



THE LAW SOCIETY  
OF NEW SOUTH WALES

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NSW Office of Environment and Heritage  
PO Box A290  
Sydney South, NSW 1232

By email: [ACH.reform@environment.nsw.gov.au](mailto:ACH.reform@environment.nsw.gov.au)

Dear Sir/Madam,

### **Draft Aboriginal Cultural Heritage Bill 2018**

The Law Society of NSW thanks you for the opportunity to comment on the draft Aboriginal Cultural Heritage Bill ("ACH Bill"). The Law Society's submissions are informed by its Indigenous Issues and Environmental Planning and Development Committees.

The Law Society's submission provides comment only in respect of selected questions set out in the document titled "*A proposed new legal framework: Aboriginal cultural heritage in New South Wales*" ("the Proposal Paper"). While we have concerns in relation to matters such as the proper constitution and role of the proposed Aboriginal Cultural Heritage Authority ("ACH Authority") and local Aboriginal cultural heritage consultation panels ("Local ACH Panels"), other organisations are better placed than us to comment in detail on those matters.

#### **1. Background**

The Proposal Paper states that the NSW Government is committed to implementing new standalone legislation that respects and protects Aboriginal cultural heritage (p 5). The Law Society notes that the object of Aboriginal cultural heritage legislation should be to protect those parts and features of the landscape that are of cultural value to Aboriginal people including those parts and features that comprise or evidence Aboriginal spiritual, material and economic culture. Values in the landscape include parts and features relating to traditional, historical and contemporary values.

The obligation to protect all aspects of Aboriginal heritage arises under numerous international instruments to which Australia is a party, including Article 27 on the *International Covenant on Civil and Political Rights*. More recently Australia has endorsed the *Universal Declaration on the Rights of Indigenous Peoples*. Article 11(1) of the Declaration confirms:

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 12(1) of the Declaration provides:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

Australia's international obligations are not only in relation to parts and features of the landscape that reflect traditional aspects of Indigenous cultures. They extend to what has elsewhere been termed the "historical Aboriginal landscape",<sup>1</sup> as well as parts and features of the lands which are significant to the cultures of contemporary Aboriginal communities.

## 2. Objects of the ACH Bill

The Proposal Paper asks whether the "statutory objects effectively describe the intent of the draft Bill?"<sup>2</sup> The objects of the ACH Bill are set out in proposed s 3. The Law Society does not consider that the objects clearly articulate an objective of protecting Aboriginal cultural heritage.

The only "object" that directly alludes to the protection of cultural heritage is object 3(b) which states the object is to "establish effective processes for conserving and managing Aboriginal cultural heritage and for regulating activities that may cause harm to that heritage so as to achieve better outcomes for Aboriginal people and the wider NSW community".

This is an objective of establishing "processes" in relation to cultural heritage "so as to achieve better outcomes for Aboriginal people and the wider NSW community". The actual outcome of protecting cultural heritage is not explicit. The non-committal form of this objective can be contrasted with the *Aboriginal Heritage Act 2006* (Vic) which includes the clear objective:

(a) to recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect for Aboriginal knowledge and cultural and traditional practices<sup>3</sup>

It is also in contrast to the *Aboriginal Cultural Heritage Act 2003* (Qld) which provides that the "main purpose of this Act is to provide effective recognition, protection and conservation of Aboriginal cultural heritage."<sup>4</sup>

The Proposal Paper notes that "Statutory objects are important because they set the overall scope of the Act and give decision-makers and the courts direction about how the Act is to be interpreted and applied."<sup>5</sup> The Law Society agrees with that observation, which highlights why it is all the more important that the purpose of protecting cultural heritage is fully articulated. In our view, the objectives should include a clear statement that the object of the legislation is to protect Aboriginal cultural heritage, similar to those contained in the Queensland and Victorian legislation.

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<sup>1</sup> See for example, *Aboriginal Cultural Heritage and Regional Studies*, pp.19-21:  
<http://www.environment.nsw.gov.au/resources/cultureheritage/RegionalStudiesfinalSect2comp2.pdf> .

<sup>2</sup> Proposal Paper, p 10.

<sup>3</sup> Section 3, *Aboriginal Heritage Act 2006* (Vic).

<sup>4</sup> Section 4, *Aboriginal Cultural Heritage Act 2003* (Qld).

<sup>5</sup> Proposal Paper, p.10.

## 2.1. Aboriginal Cultural Heritage

The Proposal Paper asks, “[H]ow well does the following approach to defining Aboriginal cultural heritage match what you consider to be Aboriginal cultural heritage?”<sup>6</sup>

Proposed s 4 of the ACH Bill defines Aboriginal cultural heritage as:

For the purposes of this Act, Aboriginal cultural heritage is the 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.<sup>7</sup>

The Law Society supports a broad definition of cultural heritage, but considers, for the reasons set out below, that the proposed definition should be reconsidered. We note that the broad reach of the definition is not reflected in the remainder of the ACH Bill.

In our view, the definition in proposed s 4 is structured awkwardly because it emphasises the “living, traditional and historical practices, representations, expression, beliefs, knowledge and skills” as the primary subject matter of the definition. These are essentially intellectual and cultural practice-based elements of Aboriginal culture. The definition refers to “environment, landscapes, places, objects, ancestral remains and materials” but only to the extent that they are “associated” with one of the intellectual or cultural practices. Apart from the very specific protection of intangible cultural heritage in Div 3, Pt 4 of the ACH Bill, the intellectual and practice-based components are not otherwise protected in the ACH Bill. Although the intellectual and cultural practice-based aspects of cultural heritage inform the cultural heritage significance of the objects, remains and declared heritage which are protected, and may inform how it will be managed, the ACH Bill in fact only protects “Aboriginal objects”, “Aboriginal ancestral remains” and “declared Aboriginal cultural heritage” which are all the subject of separate definition.

Indeed, it is hard to discern what function the definition has in the remainder of the Act other than for the very limited purpose of Div 3 Pt 4 of the ACH Bill.

## 2.2. Inadequate Protection of “Sites” and “Cultural Landscapes”

The Law Society is concerned that although the ACH Bill introduces a broad definition of cultural heritage, it is only a narrow class of heritage that is protected from harm and, in particular, does not contain adequate protection of Aboriginal sites.

The subject matter of what is protected does not appear to be any greater than what is currently protected under the *National Parks and Wildlife Act 1976* (NSW) (NPWA). Under the ACH Bill, the only heritage that is protected from harm remains “Aboriginal objects”, “Aboriginal ancestral remains” or “declared Aboriginal cultural heritage”. Indeed, Part 5 of the ACH Bill which contains the “Aboriginal cultural heritage regulatory system” only applies to Aboriginal objects, Aboriginal ancestral remains and Aboriginal cultural heritage declared under Part 3.<sup>8</sup> Aboriginal cultural heritage is only “declared Aboriginal cultural heritage” if it is so declared by the Minister.

The lack of protection for sites is compounded by the “definition” of “Aboriginal object” which pays insufficient regard to the fact that an “object” may be inextricably linked to the landscape in which it is located, and indeed may be a marker for the significance of the area

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<sup>6</sup> Proposal Paper, p 10.

<sup>7</sup> Section 4, ACH Bill.

<sup>8</sup> Section 39, ACH Bill.

as a whole. Scarred trees, also referred to as “Aboriginal culturally modified trees”<sup>9</sup>, may mark ceremonial grounds. Engravings may mark areas of broader cultural significance. This division between objects and the landscape in which they are located appears to be entrenched by s 18(1) of the ACH Bill which says that the Minister, on the recommendation of the ACH Authority, may declare that:

...land that is part of a landscape or other place having Aboriginal cultural heritage significance comprises Aboriginal cultural heritage (including land containing or otherwise connected with an Aboriginal object or Aboriginal ancestral remains whose removal from the land would reduce the Aboriginal cultural heritage significance of the object or remains or of the land)

Proposed s 18(1) of the ACH Bill relates to ‘land’ rather than ‘landscape’ or ‘environment’ which are used in the broader definition of cultural heritage. This proposed section should be amended to explicitly include those terms to capture ‘water’ and other features not included in the current draft.

The Law Society makes a number of observations in relation to this:

(1) The Proposal Paper explains the need for the change in definitions as follows:

The definition of Aboriginal cultural heritage in the NPW Act does not include an overarching definition of Aboriginal cultural heritage that captures the full scope of cultural expression and practice. Instead, it restricts the definition of Aboriginal cultural heritage to tangible aspects, specifically, ‘Aboriginal objects’ and ‘Aboriginal places.’ In addition, the definition of ‘Aboriginal objects’ currently includes Aboriginal remains. This is recognised to be inappropriate and disrespectful.

There are three main reasons for improving this approach:

1. The current definitions are outdated and no longer appropriate. They reflect an understanding of Aboriginal cultural heritage dating back to the 1960s, which assumed that Aboriginal cultural practices had ceased and that Aboriginal heritage consists largely of objects with archaeological and scientific value. We now know this is not the case.
2. The current definitions do not recognise Aboriginal people as the keepers of knowledge about their cultural heritage.
3. The way Aboriginal cultural heritage is defined in legislation determines how the law regulates and protects it. Consequently, the NPW Act only regulates and protects Aboriginal objects and Aboriginal places.<sup>10</sup>

The Law Society submits that the definitions of “Aboriginal Objects” and “Aboriginal Ancestral Remains” in the ACH Bill are indistinguishable from the definition of “Aboriginal Objects” and Aboriginal Remains in the NPWA.

(2) To the extent that an area or landscape in which an object is located is intended to be treated as part of, or protected with the object, the definition of Aboriginal object should make this clear. To the extent that an area or landscape is intended to be treated differently to the Aboriginal object comprised in the area or landscape, and to the extent to which the cultural values of land can only be protected if it is declared by the

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<sup>9</sup> See cl 80B(3), *National Parks and Wildlife Regulation 2009*.

<sup>10</sup> Proposal Paper p.11.

Minister as “declared Aboriginal cultural heritage”, then the Law Society submits that this is inadequate.

- (3) While in some instances it will be appropriate for an object to be dealt with in isolation from the landscape or place of which it forms part, this will not be appropriate in other instances. Engravings and rock art, stone arrangement, and bora rings are obvious examples. Similarly, while Aboriginal ancestral remains may be treated as an “Aboriginal object”, it is not clear why the regime for protection should be different for the burial ground in which it is located. The inappropriateness of such a distinction was noted in the evidence of one Aboriginal expert on culture and heritage in recent proceedings in the NSW Land and Environment Court where it was stated:

The carving on the rock is not the site. The site is the carving and the surrounding area and cultural practice that took place at the site. (Exhibit A11 p 31)

We look at an object on rock and we call it a woman site ... Why is it a woman on the rock? It's because of story attached to it and the journey that brings people to her and the journey that she keeps going on, and that's the cultural landscape which we haven't considered at all. We are just looking at an object, right there referring to that woman as an object when to us she is a living ancestral being who is still participating and is still doing things in country. (TS D7/394/26-33)<sup>11</sup>

- (4) To the extent that the landscape or area of which the object or heritage forms part needs to be the subject of a Ministerial declaration before it is protected, it is unclear why the Minister should be a gate keeper for when this should occur. Furthermore, there are many “sites” which are significant which are not associated with objects which are equally worthy of protection. Story places or mythological sites, and increase sites<sup>12</sup> are examples. Having regard to the centrality of land to Aboriginal cultural beliefs, it is unsurprising that most other Aboriginal cultural heritage legislation protects “sites”,<sup>13</sup> Aboriginal places,<sup>14</sup> or “significant Aboriginal areas”<sup>15</sup>. It is not clear why these cannot be protected in New South Wales as cultural heritage without the need for a declaration. This is a matter commented upon further below.
- (5) The Proposal Paper states that a declaration in respect of Aboriginal cultural heritage “would be able to permanently protect both tangible and intangible cultural heritage values. It may also recognise associations between components of a landscape...Any activity that will harm the values associated with Declared ACH will need an approval from the ACH Authority.” (p 30). However, the current draft of the ACH Bill does not enliven such higher level of protection.

### 2.3. Intangible Aboriginal Cultural Heritage

It is unclear to the Law Society what gap the provisions in respect of intangible Aboriginal cultural heritage are intended to address. We note that in the context of recognising opportunities to improve the current system, the Proposal Paper suggests that the current definitions of Aboriginal cultural heritage do not recognise Aboriginal people as the keepers of knowledge about their cultural heritage (p 11). The Law Society supports the intention to recognise Aboriginal people as the keepers of cultural heritage knowledge, but it is not clear that the mechanics put forward in the ACH Bill achieve this.

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<sup>11</sup> *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor* [2015] NSWLEC 1465 (17 November 2015) per Dixon C and Sullivan AC at [183].

<sup>12</sup> For more information on increase sites, see for example: [http://austhrutime.com/ritual\\_increase.htm](http://austhrutime.com/ritual_increase.htm)

<sup>13</sup> Section 5, *Aboriginal Heritage Act 1972* (WA), Section 3, *Northern Territory Sacred Sites Act* and s 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and s 3 of the *Aboriginal Heritage Act 1988* (SA).

<sup>14</sup> Section 5, *Aboriginal Heritage Act 2006* (Vic).

<sup>15</sup> Section 6, *Aboriginal Cultural Heritage Act 2006* (Qld).

It is of concern that the registration scheme proposed by the ACH Bill would set up a scheme where it would not necessarily be the person or persons who possess the intangible Aboriginal cultural heritage who would be the registered holder. Proposed s 37 of the ACH Bill provides a list of who may apply to the ACH Authority for registration of intangible Aboriginal cultural heritage, and who may be declared to be the registered holders of that heritage. However, those bodies are likely to be different from the individuals who in fact hold knowledge about cultural practices, or have cultural skills, or knowledge about cultural beliefs, and so forth. Under the proposed scheme to protect intangible cultural heritage, the actual individuals who hold and utilise that intangible heritage may be guilty of an offence if they use that heritage for commercial purposes without agreement.

Further, the ACH Bill does not adequately address the fact that cultural knowledge and beliefs operate at different levels. Proposed s 36(2)(a) provides that the ACH Authority may only register intangible Aboriginal cultural heritage if it is satisfied that the heritage is not widely known to the public and should be protected from unauthorised commercial use. However, the ACH Bill does not make clear how it might deal with situations where there may be different levels of knowledge in respect of a particular story, where some levels of knowledge may be public, but others may be secret or lesser known. For example, there may be a well-known public aspect of knowledge that may form the basis of well-known children's stories, such as in relation to totems. However, there may be higher levels of information that are part of that story that are not public, or well-known. The Law Society queries how the proposed provisions would deal with intangible Aboriginal cultural heritage of this type.

Noting the examples provided above, the Law Society is concerned about potential unintended consequences of the proposed scheme to protect intangible cultural heritage, and suggests that more consideration be given to the character of intangible Aboriginal cultural heritage, and how to protect the different elements of it.

While there are different schemes for protecting western intellectual property (copyright, trademarks, patents etc), the ACH Bill does not appear to distinguish between the different types of intangible Aboriginal cultural heritage (for example, artistic expression of cultural knowledge as compared to knowledge of the different uses of plants). The Law Society suggests that there should be consideration of the interaction between existing intellectual property protections with the intended protection of intangible Aboriginal cultural heritage. The interaction of the ACH Bill with other legislation, including the *Patents Act 1990* (Cth), the *Copyright Act 1968* (Cth), the *Government Information Public Access Act 2009* and the *Environmental Planning and Assessment Act 1979* ("EP&A Act") needs greater consideration.

This exercise may assist to identify any gaps in protection that the ACH Bill might then address. Such an exercise will also require consideration of who holds intangible cultural heritage, and related matters such as how to provide for collective "ownership" of intangible cultural heritage, and how to deal with protecting secret knowledge.

### **3. Ministerial discretion**

The Proposal Paper states that one of the aims of the ACH Bill is to enable decision-making by Aboriginal people (p 5). Proposed s 7 states that the ACH Authority is not subject to the control or direction of the Minister.

However, the ACH Bill provides for many instances where the discretion afforded to the Minister may undermine the independence of the ACH Authority, raising the question of

whether in fact the process is owned by Aboriginal people. For example, the Minister has discretion in the following instances:

- (1) The Minister appoints members of the ACH Authority Board (proposed s 8).
- (2) The Minister may remove members of the ACH Authority Board, including the Chair and Deputy Chair (proposed Sch 1, cls 4(1), 5(1)(d), 5(2) and 7(2)).
- (3) The Minister appoints a New South Wales Aboriginal Land Council representative as a member of the Board (proposed s 8).
- (4) Draft ACH maps, as well as the mapping methodology, require approval from the Minister (proposed ss 12 and 20). The Minister may simply approve of amendments or replacements of Aboriginal cultural heritage maps (proposed s 20(6)).
- (5) The Minister ultimately makes declarations of Aboriginal cultural heritage (proposed ss 12, 18(1)).
- (6) The monitoring and reporting framework is developed by the ACH Authority, but requires approval by the Minister (proposed s 12).
- (7) In respect of entry into Aboriginal Cultural Heritage Conservation Agreements (“ACH Conservation Agreements”), if Crown Lands are involved, approval is required from the Crown Lands Minister. If Crown-timber lands are involved, approval is required from the Minister administering the *Forestry Act 2012* (NSW) (proposed s 12). However, the Minister can direct the ACH Authority to terminate or vary ACH Conservation Agreements if a mining or petroleum authority has been granted (s 31). Further, the Minister can direct the ACH Authority to vary or terminate an ACH Conservation Agreement for the purpose of development by a public authority (proposed s 34).
- (8) While the ACH Authority develops the funding allocation strategy, the Minister’s approval is required (proposed s 12). The Minister may make such modifications as the Minister considers appropriate (proposed s 67(3)).
- (9) While the ACH Authority prepares the Aboriginal Cultural Heritage assessment pathway (“ACHAP”) Code of Practice, the Minister’s approval is required. The Minister may make such modifications as the Minister considers appropriate (proposed s 54(3)).
- (10) The ACH Authority may recommend that the Minister make an interim protection order, but it is the Minister who may make the order (proposed ss 78, 79). The Minister may revoke the order (proposed s 80(3)).

The Law Society notes that where the ACH Bill provides the Minister with discretion, such discretion is unfettered. The Law Society submits that if the Government’s intention is in fact to “enable decision-making by Aboriginal people” by “creating new governance structures that give Aboriginal people legal responsibility for and authority over Aboriginal cultural heritage”, (Proposal Paper p 5) then the latitude of Ministerial discretion currently afforded by the ACH Bill must be reconsidered.

The Law Society submits that many of the instances referred to above do not, on their face, demonstrate a *bona fide* need for Ministerial approval. For example, in our view, it is not appropriate for the Minister to be able to remove people from the ACH Authority Board. At

the very least there should be a clear framework for such decisions being made.<sup>16</sup> Further, in the Law Society's view, it is not appropriate for the Minister to have an unconstrained discretion in approving or amending maps, and certainly not local maps (see proposed s 20(4)).

Further, where Ministerial discretion is to be appropriately retained, such discretion should be bounded by reasonable parameters, such as by requiring notice and consultation, or requiring the Minister to be satisfied that the ACH Authority has not acted in accordance with its policies and strategies. The ACH Bill might also, for example, include minimum standards in respect of process and practice that must be included in documents such as the ACHAP Code of Practice. In this way, the Minister's discretion in respect of approval and amendments may be reasonably constrained in relation to the approval of an ACHAP Code of Practice that is inconsistent with the requirements of the ACH Bill.

#### **4. Interaction with the planning system**

The Law Society considers that, in general terms, the integration of cultural heritage assessment at an earlier stage of approval processes, as set out in the ACH Bill, provides a more robust and appropriate regime than the current system.

Proposed section 61 provides that any development application lodged under Part 4 of the EP&A Act, other than State significant development or an application for a complying development certificate, constitutes a 'relevant development application' which cannot be lodged with the consent authority unless:

- (a) the stages of assessment required by Division 4 have been completed in accordance with the ACHAP Code of Practice...

The efficacy of this new system in practice will depend on, among other things, having comprehensive cultural heritage mapping and a robust and effective ACHAP Code of Practice. There will also need to be appropriate education and resourcing of local consent authorities, if they are required to provide a necessary audit function. This function is critical to ensure that development applications do not proceed where the land is, in fact, included on an ACH map and, due to oversight or omission by proponents, this is not disclosed, and the proponent has not complied with the subsequent assessment stages required under Division 4. In addition, substantial penalties should apply for non-compliance with this Division.

The assessment pathway introduced under the ACH Bill will facilitate upfront assessment for development applications. We suggest, however, that there should be better integration of the protection of Aboriginal cultural heritage in the planning system through:

- Making planning proposals a trigger for the assessment pathway. Rezoning applications are often the initial step in the future redevelopment of planned precincts or for land release areas. After rezoning, the development potential of a site is fixed and the ability to minimise harm to Aboriginal cultural heritage is compromised;
- Any specific areas designated in ACH maps should be identified in a schedule to the relevant Local Environmental Plan. This will assist front-line council staff accepting development applications for lodgement to identify applications that require, at least, preliminary investigation under proposed s 56.

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<sup>16</sup> An example is ss 40, 41, 53 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).



#### 4.1. Exclusion of State Significant Development

The Law Society considers the exclusion of State Significant Development and State Significant Infrastructure is unacceptable. Major projects are likely, due to their nature and scope, to cause disturbance and destruction of ACH sites. The Law Society considers that a framework which purports to support Aboriginal control of decision-making must include all development involving significant disturbance and destruction of cultural heritage.

#### 4.2. Complying development

The Law Society also does not support the exclusion of complying development from the assessment pathway.

It is critical, in the absence of a development application “trigger” under proposed s 60, that where the information held on the new information system identifies that the relevant site is shown on an ACH map, as containing or likely to contain Aboriginal cultural heritage, then this must be disclosed on a planning certificate for the site.<sup>17</sup> Private certifiers will only be in a position to include Aboriginal cultural heritage in any assessment if notified of its existence or potential existence on that site by a reference in the planning certificate.

#### 5. Appeals and enforcement

The Law Society notes that the scheme proposed by the ACH Bill allows for a general right to commence proceedings to prevent breaches under the Act. It also provides for merits appeal to the Land and Environment Court where the ACH Authority refuses to approve a plan.

The Law Society considers that the ACH Bill should make amendments to s 12(2) of the *Land and Environment Court Act 1979* to allow for appointment of commissioners with special expertise in Aboriginal cultural heritage and require that any appeal should be heard by a judge sitting with a commissioner with special expertise in Aboriginal cultural heritage in a similar manner to how appeals under s 36(5) of the *Aboriginal Land Rights Act 1983* (NSW) are conducted.<sup>18</sup>

The Law Society also notes the following:

- (1) The scheme of the ACH Bill is to provide for Aboriginal decision-making. Accordingly, the Proposal Paper states:

The draft Bill will create a new governance structure that enables key ACH decisions to be made by a new body of Aboriginal people. The new structure will establish clearer processes for people at the local level with cultural knowledge and authority, as recognised by their communities, to be involved in those decisions.<sup>19</sup>

However, in a merits appeal there will not be Aboriginal decision-making. There should therefore be greater clarity on when merit appeals can proceed and how they will be conducted with a view to preserving as far as possible, Aboriginal participation in the process.

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<sup>17</sup>A planning certificate under s 10.7 of the *Environmental Planning and Assessment Act 1979* (formerly s 149).

<sup>18</sup> See for example ss 30(2A) and 33 of the *Land and Environment Court Act 1979* (NSW).

<sup>19</sup> Proposal Paper, p.13

- (2) One of the reasons why the Local ACH Panel and the ACH Authority may have not approved a Cultural Heritage Plan may be a failure for the proponent to follow the appropriate procedures set out in the relevant guidelines. The ACH Bill should be amended to make clear that a proponent is not entitled to a merits appeal unless it has complied with the relevant guidelines and codes put in place for consultation by the ACH Authority.
- (3) At present the ACH Bill is silent on who will be a party to an appeal. Presumably, the ACH Authority will be the contradictor. It is unclear how it will be resourced to participate. Furthermore, it is the Local ACH Panel which is tasked with negotiating Aboriginal cultural heritage Management Plans ("ACH Management Plans"), and it is not clear what role they will have in any appeal.
- (4) It is in the nature of a merits appeal that a proponent could rely on new information, including technical reports in relation to the impacts of a project on Aboriginal cultural heritage. For example, the *Calga* proceedings<sup>20</sup> involved a merits appeal by an Aboriginal Land Council of a decision of the Planning Assessment Commission ("PAC") to allow a project which may impact on Aboriginal cultural heritage. In the hearing of that matter, the proponent did not rely only on material that had been provided as part of the development application or considered by the PAC. Instead it relied on new reports prepared by experts retained specifically for the proceedings. In the absence of having the Local ACH Panel involved in some capacity, the scheme may result in ACH Management Plans being approved on appeal on the basis of information which the Local ACH Panel has never been able to respond to.
- (5) In other planning appeals there are procedures for objectors to bring forward information to the process. The Bill is silent on whether this will be able to occur.
- (6) The potential for merits appeals also highlights the need for proper resourcing of Local ACH Panels. If there is significant heritage which may justify an appeal not proceeding, then it will be necessary for the position of the Local ACH Panel to be carefully documented to enable any decision not to approve a plan to be defended. It may need to be supplemented by expert advice. Depending on the nature of the project, there may need to be expertise other than in relation to cultural heritage to identify how a project may impact on the heritage. For example, in the *Calga* proceedings, issues were raised about the impact of dust and noise on areas of cultural significance.<sup>21</sup>

Finally, it does not appear that the ACH Authority, under the current draft ACH Bill, has the power to initiate proceedings for enforcement. We suggest that the ACH Bill be amended to provide for the ACH Authority to have such power.

## 6. Regulations

There are a number of instances where the ACH Bill provides that the regulations may set out further requirements or provisions. As a rule of law matter, the Law Society has concerns with this approach to legislative drafting. We are of the view that substantive matters, particularly where they affect the rights and obligations of parties, should be set out in the primary legislation. This allows for proper public scrutiny and therefore transparency and accountability in the legislative process.

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<sup>20</sup> *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor* [2015] NSWLEC 1465 (the "Calga decision")

<sup>21</sup> See the Calga decision at [35]

We note the following examples of where the ACH Bill allows the executive to make regulations that give effect to, or modify the meaning of provisions in the draft Bill:

- (1) Before recommending the declaration of Aboriginal cultural heritage, the ACH Authority must have regard to any relevant provisions of the regulations (proposed s 18(4)).
- (2) Registration requirements for intangible Aboriginal cultural heritage will be set out in the regulations (proposed s 36(2)(b)).
- (3) The regulations may provide for additional defences to a prosecution of a harm offence (proposed s 43(1)).
- (4) The regulations may provide a defence for acts done in accordance with codes of conduct (except for the ACHAP code) (proposed s 43(2)).
- (5) The regulations will provide for the negotiation and determination period for ACH Management Plans (proposed s 50).

The Law Society submits that the matters set out in the examples above should be dealt with in the ACH Bill. In particular, the defences available should be clear on the face of the primary legislation. Alternatively, provision for those matters set out above, including defences, should only be made in the regulations where the ACH Authority agrees.

## **7. Proposed guidelines and policies**

There are a significant number of policies and guidelines yet to be developed in support of the Act. Some of these matters, in our view, should be properly described within schedules either to the Act or the regulations. It is difficult to gauge the relative weight to be ascribed to these policy and guidelines if they are not, at the very least, contained within regulations.

We consider that there should be transparency and public scrutiny in the development of these parts of the legal framework. As noted below, there also needs to be appropriate resourcing of the bodies responsible for their development.

## **8. Referencing of other legislation**

It is noted that references contained within Schedule 4 of the ACH Bill as they relate to the EP&A Act do not align with the new numbering of the amended EP&A Act and instead reference the repealed numbering structure. There is a consultation note that identifies the need to insert the correct numbering sequences into the Schedule at a later time. However this should be done now to avoid confusion. Stakeholders who are currently engaging in the consultation process may be unable to find the relevant sections in the corresponding EP&A Act due to a lack of understanding of the renumbering which has recently occurred.

## **9. Resourcing**

The establishment and implementation of the new scheme will require adequate time, training and resourcing (including in terms of developing the requisite governance and infrastructure). For example, we note that the development of the ACHAP Code of Practice will be a critical foundational governance exercise that will require significant expertise and work. Additionally, the transition of functions and procedures under the current NPWA to the new legislation will also require adequate time and resourcing.

We are concerned that there may have been little consideration in respect of costing the scheme, in relation to resourcing both Local ACH Consultation Panels, as well as the ACH

Authority. In addition to the initial resources required to establish the relevant authorities, and the resourcing required for adequate planning, mapping and assessment, there will be other ongoing costs. For example, the ACH Bill refers to “support bodies” (eg proposed ss 20(3) and 21(1)). We query what these support bodies are, and note that there is no discussion of resourcing those bodies.

By way of further example, the development of ACH Management Plans and mapping will be resource-intensive, particularly at the local level. We are concerned about the consequences of failing to properly resource Local ACH Consultation Panels. Also, merits appeals are likely to involve costly and resource-intensive litigation. At what point do Local ACH Consultation Panels respond in a merits appeal? Who would put on response material, and how would this be resourced? Our members’ experience of current timelines in respect of merits appeals in Aboriginal cultural heritage matters suggest that at least five hearing days for examination and cross-examination will be required.

## **10. Review**

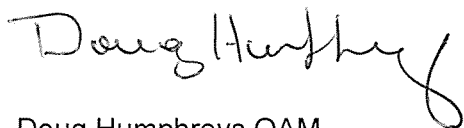
The Law Society considers that the new Act should be subject to statutory review after a period of five years from its commencement.

## **11. Conclusion**

The Law Society commends the Government for seeking to enable Aboriginal ownership and authority in the processes involved in protecting Aboriginal cultural heritage. However, we emphasise that in order for the legislation, governance structures and infrastructure to be properly operational, in addition to addressing the matters raised in this submission, the Government must recognise and commit to its adequate, sustainable and timely resourcing.

Thank you for the opportunity to comment on the ACH Bill. If it assists, the Law Society would be pleased to arrange a meeting to discuss its submissions in more detail. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au) or 9926 0354.

Yours sincerely,



Doug Humphreys OAM  
**President**