person or body prescribed by the regulations.

[57] See for example, NSW Planning Act, s. 8.12 (*Notice of appeals to be given and right to be heard*): *'Anyone who is given any such notice of appeal is, on application to the Court within 28 days after the notice is given, entitled to be heard at the hearing of the appeal if not already a party to the proceedings.'*

[58] See LEC Act ss. 30(2A), 12(2)(g) (suitable knowledge of land rights, qualifications and experience).

ACH assessment pathway (clauses 54-59)

Proposal

Division 4 of the Draft Bill sets out a four-stage assessment pathway that can be tailored to determine whether a proposed development is likely to affect ACH. Assessment is to comply with the ACH Assessment Pathway Code of Practice (**ACHAP Code**) drafted by the ACH Authority and approved by the Minister.

The relevant stages of assessment in Division 4 must be completed in accordance with the ACHAP Code before a management plan is submitted to the Authority for approval (cl. 47).

More information on the assessment pathway is in our briefing note on the draft Bill.[59]

Analysis

The ability to undertake upfront, tailored assessment based on up-to-date cultural heritage information is positive.

The Draft Bill remains unclear about how the assessment pathway applies to different types of development under the Planning Act. It is understood that this is a work in progress, but clause 61 is a starting point (e.g. Part 4 development applications are included; major projects are excluded). It is presently unclear whether the assessment pathway would apply to 'complying development' or so-called 'Part 5' activities under Planning Act. This needs to be clarified as a matter of priority.

There is no requirement that ACH assessment be independent of the proponent (which presents risks and perceptions of bias) and no requirement for consultants to be qualified.

Overall, the success of the ACH assessment pathway will depend on clear and workable entry rules, high-quality and timely local and state ACH maps, requirements for qualified assessors, and proper resourcing for Local Panel input and ACH Authority review.

Recommendations

We **recommend:**

- The Bill should clarify what types of development or activities the pathways apply to (clause 61 applies the assessment to certain Part 4 development applications only). This should include any type of development with a reasonable likelihood of impacting ACH, including complying development and private or public 'Part 5' activities under the Planning Act (such as resource exploration and local government infrastructure).

- The draft Bill should establish a mandatory registration and professional development scheme for any non-Aboriginal experts that may prepare ACH impact assessments. Additional safeguards are needed to ensure impact assessment reports are independent.

[59] EDO NSW, *Community briefing note on the Draft ACH Bill* (March 2018), pp 17-19. Available at: https://www.edonsw.org.au/aboriginal_cultural_heritage_reforms. Direct link: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/5587/attachments/original/1522294392/180328_BRIEFING_NOTE_FINAL_UPDATED.pdf?1522294392.

- The Bill should also include consequential amendments to the Planning Act, to ensure that the assessment of impacts from proposed 'Part 5 activities' (such as infrastructure) expressly refers to impacts on heritage, including Aboriginal heritage (not just environmental impacts).

The next section outlines further recommendations relating to the planning system.

Special procedures relating to certain development applications under planning legislation (clauses 60-62)

Proposal

The 'special procedures' set out in Division 5 apply to certain development applications under Part 4 of the Planning Act. This would include for example:

- ***ordinary development applications*** (usually assessed by a local council or Regional Planning Panel)
- ***integrated development*** (which requires other agency approvals as well as a development consent) and
- ***designated development*** (which requires an environmental impact statement, but is not directly addressed in the Draft Bill).

These Part 4 development applications cannot be lodged for approval until they have passed through the relevant stages of the ACH assessment pathway (under Part 5 Division 4); and any required *assessment report* has been reviewed by the ACH Authority. Both of these steps require compliance with the ACHAP Code (cl. 61).

If the assessment pathway finds that an ACH management plan is needed to authorise 'harm', then the development application must be lodged with:

- an ACH Authority-approved management plan; or
- if agreement has not been reached, a *draft* management plan.[60]

The draft Bill excludes major projects (i.e. SSD and SSI[61]), and complying development (generally overseen by private certifiers).

Future ACH regulations may deal with project changes and planning modifications after the ACH assessment pathway has been completed (Draft Bill, s. 62).

Analysis

This is a significant shift from the existing Aboriginal Heritage Impact Permit (**AHIP**) process. AHIPs require limited Aboriginal consultation and assessment reports but, in practice, can be issued *after* the development consent.[62]

On the positive side, the Draft Bill requires greater upfront assessment and negotiation of plans in accordance with the ACH Authority's code of practice.

[60] i.e. if the proponent and Local Panel have not agreed on that draft by the end of the negotiation period, or agreement has occurred but the ACH Authority has not approved the draft plan.
[61] State significant development (**SSD**) is assessed under Part 4 of the Planning Act. State Significant Infrastructure (**SSI**) is assessed under Division 5.2 of the Planning Act.
[62] *National Parks and Wildlife Act 1974*, Part 6 Div. 2, *Aboriginal heritage impact permits*. On due diligence as a defence, see s. 87(3) and the National Parks and Wildlife Regulation 2009, s. 80A.

Nevertheless, major projects will continue to be exempt from the upfront, statutory ACH Management Plan process in the same way that major projects are now exempt from AHIPs and 'prosecution for offences relating to the harm of Aboriginal objects'.[63]

(ACH Management Plans and offences are discussed elsewhere in this submission.)

Our key concerns regarding the Draft Bill's interaction with the planning system are:

- **Major project exemptions –** Major projects and some other developments remain exempt from the standard ACH evaluation processes noted above. The ACH Authority's *input and consultation* may be required in setting the Secretary's Environmental Assessment Requirements[64] to assess the impacts of State significant development (**SSD**) and State Significant Infrastructure (**SSI**).[65] However, this is not given binding effect in the Bill, and major projects remain exempt from harm offences.

- **Exemptions from ACH Act offences** – major projects and possibly other projects will continue to be exempt from harm offences under the ACH Act. Enforcement presumably relies on the Planning Act, not the ACH Authority.

- **No explanation of alternative processes –** The Draft Bill and Consultation Paper do not clearly explain the application of assessment pathways, or alternative processes for exempted activities, to allow informed public comment. (E.g. major projects, complying development, and government infrastructure and other activities assessed under Part 5 the Planning Act).

- **Stop Work Orders may not be available** for major projects or other activities – as these orders are expressed to prevent a 'contravention of this Act' (s. 73) and some projects are exempt from harm offences and Management Plans.

- **Integrated development process needs more clarity** – the timing and sequence of assessment, local panel input and the interaction between consent authorities and the ACH Authority should be clearly set out in the Bill.

Recommendations

In addition to recommendations above, to clarify the Bill's interactions with the Planning Act, we **recommend**:

- Negotiated ACH Management Plans should be binding prerequisites for major projects, infrastructure projects and resource exploration under Part 5 of the Planning Act.

- Major projects, resource exploration, government infrastructure projects and complying development should all be subject to ACH harm offences and Stop Work Orders.

- The *integrated development* process should:
    - be clearly explained to seek further community feedback;

[63] OEH Consultation Paper (2017), pp 39-40.
[64] A proponent's Environmental Impact Statement must comply with the Secretary's Environmental Assessment Requirements (SEARs).
[65] See Draft Bill, Notes to ss. 42 and 60.

    - require the ACH Authority to take into account Local Panel advice before issuing 'general terms of approval' (e.g. see cl. 18(4));
    - require that the ACH Authority (and other agencies) be notified if the Planning Secretary proposes to override any terms of the agency's concurrence; and
    - explicitly permit the ACH Authority to withdraw its concurrence or approval if the Authority's conditions are not to be included in the final approval.

- Crown development explicitly be subject to ACH considerations and approvals, as is the case for other forms of heritage under the Planning Act (s. 4.44(2)).

- Public land managers such as local councils and utility companies should be subject to ACH Management Plans (or something similar to the cultural heritage management plans introduced in Victoria – where public land managers of sensitive sites are required to develop such plans).[66]

- Further explanation is needed on how the regulations may affect project changes, planning modifications and consultation requirements after ACH assessment is completed. At a minimum, the Bill should carry over and extend modification processes under the Planning Act, so as to require public transparency and consultation with the ACH Authority and/or Local Panels.[67]

[66] Introduced under the *Aboriginal Heritage Amendment Act 2016* (Vic). See for example: https://www.vic.gov.au/aboriginalvictoria/heritage/planning-and-heritage-management-processes/cultural-heritage-management-plans.html.

[67] Planning Act, s. 4.55. Modifications must generally be incremental, i.e. substantially the same development as from the original consent (or from the current approval for some major projects).

6. FINANCIAL PROVISIONS (ACH Fund, acquisition of property etc)

Proposal

The Draft Bill proposes to set up an ACH Fund which will be managed by the ACH Authority in accordance with a Funding Allocation Strategy (clauses 63-67).

The ACH Authority will prepare a Funding Allocation Strategy which will set out the Authority's funding priorities in relation to ACH. The Minister must sign off on the Strategy, and can make whatever changes he or she considers appropriate before doing so (cl. 67(4)).

The draft Bill enables the ACH Authority to acquire property by gift via the ACH Fund (cl. 68).

Analysis

Whether the Draft Bill achieves its stated aims will depend, to a large degree, on whether sufficient funding is provided to execute the various ACH identification, assessment and protective measures, and undertake monitoring and enforcement activities.

The requirement for the Minister to approve the Funding Allocation Strategy reflects the fact that the Fund will include allocations from the State budget. It also reflects the recently established Biodiversity Conservation Trust, which manages private land conservation and biodiversity offsets in NSW, and is to act in accordance with a business plan approved by the Environment Minister.[68]

As noted throughout this submission, there are significant resource requirements if the new regime is to be effective, including for example, sufficient resources for Local Panels to function effectively.

Recommendations

We **recommend**:

- The draft Bill should specify that fines received from enforcement under the ACH Act are payable into the ACH Fund;
- If developer appeal rights are retained in the Bill, the cost of defending appeals by developers (and any other parties) should be estimated and provided for to the Authority;
- The Minister's discretion to modify the Funding Allocation Strategy should be subject to additional limitations and transparency, by requiring consultation with the Authority.
- Budget allocations to the ACH Authority must be sufficient and guaranteed into the future in order to ensure the ACH Fund is capable of financing the many important functions that are expected of the Authority and the new system.

[68] Biodiversity Conservation Act, s. 10.7. The regulations may set out further requirements of the Trust's business plan and the Biodiversity Conservation Fund (ss. 10.7 and 10.17).

7. REGULATORY COMPLIANCE MECHANISMS

Proposal

The Draft Bill carries over two protective orders from existing cultural heritage laws – stop work orders (**SWO**) and interim protection orders (**IPO**) – currently available to the Chief Executive of OEH and the Minister, respectively, under the National Parks and Wildlife Act.

The Draft Bill proposes the ACH Authority can issue SWOs (which last for up to 40 days and trigger negotiations to avoid harm) but only the Minister can make IPOs (for up to two years). The ACH Authority 'may recommend to the Minister' that an IPO should be made over 'an area of land', either due to its ACH significance, or because the ACH Authority intends to exercise its functions over that land (s. 78(1)).[69]

Analysis

Making interim protection orders (ss 78-79)

IPOs can require temporary protection and conservation of ACH for up to two years. It is a Tier 1 (most serious) offence to breach an IPO. Interim protection could be useful where heritage is newly found, not yet declared, and potentially threatened by development impacts. Issuing an IPO may give 'breathing space' for local Aboriginal people or the ACH Authority to nominate the area for an ACH declaration (and/or to request that the area be reserved as a national park – see clause 80(4)). The draft Bill suggests IPOs may also be an appropriate follow-on from SWOs, if negotiated protections are not sufficient to prevent a breach of the Act (s. 78(2)).

Our key concern here is that even if the ACH Authority recommends an interim protection order (clause 78), it is the Minister's decision whether to issue the order (clause 79). As with ACH declarations, there are few if any safeguards to constrain or guide the Minister's discretion, no timeframes for decisions, and limited transparency.

Recommendations

We **recommend**:

- The ACH Authority be given the power to issue interim protection orders (**IPOs**), instead of the Minister, consistent with our recommendation that the ACH Authority can 'declare' ACH;
- Retaining landholders'/proponents' rights to appeal to the Land and Environment Court against IPOs and Stop Work Orders to ensure procedural fairness;
- Clarifying the consequence of issuing these orders, and the difference between them (e.g. by non-binding notes, or purpose statements in Bill text);
- Clarifying the reference to issuing IPOs in order for the ACH Authority to exercise its functions under the Act (clause 78(1)(b));
- Aboriginal 'joinder' rights and rights to be heard should apply to appeals against a Stop Work Order or Interim Protection Order under clause 93 (to argue why protections should apply).[70]

We **support** the proposal that the ACH Authority can directly issue Stop Work Orders under clause 73 (subject to concerns with the scope of these orders).

[69] While this clause could be clarified, relevant functions may include recommending declaration of an area as ACH, or making conservation agreements. On the Authority's functions see draft Bill, cl. 12.
[70] See, for example, NSW Planning Act, s. 8.12 (*Notice of appeals to be given and right to be heard*).

8. INVESTIGATION POWERS

Proposal

The ACH Authority will be able to appoint authorised officers to investigate suspected breaches of the ACH law. The draft Bill gives authorised officers broad investigative powers to require information and records, entry and search of premises, question and to identify persons.

Analysis

The proposed investigation powers should be adequate to allow authorised officers to investigate alleged breaches of the cultural heritage laws, subject to resourcing and investment needs.

However, effective compliance monitoring and enforcement will rely on much higher and sustained resourcing than has occurred under the NPW Act.

Building Aboriginal capacity in this area is clearly a worthwhile investment. In practice though, the ACH Authority may be forced to delegate enforcement powers to another agency if it lacks the resources to attract and train enforcement staff.

Recommendations

We **support** the ACH Authority being the enforcement authority under the Draft Bill (Parts 8-9).

We **recommend** the Authority be properly resourced to invest in Aboriginal people and carry out these functions itself, in the short to medium term, rather than delegating them to non-Aboriginal agencies.

We **support** the inclusion of standard, up-to-date investigation powers in the draft Bill.

We **support** the various offence provisions under Part 8 Division 6 of the draft Bill, including executive liability offences (cl. 125) and offences for giving false or misleading information (cl. 128).

Offences for harm, and failure to notify discovered ACH, are considered separately above.

9. CRIMINAL AND CIVIL PROCEEDINGS

Proposal

The Draft Bill sets out a range of offences and tiered penalties to reflect the seriousness of the offence. Where an offence is alleged to have been committed, criminal prosecutions can be brought by a police officer, the ACH Authority or any other person authorised by the ACH Authority.

Criminal proceedings

Criminal prosecutions must be brought within 2 years of the date of the alleged offence, or within 2 years of the date that evidence of the offence first came to the attention of an authorised officer.

Prosecutions will be heard either in the Local Court or the Land and Environment Court, depending on the penalty that is being sought. The Local Court can only issue penalties up to $110,000. The maximum penalties for many offences are higher than that.

Penalty notices (fines) can be issued without going to court where the regulations allow.

Civil proceedings

The Draft Bill proposes open standing provisions to allow any person to bring proceedings in order to remedy or restrain a breach of the Act. This means that, in principle, any person can ask the Land and Environment Court to make an order remedying the breach or preventing the breach from happening. However, the usual risks to bringing such proceedings still apply (in particular, having to pay the other party's costs if you do not prove the breach on the balance of probabilities).

Analysis

The mechanisms of compliance and enforcement (Parts 7-10) generally reflect best practice in NSW environmental and planning legislation.

The only glaring omission relates to the intended exemption of major projects from offences, as noted throughout this submission.

Clause 128(2) appears to unnecessarily limit the false or misleading offence to ACH management plans, or matters prescribed in the regulations.

Clause 130 includes guidance on sentencing for offences, which directs the Court to take certain matters into account. Similar provisions are in the existing NPW Act (s. 194). The Draft Bill includes the 'extent of the harm caused' by the defendant's actions. However, unlike the NPW Act,[71] it does not require the Court to consider the *significance* of the heritage harmed. It is unclear why heritage significance is not included.[72]

[71] *National Parks and Wildlife Act 1974* (NSW), s. 194(1)(b): 'the significance of the reserved land, Aboriginal object or place, threatened species or endangered species, population or ecological community (if any) that was harmed, or likely to be harmed, by the commission of the offence'.
[72] For example, significance is defined in s. 4 and the 'act of disrespect' component of harm (s. 40) also relates to significance.

Recommendations

We **strongly support** the 'open standing' provisions, which allow any person to seek civil enforcement (i.e. injunctions, declarations and other Court orders) in the Land and Environment Court (cl. 132).

We **recommend** that any person should be able to seek civil enforcement for a breach of an ACH Conservation Agreement or ACH Management Plan (cf draft Bill clause 133).

To promote access to justice, we **recommend** a note under clause 121 (Authority to take proceedings) referencing the ability for any person to bring civil proceedings under clause 132.

We **recommend** broadening the false or misleading offence provision beyond information in connection ACH management plans (i.e. that example should not limit clause 128). The offence should apply to any information given in connection with a matter under the ACH Act.

We **recommend** second or subsequent offences be retained as an aggravating factor,[73] or as a sentencing consideration under clause 130. We can also see benefits in including 'significance' as a sentencing factor under clause 130 of the Draft Bill, provided it is not to be used to *reduce* the penalty on account of limited documentation of the ACH concerned.

We **support** the range of investigation powers, increased penalties, tiered enforcement provisions (which clarify the level of seriousness and maximum penalties[74]) and Court orders in the Draft Bill. This includes novel tools that will help the ACH Authority to do its job.[75]

We also **support** the inclusion of enforceable undertakings, as additional tools in tandem with other more conventional enforcement. Enforceable undertakings should not be take the place of prosecutions where prosecution is more appropriate.

[73] Committing a second or subsequent offence is an aggravating factor under the NPW Act offences.
[74] See s. 119 for maximum monetary penalties under Tier 1 (most serious), Tier 2, Tier 3 and Tier 4.
[75] For example:

- binding agreements that a defendant will do or not do certain things (enforceable undertakings);
- significant maximum penalties that are higher than the existing *NPW Act*, and generally equal to the *Biodiversity Conservation Act 2016* (table below);
- the ability to issue penalty notices (fines) of up to $5500 for relatively minor offences; and
- Court orders that require the offender to do additional, positive acts that benefit Aboriginal people and their heritage (restorative justice orders).

10. MISCELLANEOUS (Act binds NSW Crown, ministerial delegations etc)

Proposal

This Part of the draft Bill (clauses 149-154) provides that:

- the proposed ACH Act will bind the NSW Crown;
- the Minister may delegate any functions to a NSW Government agency head (or similar position/agency);
- members of new Aboriginal institutions who act in good faith cannot be sued personally;
- native title rights and interests are not affected;
- procedures for serving documents; and
- the Governor may make regulations to give effect to the proposed ACH Act.

Analysis

It is not clear in what circumstances the Minister would delegate functions to agencies or public authorities (including the ACH Authority), but there is very broad discretion to do so.

The Regulations may only specify new offences with penalties up to $5,500.

Recommendations

We **recommend**:

- The maximum penalty for offences made in the regulations should be increased, for example, to $15,000 instead of $5,500 (clause 154).[76]

[76] While there may be limitations on penalties levels set by regulations, the equivalent provision in the *Mining Act 1992* (NSW) (s. 388), for example, sets a limit of $11,000 (100 penalty units).

11. SCHEDULES TO THE DRAFT BILL

Proposal

The Schedules to the draft Bill set out:

Schedule 1 Members and procedure of the Board of the ACH Authority
Schedule 2 Amendment of Heritage Act 1977
Schedule 3 Amendment of National Parks and Wildlife Act 1974
Schedule 4 Amendment of other Acts and instruments
Schedule 5 Savings, transitional and other provisions

Analysis

Our key concern with proposed Schedule 1 relates to the Minister's discretion to dismiss ACH Authority members (discussed above).

As we understand it, Schedule 2 proposes that the ACH Authority will take over ACH-related functions from the NSW Heritage Council; and have a concurrence function where both Aboriginal and non-Aboriginal heritage values exist (draft Bill Schedule 2 item [2] clause 4B).

Schedule 3 proposes initial amendments to the NPW Act, including transferring certain powers from OEH to the ACH Authority once the new system is operational.

Recommendations

We **recommend**:

- The Minister's discretion to dismiss or demote ACH Authority members be limited.
- Providing clear upfront information and frequent updates on proposed amendments to the NSW *Heritage Act*, the *National Parks and Wildlife Act* and the Planning Act as the Bill progresses, including to clarify interactions with the ACH Bill.
- Clarifying the process of reserving land for conservation of ACH, including the respective roles of the ACH Authority and Office of Environment and Heritage; and whether this will be given effect in the ACH Bill (it is not given effect in the draft Bill).

We **support** the ACH Authority taking over functions from (and cooperating with) the Heritage Council where relevant to ACH listings on the State heritage register.

We **support** the ACH Authority taking over ACH-related functions from the Office of Environment and Heritage, with proper resourcing.

APPENDIX A – List of major projects (State Significant Development and Infrastructure) exempt from draft ACH Bill's harm offences

The purpose of this list is to show the breadth of exclusions to the draft Bill's offences for causing unauthorised harm, and the breadth of projects for which the ACH Authority will have no powers to issue protective orders (as we understand the draft Bill):

Development listed under the SEPP (State and Regional Development) 2011, Schedule 1:

1 Intensive livestock agriculture
2 Aquaculture
3 Agricultural produce industries and food and beverage processing
4 Timber milling, processing, paper/pulp processing
5 Mining (coal, mineral sands, OR in an 'environmentally sensitive area of State significance' (**ESASS**) OR >$30m)
6 Petroleum (oil and gas) (production phase; works related to SSD OR >$30m)
7 Extractive industries (in certain areas or above certain thresholds[77])
8 Geosequestration (GHG)
9 Metal, mineral and extractive material processing
10 Chemical, manufacturing and related industries
11 Other manufacturing industries[78]
12 Warehouses or distribution centres
13 Cultural, recreation & tourist facilities
14 Hospitals, medical centres and health research facilities
15 Educational [including research] establishments
16 Correctional centres
17 Air transport facilities
18 Port facilities and wharf or boating facilities (excluding marinas)
19 Rail and related transport facilities
20 Electricity generating works/heat/co-generation
21 Water storage or water treatment facilities
22 Sewerage systems
23 Waste and resource management facilities
24 Remediation of contaminated land, category 1 work

State Significant Development – 'Specific sites':[79]

Certain development on specified urban sites in Sydney, Western Sydney and Central Coast, over a certain capital investment value.[80]

[77] (>500,000t/yr, OR 5Mt total, OR in an ESASS; OR works related to SSD, OR >$30m; excl. SSI.)
[78] CIV over $30 m for the following purposes: Laboratory or R&D facilities; medical products manufacturing; printing/publishing; textile, clothing, footwear or leather manufacturing; furniture manufacturing; machinery or equipment manufacturing; vehicle, defence or aerospace industry; vessel, boat building and repair facilities (excl. marinas).
[79] Schedule 2 of the SEPP (State and Regional Development) 2011.
[80] E.g. Sydney Opera House Site, Bays Precinct Site, Darling Harbour Site, Broadway (CUB) Site, Honeysuckle Site, Luna Park Site, Sydney Olympic Park Site, Redfern-Waterloo Sites, Taronga Zoo Site, Barangaroo Site, Royal Randwick Racecourse, Western Parklands, The Rocks, Fox Studios, Moore Park Showgrounds and Sydney Sports Stadium Site , Penrith Lakes Site , Warnervale Town Centre Site , NSW Land and Housing Corporation Sites for NSW Land and Housing Corporation, North Penrith Site, North Ryde Station Precinct Site.

State Significant Infrastructure - general (over certain capital value e.g. $10m/$30m/$50m):[81]

1 Infrastructure or other development or activity by a public authority (other than a local council) that requires an Environmental Impact Statement under Part 5 of the Planning Act.
2 Port facilities and wharf or boating facilities
3 Rail infrastructure carried out on behalf or by Australian Rail Track Corp.
4 Development for the purpose of water storage or water treatment facilities
5 Development/licensing of a pipeline requiring a licence under the Pipelines Act
6 Submarine international telecommunication cables & attachments (NSW seabed)
7 Development in reserved land under the National Parks and Wildlife Act, by a person other than a public authority, for sustainable visitor or tourist use of reserved land.[82]

State Significant Infrastructure and 'Critical' State Significant Infrastructure - specific sites:[83]

1 Transitional developments – subject to certain Part 3A applications
2 Northern Beaches Hospital Precinct (CIV >$30 million).
Critical SSI includes certain SSI development related to, for example:
(1) Pacific Highway projects; (2) Rail infrastructure projects; (3) F3–M2 project;
(4) WestConnex; and (5) Sydney Metro City and Southwest.

[81] Schedule 3 of the SEPP (State and Regional Development) 2011.
[82] Under s151A(1)(b) of the NPW Act (Capital Investment Value >$10m).
[83] Schedule 4 of the SEPP (State and Regional Development) 2011.

APPENDIX B - Background information on appeal rights

There are two main types of appeal rights against decisions under planning and environmental laws, depending on the relevant legislation: *merit appeals* and *judicial review*.

Merit appeal rights

First, *merit appeal rights* enable the Land and Environment Court to stand in the shoes of the original decision-maker and make a fresh decision on the facts and evidence. The Court may uphold or overturn the original decision, and may impose new conditions. Procedure for merit appeals is less formal and legalistic, and generally each party bears their own costs of bringing or defending the appeal.

There is a large imbalance in who has merit appeal rights under the NSW Planning Act. Merit appeal rights are routinely available to development proponents who are dissatisfied with a decision on their proposal. However, merit appeal rights for community members (**'objectors'** or **'third parties'**) are much more restricted.

Community objectors can only bring merit appeal rights against certain major projects, where they have formally objected to a development in a written submission, and the appeal is brought within 28 days of the approval decision being publicly notified. As lack of incorporation is not a technical barrier to objectors appeals, nor should it be for Aboriginal people or groups (including Local Consultation Panels under the draft ACH Bill).

Merit appeal rights improve decision-making, public accountability and protections against corruption. The Independent Commission Against Corruption has repeatedly criticised the limits on third party appeal rights in submissions on NSW planning system reform (2012-13).

Judicial review rights

The second, narrower type of appeal rights is *judicial review*. This enables the Court to review whether the decision-maker (e.g. a Minister, Department or public authority) correctly applied the law in reaching a decision. It does not review the 'merits' of whether it was a good or bad decision. Rather it considers whether all relevant factors, and no irrelevant factors, were taken into account according to what the legislation requires.

NSW planning and environmental laws enable any person to go to the Land and Environment Court and seek judicial review of a decision (known as 'open standing'). However these are very difficult cases to run and to win, as they rely on complex legal arguments. Few judicial review cases are run because there are significant cost risks if the case is unsuccessful. The general rule in judicial review is that the losing party pays the successful party's costs. This may amount to debts of tens of thousands of dollars.

If the law gives a lot of discretion to decision-makers there is limited scope for judicial review. There have to be criteria or standards in the legislation which the Court can hold the decision-maker to, in order to review their decisions. Unlike a merits appeal, a judicial review would not be able to overturn a decision that correctly 'considered' all the requirements set out in the law, even if a member of the public is not happy with the decision or considers it unfair. It is also possible that an unlawful decision may be overturned by judicial review, only to have the decision-maker 'correct' the legal error, but remake the decision in otherwise identical terms.

Judicial review is fundamentally important, as it is about ensuring the law is complied with. However, judicial review is not a mechanism for giving greater control over cultural heritage resources to Aboriginal people.