



**New South Wales  
Aboriginal Land Council**

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# **Protecting the Past, Guarding the Future**

**Models to reform Aboriginal Culture and Heritage management in NSW**

**Report by Sylvie Ellsmore**

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Commissioned by the New South Wales Aboriginal Land Council



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# Protecting the past, guarding the future: Models to reform culture and heritage management in NSW

## Executive Summary

It is widely acknowledged that the current system for managing Aboriginal culture and heritage in NSW is outdated and inadequate. The main Aboriginal heritage law in NSW – the *National Parks and Wildlife Act 1974* (NSW) – does not recognise or respect the rights of Aboriginal peoples to control and manage their culture and heritage. Despite considerable time, effort and expense by government agencies, Aboriginal groups and industry the system frequently fails to identify and/ or protect important Aboriginal culture and heritage.

This report suggests practical ways that the management of Aboriginal culture and heritage in NSW can be reformed. It has been commissioned by the NSW Aboriginal Land Council (NSWALC), to assist community input into the current legislative review of Aboriginal heritage management being undertaken by the NSW Government, through the Office of Environment and Heritage (OEH).

The report proposes three possible alternative systems or models to manage Aboriginal cultural heritage which could be implemented in NSW. The models have been proposed in order to encourage discussion and debate about the merits of different possible approaches to legislative reform.

Laws and policies in Australian and international jurisdictions are evaluated to identify ‘best practice’ features of Aboriginal cultural heritage management, in terms of workability, certainty, cost, protection and control of Aboriginal culture and heritage. Advice and recommendations by Aboriginal groups and key stakeholders, Australia’s international human rights and environmental commitments and cultural heritage management literature are also considered.

The report proposes that the heritage provisions of the *National Parks and Wildlife Act 1974* (NSW) and other NSW laws impacting on Aboriginal culture and heritage in NSW be centralised into either a new stand-alone Aboriginal Culture and Heritage Act, or a series of amendments to the *Aboriginal Land Rights Act 1983* (NSW).

The three options for new systems to manage Aboriginal culture and heritage in NSW proposed by the report are:

**Option 1:** Establishment of a NSW Aboriginal Culture and Heritage Commission controlled by regional Councils or Boards nominated or elected by Aboriginal groups, along traditional Aboriginal nation boundaries. This model reflects the recommendations of past reviews of Aboriginal heritage undertaken in NSW and some aspects of the Northern Territory Aboriginal Areas Protection Authority.

**Option 2:** Two tiered Aboriginal Land Councils. This model would build on the existing Land Council structures under the *Aboriginal Land Rights Act 1983* (NSW) by creating two complimentary but separate voting memberships within Land Councils. While a Local Aboriginal Land Council (LALC) Board is currently elected by the general Aboriginal membership of the LALC, a separate ‘Aboriginal Owners Council’ would be selected or elected by Aboriginal Owners and become responsible for making decisions for Aboriginal culture, heritage and culturally significant lands and waters. At the state level a ‘NSW Aboriginal Owners Council’ made up of elected Aboriginal Owners would exercise a culture and heritage advice and oversight role, separate and complimentary to the existing elected Council of NSWALC.

**Option 3:** A Registered Aboriginal Party (RAP) model, with Aboriginal organisations able to nominate to become responsible for managing Aboriginal culture and heritage over a particular area, and a central State-wide Aboriginal Culture and Heritage Council undertaking some functions including the selection of which Aboriginal groups become the RAP for an area. This option references the current Victorian *Aboriginal Heritage Act 2006* (Vic) system, with significant changes to recognise the network of existing Aboriginal organisations in NSW such as Land Councils and Native Title groups and to respond to some of the issues which have been identified through the reviews of the Act.

All three proposed models involve the majority if not all of the functions currently undertaken by the NSW Government through OEH being transferred to an Aboriginal controlled body, with some oversight functions resting with the NSW Registrar of the *Aboriginal Land Rights Act* and either the NSW Minister for Aboriginal Affairs or the NSW Minister for Heritage. All three models also involve an expanded role for the NSW Aboriginal Owners Register as the primary mechanism to identify the right people to speak for Country and cultural heritage.

The report also:

- Provides background and context to the operation of the current NSW system, including the current role played by particular Aboriginal groups;
- Summarises the strength and weaknesses of the current NSW system;
- Provides examples of selected features from other Australian and international heritage legislation which could be considered for adoption as part of any new NSW model;
- Identifies a number of challenging issues which new heritage system would need to address, including: who speaks for Country; access and use of sites on private lands; and integration of any new system with environmental assessment and land management processes; and
- Where possible includes links to other useful further readings and reports discussing the issues.

A corresponding report which estimates the costs of the current system and the three proposed models, entitled "Modeling the Cost of Reform", has also been commissioned by NSWALC and is expected to be finalised by July 2012. This complementary report compares government costs in NSW, Qld, NT and Vic, highlights opportunities for a reduction in costs and red-tape if a new model is to be adopted, particular savings which could be made by transitioning current government-run Aboriginal heritage services to an Aboriginal community controlled body or bodies. This reported is will be available on request from NSWALC's Policy and Research Unit.

**More information:**

For more information about the NSW Government Review – Aboriginal cultural heritage law reform contact the Office of Environment and Heritage at <http://www.environment.nsw.gov.au/achreform/>, email [ach.reform@environment.nsw.gov.au](mailto:ach.reform@environment.nsw.gov.au) or phone 1800 881 152.

For more information about NSWALC's 'More than Flora and Fauna' Campaign to improve Aboriginal heritage protection and management in NSW visit <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx> or contact the Policy and Research Unit on email [policy@alc.org.au](mailto:policy@alc.org.au) or phone 02 9698 4444.

**About the author:** This report has been written by researcher Sylvie Ellsmore. The author is a former Policy Coordinator for NSWALC and was actively involved in the negotiation of the 2009-10 amendments to the *National Parks and Wildlife Act 1974* (NSW). Other recent publications by the author include Schnierer E., Ellsmore S. and Schnierer S. (2011) *State of Indigenous Cultural Heritage 2011: A contributory report to the Australian State of the Environment Report 2011*.

# Protecting the past, guarding the future: Models to reform Aboriginal culture and heritage management in NSW

## (i) Introduction

### **(a) Aboriginal culture and heritage**

The lands and waters on which New South Wales was established have been owned and nurtured by Aboriginal people for tens of thousands of years. The ongoing legacy of Indigenous Australians' custodianship and management of Australia's lands and waters is a rich heritage and diversity of cultures which continue to be practiced, protected and renewed by communities today.<sup>ii</sup>

For Aboriginal peoples land, waters and natural resources are all part of Aboriginal culture and heritage ('Country').<sup>iii</sup> Examples of Aboriginal culture and heritage (or 'cultural heritage') in NSW include but are not limited to: objects used for cultural activities, ceremonial or sacred areas which may feature carved trees, rock art or burial grounds, natural formations, areas of land and waters used for past or current activities, cultural practices including fishing, hunting and gathering, traditional knowledge, use of native species for medicine, language, dance, ceremony, stories and human genetic materials including DNA.<sup>iv</sup> Buildings or places where important historical events have previously or currently take place may also have Aboriginal cultural heritage value.<sup>v</sup>

Managing and protecting culture and heritage in line with Aboriginal peoples' view of culture and heritage means recognising all these aspects of culture and heritage, both tangible and intangible, and the connections between them.<sup>vi</sup> The ability of Aboriginal peoples to protect and control Aboriginal culture and heritage is an essential part of self-determination for Aboriginal communities.<sup>vii</sup> The Aboriginal culture and heritage values of a particular place (also often referred to as 'sites') are determined not only by what may exist at that place, for example whether there is physical evidence of how that place has been or is being used, but also knowledge about that place, and the relationship of the place to people and to other places.

In NSW the regulatory system that largely determines the protection, management and control of Aboriginal culture and heritage is the *National Parks and Wildlife Act 1974* (NSW). As discussed in more detail in the following sections of this report, the *National Parks and Wildlife Act 1974* is widely recognised as outdated and in urgent need of reform. In NSW, as in many other parts of Australia, there are concerns that under existing laws Indigenous heritage remains under threat from lack of understanding and awareness of its location and significance, a high rate of approved destruction through the issue of permits and development consents, and a lack of meaningful decision-making or regulatory roles for Aboriginal people.<sup>viii</sup> Aboriginal groups share the frustration of industry that the NSW system is slow and expensive, and even where there is extensive consultation this often does not lead to an outcome which is supported by the community.

### **(b) Review and reform of the NSW system**

Currently in NSW there is a major review of Aboriginal cultural heritage underway. The review is being coordinated by the Office of Environment and Heritage (OEH), within the NSW Department of Premier and Cabinet. The review will report jointly to the NSW Minister for the Environment and Heritage, the Hon Robyn Parker MP, and the NSW Minister for Aboriginal Affairs, the Hon Victor Dominello MP, in late 2012. Information about the review process can be found at <http://www.environment.nsw.gov.au/achreform/> or by contacting OEH at [ach.reform@environment.nsw.gov.au](mailto:ach.reform@environment.nsw.gov.au) or by phone on 1800 881 152.

A number of previous reviews into Aboriginal cultural heritage have recommended that the system be reformed through the establishment of a separate Aboriginal heritage law for NSW and the

removal of Aboriginal heritage from the *National Parks and Wildlife Act*. These past reviews also recommended the return of control of Aboriginal heritage to Aboriginal people through the establishment of some form of Aboriginal controlled commission or body. For a summary of the findings of past Aboriginal culture and heritage reviews see the NSW Aboriginal Land Council's (NSWALC's) 2010 publication *Our Sites, Our Rights: Returning Control of Aboriginal Sites to Aboriginal Communities*, available from <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>.

There are a number of other important reviews currently being undertaken in NSW by different agencies, which may impact significantly on how Aboriginal culture and heritage is managed and protected. These are:

- **Review of the *Aboriginal Land Rights Act 1983*:** In late 2011, the NSW Minister for Aboriginal Affairs announced the five yearly review of the *Aboriginal Land Rights Act*. The Terms of Reference of the review include to "Inquire into and make general recommendations as to whether the aims and objectives of the NSW *Aboriginal Land Rights Act 1983* (the Act) require expansion or change of the Act in light of developments since 1983." The review is due to report on 1 November 2012. For details contact the NSW Office of Aboriginal Affairs at <http://www.daa.nsw.gov.au/landandculture/> or NSWALC at <http://www.alc.org.au/about-nswalc/getting-into-the-act,-alra-review-2012.aspx>.
- **A new planning system for NSW:** A major review is also underway of the state's main planning law, the *Environmental Planning and Assessment Act 1979* (NSW). This Act has a major impact on Aboriginal heritage as it guides what kinds of environmental (including heritage) assessments must be undertaken and when development will be approved. Following a public consultation process a Green Paper is due to be released in May 2012. For more information see the Planning Review website at <http://www.planningreview.nsw.gov.au/>.
- **Ministerial Taskforce on Aboriginal Affairs:** In 2011 the NSW Minister for Aboriginal Affairs announced a high level taskforce to consider the delivery of services and government programs to reduce disadvantage in Aboriginal communities. The Taskforce is developing a new whole of government Aboriginal affairs plan, with a focus on education and employment. The review is due to report in 2012. For more information contact the Office of Aboriginal Affairs at <http://www.daa.nsw.gov.au/taskforce/> or by phone on 02 9219 0702.

## Recommendations

It is strongly recommended that the current NSW Aboriginal culture and heritage law reform review be coordinated with the other major legislative and policy reviews being undertaken in NSW. In particular, it is recommended that:

- The Review of the *Aboriginal Land Rights Act* consider the culture and heritage role of Aboriginal Land Councils and whether an expansion of the role of Land Councils in Aboriginal cultural heritage management is appropriate or feasible;
- The Planning Review consider how new legislation or systems to assess and manage Aboriginal heritage could be effectively integrated into planning and development approval process; and
- The Ministerial Taskforce on Aboriginal Affairs consider employment, education and training opportunities in the areas of cultural heritage and land management, including how the development of training and cultural industry strategies could increase the financial capacity of Aboriginal organisations in this area and contribute to Closing the Gap targets.

### **(c) Report Methodology**

This report references academic research, government reports, submissions, media articles, Parliamentary debates, notes taken at Aboriginal public consultations and previously unpublished material contained in NSWALC archives.

In order to identify issues with the current system and develop alternative models particular reference is made to the views of Aboriginal groups and other key stakeholders as expressed in written submissions and public consultations. These include:

- Written submissions to OEH in response to the first stage of consultation for the current NSW Government Review – ‘Aboriginal cultural heritage law reform’ (submission deadline December 2011, submissions released February 2012);<sup>ix</sup>
- Reports and notes from regional Aboriginal community workshops convened by OEH in late 2011 as part of the current review (notes released February 2012);<sup>x</sup>
- Written submissions to the former Department of Environment, Climate Change and Water (DECCW, now OEH) in response to the last round of Aboriginal heritage legislative amendments (the *National Parks and Wildlife Amendment Bill 2009* or ‘Omnibus Bill’) (as released in 2010);<sup>xi</sup>
- Written submissions to the former Commonwealth Department of Environment, Water, Heritage and the Arts in response to proposed national reforms to Indigenous heritage protection laws (the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)) (as released in 2011);<sup>xii</sup> and
- Reports on issues and community forums convened by the last review of the *Aboriginal Land Rights Act* Review Task Force (2005).<sup>xiii</sup>

In order to identify what features of systems operating in other jurisdictions could be considered ‘best practice’ reference is also made to:

- Recent reports published by various government and non-government bodies which compare relevant laws in NSW and other jurisdictions;<sup>xiv</sup>
- Reports and submissions provided to recent reviews of Aboriginal heritage laws in other States<sup>xv</sup> including to the current Victorian Parliamentary ‘Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties’;<sup>xvi</sup>
- International human rights, culture, heritage and environmental instruments to which Australia is a party (as discussed in Section (II)(d) of this report); and
- The ‘Key Principles for Reform’ adopted by NSWALC in relation to the current review. These principles were originally developed and adopted by the joint NSW Government and community Working Group formed to guide the last major review of Aboriginal heritage law in NSW (2005).<sup>xvii</sup> A copy of these Key Principles is attached at **Appendix 1**.

**More information:** The author notes that Aboriginal culture and heritage law is a highly complex area, and it is outside the scope of this report to canvas all issues and aspects of relevant Australian and international legislation. The primary focus of this report is on Aboriginal heritage in the form of sites and places.

For this reason where possible useful public reports and readings have been identified and full links included in the **End Notes and Resources** section of this report, to assist readers to access this additional information as relevant.



## **(ii) Management of Aboriginal culture and heritage**

### ***(a) Aboriginal groups in NSW and ‘speaking for Country’***

For Aboriginal communities the right and responsibility to speak for Country, including culture and heritage associated with that Country, rests with the custodians of those lands. Custodians are often referred to as ‘Traditional Owners’:<sup>xviii</sup> that is, Aboriginal people whose ancestors historically controlled Australia’s land and waters within defined boundaries, or ‘Aboriginal nations’.

Under customary Aboriginal law certain Traditional Owners may be the only ones who have the authority to speak for aspects of Country, for example particular senior women or men in the community.<sup>xix</sup> Other people who are not directly descendent from Traditional Owners may also have been granted the authority to speak on certain issues by the Traditional Owners. It is estimated that there are between 30 to 70 Aboriginal nations in NSW, including a large number of clans and language groups.<sup>xx</sup>

A lack of clear guidance or direction in NSW Government policies about how to identify and prioritise one nominated Aboriginal group to be consulted on Aboriginal culture and heritage matters in an area is one of the major complaints about the NSW system. This issue has been recognised by OEH<sup>xxi</sup> and was raised in several of the submissions to the OEH Aboriginal cultural heritage law review, as well as past reviews of Aboriginal culture and heritage.

The current NSW system for managing cultural heritage generally recognises three main groups as speaking for Country and/ or representing the Aboriginal community on culture and heritage matters, including when an application for a permit to impact on Aboriginal heritage is being made.<sup>xxii</sup> These groups are:

- **Native Title** holders, as well as registered Native Title claimants (ie persons who have registered an application for Native Title but a determination has not yet been made), who in most cases represented at the State level by NTSCORP Ltd (formerly NSW Native Title Services),
- **‘Aboriginal Owners’** listed on the Register of Aboriginal Owners, which is established under the *Aboriginal Land Rights Act 1983* and referenced in the *National Parks and Wildlife Act 1974*, and
- **Aboriginal Land Councils**, also established under the *Aboriginal Land Rights Act 1983*, including Local Aboriginal Land Councils (LALCs) and at the State level the NSW Aboriginal Land Council (NSWALC).

Also in NSW there are a number of Aboriginal corporations, Elder and nation groups, advisory committees, Keeping Places and other organisations or groups which play different important roles managing or advising on Aboriginal culture, heritage and Country. Further details of the number, capacity and functions of Aboriginal groups in NSW are discussed in **Appendix 2** to this report: ‘Culture and heritage roles of Aboriginal groups in NSW’.

In brief, **Native Title** is a national scheme based on rights recognised by the High Court for Aboriginal people whose ancestors were the Traditional Owners for an area, and who have maintained an ‘ongoing connection’ to that area based on traditional law and custom.<sup>xxiii</sup> The *Native Title Act 1993* (Cth) regulates Native Title claim processes and provides Native Title groups with some rights while a claim is underway, such as rights to be notified, consulted or negotiate about activities that may impact on Native Title (including culture and heritage).

To date there have been only a small number of successful Native Title determinations over lands and waters in NSW.<sup>xxiv</sup> The reasons for this include that the actions of previous governments have ‘extinguished’ native title rights although Aboriginal people have continued to maintain a connection to those traditional lands, through their actions. At the time of completing this report approximately 50% of NSW was under a Native Title claim. Amongst policy makers, in NSW and nationally, there is an increasing trend towards prioritising native title groups as the primary or sole group to be consulted on cultural heritage matters, where these groups have been established.<sup>xxv</sup>

NSW legislation does not include a definition of ‘Traditional Owner’, but does include a definition of ‘**Aboriginal Owners**’. Aboriginal Owners under the *Aboriginal Land Right Act 1983* and the *National Parks and Wildlife Act 1974* are defined as Aboriginal persons who are:

- (a) directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated,
- (b) have a cultural association with the land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land and
- (c) have agreed to have their names added to the Register of Aboriginal Owners maintained by the Registrar of the *Aboriginal Land Rights Act 1983*.<sup>xxvi</sup> That is, the Registrar of the *Aboriginal Land Rights Act* determines who is eligible to join the register.

To date the role of the Aboriginal Owners Register has been largely limited to areas where jointly managed national parks have been established, and Aboriginal Owners have only been registered over 9 areas where Aboriginal managed parks have, or may be, established (or approximately 700 people).<sup>xxvii</sup> Registered Aboriginal Owners have rights under legislation over parks which have been handed back, and some consultation rights under policies for activities that may otherwise impact on their culture and heritage.

**Aboriginal Land Councils** in NSW were established in the 1970s by Aboriginal people seeking recognition of Aboriginal peoples’ rights to traditional lands, waters and sacred sites.<sup>xxviii</sup> Membership of Aboriginal Land Councils is open to all Aboriginal adults in an area, who elect a Board every two years.<sup>xxix</sup> The state-wide NSWALC Board is directly elected every four years. There are currently 119 Local Aboriginal Land Councils (or LALCs), extending across nearly all of NSW.

Land Councils have a role to provide advice and to protect Aboriginal culture and heritage within their boundaries, but no statutory powers to actively enforce these provisions. The Land Council structure does not formally prioritise Traditional Owners or ‘Aboriginal Owners’ as decision makers, as Boards are elected from the general adult membership of Land Councils.

In outlining the legislative roles of these key groups, it is important to note that there are numerous examples of Aboriginal groups, including Land Councils, adopting culturally appropriate decision-making processes which prioritise the voices of Traditional Owners where this is not required by legislation.<sup>xxx</sup> The suggestion that any new Aboriginal cultural heritage system for NSW should support existing Aboriginal organisations to work together to achieve culture and heritage outcomes was raised at several of the recent Aboriginal community forums held by OEH across NSW.<sup>xxxi</sup>

### ***(b) Current legislative regime***

In addition to the *National Parks and Wildlife Act 1974* a number of other laws play an important role in the system to manage Aboriginal culture and heritage, including the *Heritage Act 1977*, the *Aboriginal Land Rights Act 1983*, the *Environmental Planning and Assessment Act 1979* and other NSW and national legislation which regulates Crown land, fisheries, mining, forestry, natural resources and Native Title.

An overview of the main legislative provisions which currently guide the management of Aboriginal culture and heritage in NSW can be found in the OEH report '*Aboriginal heritage legislation in NSW: Public consultations on issues for reform*' (2011), which is available to download from: <http://www.environment.nsw.gov.au/achreform/ACHmedia.htm>. A summary of how key sections of these laws work in practice are outlined in **Appendix 3** of this report: 'Overview of the current NSW system', including:

- What percentage of NSW's land mass is currently offered direct protection by the *National Parks and Wildlife Act 1974* and other legislation (estimated 2-3% of NSW lands);
- The process for undertaking Aboriginal heritage assessments;
- The number of permits issued which authorise harm or destruction to Aboriginal cultural heritage;
- When and how items are repatriated to Aboriginal communities; and
- What rights are recognised in legislation for Aboriginal people to access and use cultural heritage in private lands.

### ***(c) Strengths and weaknesses of the NSW system***

**Successive waves of reform:** The *National Parks and Wildlife Act 1974* and other current laws and policies contain a number of strengths or positive features, including those which Aboriginal groups actively campaigned to have adopted over the years.<sup>xxxii</sup> **Appendix 3** includes further discussion about the practical application of these and other provisions.

Positive aspects of the current system include:

- A scheme for 'joint management' of national parks, where cultural significant areas are returned to Aboriginal ownership and then leased back to the Government as national parks under Aboriginal management;<sup>xxxiii</sup>
- The Aboriginal Owners Register;<sup>xxxiv</sup>
- Requirements that a person must apply for a permit if they are likely to harm Aboriginal heritage and large fines and penalties for unauthorised harm to Aboriginal heritage;<sup>xxxv</sup>
- Requirements in regulation and policy to consult with Aboriginal people to identify Aboriginal heritage and its significance before a permit is issued;<sup>xxxvi</sup>
- Exemptions from licences for Aboriginal cultural fishing<sup>xxxvii</sup> and for use of national parks;
- The establishment of a number of state-wide Aboriginal advisory committees made up of Aboriginal members, including the Aboriginal Cultural Heritage Advisory Committee (ACHAC),<sup>xxxviii</sup> the Aboriginal Heritage Advisory Panel to the Heritage Council and the Aboriginal Fishing Advisory Council; and
- Growing awareness and involvement of Aboriginal people in natural resource management.

**Lack of meaningful roles for Aboriginal people:** In 1989 the NSW Taskforce on Aboriginal Culture and Heritage identified the lack of meaningful decision-making roles for Aboriginal people in the protection and management of Aboriginal heritage as the main weakness of the NSW system.<sup>xxxix</sup> Despite successive rounds of reform the roles of Aboriginal people under the *National Parks and Wildlife Act 1974* continue to be limited to consultation, rather than formal decision-making. Aboriginal heritage continues to be characterised as the property of the 'Crown' with the power to control that property resting with the NSW Government.

**Outdated legislation:** The ongoing management of Aboriginal heritage through legislation that is designed to manage flora and fauna – the *National Parks and Wildlife Act 1974* – has been

repeatedly identified as a major weakness of the system and offensive to Aboriginal people and the wider community.<sup>xi</sup>

The limited ‘archaeological’ definition of Aboriginal heritage under the *National Parks and Wildlife Act 1974*<sup>xii</sup> has also been identified as evidence of the need to update the law so that it reflects contemporary understanding of Aboriginal culture and heritage. Previous Aboriginal heritage reviews have argued strongly for legislation which recognises both tangible and intangible Aboriginal culture and heritage, including broad recognition of Aboriginal hunting, fishing and gathering practices. The *National Parks and Wildlife Act 1974* currently contains some rights for Aboriginal people to undertake cultural practices in national parks, and in some other circumstances.

**Blanket protection or regulated destruction?** It is arguable that ‘blanket protection’ is offered to Aboriginal heritage under the *National Parks and Wildlife Act* – that is, protection extended to all ‘objects’ regardless of whether they are on public or private lands, or whether the objects are considered to have high cultural significance.

In practice the *National Parks and Wildlife Act* largely relies on a person who is likely to impact on Aboriginal heritage identifying the need to apply for a permit authorising the activity they plan to undertake, or taking some other action which they feel will avoid the harm (‘due diligence’). In this way it has been argued that the protection offered by the system is in reality both ‘reactive’ and ‘proponent-driven’.<sup>xlii</sup>

**Authorised harm:** Although the *National Parks and Wildlife Act* creates obligations for the NSW Government (currently the Director-General of the Department of Premier and Cabinet) to protect Aboriginal cultural heritage,<sup>xliii</sup> the power of the same government representative to issue permits under the Act has also led some to describe the role of the NSW Government as the “regulation of destruction, not protection”.<sup>xliv</sup>

The rate of approved harm or destruction of Aboriginal cultural heritage through the issuing of Aboriginal Heritage Impact Permits and the low level of prosecutions for illegal destruction of Aboriginal heritage is a major concern about the operation of the current system, particularly amongst Aboriginal groups. As discussed in more detail in Appendix 3 between 92% and 100% of applications to disturb or harm Aboriginal heritage are granted by OEH, though permits include conditions which can require mitigation of harm. Prosecutions for illegal destruction are rare, and Aboriginal people are largely unable to appeal against the issuing of a permit or take action to seek prosecution when the government is unwilling to do so.<sup>xlv</sup>

**Protections can be ‘switched off’:** There are a number of exemptions and defences under NSW laws which can remove the requirement for a permit even where an activity is likely to harm Aboriginal cultural heritage. This includes:

- Certain large-scale developments, particularly those considered ‘state significant’. Under the *Environmental and Planning Assessment Act 1979* the Minister for Planning has considerable flexibility to determine alternative requirements for environmental or heritage assessments;
- A range of activities by industries which are regulated by separate legislation, including forestry and mining;
- Where an industry has adopted a standard practice which, in the opinion of the Minister administering the *National Parks and Wildlife Act 1974*, constitutes ‘due diligence’ (a reasonable standard of care in the circumstances); and
- Where an activity is excluded from the definition of ‘harm’ under the *National Parks and Wildlife Act*. This currently applies to some archeological testing activities.<sup>xlvi</sup>

Concerns have also been raised about the operation of the 'due diligence' standard, which places the obligation on the developer to comply with a standard of care rather than apply for a permit.<sup>xlvii</sup>

**Protection of significance:** The current legislation does not include a test of whether Aboriginal heritage is significant, before it is offered protection. It has been argued that Aboriginal cultural heritage laws should focus on protecting what is significant to Aboriginal communities, because applying a standard protection to all heritage wastes time and can devalue particularly important places.<sup>xlviii</sup>

**Existing network of Aboriginal organisations and Aboriginal expertise:** An important strength of the current NSW system is the network of Aboriginal organisations which exists in NSW, many of whom have extensive experience participating in Aboriginal cultural heritage assessments and managing significant lands and waters (as discussed in Section (II)(a) and Appendix 2).

An arguable weakness of the current system is the reliance on non-Aboriginal 'experts' to undertake complex Aboriginal heritage assessments as required by government decision makers. There are currently only a very small number of Aboriginal archeologists and heritage consultants, and the role of Aboriginal site or heritage officers employed by Aboriginal organisations tends to be limited to providing input into complex Aboriginal heritage assessment coordinated by archeology or heritage consultancy firms employed by the proponent. This creates concerns amongst Aboriginal communities in some cases that they are not directly in control of important cultural heritage information.

**Identifying the right group to speak for culture and Country:** Also as previously discussed a key problem with the current system is the difficulties faced by agencies or developers trying to identify the right Aboriginal groups to speak for Country, as well as a lack of processes to resolve disputes between Aboriginal groups over who speaks for Country.<sup>xlix</sup> A repeatedly cited example in submissions to the Aboriginal heritage review was over 30 Aboriginal groups for consultations in the Hunter Valley, where there is considerable mining activity and opportunities for paid consultation work.<sup>i</sup> Very open consultation processes can take a long time to complete, and are therefore costly, and even where an extensive consultation has been undertaken can leave Aboriginal groups unhappy with the outcome, if they feel the wrong groups or individuals were listened to. It is also noted that, although many different types of Aboriginal organisations exist, there is a minority of Aboriginal individuals and groups in some areas who feel unfairly excluded from participation in one or more of the three legislated stakeholder groups, including Land Councils, Native Title groups and the Aboriginal Owners Register.<sup>ii</sup>

International and local research indicates that effective and culturally appropriate resolution to internal Aboriginal community conflicts requires establishing processes which allow for Aboriginal communities to resolve these issues themselves, which includes allowing decision making roles for identified Aboriginal groups<sup>iii</sup>. That is, Aboriginal *control* over the process. The Register of Aboriginal Owners provides a potential solution to identify who speaks for Country, but is currently under-resourced and only extends to a small part of the state.<sup>iiii</sup> Also of interest is the Victorian 'Right People for Country Project', which is assisting to resolve internal Aboriginal disputes around land and cultural issues.

**High costs and delays:** Industry in particular has repeatedly identified the high cost of complying with the NSW system, caused by factors such as: the lack of guidance as to the correct or priority Aboriginal group to contact; requirements to complete technical reports which effectively require the engagement of an archeological or heritage expert to facilitate consultation with Aboriginal groups; high fees for Aboriginal site assessments; lack of access to reliable Aboriginal heritage maps; and long time frames for the processing of permits.

**Lack of reliable mapping:** As noted in Appendix 3 the state-wide Aboriginal heritage database maintained by OEH – the Aboriginal Heritage Information Management System, or AHIMS – currently maps only a small percentage of Aboriginal heritage sites in NSW.<sup>liv</sup> It also contains a number of errors.<sup>lv</sup>

There are currently no significant programs or funding for regional Aboriginal cultural heritage mapping, or the centralisation of coordination of mapping being undertaken by groups such as Local Councils or Catchment Management Authorities. Aboriginal groups remain concerned about sensitive cultural information being held by a government agency, particularly where this information is available for use in permit applications, so often do not provide information about the location of sites until a threat to that site is imminent.

**Lack of streamlined processes:** There is considerable overlap across different laws which deal with aspects of Aboriginal cultural heritage, particularly if the cultural significance of lands, waters and natural resources such as native species are considered. Even where the current definition of Aboriginal cultural heritage is used there is lack of streamlined processes across the *National Parks and Wildlife Act*, the *Environmental Planning and Assessment Act* and the *Heritage Act 1977*. A lack of regional cultural heritage management planning means multiple Aboriginal heritage assessments over the same area may be required, each time there is a new project or potential impact. In the alternative previous rounds of legislative reform designed to ‘reduce red tape’ by fast-tracking or removing heritage assessments from planning approvals can threaten heritage by failing to identify where it is, or why it is important.<sup>lvi</sup>

**Community education:** The awareness of Aboriginal cultural heritage, although growing, remains low. More needs to be done to build awareness amongst industry and the community about identifying, protecting and respecting Aboriginal heritage.<sup>lvii</sup>

**Cumulative impact assessments:** The *National Parks and Wildlife Act 1974* requires that decisions made under the Act are guided by the principle of ‘ecologically sustainable development’ or ESD (see 2A Objects of the Act). Included in ESD is consideration of the ‘cumulative impact’ of a decision. In the case of heritage this could include, for example, what development approvals have been made in the past which authorised destruction to important heritage in the area.

Currently development assessments tend to be made without consideration of past approvals, as there is no comprehensive reporting which compiles this information. There are also limited policies or guidance for decision makers about how to effectively assess ESD in relation to Aboriginal heritage.<sup>lviii</sup>

**Management plans and monitoring:** Permit and planning assessment approval processes require heritage management plans in some circumstances. However there is no common standards or frameworks for such plans, and if plans are developed there are limited requirements for monitoring whether they are complied with. Aboriginal people have no statutory powers to inspect or to act if they see that the conditions of a permit are being breached, and must rely on requests to relevant agencies.

This can be contrasted with other Australian jurisdictions such as Queensland and Victoria which have introduced standards and processes which emphasise cultural heritage management planning.

#### ***(d) International instruments to which Australia is a party***

Australia is party to a number of international instruments which include provisions for the protection of Indigenous heritage. Importantly in 2009 Australia signed the *UN Declaration on the*

*Rights of Indigenous Peoples*, which recognises a range of Indigenous rights over Indigenous culture, heritage and Country, and makes these rights the “core business for Australian Governments.”<sup>lix</sup>

The relevant international standards and principles to which Australia is a party are outlined in brief below. A more detailed summary can be found in Chapter 2 of Schnierer, E., Ellsmore, S. and Schnierer, S. (2011) *Australian State of Indigenous Cultural Heritage Report 2011*, as available to download from <http://www.environment.gov.au/soe/2011/report/heritage/supporting-material.html>.<sup>lx</sup>

## **United Nations Declaration on the Rights of Indigenous Peoples**

### *Article 11*

1. *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.*

2. *States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

### *Article 12*

1. *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.*

2. *States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.*<sup>lxi</sup>

Also relevant to Aboriginal heritage are Articles 13, 24, 25 and 31 which include requirements that states consult and cooperate in good faith with Indigenous peoples to obtain their ‘free, prior and informed consent’ before adopting and implementing legislative or administrative measures that may affect them, their cultural heritage, or their traditional lands and waters.

**ICCPR and ICESCR:** The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognise the right of minorities to practice and protect their cultures, as an inherent part of the right to self-determination.<sup>lxii</sup>

**ILO Convention 169:** The *International Labor Organisation Convention Regarding Indigenous and Tribal Peoples in Independent Countries* (ILO 169) recognises the rights of Indigenous peoples to undertake traditional cultural practices and control and use traditional lands.<sup>lxiii</sup>

**Convention on the Protection and Promotion of the Diversity of Cultural Expressions:** This 2005 *United National Economic Social and Cultural Organisation (UNESCO)* includes recognition of Indigenous cultures and the importance of these cultures to the ongoing and sustainable development of communities.<sup>lxiv</sup>

**Convention on Biological Diversity:** This year Australia signed the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (the

Ngoya Protocol) to the Convention on Biological Diversity, which was signed by the Australian Government in 1993.<sup>lxv</sup>

*Extract from the CBD:*

*Article 8 In-situ Conservation*

*Each Contracting Party shall, as far as possible and as appropriate: ... (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; ...*

*Article 10 Sustainable Use of Components of Biological Diversity*

*Each Contracting Party shall, as far as possible and as appropriate: .... (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; ...<sup>lxvi</sup>*

The Nagoya Protocol provides a framework to allow better ‘access and benefit sharing’ (or ABS) with Indigenous people over biological resources. The Nagoya Protocol explicitly adopts Indigenous rights identified by the *UN Declaration on the Rights of Indigenous Peoples* over biological resources into the *Convention on Biological Diversity*.<sup>lxvii</sup>

Generally, all these instruments require states to take action to recognise and protect human rights, or Indigenous rights and interests, and make policies in consultation with the groups that are affected by government and development decisions. They also use the language of ‘free, prior and informed consent’, particularly in relation to Indigenous people, which moves the role of the State beyond ‘consultation’ to requiring recognition of the right of Indigenous peoples to exercise *control* in decisions over their culture, heritage and Country. It is noted that the more recent instruments recognise broader definitions of Aboriginal culture and heritage, and the cultural significance of lands and waters.

***(e) Systems in operation in other jurisdictions***

Several useful public reports have been recently published which compare Aboriginal cultural heritage systems across Australian jurisdictions. These include:

- Schnierer, E. (2010) *Caring for Culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia*, available from <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>;
- Research Section, National Native Title Tribunal (2010) *Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation*, <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>; and
- Environmental Defenders Office (NSW) (2009) *Reforming New South Wales’ Laws for the Protection of Aboriginal Cultural Heritage*, available from: [http://www.edo.org.au/edonsw/site/policy\\_discussion.php](http://www.edo.org.au/edonsw/site/policy_discussion.php).

In brief, the **Victorian system** established through the *Aboriginal Heritage Act 2006* (Vic) involves the appointment of Registered Aboriginal Parties (or ‘RAPs’) which are Aboriginal organisations which apply to be actively involved in decision-making around cultural heritage. At the state level a semi-independent Victorian Aboriginal Heritage Council supported by Aboriginal Affairs Victoria has been established to appoint RAPs, to provide a state-wide voice for Aboriginal people and to advise the



Minister for Aboriginal Affairs on issues relating to the management of cultural heritage. RAPs and the Victorian Aboriginal Heritage Council undertake a number of functions which in NSW are undertaken by OEH.

The Victorian system was identified by Schnierer (2010, as above) as the most promising in terms of support from Aboriginal groups engaged with the system. The Victorian system has been used as the basis for Option 3 (as outlined in the following section). Recent reviews of the legislation have identified broad support from all stakeholders for its operation, but also a number of problems which need to be addressed which have prevented the legislation from meeting its aims.<sup>lxviii</sup>

Suggested aspects of the Victorian system which could be considered for NSW, if amended to deal with problems which have been identified by recent reviews, include:

- The tiered registration test for RAPs, which prioritises groups who represent Traditional Owners to speak for Country. In Victoria the RAP test prioritises Native Title groups over other Aboriginal groups, including those for whom a Native Title claim has not been successful. It is recommended that any NSW RAP test be weighted towards Native Title but also prioritise factors such as whether groups are able to work with and incorporate the views of all relevant Traditional Owners, not only those who have registered a Native Title claim, the capacity of Aboriginal groups to undertake the expected functions and historic knowledge of an Aboriginal group about heritage in the area.
- Resources for RAPs to undertake required functions. In Victoria RAPs receive only a small amount of money from the Victorian Government and rely on standard fees set by regulation. Both Aboriginal groups and industry have raised concerns that RAPs are “grossly under-resourced” to undertake expected functions.<sup>lxix</sup> This has led to delays in decision-making and potential risks to heritage. Any NSW model would need to address the issue of base RAP funding and the level of standard fees set by the *Aboriginal Heritage Regulation 2007*. It is noted that the Victorian Government in 2012 announced that its intention to increase the regular funding for RAPs.
- Public mapping of ‘sensitive’ areas, to assist in determining what level of heritage assessment is likely to be required. The upfront involvement of Aboriginal groups in mapping regions to better identify where heritage exists would allow more certainty for development, and would reduce the reliance on self-regulation by developers which has been problematic in NSW and Qld.
- The establishment of a tiered, standardised Aboriginal heritage assessments. The Victorian system has established a series of templates and standards for different levels of assessments. While some practical issues with these standards have been identified, they could provide a basis for the development of NSW versions.
- A register of Aboriginal Cultural Heritage Advisors and a training program targeted for Aboriginal people. In Victoria the register, along with the standard templates and fees, is designed to provide certainty to industry as to projected costs and Aboriginal employment. A *Certificate IV in Aboriginal Cultural Heritage Management* has been developed and rolled out across several training providers. However, to date very few Aboriginal people have been registered and the Vic system has actually seen an increase in income for the non-Indigenous heritage management sector. To address this in NSW it is recommended that the existing network of community Aboriginal Site Officers could be temporarily registered and free training provided in order to ensure compliance with the agreed standards by a designated deadline of 2-5 years.

In considering possible aspects of the Victorian system which could be adopted in NSW it is also noted that the legislative system in Victoria includes a human rights framework which recognises Aboriginal cultural rights (section 19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)). Victoria has also established the *Traditional Owner Settlement Act 2010* (Vic) which encourages the negotiation of Native Title type agreements over Crown Land. There is no equivalent for either of these laws in NSW.

Dealing briefly with the **Queensland system** under the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld), Aboriginal heritage management in this state focuses on agreement making with Native Title groups. Aspects of the Queensland system are referenced in the proposed Options but the system as a whole has not been recommended for adoption in NSW as it relies heavily on identifying Aboriginal groups through Native Title, which has been much more extensively recognised in Qld than in NSW.

Some industry groups consider the Queensland legislation to be best practice as a result of its focus on agreement making and negotiation.<sup>lxx</sup> However concerns have been raised by Aboriginal groups that an emphasis on negotiation in the Qld system does not lead to just outcomes because Aboriginal groups are not adequately resourced to participate in the negotiations. Criticisms of the Qld system include:

- While the Acts aim to deliver ownership and control of heritage to Aboriginal and Torres Strait Islander people, it does not include sufficient provisions to achieve this in practice.
- ‘Aboriginal Cultural Heritage Bodies’ recognised by the Qld Government receive little or no funding and are generally not resourced to be able to undertake required functions and
- The blanket protection of heritage and the focus on the negotiation of ‘Cultural Heritage Management Plans’ between developers and Aboriginal groups is undermined by the inability of Aboriginal groups to monitor or enforce agreements.

The **NT model** under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) is referenced in the Options because it incorporates a successful, long running Aboriginal-controlled heritage body, in the form of the Aboriginal Areas Protection Authority (AAPA).

The different nature of land rights and history of Aboriginal nations in the NT makes it difficult to translate the NT system directly into a NSW context. However, some key aspects of the NT system were identified and referenced in the Options, including the separation of decision-making about Aboriginal heritage by an Aboriginal body separate from Land Councils (in Option 1), and an Aboriginal heritage body controlled by custodians or Traditional Owners (in all three Options).

Other aspects of the NT model could be incorporated into any of the three proposed Options including: Aboriginal control of information about sacred sites including mapping, the requirement for permission to undertake research (permits), the establishment of protected zones around sites, consultation undertaken by the AAPA rather than the proponent, the direct engagement of ‘experts’ and inspectors directly by the AAPA and broad rights of access to sacred sites by Aboriginal custodians.

One alternative method for heritage assessments which is used in the NT and could be considered for NSW is the issue of indemnity certificates. The AAPA has the power to issue an indemnity certificate to a person wanting to undertake an activity which make impact on a sacred site. The AAPA undertakes an assessment to satisfy itself that the use of, or work on, the area in question can proceed without there being a substantive risk of damage to, or interference with, a sacred site on or in the vicinity of the area. A certificate may also be issued if an agreement has been reached between the Aboriginal custodians and the applicant.<sup>lxxi</sup> An indemnity certificate sets out the conditions for carrying out the works but it is not an approval for development. It indemnifies the holder against prosecution for damage to sacred sites, and is effective because the AAPA also has extensive powers to enter, inspect and prosecute.

Finally, **internationally** lessons can also be learnt from other jurisdictions, particularly those with similar legislative governance frameworks to Australia. It is outside the scope of this report to canvas the range of relevant legislation in other countries however some useful reference can be drawn to:

- The **New Zealand Resource Management Act 1991**, which provides a process whereby Maori groups can register planning documents which they have developed with a local council. The local council must then take these documents into account when making planning decisions.<sup>lxxii</sup>

This concept could be adopted in NSW with nominated Aboriginal groups becoming responsible for providing the maps of heritage and sensitive areas to Local Councils. Local Councils are already required to develop and include maps of Aboriginal heritage in their Local Environment Plans (LEPs), however only a small number of Councils have undertake comprehensive Aboriginal heritage assessments in partnership with Aboriginal groups and many rely on the limited information about the location of Aboriginal sites provided by AHIMS. Placing responsibility for providing maps onto Aboriginal groups and establishing these as the primary Aboriginal heritage maps would remove the need for duplicate searches and unnecessary consultations. Sufficient time and resources would need to be provided if this responsibility was to shift to Aboriginal community groups and establish credible maps across NSW.

- In **Canada** the *First Nations Management Act* and the *Framework Agreement on First Nations Management* establishes wide powers for Indigenous people to establish rules determining how lands and heritage within traditional lands will be managed. This includes the establishment of local regulations about what community consultation is required in relation to different impacts on heritage sites, and the role of Elders Councils.<sup>lxxiii</sup>

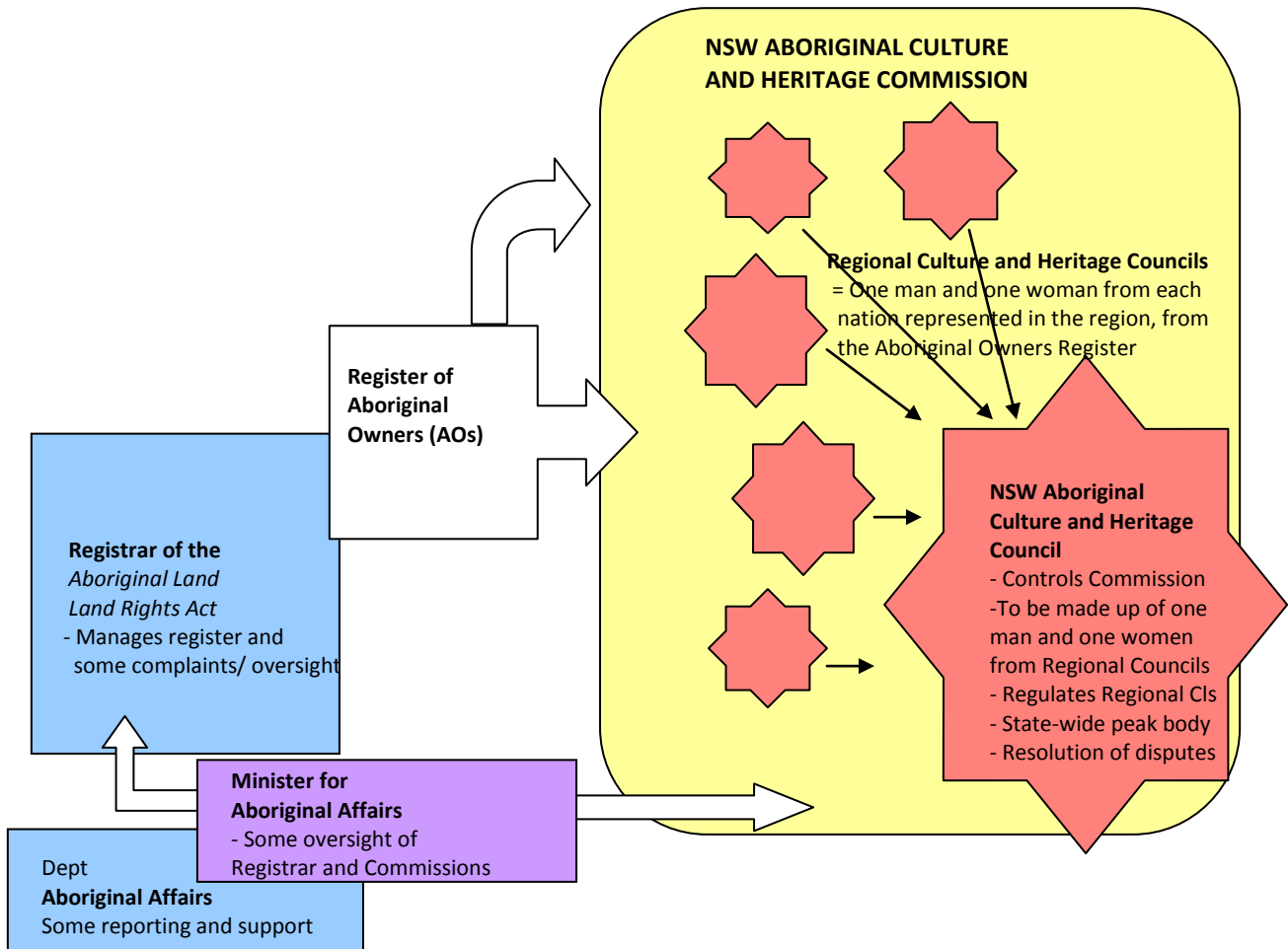
A similar community driven, flexible regulations structure could be established in NSW, for any of the three proposed Options. Local Aboriginal organisations could become responsible for developing regulations which specify: when the consent of Aboriginal Owners is required, when consultation and advice with Aboriginal Owners is required and when notification and consultation with broader Aboriginal groups is required, for different regions and nation groups.

- Like some Australian Land Councils in the North of Australia, a number of First Nations have established substantial Indigenous controlled archeological and heritage research centres. Some centres have been able to operate on a business model, that is to secure enough funding government and private contracts to be self-sufficient.<sup>lxxiv</sup> It is recommended that these be considered as possible successful models for NSW.

### (iii) Three Proposed Options for Reform

#### **Option 1 – NSW Aboriginal Culture and Heritage Commission**

Establishment of a NSW Aboriginal Culture and Heritage Commission controlled by regional Councils or Boards nominated by Aboriginal groups, elected or selected to reflect traditional Aboriginal nation groupings and a State-wide NSW Council board. This model reflects the recommendations of past reviews of Aboriginal heritage in NSW.



#### **Legislative change:**

- Aboriginal heritage provisions of *National Parks and Wildlife Act 1974* and some other NSW Acts to be removed and incorporated into a new Aboriginal culture and heritage law for NSW.
- Amendments to the Aboriginal Owner provisions of the *Aboriginal Land Rights Act 1983*, and amendments to recognise reduced culture and heritage advisory role for Land Councils, beyond lands which Land Councils directly own and control.
- Amendments to environment and planning legislation to recognise the role of Commission and Councils in preparing Aboriginal heritage assessments and approving decisions which will impact on heritage.

#### **Who Speaks for Country:**

- Aboriginal Owners (or AOs), as defined under the *Aboriginal Land Rights Act*, will be identified as those who are able to speak for Country. AOs will nominate or elect the people to represent them at the regional and State level, through the Regional and State Aboriginal Culture and Heritage Councils. In order to facilitate this the AOs Register would need to be expanded.

- The Regional Aboriginal Culture and Heritage Councils would be the one contact point for development decisions, and would undertake consultation with other relevant Aboriginal groups.
- Native title groups would continue to exercise rights and responsibilities as per the *Native Title Act*. Protocols to be established as to how the Aboriginal Owners Council would respect the rights of Native Title holders as per Commonwealth legislation. Native Title holders will meet AO Registration test, but may choose not to register.
- Land Councils continue to exercise functions as per the *Aboriginal Land Rights Act*, with some amendments to recognise that Land Councils no longer have a function to protect culture and heritage beyond the lands which they have claimed or directly control.

### Boundaries of regions:

This report does not propose specific regional boundaries. However, it is suggested that the regional Commission Council structure could potentially represent more than one nation, grouped as appropriate. These regions may reference the existing NSWALC regions (9), Aboriginal Fishing Advisory Council boundaries (10), former NSWALC regional boundaries (13) or former ATSIC boundaries (6) but should only be established following appropriate mapping and consultation.

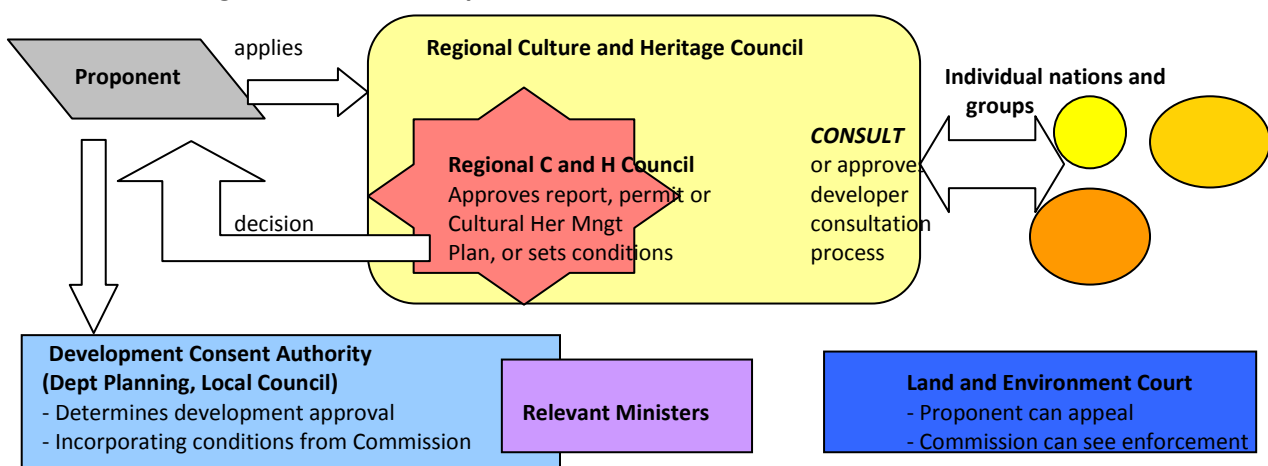
### Administration and funding:

- This model requires the establishment of new structures, potentially collocated with other groups such as Land Councils or native title bodies. As an independent Aboriginal organisation it is arguable that it is not appropriate to co-locate the Commission with a government agency beyond an initial transition period.
- For discussion of funding options see corresponding report: ‘Modeling the Cost of Reform.’

### Governance and decision-making:

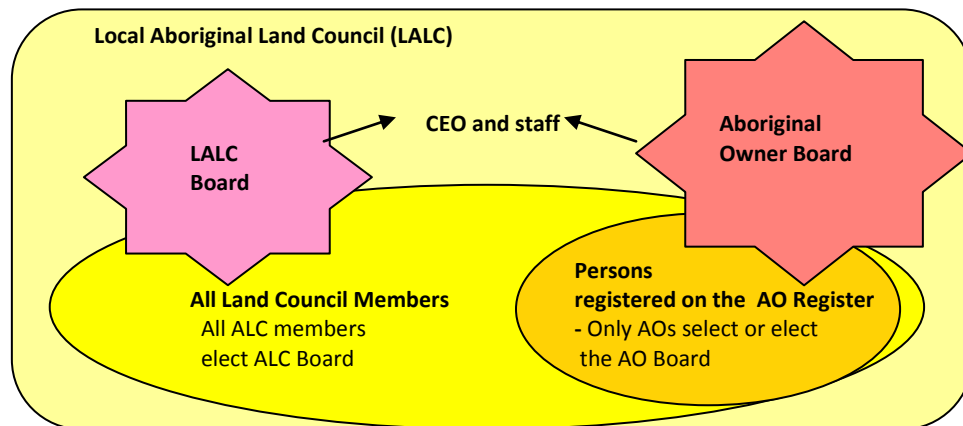
- One man and one woman from each nation within the boundaries of a region (who is registered on the Register of Aboriginal Owners) to be elected or selected by the Aboriginal Owners for that nation.
- One man and one woman from each Region to be elected or selected for the state-wide NSW Aboriginal Culture and Heritage Council.
- The state-wide NSW Aboriginal Culture and Heritage Council’s functions will include policy, advice, training, community education, research and advice to NSW Government agencies.
- Decisions about impacts on local heritage will rest with the Regional Councils. The Regional Councils will be the central bodies to be consulted and consent to culture and heritage issues within their boundaries.
- Local nation decision making to be facilitated through consultation policies in relation to local decisions (eg permits, below) but ultimate decision rests with Regional Councils.

### Cultural heritage assessments and permits:



## Option 2 – Two-tiered Aboriginal Land Councils

This model would build on the existing Local Aboriginal Land Council (LALC) and NSW Aboriginal Land Council (NSWALC) structures under the *Aboriginal Land Rights Act 1983* (NSW) by creating two complimentary but separate voting memberships within Land Councils. While a LALC Board is currently elected by the general Aboriginal membership of a LALC, a separate 'Aboriginal Owners Board' would be selected or elected by Aboriginal Owners and become responsible for making decisions for Aboriginal culture, heritage and culturally significant lands and waters. At the state level a 'NSW Aboriginal Owners Council' made up of elected regional Councillors who would exercise a culture and heritage advice and oversight role, separate and complimentary to the existing elected Council of NSWALC.



### Legislation:

- Aboriginal heritage provisions to be removed from the *National Parks and Wildlife Act 1974*, and some provisions transferred to the *Aboriginal Land Rights Act 1983*.
- *Aboriginal Land Rights Act* to be amended to create a two tiered membership structure, establish separate Culture and Heritage Boards within Land Councils and increase the culture and heritage role of Land Councils.
- Amendments to environment and planning legislation to recognise the stronger role of the Land Councils in assessing and approving heritage impacts.

### Who Speaks for Country:

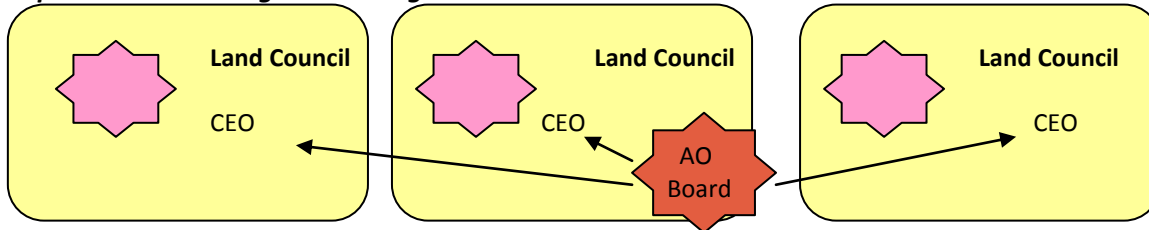
- As per Option 1, Aboriginal Owners (or AOs) will be identified as those who are able to speak for Country. In this model they are represented through Land Councils, with Aboriginal Owner Boards established within Land Councils exercising control over culture and heritage issues.
- As per Option 1, Native Title groups continue to exercise rights and responsibilities as per the *Native Title Act*. Protocols to be established as to how the Aboriginal Owners Council complies with the requirements of Native Title legislation. Native Title holders will meet AO Registration test, and become automatically able to join a Land Council, but may choose not to register.
- As per Option 1, consultation processes to be established with other Aboriginal groups, but government and proponents will deal with Aboriginal contact – in this case Land Councils.

### Boundaries:

- In order to be entered on the Register of Aboriginal Owners the specific lands with which a person has a cultural association must be recorded. In contrast, the current boundaries of the 119 LALCs do not, in the main, reflect traditional nation boundaries and are unlikely to be easily matched with these cultural boundaries.
- One way to deal with this would be for individual Aboriginal Owners, whose lands may cross several LALCs, to have the right to be a member of several LALCs (ie hold speaking rights in each) but only hold voting rights or the ability to stand for the Aboriginal Owners Board of one.

- A second option is to create protocols between LALC AO Boards, where there is a significant overlap, requiring consultation when certain important cultural heritage decisions are made by one AO Board over lands within the LALC's boundaries.
- A third option would be to create larger AO Boards which cross several LALCs, effectively 'shared' or 'regional' Aboriginal Owner Boards.

**Option – 'shared' regional Aboriginal Owner Boards across LALCs**



**Administration and funding:**

- This model does not require the establishment of new bodies, instead proposes an expansion of the role of Land Councils. If an option was to be adopted which saw the establishment of 'shared' or 'regional' Aboriginal Owner Boards one primary LALC would need to be nominated to act as secretariat and support for that Board. Clear processes for directing staff of different LALCs within the shared region would also need to be developed.
- For discussion of funding options see the separate report: 'Modeling the Cost of Reform'.

**Governance and decision making:**

- The Aboriginal Owner Boards are to be made up of AOs elected or selected alongside LALC Boards. It is proposed that any new system allow flexibility with regulations guiding how the AO Boards are appointed, to allow elections from all AOs in an area, representative nation nominees, or more consensus based models as appropriate in different regions. The regulations will also need to place limits on a person being a member of both an AO Board and the LALC Board.
- LALC Boards would continue to undertake the range of functions to manage the LALC and its assets. However, LALC Boards must defer to the AO Boards in relation to defined culture, heritage and Country functions. Regulations to be established to identify:
  - When the consent of the AO Board is required by the LALC
  - When consultation with the AO Board is required by the LALC
  - When consultation or consent by majority approval (ie a vote) by the Aboriginal Owner members of a LALC is required
- At the State level NSWALC be expanded to include a NSW Aboriginal Owners Council with statewide responsibilities for culture and heritage similar to Option 1. The State-wide Aboriginal Culture and Heritage Council could either be elected by AOs at same time as NSWALC elections or nominated from LALC AO Boards.
- Like the current system for regulating Aboriginal Land Councils the Minister for Aboriginal Affairs would retain some oversight and regulatory functions, but the regulation of LALCs would largely remain with NSWALC as an independent Aboriginal organisation.
- Both the Aboriginal Land Council Member Register and the Register of Aboriginal Owners would be maintained by the Office of the Registrar of the *Aboriginal Land Rights Act*.

**Cultural heritage assessments and permits:**

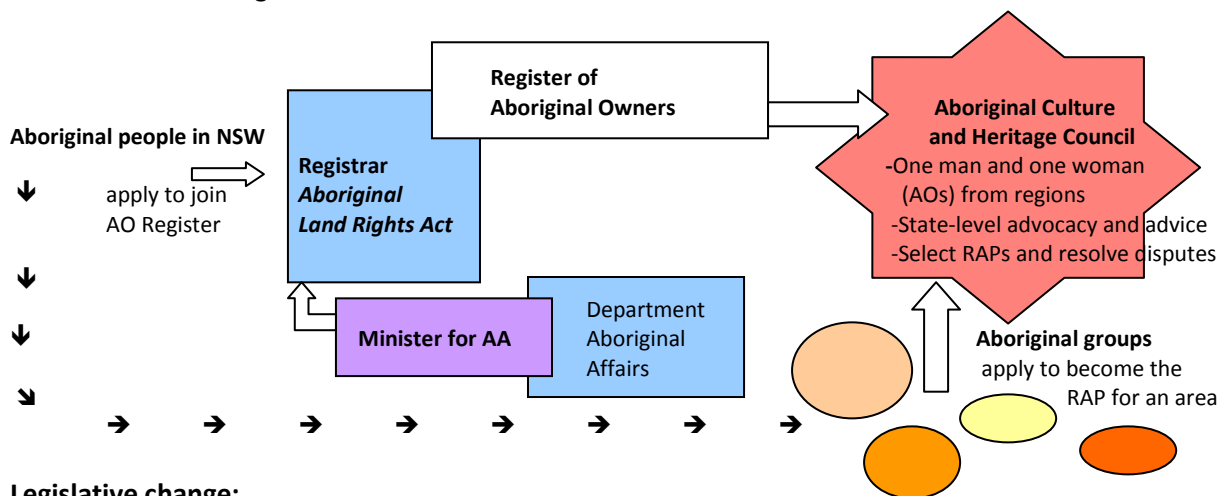
- This model would operate similarly to Option 1, with the LALC replacing the role of the Regional Aboriginal Culture and Heritage Commission as the one Aboriginal contact point cultural heritage matters.

### Option 3 – Registered Aboriginal Parties

Under this model Aboriginal organisations would nominate to become responsible for protecting and managing Aboriginal heritage in a particular area. A state-wide Aboriginal Culture and Heritage Council would be established to select which Aboriginal groups would become the Registered Aboriginal Party (RAP) for an area and a range of other functions including regulation of RAPs, advice, research, education and training.

This option references the current Victorian *Aboriginal Heritage Act 2006* system, which has established RAPs as the initial contact point for developers in relation to cultural heritage assessments. The proposed Option 3 model differs in several important aspects from the Victorian system though, including:

- There is a reduced emphasis on Native Title as the test to identify Traditional Owners, with the Aboriginal Owners Register test under the *Aboriginal Land Rights Act 1983* (section 171) used instead to identify individuals who can speak for Country.
- More flexibility in the RAP application test to allow existing groups which are not Traditional Owner based, such as Land Councils, to register where they can demonstrate culturally appropriate decision-making or the consent of a sufficient number of Traditional Owners,
- Increased importance in the RAP registration test for whether an Aboriginal group has the ‘capacity’ to undertake the various cultural heritage functions required, as an important factor when determining if it should become the RAP for an area, and
- Increased independence for the state-wide Aboriginal Culture and Heritage Council, which in Victoria the Council located within the Victorian Department of Planning and is appointed by the Minister for Aboriginal Affairs.



#### Legislative change:

- As per Option 1 – a new Aboriginal Culture and Heritage Act for NSW to be established. The Act will provide for the creation of Aboriginal Culture and Heritage Council and RAP registration.
- Amendments to the *Aboriginal Land Rights Act 1983*, to accommodate expanded roles for those LALCs which are registered as RAPs and reduced culture and heritage functions for those that do not, including NSWALC whose state-wide culture and heritage advocacy functions will be reduced.

#### Who Speaks for Country:

- Aboriginal Owner test as per the *Aboriginal Land Rights Act 1983* used to identify which individuals have the authority to speak for Country. Like Options 1 and 2 this model would require the expansion of the Aboriginal Owners Register across the State.
- RAPs are selected by a Council comprised of Aboriginal Owners (the ‘Aboriginal Culture and Heritage Council’). RAPs then become responsible for protecting and managing Aboriginal cultural heritage within their boundaries.



- In order to become a RAP an Aboriginal organisation must pass a registration test which includes a requirement to demonstrate that a sufficient number of registered Aboriginal Owners for the area will be appropriately engaged in decision making. This could include through governance structures, protocols or consultation and consent requirements.
- As per Options 1 and 2 Native Title groups would continue to exercise rights and responsibilities as recognised through Commonwealth legislation and native title determinations. Native title holders and most registered claimants would meet the Aboriginal Owners registration test, but may choose not to register.
- Unlike the Victorian system priority acceptance of Native Title holders or registered claimants as the RAPs for an area will not apply, where a group cannot demonstrate capacity to undertake the functions required. In such cases the state-wide Council should offer support to assist groups towards registration.

#### **Regional boundaries:**

- It is recommended that the Aboriginal Culture and Heritage Council be elected or selected based on existing NSWALC boundaries (9), or alternative boundaries are discussed for Option 2.
- As per the Victorian system more than one RAP may be registered for an area in special circumstances, but before a second or overlapping RAP can be registered an agreement or protocols must be negotiated between the two groups.

#### **Administration and funding:**

- This model requires the establishment of a new state-wide Council, independent or potentially co-located with NSWALC or another appropriate NSW Aboriginal-run body.
- It does not require the establishment of new organisations as RAPs, as it is anticipated that the the extensive network of Land Councils, Native Title groups, other Aboriginal organisations and Aboriginal Boards of Management which exist in NSW will offer sufficient regional coverage.
- As per the other options the majority of Aboriginal cultural heritage functions currently undertaken by OEH will be transferred to Aboriginal controlled bodies (in this option RAPs), including assessment permit applications. For this reason it would be appropriate for direct grants to be made available to RAPs, which can be supplemented by independent income. For further discussion of possible funding models see the separate report: 'Modeling the Cost of Reform.'

#### **Governance and decision-making:**

- Local decisions are to be made at first instance through RAPs. The state-wide Council will be responsible for regulating RAPs, including reviewing decisions of RAPs where appropriate.
- Clear dispute resolution processes strategies between groups will be developed, with the state-wide Council assisting with the resolution of local disputes, drawing on lessons learnt in Victoria.
- The Minister for Aboriginal Affairs or the Minister for Heritage will maintain a role to ensure the operation of the new Act, including limited compliance roles and some powers of intervention at the request of the Council or a RAP.
- It is proposed that the state-wide Aboriginal Culture and Heritage Council could be elected by Aboriginal Owners in conjunction with NSWALC elections, or alternatively regional forums jointly convened by NSWALC, NTSCORP and the Registrar of the Aboriginal Land Rights Act could be held through which one man and one woman from each region could be selected.

#### **Cultural heritage assessments and permits:**

- As per Options 1 and 2, there will be one contact point for developers or proponents who is planning to undertake an activity which may impact on Aboriginal heritage – in this case the RAP.
- As per the other Options a proponent unhappy with a RAP assessment or decision can apply to the Council or the Land and Environment Court.

## **(iv) Some additional legislative features**

### **(a) Aim and objectives**

The current objects of the *National Parks and Wildlife Act* include at section 2A:

*“(1)(b) the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to: (i) places, objects and features of significance to Aboriginal people, .... and (c) fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation.”*

Section 2A also states that the objects of the Act are to be achieved by applying the principles of ecologically sustainable development, and having regard to the ‘public interest’. In practice this reference to the public interest, along with the sections of the Act which allow for the issuing permits authorising destruction, has meant that the protection of Aboriginal cultural heritage is ‘balanced’ against other interests, such as the economic benefit of a development proceeding which involves harm to heritage.<sup>lxv</sup> This is a significantly weaker protection for heritage than other forms of heritage legislation – such as the *Heritage Act 1977* (NSW).

An alternative definition, which could be adopted in NSW regardless of which model is selected, can be found in the **Victorian Aboriginal Heritage Act 2006**. The Victorian Act’s main purpose (at section 1) is “to provide for the protection of Aboriginal cultural heritage in Victoria”. See also:

#### *Section 3*

*The objectives of this Act are—*

- (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;*
- (b) to recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;*
- (c) to accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage;*
- (d) to promote the management of Aboriginal cultural heritage as an integral part of land and natural resource management;*
- (e) to promote public awareness and understanding of Aboriginal cultural heritage in Victoria;*
- (f) to establish an Aboriginal cultural heritage register to record Aboriginal cultural heritage;*
- (g) to establish processes for the timely and efficient assessment of activities that have the potential to harm Aboriginal cultural heritage;*
- (h) to promote the use of agreements that provide for the management and protection of Aboriginal cultural heritage;*
- (i) to establish mechanisms that enable the resolution of disputes relating to the protection of Aboriginal cultural heritage; and*
- (j) to provide appropriate sanctions and penalties to prevent harm to Aboriginal cultural heritage.*

### **(b) Defining Aboriginal culture and heritage**

Section 5 of the *National Parks and Wildlife Act 1974* defines an Aboriginal object as:

*any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.*

‘Aboriginal places’ can be declared over an area which “in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture, to be an Aboriginal place for the purposes of this Act” (section 84).

As discussed in previous sections this definition captures only limited aspects of Aboriginal cultural heritage. A ‘best practice’ definition would accord with Aboriginal peoples’ understanding of

heritage would be broader than sites and objects, and would recognise the intangible as well as physical values connected with a place.

Examples of broader definitions of Aboriginal cultural heritage include:

- The *UN Declaration on the Rights of Indigenous Peoples* (see sections quoted in Section (ii)(d) of this Report);
- The Victorian *Aboriginal Heritage Act 2006* which recognises Aboriginal ‘objects’, human remains and ‘Aboriginal places’, where place is defined broadly to include: an area of land; an expanse of water; a natural feature, formation or landscape; or an archaeological site, feature or deposit; as well as the area around that site (section 5). The recognition of buffer zones has been identified as important to ensure that genuine protection is provided to particular sites;<sup>lxxvi</sup> and
- The Queensland *Aboriginal Cultural Heritage Act 2003* (and corresponding *Torres Strait Islander Cultural Heritage Act*) which defines ‘Aboriginal cultural heritage’ is “anything” that is a significant Aboriginal area in Queensland; or a significant Aboriginal object; or evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland (section 8).

Also important to consider in the development of new legislative definition of Aboriginal cultural heritage is whether the definition of cultural heritage includes a test of ‘significance’ and who determines whether something is Aboriginal cultural heritage.

The *National Parks and Wildlife Act* defines objects as Aboriginal cultural heritage because they are evidence of Aboriginal habitation (an archaeological definition). Aboriginal places can be established if they are significant in the opinion of the Minister.

Some other Australian legislation recognises that Aboriginal people determine whether something is a heritage item based on whether it has heritage value (or ‘significance’) to Aboriginal people (for example Queensland system, as quoted above), with the test relying on information from Aboriginal people. See also for example section 4 of the Victorian *Aboriginal Heritage Act* (section 4) and the South Australian *Aboriginal Heritage Act 1988* (section 3) which protects “all Aboriginal sites, objects and remains ... that are of significance to Aboriginal tradition, archaeology, anthropology or history” (section 3).

As discussed in Section (ii)(c) of this report one of the criticisms of the current *National Parks and Wildlife Act* is that it does include a test of significance. Defining heritage as those things that the Aboriginal community values, rather than those things that are evidence of historical activities by Aboriginal people, would be consistent with the *UN Declaration on the Rights of Indigenous Peoples*.

### **(c) Other selected features**

Features of Aboriginal heritage systems in other jurisdictions which could be considered as part of any of the three proposed Options are discussed in Section (ii)(e) of this Report. This includes alternative approaches to Aboriginal cultural heritage mapping and assessments.

Some other selected features of relevant legislation, including different legal approaches to the recognition of ‘ownership’ of Aboriginal heritage, are discussed in Schnierer, E. (2010) *Caring for Culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia*, as available from <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>.

## **(v) Conclusion**

Reform to the system of management of Aboriginal culture and heritage in NSW is a long debated issue. The system currently in operation represents a diverse history of amendments and changes which have been pushed forward by Aboriginal groups, policy makers, heritage professionals, environmentalists, industry groups and Ministers of different political persuasions.

In recent times there has been a significant increase in local, national and international interest and understanding about the importance of Aboriginal culture and heritage. This includes an increased understanding of the central role of Aboriginal culture and heritage to Aboriginal human rights and self-determination.

There is a broad consensus that significant work needs to be done to reform Aboriginal culture and heritage management in NSW. There is also a strong understanding that Aboriginal culture and heritage needs to be better protected and supported for future generations of Australians.

The current NSW Aboriginal cultural heritage review represents an important opportunity to move forward where previous reform processes have faltered. Along with past reviews there is a significant body of advice from Aboriginal communities about what needs to be done which can be drawn on. Legislation in other Australian States and internationally provides useful lessons about alternative approaches which could work for NSW. In putting forward the three possible Options for reform outlined in this Report it is hoped that this report can also make a useful contribution to current debates and the current review.

## Appendix 1: Key Principles for Reform

1. Recognition that Aboriginal communities are the rightful owners of Aboriginal cultural heritage in NSW.
2. The establishment of a legislative system which effects a practical balance between:
  - the recognised need to preserve and enhance Aboriginal cultural traditions;
  - the need to deliver social justice to Aboriginal people in NSW to redress the significant cultural, economic, and social dispossession which they have suffered;
  - the need for Government to ensure the economic, social and cultural advancement of other (non-Aboriginal interests) in NSW.
3. Respect for Aboriginal cultural proprieties, including contemporary beliefs, values and practices.
4. Recognition that Aboriginal cultural heritage is part of a broader Aboriginal relationship with the land including:
  - land rights;
  - land use and sustenance: hunting, gathering and fishing practices;
  - religious, spiritual and cultural beliefs and practices; and
  - intangible cultural property: dance, drama, art, music.
5. Provision for the protection and management of culturally significant areas on private and public lands.
6. The establishment of management processes which:
  - recognise cultural rights and responsibilities of local Aboriginal communities, traditional owners and custodians;
  - allow for the advocacy of Aboriginal interests; and
  - are clear, transparent and accountable.
7. The identification and mapping of cultural areas/zones in NSW, as a basis for the operation of the proposed Aboriginal Heritage Commission. Such mapping should:
  - be consistent with native title interests; and
  - recognise the diversity of Aboriginal interests across the State.
8. Every opportunity should be given to Aboriginal communities and other land users to discuss, negotiate and resolve land use proposals at community levels.
9. The establishment of:
  - centralised and co-ordinated monitoring of inter-agency policies and programs which affect Aboriginal cultural heritage; and
  - a co-ordinated and consultative approach between all levels of Government on the development of policies and programs affecting Aboriginal cultural heritage.
10. Support and encouragement for greater understanding of Aboriginal cultural heritage and management and protection policies through a range of education programs and research work.
11. The establishment of an effective system of prosecution and penalties.
12. Recognition of international standards set by the United Nations.

## Appendix 2: Culture and heritage roles of Aboriginal groups in NSW

This Appendix provides additional information about the number, functions and capacity of Aboriginal groups in NSW to that provided in Section (II)(a) of the Report. In particular the report focuses on the three main Aboriginal groups which currently have recognised legislative roles for the protection and management of culture and heritage in NSW – Land Councils, Aboriginal Owners and Native Title.

**Aboriginal Land Councils:** Under the *Aboriginal Land Rights Act 1983* (NSW) Aboriginal adults living in NSW are able to join the Local Aboriginal Land Council (LALC) for the area in which they live, or another LALC covering lands with which they have an association, and vote in NSW Aboriginal Land Council (NSWALC) elections.<sup>lxxvii</sup> The *Aboriginal Land Rights Act* was enacted following a long campaign for land rights by Aboriginal people, in recognition that “Land in the State of New South Wales was traditionally owned and occupied by Aborigines” and that “Land is of spiritual, social, cultural and economic importance to Aborigines.”<sup>lxxviii</sup>

Land Councils are independent Aboriginal bodies run by boards elected from the membership, under regulation by the Minister for Aboriginal Affairs and the Registrar of the *Aboriginal Land Rights Act*. In this way LALCs are similar to Local Government, with voluntary voting. Across the State Land Councils have an estimated membership of more than 20,000, or approximately one quarter of Aboriginal adults in NSW.<sup>lxxix</sup>

Land Councils’ responsibilities include representation of the Aboriginal people of NSW, economic development and the protection and promotion of Aboriginal culture and heritage.<sup>lxxx</sup> The Act does not provide specific powers for Land Councils to take action to protect Aboriginal heritage. Historically NSWALC, as the elected representative body for Aboriginal people in NSW, has played a significant role advising the NSW Government and advocating for legislative and policy reforms in the area of culture and heritage.

NSWALC is funded through an independent statutory fund, rather than recurrent government grants. LALCs are also funded independently. Most receive a small grant each year from NSWALC and otherwise rely on local income from land claims, fundraising and business ventures, including cultural heritage services. It is estimated that LALCs and NSWALC currently own, or have made land claims over, 1-2% of NSW’s land mass.<sup>lxxxi</sup>

There are currently 119 LALCs in NSW, of which approximately 10% are considered to have significant management difficulties. The ongoing sustainability of the current network of LALCs has been raised as an issue by NSWALC.<sup>lxxxii</sup>

**Aboriginal Owners registered on the Register of Aboriginal Owners:** Under the *Aboriginal Land Rights Act 1983* (NSW), the Registrar of the *Aboriginal Land Rights Act*, Mr Stephen Wright, must keep and maintain a Register of Aboriginal Owners (AOs) and details of lands with which those AOs have a cultural association.

A person's name can only be entered on the Register of Aboriginal Owners if the person:

- is directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated,
- has a cultural association with the land that derives from 'the traditions, observances, customs, beliefs or history' of the original Aboriginal inhabitants, and
- has given consent to have their name added to the Register.<sup>lxxxiii</sup>

The Aboriginal Owners Register recognises individuals, rather than groups. Where a park has been handed back to Aboriginal ownership in NSW selected Aboriginal Owners will be included on a Board of Management This Board of Management is supported staff from OEH (National Parks) and have functions including the “care, control and management” of relevant lands and the consideration of proposals for the carrying out, by Aboriginal Owners or other Aboriginal people, of cultural activities (such as hunting and gathering) within those lands (section 71AO). Boards of Management are largely limited to functions relating to the relevant park lands.

Currently Aboriginal Owners have only been registered over areas where there is a jointly managed national park, which is a small percentage of the state. There are nine areas in NSW for which Aboriginal Owners have been registered and approximately 700 Aboriginal persons have been registered.<sup>lxxxiv</sup> Registration is undertaken following extensive research.

**Native Title groups:** Native title recognises that Indigenous people have rights which derive from traditional Indigenous laws and customs. Native Title groups are formed to make native claims or to negotiate native title agreements such Indigenous Land Use Agreements, or ILUAs.

At the State level NTSCORP Ltd (formerly NSW Native Title Services) supports Native Title groups to lodge, research and negotiate claims.<sup>lxxxv</sup> NTSCORP also plays a role advocating for culture and heritage reform at the state level.

For native title claims, parties can be numerous and diverse and their relationships complex. Native Title claims can take up many years to be finalised, with several NSW claims taking 10 years or more,

When native title is granted, claimants are required by law to set up a Prescribed Bodies Corporate (PBCs) to manage their native title interests. Prescribed Bodies Corporate receive little or no direct government funding and anecdotally many lack the resources to undertake a range of functions. However, as Native Title agreements are confidential financial information about PBCs is not public.

**MILDRN & NBAN:** The Murray Darling Basin extends across significant parts of NSW and other States, including across significant areas where native title has been recognised. In the 1990s during the Yorta Yorta Native Title Case a confederation of Aboriginal nations was formed as the Murray Lower Darling Rivers Indigenous Nations (or MILDRN). MILDRN represents up to 40 Indigenous nations, which meet regular and provide advice to State and Federal Government agencies on issues relating to the basin, including cultural water flows.<sup>lxxxvi</sup>

More recently the Northern Murray Darling Basin Indigenous Nations (NBAN) was also formed, representing up to 22 nations or clans.<sup>lxxxvii</sup>

**Aboriginal advisory groups:** There are a number of Aboriginal advisory groups to NSW Government established under various legislation. These groups have important input in government policy, and can provide independent advice, but are generally limited in their role as government advisory bodies appointed by relevant Ministers.

The Aboriginal Cultural Heritage Advisory Committee (ACHAC) is established under the *National Parks and Wildlife Act 1974* and advises the NSW Minister for the Environment. Its membership is appointed by the Minister and includes some designated positions for NSWALC and NTSCORP. The functions of ACHAC under the *National Parks and Wildlife Act 1974* (section 28) are very broad. Previous incarnations of ACHAC have played an active role in providing advice on individual permit applications.

Other committees include the Aboriginal Heritage Advisory Panel (AHAP) which provides advice to the Heritage Council and the Aboriginal Fishing Advisory Council which was more recently established under Section 229 of the *Fisheries Management Act 1994* (NSW) to provide strategic level advice to the NSW Minister for Primary Industries on issues affecting Aboriginal fishing interests.

**Local Councils:** A large number of Local Councils have established different forms of Aboriginal advisory groups. The most recent NSW Local Government and Shires Associations' Social Policy and Community Services Survey found that, of the 110 Councils which responded to the survey, 48 Councils had Aboriginal and Torres Strait Islander Peoples Advisory Groups/Committees and 18 Councils identified Aboriginal Heritage Advisory Committees/Groups.<sup>lxxxviii</sup> The membership of advisory bodies varies across Councils and include Aboriginal Elders, local Aboriginal and non-Aboriginal community members, Aboriginal groups and reconciliation groups.

A number of other government bodies also have Aboriginal advisory groups, including some Catchment Management Authorities.

**DAA Partnership Communities:** Aboriginal Affairs NSW (formerly the Department of Aboriginal Affairs) has established a program in 40 discrete Aboriginal communities, referred to as 'Partnership Communities', to identify 'Community Engagement Bodies' which act as a forum for government agencies and local Aboriginal communities to discuss service delivery and develop strategies to strengthen community wellbeing. In some cases existing Aboriginal organisations such as Land Councils or Aboriginal health services, have been established as the Community Engagement Body for a community.<sup>lxxxix</sup> This program is currently being reviewed.

**Elders groups, nation groups and Aboriginal corporations:** There exist across Australia, and NSW, a range of corporations as well as less formal bodies established by Aboriginal individuals and family groups to represent their interests, hold land and assets and/or to provide services to the Aboriginal community.

The legal arrangements which guide these organisations vary significantly, as they may be established as businesses, as not-for-profits, or as recognised Aboriginal and Torres Strait Islander Corporations registered with the Commonwealth Government Office of the Registrar of Indigenous Corporations.<sup>xc</sup> In some cases these bodies have specifically been established to undertake activities like provide cultural heritage services in an area.

In the case of less formal groups, like committees of Elders, there may be no formal legal arrangements or structures. Support and facilitation for such groups is often provided by other community-run Aboriginal organisations, like Aboriginal legal services, health services or the Land Council, who assist by ensuring that when needed Elders are notified of developments in the local area and have an opportunity to provide advice and guidance.

**Keeping Places and Cultural Centres:** NSW has a network of community Aboriginal art spaces, galleries and cultural centres (or 'Keeping Places'), which receive different forms of funding and support, often connected to existing Aboriginal organisations. The functions of these spaces ranges from supporting community artists to education about Aboriginal culture and heritage, including practicing and reviving Aboriginal cultural activities.

In 2010-11 a survey undertaken by Museums and Galleries NSW about the number of these spaces in NSW found around 50 organisations or locations engaged in Aboriginal arts and cultural expression, and more than 40 LALCs engaged in artistic and cultural expression 'leading to the establishment of premises or the desire to establish premises.'<sup>xc</sup>



### Appendix 3: Overview of the current NSW system

This appendix summarises the practical operation of key provisions of NSW laws for the management of Aboriginal culture and heritage, particularly the role of the Office of Environment and Heritage (OEH), within the NSW Department of Premier and Cabinet.

**Protection of cultural heritage:** In brief, under the *National Parks and Wildlife Act 1974* 'blanket protection' is provided to Aboriginal heritage which fits within the definition of a physical Aboriginal 'object',<sup>xcii</sup> which includes objects on public and private lands.

Part 6 of the *National Parks and Wildlife Act* defines offences for harming Aboriginal heritage without a permit, with penalties of up to \$1.1 million for a corporation.<sup>xciii</sup> There have only been a handful of prosecutions for unlawful harm Aboriginal heritage pursued by the NSW Government.<sup>xciv</sup>

A number of places, sites and areas of lands are also protected, where they have been recognised by the Minister for their cultural values, in the form of 'Aboriginal Places'<sup>xcv</sup> or other kinds of reserves. In NSW there are currently: 77 declared Aboriginal Places,<sup>xcvi</sup> 21 Aboriginal Areas and 16 jointly or co-managed agreements over parks - which represents 23% of the national park system in NSW.<sup>xcvii</sup>

There are 19 listed items protected for their Aboriginal heritage values alongside other heritage items on the State Heritage Register, under the *Heritage Act 1977*.<sup>xcviii</sup> There also exist agreements with Aboriginal groups over private, State and Commonwealth lands, including 9 Indigenous Land Use Agreements (or ILUAs) and 9 Indigenous Protected Areas, which are voluntary conservation agreements between the Commonwealth Government and Aboriginal groups.<sup>xcix</sup> In total it can be estimated that the patchwork of Aboriginal cultural heritage protections cover 2-3% of NSW's lands and waters.<sup>c</sup>

**Ownership of cultural heritage:** The Director-General of the Department of Premier and Cabinet is responsible for protecting and recording Aboriginal heritage and administering the *National Parks and Wildlife Act 1974*.

The 'Crown' is recognised under the *National Parks and Wildlife Act 1974* as the owner of Aboriginal 'objects'.<sup>ci</sup> Since 1996 the Act has included provisions for the transfer of Aboriginal objects to Aboriginal people,<sup>cii</sup> however it is unclear whether this provision of the Act has been used. A number of skeletal remains and related cultural material are repatriated and reburied in traditional Country each year with the support of OEH and federal agencies.<sup>ciii</sup> A number of Aboriginal objects are also 'salvaged' each year from areas impacted by development. The majority of salvaged items are presented to the Australian Museum, which is the NSW statutory repository for archaeological material. The Museum currently holds approximately 1 million archaeological objects.<sup>civ</sup>

**Identifying and recording heritage:** The central NSW Government register of Aboriginal 'sites' (which includes objects, places and other information) is OEH's Aboriginal Heritage Information Management System (AHIMS). It currently contains 66,000 records.<sup>cv</sup>

Though it is a requirement under the Act to report any Aboriginal heritage object when it is identified,<sup>cvi</sup> it is widely acknowledged only a small percentage of Aboriginal culture and heritage in NSW has been formally identified and mapped. The vast majority of information about Aboriginal cultural heritage continues to be held by Aboriginal communities. There are examples of some regional Aboriginal heritage mapping projects and several Local Councils have undertaken Aboriginal cultural mapping for their local areas, as Local Councils are now required to include Aboriginal

heritage in their Local Environment Plans. However, most local Councils and other groups, such as developers, still rely primarily on the information that is recorded in AHIMS.

**Assessments:** A significant regulatory role for OEH under the current system is the approval of activities which are likely to disturb, harm or destroy Aboriginal cultural heritage. Generally, if a person is planning to undertake an activity which may harm Aboriginal heritage then they are required to apply for an Aboriginal Heritage Impact Permit (or AHIP) from OEH or risk a penalty.<sup>cvi</sup>

The permit process will be triggered when a person ('the proponent') identifies that they are planning to do something that is likely to impact on Aboriginal cultural heritage, or when the body responsible for approving the development – such as a Local Council or the NSW Department of Planning – requires an AHIP or other form of Aboriginal heritage assessment as part of the environmental assessment for the development. It is not known how many Aboriginal heritage assessments are completed each year, over what area.

**Consultation:** Under the *National Parks and Wildlife Act* the proponent is required to identify and consult with Aboriginal groups who are 'Traditional Knowledge Holders' (TKHs) to identify heritage and its significance in the area.<sup>cvi</sup> Usually the consultant will engage a heritage consultant or archaeologist to complete a report and discuss options to mitigate or manage the impact on heritage with local Aboriginal people. The goal of Aboriginal consultation under the current permit system is to seek the input and information from Aboriginal groups about the location and significance of heritage – the agreement or the consent of Aboriginal groups to the activity is encouraged but not required.

**Permits and exemptions:** Once completed the report and the permit application is assessed by the OEH, or OEH provides advice to the other decision maker, such as the Department of Planning.

Most requests for permits are granted. Between 2004 and 2009 approximately 1000 permits were issued by DECCW/ OEH. Around 100 permits have been approved in the last 12 months. In more recent years between 92% and 100% of permit applications seeking to disturb or destroy Aboriginal heritage have been approved by OEH.<sup>cix</sup>

**Access and use of cultural heritage:** Generally, Aboriginal peoples' ability to access and use places for cultural purposes is guided by the *National Parks and Wildlife Act* (for parks, reserved lands and threatened species), or the different type of agreements as noted above. Exemptions exist for Aboriginal people in relation to some hunting, fishing and gathering restrictions under the *National Parks and Wildlife Act 1974* and the *Fisheries Management Act 1994*. The *Aboriginal Land Rights Act* contains a provision for an Aboriginal person to negotiate an access agreement over private lands for hunting, fishing or gathering<sup>cx</sup>. However, this provision has never been used.<sup>cx</sup> A Conservation Agreement can also be negotiated over private land<sup>cxii</sup>, however no examples of agreements to provide access for cultural reasons are known. ILUAs, which are a form of Native Title agreement, are confidential but often include provisions for access and use of lands and waters for cultural heritage purposes.

**Role of the Commonwealth:** The Commonwealth Government has some powers to approve developments or impacts on heritage where that heritage is of national or international significance, or is located on Commonwealth controlled land. The Commonwealth also has some powers to step in to protect Aboriginal heritage under immediate threat. However, these powers have rarely been used.<sup>cxiii</sup>

A recent review of Commonwealth heritage and environmental legislation considered the creation of national Indigenous heritage standards which would apply to all States. However at the time of completing this report this did reform did not appear to be progressing.<sup>cxiv</sup>

## End Notes and Resources

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<sup>i</sup> This report uses the term 'Aboriginal' to refer to the traditional owners and custodians of the lands and waters of New South Wales. At points 'Indigenous' is also used to refer to the traditional owners of NSW, particularly when international instruments are discussed. When 'Indigenous' is used in relation to the whole of Australia it refers to *all* the Indigenous peoples of Australia – that is Aboriginal Australians and Torres Strait Islanders.

<sup>ii</sup> Janke, T. and Frankel, M. (1998) *Our Culture, Our Future: Proposals for the recognition and protection of Indigenous cultural and intellectual property*, Final Report to the Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra. Copy of report available to download from <http://frankellawyers.com.au/publications/> (accessed 1 March 2012).

<sup>iii</sup> See Office of Environment and Heritage (OEH) (2011) Discussion Paper *Aboriginal heritage legislation in NSW: Public consultation on issues for reform*, available to download from <http://www.environment.nsw.gov.au/achreform/ACHmedia.htm> (accessed 1 February 2012) and Comments by members of the Aboriginal Cultural Heritage Advisory Committee (ACHAC) (2011), in *Aboriginal Cultural Heritage Video* published on the OEH website, as available from <http://www.environment.nsw.gov.au/achreform/ACHreformVideo.htm> (accessed 1 February 2012).

<sup>iv</sup> See Principles of Reform, at Appendix 1, and Janke and Frankel, as above Note 2. See also Schnierer, E., Ellsmore, S. and Schnierer S. (2011) *State of Indigenous Cultural Heritage 2011: Supplementary Report to the Australian State of the Environment Report 2011*, Australian Government, Canberra, at p17, copy of report available to download from <http://www.environment.gov.au/soe/2011/report/heritage/supporting-material.html> (accessed 1 February 2012). Also see: Bell, C. and Paterson, R. K. (2009) (eds) *Protection of First Nations Cultural Heritage: Laws, Policy and Reform*, UBC Press, Vancouver.

<sup>v</sup> See for example the State Heritage listed Tranby Aboriginal Co-operative in Glebe (Sydney) and the Cyprus-Hellene Club (Sydney) both significant meeting places for Aboriginal activists. For more information see State Heritage Listings available to view on the *NSW Heritage Office Website* at <http://www.heritage.nsw.gov.au> > State Heritage Register (accessed 1 March 2012).

<sup>vi</sup> OEH (2011) Discussion Paper, as above Note 3, and ACHAC (2011) *Submission to the NSW Government Review into the NSW Aboriginal Culture and Heritage Legislation (Broad Reform)*, as available from <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm> (accessed 15 March 2012).

<sup>vii</sup> OEH (2011) Discussion Paper, as above Note 3.

<sup>viii</sup> For a summary of key threats to Indigenous culture and heritage see Chapter 9 'Heritage: State and Trends' in Australian State of the Environment 2011 Committee (2011) *Australian State of the Environment 2011: An independent report presented to the Australian Government Minister for Sustainability, Water, Populations and Communities*, at p 721, copy of the report available to download from: <http://www.environment.gov.au/soe/2011/report/index.html> (accessed 1 February 2012). See also NSWALC (2009) *More than Flora and Fauna: Response to the National Parks and Wildlife Amendment Bill 2009*, Submission made to DECCW, copy of submission available from <http://www.alc.org.au/culture-and-heritage/site-protection.aspx> (accessed 1 December 2011).

<sup>ix</sup> Copies of public 2011 submissions to OEH for the Aboriginal culture and heritage law reform review are available from <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm> (accessed February 2012).

<sup>x</sup> Reports from workshops convened by OEH in late 2011 are available from <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm> (accessed February 2012).

<sup>xi</sup> Submissions to OEH and other reports from the 2010 Omnibus Bill consultation are available from <http://www.environment.nsw.gov.au/legislation/NPWamendmentAct2010.htm#Consultations> (accessed 1 December 2011).

<sup>xii</sup> Submissions to the Commonwealth Government and reports from the 2010 *Aboriginal and Torres Strait Islander Heritage Protection Act* (ATSIHPA) consultation are available from <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/submissions.html> (accessed 1 December 2011).

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<sup>xiii</sup> Reports from the 2005 Review of the *Aboriginal Land Rights Act* are available from <http://www.oralra.nsw.gov.au/resourcesinformpub.html> (accessed 1 February 2012).

<sup>xiv</sup> See in particular: Schnierer, E. (2010) *Caring for Culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia*, available from <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>; Research Section, National Native Title Tribunal (2010) *Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation*, <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>; and Environmental Defenders Office NSW (2009) *Reforming New South Wales' Laws for the Protection of Aboriginal Cultural Heritage*, available from: [http://www.edo.org.au/edonsw/site/policy\\_discussion.php](http://www.edo.org.au/edonsw/site/policy_discussion.php).

<sup>xv</sup> In relation to the Victorian system see: Submissions (various, 2011) to the Victorian Department of Planning and Community Development in response to the *Review of the Aboriginal Heritage Act 2006* (Vic) available to download from: Review of the <http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006/reveiw-submissions> (accessed 15 March 2012); Sir Zelman Cowen, Centre Faculty of Business and Law, Victoria University (2010) *Collaborative Approaches to Aboriginal Cultural Heritage Protection: An examination of the operation of the Victorian Aboriginal Heritage Act 2006 and Aboriginal Heritage Regulations 2007* available to download from <http://www.achp.org.au/downloads.html> (accessed 1 February 2012); D'Ambrosio, L and Aboriginal Affairs Victoria in conjunction with The Allen Consulting Group (Nov 2008) *Report of the Review of the Aboriginal Heritage Regulations 2007* available to download from <http://www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#supp> (accessed 1 February 2012).

In relation to the Queensland system see: Qld Department of Environment and Resource Management (2009) *Indigenous Cultural Heritage Acts Review – Key issues and draft recommendations paper*; (2010) *Explanatory Notes: Indigenous Cultural Heritage Acts Amendment Bill 2011*; and *Indigenous Cultural Heritage Acts Review: Non-legislative outcomes* as available to download from [http://www.derm.qld.gov.au/cultural\\_heritage/legislation/index.html](http://www.derm.qld.gov.au/cultural_heritage/legislation/index.html) (access 1 February 2012).

Reforms to the Queensland legislation are being progressed through the wide-ranging *Aboriginal and Torres Strait Islander Land Holding Bill 2011* (Qld). See the report and submissions to the Queensland Parliament's Community Affairs Committee's inquiry into the *Aboriginal and Torres Strait Islander Land Holding Bill 2011* as available to download from <http://www.parliament.qld.gov.au/work-of-committees/committees/CAC/inquiries/past-inquiries/ATSILH> (accessed 15 April 2012).

In relation to the South Australian system see: Submissions (various, 2009) to the SA Department of Premier and Cabinet, as available to download from <http://www.aboriginalaffairs.sa.gov.au/aha/submissions.html> (accessed 1 March 2012); Joint Aboriginal Heritage Committees on behalf of the State Aboriginal Heritage Committee and the Aboriginal Congress of South Australia (March 2009) *Aboriginal Heritage Discussion Paper for the Review of the South Australian Aboriginal Heritage Act 1988*; Rougan, S. Rural Solutions SA (2010) *"It's Not Just About Sacred Sites." A qualitative analysis of the community consultation process of the 2009 Review of the Aboriginal Heritage Act 1988* as available to download from <http://www.aboriginalaffairs.sa.gov.au/aha/introduction.html> (accessed 1 March 2012); and Department of Premier and Cabinet, Government of South Australia (March 2008) *Review of the Aboriginal Heritage Act 1988 Scoping Paper* as available to download from [http://www.aboriginalaffairs.sa.gov.au/aha/scoping\\_paper.html](http://www.aboriginalaffairs.sa.gov.au/aha/scoping_paper.html) (accessed 1 March 2012).

<sup>xvi</sup> Author's notes of direct testimony given on 27 February 2012 to the Victorian Parliament Joint Investigatory Committee: Environment and Natural Resources, Victorian Parliament Melbourne, for the *Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties*. See also Submissions (various, 2012) made to the *Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties* available to download from <http://www.parliament.vic.gov.au/enrc/inquiries/article/1419> (accessed 15 March 2012).

<sup>xvii</sup> At page 5, OEH (2011) *Aboriginal heritage legislation in NSW: Reform milestones 1969-2011*, as available from <http://www.environment.nsw.gov.au/achreform/ACHmedia.htm> (accessed 1 February 2011).

<sup>xviii</sup> See: Comments by members of ACHAC (2011) in *Aboriginal Cultural Heritage Reform Video*, as above Note 3; Comments made by Aboriginal community members in workshops held by OEH in November-December 2011 as published in *Regional Aboriginal community workshop reports*, available to download from: <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm>; and Environmental Defenders Office NSW (EDO) (19 Dec 2011) *Submission to the Aboriginal Culture and Heritage Reform Working Party on Aboriginal*

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*Culture and Heritage Legislative Review and Reform*, as available to download from [http://www.edo.org.au/edonsw/site/policy\\_submissions.php](http://www.edo.org.au/edonsw/site/policy_submissions.php) (accessed 1 February 2012).

<sup>xix</sup> ACHAC (2011) as above Note 6.

<sup>xx</sup> See for example the *Aboriginal Australia Map* identifying language groups, published by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), as available from <http://www.aiatsis.gov.au/asp/map.html> (accessed 1 March 2012).

<sup>xxi</sup> See OEH (2011) Discussion Paper, as above Note 3.

<sup>xxii</sup> See OEH (2009) *Aboriginal cultural heritage consultation requirements for proponents 2010*, available to download from: <http://www.environment.nsw.gov.au/licences/applyforahip.htm> (accessed 1 March 2012)

<sup>xxiii</sup> See: *National Native Title Tribunal Website*, including the 'Exactly What is Native Title' page at <http://www.nntt.gov.au/Information-about-native-title/Pages/Nativetitlerightsandinterests.aspx> (accessed 1 March 2012); National Native Title Tribunal publications including *Native Title an Overview and Water, Fishing and Native Title*, available from <http://www.nntt.gov.au/News-and-Communications/Pages/default.aspx> (accessed 1 March 2012); and Reconciliation Australia (Dec 2010) *Native Title Q and A*, available from <http://www.reconciliation.org.au/home/latest/q-a-on-native-title> (accessed 15 February 2012).

<sup>xxiv</sup> For current Native Title determinations see the National Native Title Tribunal, *National Report: Native Title* (most recent Feb 2012) available from <http://www.nntt.gov.au/Information-about-native-title/Pages/NationalReport-NativeTitle.aspx> and *NSW/ACT Map* (as of 10 Jan 2012) <http://www.nntt.gov.au/Mediation-and-agreement-making-services/Geospatial-services/Maps/Pages/State-Maps.aspx> (accessed 1 March 2012).

<sup>xxv</sup> The trend towards Native Title as the basis for identifying who should be consulted on cultural heritage issues is also evident in other states and territories, see: Research Section, National Native Title Tribunal (2010) *Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation*, as above Note 14.

<sup>xxvi</sup> See *Aboriginal Land Rights Act 1983* (NSW), section 171 for the definition of 'Aboriginal Owners'. Also note that persons will only be entered onto the Register of Aboriginal Owners if they have consented to have their name added (s171(2)(c)).

<sup>xxvii</sup> The *Aboriginal Land Rights Act* requires that the Registrar of the *Aboriginal Land Rights Act* prioritise areas which have or will be returned as national parks: section 171(3). For this reason the Registrar has only registered Aboriginal Owners for a limited number of areas to date.

<sup>xxviii</sup> See Norman, H. (2009) 'Land Rights at Last!' in *Cosmopolitan Civil Societies: An Interdisciplinary Journal*, Vol 1, No 2 (2009), full text available through UTS Library at <http://epress.lib.uts.edu.au/ojs/index.php/mcs/article/view/1138> (accessed 1 December 2010) and NSWALC 'Our History' Webpage, at <http://www.alc.org.au/about-nswalc/our-history.aspx> (accessed 1 December 2010).

<sup>xxix</sup> See *Aboriginal Land Rights Act 1983* (NSW) - sections 53-4 deal with eligibility for membership of Local Aboriginal Land Councils - and *Aboriginal Land Rights Regulation 2002* - Part 3 Division 3 deals with election of Local Aboriginal Land Council Boards.

<sup>xxx</sup> Cooperation between LALCs Traditional Owners was a recurring theme of the recent NSW Aboriginal heritage review consultations, with repeated reference to the role of LALCs as 'facilitators' – see *Reports of 25 Regional Aboriginal community workshop reports*, as above Note 18.

At a local level it is common for Traditional Owners or Native Title claimants to hold elected positions within several local Aboriginal organisations, including Land Councils. See examples of local cooperation including: the Gaagal Wanggaan (South Beach) National Park joint management agreement and Indigenous Land Use Agreement; and the Wattlebridge and 'Tariwa Kurrukun' Indigenous Protected Areas (IPAs) and the Nyambaga Green Team, both profiled in Hunt, J. (2010) *Looking After Country in New South Wales: Two Case Studies of Socioeconomic Benefits for Aboriginal People*, Working Paper 75 / 2010, Centre for Aboriginal Economic Policy Research, Australian National University, available from: <http://caepr.anu.edu.au/Publications/WP/2010WP75.php> (accessed 1 Dec 2011).

See examples of regional cooperation agreements across Land Councils including: the Northern Region LALCs Friendship Treaty, signed 22 July 2011, which includes a number of cultural heritage provisions:

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<http://www.alc.org.au/land-councils/friendship-treaty.aspx> (accessed 1 March 2012); the Saltwater Freshwater Alliance of mid North Coast LALCs at <http://www.saltwaterfreshwater.com.au/> (accessed 15 March 2012).

At the State level see examples of recent cooperation between NSWALC and NTSCORP: *Memorandum of Understanding* between NSWALC and NTSCORP signed October 2009, which includes a commitment to act cooperatively on Aboriginal culture and heritage issues; joint negotiation of legislative cultural fishing amendments in 2009-10; and joint submissions and statements by NSWALC and NTSCORP in response to the current NSW Aboriginal heritage review process including *Submission by the New South Wales Aboriginal Land Council and the NTSCORP Limited in response to the Reform of Aboriginal Culture and Heritage in NSW* (Dec 2011) as available to download from <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm> (accessed 1 March 2012).

<sup>xxxix</sup> See *Regional Aboriginal community workshop reports*, as above Note 18. It is noted also that a small number of submissions and comments from the workshops referred to the exclusion of some Aboriginal members from existing Aboriginal organisations including from Land Councils, and from the Aboriginal Owners Register.

<sup>xxxix</sup> See OEH (2011) *Aboriginal heritage legislation in NSW: Reform milestones 1969-2011*, as above Note 17.

<sup>xxxix</sup> Part 4A of the *National Parks and Wildlife Amendment Act 1974*. See also Baird, W. for Office of the Registrar of the Aboriginal Land Rights Act (2002) *Guide to Aboriginal Ownership and Joint Management of Lands in NSW*, and other related publications available from <http://www.orala.nsw.gov.au/resourcesinformpub.html> (accessed 1 December 2011).

<sup>xxxix</sup> Sections 170-5 of the *Aboriginal Land Rights Act 1983* (NSW).

<sup>xxxix</sup> See OEH (2010) *Fact Sheet 3: Better law enforcement for the protection of Aboriginal heritage, national parks and threatened species in NSW*, available from <http://www.environment.nsw.gov.au/licences/achregulation.htm> (accessed 1 February 2012).

<sup>xxxix</sup> See NSWALC (2010) *Consultation Fact Sheet*, available from <http://www.alc.org.au/publications/fact-sheets.aspx> (accessed 1 December 2011)

<sup>xxxix</sup> See Department of Primary Industries, *Aboriginal fishing and legislation* webpage, <http://www.dpi.nsw.gov.au/fisheries/aboriginal-fishing/legislation> (accessed 1 February 2012) and NSWALC (2011) *Fishing Fact Sheets*, available from <http://www.alc.org.au/publications/fact-sheets.aspx> (accessed 1 December 2011).

<sup>xxxix</sup> See Schedule 9, *National Parks and Wildlife Act 1974*: The Aboriginal Cultural Heritage Advisory Committee.

<sup>xxxix</sup> At page 30, Jonas, B. (Chair) (1989) *Report on the NSW Task Force on Aboriginal Heritage and Culture 1989*, NSW Government, copy of report accessed from NSWALC archives.

<sup>xl</sup> See comments by the former Shadow Minister for the Environment, the Hon Catherine Cusack MLC, that the management of Aboriginal heritage under "an Act (that) was made to protect plants and animals .... is grossly offensive to Aboriginal people": Second Reading Speech, *National Parks and Wildlife Amendment Bill 2010* (1 June 2010), Hansard, NSW Legislative Council, full text available at <http://www.parliament.nsw.gov.au> > Hansard > Legislative Council by Date > 1 June 2010. See also NSWALC submission (2009) '*More than Flora and Fauna*', as above Note 8.

<sup>xli</sup> The archaeological definition of Aboriginal heritage under the *National Parks and Wildlife Act* has been criticised as focusing on 'stones and bones': see Kijas, J. (2005) *Revival, Renewal and Return: Ray Kelly and the NSW Sites of Significance Survey*, Department of Environment and Conservation (NSW), as available to download from <http://www.environment.nsw.gov.au/nswcultureheritage/RevivalRenewalReturn.htm> (accessed 1 December 2011).

<sup>xlii</sup> NSWALC (2009) *More than Flora and Fauna*, as above Note 8 and EDO (19 Dec 2011), as above Note 18.

<sup>xliii</sup> See section 2A Objects of the *National Parks and Wildlife Act 1974*.

<sup>xliii</sup> Ridge, K. and Seiver, A. [2005] "Carriage: An Elder's Journey through the Courts " in *IndigLawB* 10; (2005) 6(9), available at <http://www.austlii.edu.au/au/journals/IndigLawB/2005/10.html> (accessed 1 Dec 2011).

<sup>xliii</sup> See: summary of cases by Aboriginal people appealing against the issue of permits in EDO (2009) *Reforming NSW Laws*, as above Note 14; Section C. of EDO (19 Dec 2011) Submission to OEH, as above Note 18; and

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discussion of the NSW Government's response to the unauthorised damage to the Aboriginal Place at Mumbulla Mountain in 'Case studies', Schnierer et al (2011) *State of Indigenous Cultural Heritage 2011*, as above Note 4.

<sup>xlvi</sup> For a summary of the legal requirements for Aboriginal heritage under the *Environmental Planning and Assessment Act 1979* see the Fact Sheets produced by the Environmental Defenders Office, NSW, as available from <http://www.edo.org.au/edonsw/site/education.php>. For information about the definition of 'harm' and exemptions from permit requirements under the *National Parks and Wildlife Act 1974* visit the OEH website at <http://www.environment.nsw.gov.au/licences/achregulation.htm>.

<sup>xlvii</sup> See for example the discussion of the 'Cromer' case, where known Aboriginal rock objects were damaged by an electricity company who were aware of its location, but for which there has not yet been a prosecution, in NSWALC (March 2012) *Submission to the Planning Review Panel: Issues Paper*, advance copy as provided to the author.

<sup>xlviii</sup> See S. Tran on behalf of the NSW Minerals Council Inc (9 December 2011) *Submission on Aboriginal Heritage Legislation in NSW: Public Consultation on Issues for Reform*, available to download from <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm> (accessed 15 February 2012).

<sup>xlix</sup> Minerals Council (2011) Submission, as above Note 48.

<sup>l</sup> See EDO (19 Dec 2011) Submission, as above Note 18, and Minerals Council (9 December 2011) as above Note 48.

<sup>li</sup> See for example submissions to the current OEH Aboriginal heritage review by D. Arnold for Garigal Aboriginal Community Inc (18 November 2011) and G. Stanley (1 December 2011), as available to download from <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm> (accessed 15 February 2012).

<sup>lii</sup> See discussion of 'lateral violence' and examples of successful dispute resolution in Aboriginal and Torres Strait Islander Social Justice Commissioner (2011) *Native Title Report 2011*, Australian Human Rights Commission, as available from [http://www.hreoc.gov.au/social\\_justice/nt\\_report/index.html](http://www.hreoc.gov.au/social_justice/nt_report/index.html) (accessed 1 Dec 2011).

<sup>liii</sup> Under section 171 of the *Aboriginal Land Rights Act* the Registrar must give priority to entering the names of Aboriginal people who have a cultural association with land that is listed in Schedule 14 to the *National Parks and Wildlife Act 1974*, or subject to provisions of section 36A of the *Aboriginal Land Rights Act*. That is, lands that are or will be jointly managed as a national park or conservation reserve. To date funding allocations to allow the register to be expanded beyond these areas have been limited.

<sup>liv</sup> NSWALC (2009) *More than Flora and Fauna*, as above Note 8.

<sup>lv</sup> Minerals Council (2011) Submission, as above Note 48.

<sup>lvi</sup> EDO (19 December 2011), as above Note 18.

<sup>lvii</sup> NSWALC (2009) *More than Flora and Fauna*, as above Note 8 and Minerals Council (2011) as above Note 48.

<sup>lviii</sup> The lack of recording of cumulative impact was identified by the Australian State of the Environment Report as one of the major threats to Australian Indigenous heritage, as above Note 8. See also NSWALC *Submission to the Planning Review Panel* (March 2012), as above Note 47.

<sup>lix</sup> At page 7, OEH (2011) Discussion Paper, as above Note 3.

<sup>lx</sup> See also resources available on the *Australian Human Rights Commission Website*, 'International Indigenous Rights', at [http://www.humanrights.gov.au/social\\_justice/internat\\_develop.html](http://www.humanrights.gov.au/social_justice/internat_develop.html) (accessed 1 March 2012).

<sup>lxi</sup> See copy of the *UN Declaration on the Rights of Indigenous Peoples* available from the Australian Human Rights Commission website, at [http://www.hreoc.gov.au/social\\_justice/declaration/assembly.html](http://www.hreoc.gov.au/social_justice/declaration/assembly.html) (accessed 1 March 2012).

<sup>lxii</sup> See copy of the ICCPR and ICESCR available from the website of the Office for the United Nations High Commissioner for Human Rights, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 1 Feb 2012).

<sup>lxiii</sup> See copy of *Convention* available from the website of the International Labor Organisation, at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> (accessed 1 Feb 2012).

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- <sup>lxiv</sup> See copy of *Convention* on the UNESCO website, at [http://portal.unesco.org/en/ev.php-URL\\_ID=31038andURL\\_DO=DO\\_TOPICandURL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31038andURL_DO=DO_TOPICandURL_SECTION=201.html) (accessed 1 Feb 2012).
- <sup>lxv</sup> The Nagoya Protocol was signed by the Australian Government on 20 January 2012: See *Australian Department of Sustainability, Environment, Water, Populations and Communities Website*, at <http://www.environment.gov.au/biodiversity/science/access/biological-diversity.html> (accessed 15 March 2012).
- <sup>lxvi</sup> See text of the *Convention on Biological Diversity* at <http://www.cbd.int/convention/text/> (accessed 1 Feb 2012).
- <sup>lxvii</sup> See EDO (20 April 2011) *Submission: Ratifying the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits*, as available to download from <http://www.edo.org.au/edonsw/site/pdf/subs/110420nagoya.pdf> (accessed 30 April 2011).
- <sup>lxviii</sup> See conclusions of the Victorian University study into the Victorian legislation and submissions to the current Victorian review, also as above Note 15.
- <sup>lxix</sup> See Victorian University (2010), as above Note 15.
- <sup>lxx</sup> See submission by the Queensland Resources Council to the Queensland Parliament's Community Affairs Committee's inquiry into the Aboriginal and Torres Strait Islander Land Holding Bill 2011 (31 January 2012), as available to download from <http://www.parliament.qld.gov.au/work-of-committees/committees/CAC/inquiries/past-inquiries/ATSILH> (accessed 15 April 2012).
- <sup>lxxi</sup> See AAPA, Fact Sheets, as available to download from <http://www.aapant.org.au/fact-sheets.html> (accessed 1 March 2012).
- <sup>lxxii</sup> See discussion of NZ legislation in Zhu, J (April 2011) *The Legal Protection of Maori Heritage in New Zealand*, a research paper commissioned by NSWALC, as provided to the author.
- <sup>lxxiii</sup> See Bell, C. and Solowan, M (2004) *A Selected Review of Canadian Legislation Affecting First Nations Cultural Heritage*, a research paper completed for the 'Project for Repatriation and Protection of First Nations Cultural Heritage in Canada', as available from <http://www.law.ualberta.ca/research/aboriginalculturalheritage/researchpapers.htm> (accessed 1 March 2012).
- <sup>lxxiv</sup> See discussion of the Nlaka'pamux Nation and Office of the Wet'suwet'en, both in British Columbia, in Nicholas, P. 'Policies and Protocols for Archeological Sites and Associated Cultural and Intellectual Property' in Bell and Paterson (2009), as above Note 4.
- <sup>lxxv</sup> EDO (19 Dec 2011) Submission, as above Note 18.
- <sup>lxxvi</sup> EDO (19 Dec 2011) Submission, as above Note 18.
- <sup>lxxvii</sup> See section 54, *Aboriginal Land Rights Act 1983*.
- <sup>lxxviii</sup> Extract from Preamble to the *Aboriginal Land Rights Act 1983*.
- <sup>lxxix</sup> Based on an estimation of the number of NSWALC members reported in NSWALC (2011) *Annual Report 2010-11*, available to download from <http://www.alc.org.au/publications/annual-reports.aspx> (accessed 1 March 2012) and estimation of number of Aboriginal adults in NSW, from Australian Bureau of Statistics (19 August 2008) 3238.0.55.001 - *Experimental Estimates of Aboriginal and Torres Strait Islander Australians, June 2006*, State and Territory breakdown, available from <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3238.0.55.001Jun%202006?OpenDocument> (accessed 1 March 2012).
- <sup>lxxx</sup> Under the *Aboriginal Land Rights Act 1983 (NSW)* the functions of NSWALC include to: "(a) to take action to protect the culture and heritage of Aboriginal persons in New South Wales, subject to any other law, and (b) to promote awareness in the community of the culture and heritage of Aboriginal persons in New South Wales" (section 106(7)). LALCs have similar functions in relation to lands within their boundaries (section 52(4)).
- <sup>lxxxi</sup> 'Land Claims Campaign 2010', *NSWALC Webpage*, <http://www.alc.org.au/land-councils/land-claim-campaign-2010.aspx> (accessed 1 March 2012).



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- <sup>lxxxii</sup> See pp134-143, NSWALC (2011) *Annual Report 2010-11*, as above Note 79, and Section 3.1.2 'Risk assessment and LALC performance' in NSWALC (2011) *The Sustainability of the NSW Aboriginal Land Council Network: A Discussion Paper*, available from <http://www.alc.org.au/about-nswalc/sustainability-of-the-network-discussion-paper.aspx> (1 December 2011).
- <sup>lxxxiii</sup> See sections 170-175 of the *Aboriginal Land Rights Act* and *Office of the Registrar of the Aboriginal Land Rights Act Website*, 'Register of Aboriginal Owners', at <http://www.oralra.nsw.gov.au/registerjmn.html> (accessed 15 March 2012).
- <sup>lxxxiv</sup> See *Office of the Registrar of the Aboriginal Land Rights Act Website*, as above Note 33. The figure of 700 persons registered is provided at page 34 of OEH (2011) as above Note 17.
- <sup>lxxxv</sup> See *NTSCORP Website* at <http://www.ntscorp.com.au/>.
- <sup>lxxxvi</sup> See the MLDRN website at <http://www.mldrn.org.au/about/> and information about how the Murray Darling Basin Authority works with Indigenous communities at <http://www.mdba.gov.au/explore-the-basin/communities/indigenous-communities>.
- <sup>lxxxvii</sup> See the NBAN website at <http://www.nban.org.au/>.
- <sup>lxxxviii</sup> See 'Aboriginal and Torres Strait Islander Peoples' section of Local Government and Shires Association of NSW (2011) *Your council in the community: A snapshot of council activities and services from the Local Government and Shires Associations' Social Policy and Community Services Survey*, as available to download from <http://www.lgsa.org.au/www/html/320-social-policy.asp> (accessed 15 April 2012).
- <sup>lxxxix</sup> See AANSW website at <http://www.daa.nsw.gov.au/communitydevelopment/pcprecgrp.html> including a list of Community Engagement Bodies established.
- <sup>xc</sup> Search for Registered Indigenous Corporations at <http://www.orac.gov.au/Default.aspx?class=home>.
- <sup>xci</sup> See background paper prepared for participants in 'Keeping Places & Beyond: Building Cultural Futures in NSW', a Summit held on 19-20 September 2011 at Carriageworks, Sydney, as available to download from <http://mgsw.org.au/uploaded/keeping%20places%20and%20beyondflash2.swf> (accessed 1 February 2012).
- <sup>xcii</sup> Section 5, *National Parks and Wildlife Act 1974* (NSW).
- <sup>xciii</sup> OEH (2010) *Fact Sheet 3*, as above Note 35.
- <sup>xciv</sup> Since 2005/6 there have been four distinct prosecutions progressed to Court, with fines totaling \$6150: figures compiled by the EDO (19 Dec 2011) Submission, page 7, as above Note 18.
- <sup>xcv</sup> Section 84, *National Parks and Wildlife Act 1974* (NSW).
- <sup>xcvi</sup> See history of Aboriginal Place declarations and map of location of Aboriginal Places available from the *OEH Website* at <http://www.environment.nsw.gov.au/AboriginalPlaces/> (accessed 1 February 2012).
- <sup>xcvii</sup> Figures provided in OEH (2011) Discussion Paper, as above Note 3. 'Joint management' under Part 4A of the *National Parks and Wildlife Act* refers to parks that have been handed back to Aboriginal ownership. There are 6 of these parks in NSW. There are also a number of other consultation or management agreements with Aboriginal groups over other NSW parks. A map indicating the location of parks under Part 4A and other forms of agreement can be accessed at <http://www.environment.nsw.gov.au/jointmanagement/jointmanagedparks.htm> (accessed 1 February 2012).
- <sup>xcviii</sup> Figure from online search of the NSW Heritage Register conducted on 9 March 2012, for items listed on the State Heritage Register under Item Group 'Aboriginal'. Online search of the NSW Heritage Register available at [http://www.heritage.nsw.gov.au/07\\_subnav\\_04.cfm](http://www.heritage.nsw.gov.au/07_subnav_04.cfm).
- <sup>xcix</sup> For a list of current Indigenous Land Use Agreements (ILUAs) see the *National Native Title Tribunal Register* at <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Search.aspx> (search conducted 1 March 2012). See *Map of Indigenous Protected Areas* published on the Australian Government Department of Sustainability, Environment, Water, Populations and Communities website at <http://www.environment.gov.au/indigenous/ipa/map.html> (accessed 1 March 2012). See also information about Commonwealth-Aboriginal jointly-managed 'Booderee National Park' at <http://www.environment.gov.au/parks/booderee/index.html> (accessed 1 March 2012).

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<sup>c</sup> Estimation made based on figures sites above and available figures for the percentage of NSW lands and waters under conservation reserve. 8.7% of NSW is currently under some form of conservation reserve, which includes Aboriginal controlled reserves: 'State and territory levels of protection' summary table for the *National Reserve System*, available to view at <http://www.environment.gov.au/parks/nrs/about/ownership.html#levels> (accessed 1 March 2012); and OEH (2010) *NSW State of the Environment Report*, available from [http://www.environment.nsw.gov.au/soe/soe2009/chapter7/chp\\_7.3.htm#7.3.52](http://www.environment.nsw.gov.au/soe/soe2009/chapter7/chp_7.3.htm#7.3.52) (accessed 1 March 2012).

<sup>ci</sup> Section 83, *National Parks and Wildlife Act 1974* (NSW). There are some exceptions, including objects in private collections prior to the 13 April 1970 and objects which can be considered 'real property' such as heritage which is part of natural formations on private land, like rock art or scarred trees.

<sup>cii</sup> Section 85A, *National Parks and Wildlife Act 1974*.

<sup>ciii</sup> See information about the OEH repatriation program on the *OEH Website*, at <http://www.environment.nsw.gov.au/conservation/Repatriation.htm> (accessed 1 March 2012).

<sup>civ</sup> See section 88 of the *National Parks and Wildlife Act 1974* and Howarth, F. (14 December 2011) *Submission by the Australian Museum on the Office of Environment and Heritage Public Consultation on Issues for Reform*, full text available to download from <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm> (accessed 1 March 2012). It is noted that in its submission the Australian Museum notes it may not have the resources to continue to accept all salvaged material. The Museum recommends that consistent with the aspirations of many Aboriginal communities where possible materials should be held on Country, in local Keeping Places or Museums.

<sup>cv</sup> Figure provided for March 2011 by the former DECCW, as quoted in Schnierer et al (2011), page 55 as above Note 4.

<sup>cvi</sup> Section 89A, *National Parks and Wildlife Act 1974* (NSW): Notification of Aboriginal objects.

<sup>cvii</sup> See Part 6 of the *National Parks and Wildlife Act 1974*.

<sup>cviii</sup> See above, Note 23.

<sup>cix</sup> Statistics on the number of permits issued including to which sectors are provided in Answers by the Minister for the Environment to Questions on Notice asked in the Legislative Council by Ian Cohen MLC – See Questions *Number 0127* (Answered 31 July 2007), *2091* (Answered 28 October 2008), *3009* (Answered 7 May 2009), *3120* (Answered 17 June 2009), *3695* (Answered 27 October 2009), *4109* (Answered 14 April 2010). Full text available from <http://www.parliament.nsw.gov.au/> > Legislative Council > Hansard Search > All sessions. Analysis of AHIP data is included in NSWALC (2009) *More than Flora and Fauna*, as above Note 8, at p17, and EDO (19 Dec 2011) Submission, as above Note 18, at p7. From 2010 details of AHIPs issued have been published on the OEH website at <http://www.environment.nsw.gov.au/licences/ahipregister.htm>.

<sup>cx</sup> See Sections 47-8, *Aboriginal Land Rights Act 1983*.

<sup>cxii</sup> Source = Advice to NSWALC from the Office of the Registrar of the *Aboriginal Land Rights Act* (2010).

<sup>cxiii</sup> See Sections 69A-KA of the *National Parks and Wildlife Act 1974*.

<sup>cxiiii</sup> See discussion of the current regulatory framework for protection and management of Indigenous heritage in Australia in Schnierer et al (2011), as above Note 4. See also Discussion Paper on the operation of the Aboriginal and Torres Strait Islander Heritage Protection Act (the ATSIHPA Act) at <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/index.html> (accessed 1 December 2011).

<sup>cxv</sup> See Australian Government response to Recommendation 64 in *Australian Government response to the Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999* (2011). Full text available from <http://www.environment.gov.au/epbc/publications/epbc-review-govt-response.html> (1 February 2012)