



NSW Aboriginal Council submission

Draft *Aboriginal Cultural Heritage Bill 2018* and related proposals

April 2018

Contents

Part A - Executive Summary.....	2
Urgent need for reform.....	4
Enshrining the Aboriginal Land Rights network in ACH laws is essential	5
Key improvements in the Draft Bill	6
Key concerns with the Draft Bill	11
Broader reform package	14
<i>Resourcing</i>	14
<i>Transition and implementation arrangements</i>	15
<i>Education and awareness</i>	16
<i>Development of appropriate Regulations</i>	16
<i>Development of appropriate Policies, Guidelines, Codes</i>	17
<i>Reforms to planning laws and reforms to recognise and support cultural practice</i>	18
<i>Government reform and consultation process</i>	19
Part B - Proposals measured against NSWALC Principles for Reform	20
Part C - Draft ACH Bill	27
Part 1 Preliminary (Objects and definitions).....	27
Part 2 Aboriginal Cultural Heritage Authority and Local Consultation Panels.....	30
Role of LALCs	39
Part 3 Aboriginal Cultural Heritage declarations and information (mapping).....	43
Part 4 Conservation of Aboriginal cultural heritage	49
Part 5 Aboriginal cultural heritage regulatory system.....	53
Part 6 Financial provisions	72
Part 7 Regulatory compliance mechanisms	73
Part 8 Investigation powers	74
Part 9 Criminal and civil proceedings	74
Part 10 Miscellaneous	76
Schedules	77

Part A - Executive Summary

The New South Wales Aboriginal Land Council (**NSWALC**) welcomes the NSW Government's commitment to develop new legislation to provide proper protections for Aboriginal cultural heritage (**ACH**).

Given the high rates of destruction of our heritage, there is a need for reform now more than ever.

In 1980 the first report to Parliament by the *NSW Legislative Assembly Committee upon Aborigines* (the Keane Committee),¹ spoke of an independent Aboriginal Heritage Commission to return control over Aboriginal sites to Aboriginal people. This sentiment was echoed when the then Minister for Aboriginal Affairs, the Hon. Frank Walker, introduced the *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**) into Parliament outlining that land rights was the first step in Government recognition and rectification of past dispossession, with the establishment Aboriginal Heritage Commission to be the second step.

There have been a number of reviews and inquiries into the reform of Aboriginal culture and heritage laws in NSW since the Keane Committee reported in 1978. All of the reviews have supported:

- Aboriginal ownership and the right of Aboriginal people to control their culture and heritage recognised in separate stand-alone legislation,
- An independent Aboriginal Heritage Commission, with decentralised control of Aboriginal culture and heritage with the day-to-day management responsibilities are invested in local Aboriginal people, and
- Aboriginal understandings and definitions of what is culture and heritage.

The current reform proposals² have the potential to provide significant improvements on the current regulatory regime in the *National Parks and Wildlife Act 1974 (NSW)* (**NPW Act**) including in relation to:

- Decision making, administration, compliance and enforcement by Aboriginal people
- Generally requiring consideration of Aboriginal heritage before planning decisions are made
- Broadening the definition of ACH
- Building on the Aboriginal Land Rights Network - provided that roles for Aboriginal Land Rights are clearly articulated in legislation
- Establishing clearer consultation requirements and steps
- New investigation powers and enforcement provisions

However, the intent of the reforms has not been adequately captured in some areas of the *Draft Aboriginal Culture and Heritage Bill 2018 (Draft Bill)*. Key needed amendments include:

- Limiting the decision-making roles of the Minister

¹ In 1978 the NSW Government established the cross-party *Select Committee of the Legislative Assembly upon Aborigines*, chaired by Labour Member for Woronora, Maurice Keane. The Committee produced two reports (1980 and 1981) referred to as the Keane Committee Reports, which made wide ranging findings on land rights and the protection of sacred and significant sites based on evidence and submissions made during the inquiry process, including the establishment of the land rights system and an Aboriginal Heritage Commission.

² The NSW Government's proposals are outlined in the *Draft Aboriginal Culture and Heritage Bill 2018 (Draft Bill)* and the *'A proposed new legal framework'* (**Proposals paper**) available at: <http://www.environment.nsw.gov.au/topics/aboriginal-cultural-heritage/legislation/draft-aboriginal-cultural-heritage-legislation-2017-consultation>

- Requiring all developments to follow the ACH Assessment Pathway and ACH Management Plan (**ACHMP**) processes
- Limiting defences available to the harm offences
- Removing merits appeals for proponents
- Extending the harm offence to all ACH including undeclared ACH
- Including safeguards in mapping, assessment pathway and ACH management plan processes

We seek to ensure that the legislation strengthens and supports the existing roles of Aboriginal Land Councils and builds on the investment in Land Rights system to date.

Key elements of the new proposed model are not yet known. The ACH Authority, the Local ACH Consultation Panels, resourcing, regulations and policies are all critical elements of this reform package. To be successful, these elements must be developed in partnership with Aboriginal peoples, and the reforms must enshrine the principles of self-determination and free, prior and informed consent.

The NSW Government should also:

- Immediately implement education and awareness strategies to explain to landowners and developers the impact and opportunities outlined in proposed new laws, and
- Explore incentives or amnesty to encourage landholders to hand ACH back to communities and come forward about Aboriginal sites.

We look forward to working with Government and the ACH Authority once established to further develop and implement the reforms.

Part A of this submission outlines NSWALC’s key recommendations on the reform proposals.

Part B of this submission measures the reform proposals against NSWALC’s Principles for Reform.

Part C of this submission provides detailed comments and recommendations on the Draft Bill.

The recommendations in this submission are designed to further the protection of Aboriginal culture and heritage in NSW and to recognise the rights of Aboriginal people to control and manage Aboriginal culture and heritage, while also providing practical solutions.

Recommendation 1: The NSW Aboriginal Land Council (**NSWALC**) seeks a commitment that Government:

1. Will work with NSWALC, Local Aboriginal Land Councils (**LALCs**) and Aboriginal communities to ensure the reforms:
 - Meet the needs of Aboriginal communities,
 - Enshrine the principle of self-determination,
 - Include legislated roles for Aboriginal Land Councils,
 - Meet NSWALC’s Principles for Reform³, and
 - Reflect best practice standards and the principles outlined in the United Nations *Declaration on the Rights of Indigenous Peoples* (**UNDRIP**),⁴ and
2. Prioritise this reform process.

³ NSWALC’s Principles for Reform are available at:

[http://alc.org.au/media/130647/170911%20final%20nswalc%20principles%20for%20reform\[1\].pdf](http://alc.org.au/media/130647/170911%20final%20nswalc%20principles%20for%20reform[1].pdf)

⁴ United Nations Declaration on the Rights of Indigenous People, available at:

http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Urgent need for reform

Aboriginal people have been waiting for decades for ACH reform. There is a need for reform now more than ever. For too long the Government has approved the destruction of our heritage at alarmingly high rates. Five Aboriginal Heritage Impact Permits (**AHIPs**) continue to be issued every week by the NSW Office of Environment and Heritage (**OEH**)⁵.

There is currently much less transparency around Major projects, which are exempt from the AHIP requirement. However, we know that a significant amount of our heritage is being destroyed via Department of Planning and Environment approvals for major projects. Furthermore, despite the thousands of Aboriginal sites across NSW, only about 100 Aboriginal Places are formally protected under the current *National Parks and Wildlife Act 1974* (**NPW Act**).

The state of our heritage grows objectively worse. The State of the Environment Report 2011 highlighted that:

“One of the main threats to Indigenous heritage places is conscious destruction through government-approved development—that is, development for which decision-makers are aware of (or obliged to be informed about) Indigenous heritage impacts, yet choose to authorise the destruction of Indigenous heritage. This widespread process, combined with a general lack of understanding of physical Indigenous heritage, means that individual decisions on assessment and development result in progressive, cumulative destruction of the Indigenous cultural resource.”⁶

The State of the Environment Report 2016 re-iterates the scale of the problem, highlighting that “incremental destruction” is a key risk to our cultural heritage⁷. The report notes that:

“The economic imperatives of development and infrastructure delivery can place great pressure on sensitive Indigenous heritage places and overemphasise the individual ‘site’, rather than understanding that Indigenous heritage exists at a landscape scale, covering both tangible and intangible manifestations.” The cumulative impacts on Aboriginal heritage, along with the high rates of destruction both illegal and legally authorised must be urgently addressed.”⁸

The high rates of destruction of Aboriginal sites, both ‘approved’ and illegal, continues to cause deep distress within our communities. The destruction of Aboriginal sites impacts on the ability of Aboriginal peoples to connect with a living culture and create wellbeing and healthy communities. Our sites tell important stories and must be protected to provide Aboriginal people with opportunities to strengthen and maintain culture now and in the future.

The current Aboriginal heritage provisions are primarily contained in sections 83-91 of the NPW Act. These sections are not well integrated with the development process in NSW. This results in a reactive

⁵ OEH AHIP register available at: <http://www.environment.nsw.gov.au/licences/current-AHIP-register.htm>

⁶ Australia State of the Environment Report 2011, State of the Environment 2011 Committee, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Canberra, page 721 <http://155.187.2.69/soe/2011/report/heritage/pubs/soe2011-report-heritage.pdf>

⁷ Australia State of the Environment Report 2016, Heritage Chapter, page 27 <https://soe.environment.gov.au/sites/g/files/net806/f/soe2016-heritage-launch-v27march17.pdf?v=1488844294>

⁸ Ibid. page 27

system that often does not consider Aboriginal heritage until after the development assessment process or when Aboriginal heritage is under threat of destruction.

The NSW planning laws provide inadequate consideration and protection of Aboriginal heritage.

NSWALC's submission in response to the 2013 Government proposals provides detailed analysis of the need for reform and key recommendations to improve the current laws⁹. We refer Government to that submission for further details.

Enshrining the Aboriginal Land Rights network in ACH laws is essential

NSWALC is the peak body representing the interests of Aboriginal peoples in NSW. NSWALC has legislative responsibilities to protect and promote the rights of Aboriginal peoples, including Aboriginal culture and heritage. NSWALC has long advocated for reform of the State's ACH laws, and has engaged constructively and in good faith in this reform process and those that have preceded it.

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.¹⁰ Membership of Aboriginal Land Councils is open to all Aboriginal adults who reside in the LALC area. LALC members elect a Board every four years. The state-wide Council of the NSWALC is also directly elected every four years. There are currently 120 LALCs extending across nearly all of NSW.

From its very beginning, the call for land rights in NSW included not only the return of Aboriginal land, but also the return of sacred sites, the right to access sites, and the right to undertake cultural hunting and fishing. The protection and promotion of ACH remains a key priority for our network.

The link between Aboriginal Land Rights, Aboriginal Land Councils and the need for proper protection of Aboriginal culture and heritage was recognised when the *Aboriginal Land Rights Bill 1983* (NSW) was introduced into Parliament by the then Government. The Minister for Aboriginal Affairs, in proposing legislative recognition of Aboriginal Land Rights, indicated that it was to be only the first step in recognising and recompensing for past injustices suffered by Aboriginal peoples:

"It is my intention to seek the assistance of the new Aboriginal councils that will be formed under the proposed legislation [The Aboriginal Land Rights Act 1983] before introducing an Aboriginal heritage commission bill for the protection and ownership of sacred and significant sites"¹¹.

Since their establishment Aboriginal Land Councils have been consistent advocates for the recognition of Aboriginal rights to own, control, manage, practice and protect their culture and heritage. Every day LALCs work tirelessly in their communities to protect and promote our heritage.

NSWALC supports reforms that build on the existing structures of the Aboriginal Land Rights Network. This will create a unified, accountable and workable system that complements the existing

⁹ NSWALC submission in response to the 2013 Government model, available at:

<http://alc.org.au/media/97179/140402%20NSWALC%20submission%20Aboriginal%20Culture%20and%20Heritage%20Reform%20FINAL%20.pdf>

¹⁰ 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> and NSWALC 'Our History' Webpage, at <http://www.alc.org.au/about-nswalc/our-history.aspx>

¹¹ The Hon. Frank Walker NSW Parliament Hansard; Legislative Assembly; 24 March, 1983; at 5090

roles of Aboriginal Land Councils, builds on the investment in the Aboriginal Land Rights system over the last 35 years, and will create clarity for all stakeholders.

The proposed roles¹² outlined for LALCs will be critical to the operation of the new system. It is important that proper resourcing, transitional arrangements and capacity building programs are developed to support proposed new functions for LALCs. The statutory and existing roles of LALCs must be recognised and proposed new roles and functions must not conflict with the ALRA, its operation, and the practicalities of how a new system will operate on the ground.

The proposed reforms are multifaceted and complex, with much more detail to be determined. NSWALC does not support the creation of new bodies that undermine existing structures and create divisions and conflict in Aboriginal communities. If the proposals in the Bill are implemented properly we believe that the reforms will build on LALCs existing roles, and that the reforms can complement the ALRA. However, we continue to seek for the role of Aboriginal Land Councils to be clearly articulated in the new legislation.

NSWALC acknowledges and respects the roles of other Aboriginal groups including Native Title groups. Our position seeks to recognise and work with other Aboriginal groups to bring Aboriginal communities together in the implementation of new legislation.

NSWALC, the Aboriginal Land Rights Network and Aboriginal communities must be fully informed, meaningfully and genuinely engaged throughout this law reform process, and there is a need for an ongoing partnership approach.

Recommendation 2: The NSW Aboriginal Land Council re-affirms that a new legislative system for the protection of Aboriginal culture and heritage must:

- Recognise and build on the *Aboriginal Land Rights Act 1983 (NSW)*,
- Clearly articulate roles for Aboriginal Land Councils to create a unified, accountable and workable system that complements the existing roles of Aboriginal Land Councils, and builds on the investment in the Aboriginal Land Rights system,
- Provide proper resourcing to LALCs to take on new roles, and
- Ensure that reforms meet the needs of Aboriginal communities and do not divide Aboriginal communities.

See additional recommendations at sections 8-13 in the table at Part C.

Key improvements in the Draft Bill

This section outlines elements of the Draft *Aboriginal Cultural Heritage Bill 2018 (Draft Bill)* and reform proposals that have the potential to be significant improvements compared to the current laws. Detailed recommendations are included in the table at Part C.

1. Decision making and administrative roles for Aboriginal peoples

Under the current laws the Minister and OEH have all roles.

¹² Proposals paper, page 19-20. We note that LALCs could be delegated other functions by the ACH Authority and could become 'authorised officers' (see section 97, Draft Bill).

The draft Bill provides some decision making and most administrative roles to Aboriginal peoples, including compliance and enforcement via:

- **Aboriginal Cultural Heritage (ACH) Authority** made up of only Aboriginal people (section 8, Draft Bill) to undertake key functions (section 12, Draft Bill).
- **Local Aboriginal Land Councils** may be delegated '*local coordination and support roles*' - s.13, Draft Bill. This provides a key opportunity to recognise and build on the existing roles LALCs already undertake in relation to ACH. LALCs have strong governance and are publicly accountable organisations. We seek commitments that the role of LALCs will genuinely be built on and supported, and not undermined (see recommendations at section 13 in the table at Part C).
- **Local ACH Consultation Panels** – to provide advice on local matters – sections 14-17, Draft Bill. The ACH Authority is proposed to develop policies and guidance around the operation, establishment and membership of the Local ACH Consultation Panels – ie. The Bill does not propose to outline who speaks for Country.

There has been a clear message from Aboriginal communities that the ACH Authority must have the confidence of the Aboriginal community and must be appointed based on the results of a community process.

See additional recommendations at sections 8-17 in the table at Part C of this submission.

Recommendation 3: The NSW Aboriginal Land Council supports Aboriginal controlled decision making and administrative structures in the new laws.

Recommendation 4: The ACH Authority Board should be comprised of 13 members being one NSWALC representative plus four representatives from each of the following:

- Local Aboriginal Land Council membership,
- Aboriginal Owners, registered under the *Aboriginal Land Rights Act 1983 (NSW)*,
- Native Title holders / Prescribed Body Corporates.

Recommendation 5: We support processes where NSWALC, the Registrar, ALRA and NTSCORP seek nominations from the Aboriginal Land Council membership, Aboriginal Owners, and Native Title holders respectively.

Recommendation 6: If the Minister is to appoint ACH Authority members, the legislation must include safeguards to ensure that the Minister's decision is bound by the results of the above recommended selection process, and that the Minister cannot unjustly remove Board members.

Recommendation 7: The NSW Government should resource the expansion and maintenance of the Aboriginal Owners Register under the *Aboriginal Land Rights Act 1983 (NSW)* to cover the whole of NSW. Further consultation is needed on appropriate amendments to the definition and processes related to the Aboriginal Owners Register.

2. Clearer interactions with the planning system and upfront assessment

The Draft Bill outlines that proponents will generally have to obtain Aboriginal heritage approvals before applying for development consent – this is a significant change. However, as noted below we are concerned by the proposed exceptions (eg. for state significant development and complying development). More clarity and rigour is needed to ensure all developments and land use activities must follow the ACH processes.

See additional recommendations on sections 60-62 and Schedule 2 in the table at Part C.

Recommendation 8: NSWALC supports clearer interactions with the planning system but further clarity and safeguards are needed.

Recommendation 9: The legislation should require all categories of development and land use activities, in addition to planning proposals, rezoning and strategic planning to comply with Aboriginal heritage requirements.

3. Building on the Aboriginal Land Rights Network

Under the current NPW Act LALCs do not have any legislated roles in ACH. LALCs are referenced in current OEH consultation policy, despite being the key Aboriginal community organisation in their areas, and despite working to be the key protectors of ACH in their communities. The current OEH policy creates an open consultation process and has been a source of conflict and confusion. For these reasons NSWALC opposes the current OEH consultation policy.

Under the Draft Bill LALCs may be delegated '*local coordination and support roles*'. This provides a key opportunity to recognise and build on the existing roles LALCs already undertake in relation to ACH.

See additional recommendations on section 13 and '*Role of LALCs*' in the table at Part C.

Recommendation 10: The legislation should ensure that LALCs will be the key local support and coordination body, unless the LALC chooses not to undertake this role. The legislation should ensure any other body proposed to become accredited instead of a LALC should be as an interim measure (time limited) only until such time as the relevant LALC is able to take on those functions. Any accreditation process must genuinely promote capacity. LALCs must be supported to take on additional roles if they choose.

4. Clearer consultation process

The current NSW Government policy of 'open' consultation does not work and needs to be addressed. Under the Government's current consultation policy, there are sometimes 50 to 150 '*Registered Aboriginal Parties*' that proponents consult with and get to choose who they will listen to. This undermines Aboriginal people and organisations with existing statutory rights and community recognition ie. LALCs and traditional owners. Further work is needed to ensure that the processes to form Local ACH Consultation Panels are robust and supported by Aboriginal communities.

Recommendation 11: NSWALC supports clearer consultation processes.

5. New objects

The proposed new objects are more comprehensive than the current objects outlined in the NPW Act, and include recognition that Aboriginal heritage '*belongs*' to Aboriginal peoples. However, the legislation must be clear that protection of ACH is a key object of the Act. The objects should be updated to align with the United Nations *Declaration on the Rights of Indigenous Peoples*.

See additional recommendations at section 3 in the table at Part C.

Recommendation 12: The proposed objects should be updated to:

- Include protection of ACH as a key object, and

- Align with NSWALC's Principles for Reform and the United Nations *Declaration on the Rights of Indigenous People*.

6. New provisions relating to intangible ACH

Under the current NPW Act there are no protections for intangible ACH.

The Draft Bill proposes that intangible heritage can be registered and agreements can be made about the use of intangible ACH. A new offence for knowingly using registered intangible cultural heritage for commercial purposes without agreement is included in the draft Bill. However, further clarifications and safeguards are needed to better align with Aboriginal community's rights to control ACH.

See additional recommendations at sections 36-38 in the table at Part C.

Recommendation 13: NSWALC supports the inclusion of provisions relating to intangible ACH. However, safeguards are needed to better align with Aboriginal community's rights to control ACH.

Recommendation 14: We recommend that the NSW Government engage with Aboriginal peoples to address key recommendations in the IP Australia discussion paper¹³ that are within the NSW Government's jurisdiction.

7. New investigation powers and enforcement provisions

The Draft Bill outlines that the ACH Authority will be responsible for investigating breaches of the laws and harm to ACH and will be able to issue stop work orders and remediation orders.

The Minister is proposed to issue interim protection orders.

The Draft Bill also outlines that new Court orders can be made including to "prevent, control, abate or mitigate" harm, "make good any resulting harm to ACH" and for compensation (restorative justice). Binding agreements can be made that the defendant will do or not do certain things (enforceable undertakings).

These will be important enforcement and compliance tools to deter harm.

See additional recommendations at sections 94-118 in the table at Part C.

Recommendation 15: NSWALC broadly supports the new compliance, enforcement, remediation and investigation powers. However some amendments are needed including:

- Removing merits appeals for proponents/ land holders, and
- Providing roles to the ACH Authority to issue Interim Protection Orders.

8. Broader recognition and definitions of Aboriginal cultural heritage

The Draft Bill proposes a new broader definition of ACH. This is supported, however, as noted further below, we seek to ensure that the harm offences capture the broader definitions and 'undeclared' ACH.

¹³ See IP Australia discussion paper 'Indigenous Knowledge: Issues for protection and management' https://www.ipaustralia.gov.au/sites/g/files/net856/f/ipaust_ikdiscussionpaper_28march2018.pdf

See additional recommendations at sections 4 and 40 in the table at Part C.

Recommendation 16: NSWALC supports the proposed definitions with some amendments to better align with NSWALC's Principles for Reform and the UNDRIP. The definition must include water. Harm offences must protect all ACH.

9. A new information system to be managed by Aboriginal people

Under the current laws mapping and information is managed by OEH.

The Draft Bill proposes that this will now be managed by the ACH Authority.

See additional recommendations at sections 19-21 in the table at Part C.

Recommendation 17: NSWALC supports information and mapping systems to be managed and owned by Aboriginal people, including a restricted access database for Aboriginal people only.

Further safeguards are needed to protect Aboriginal people's knowledge and information from misuse and unauthorised access. The legislation should include offences and penalties for unauthorised access and use of Aboriginal people's information.

10. Inclusion of monitoring and reporting requirements

The Draft Bill includes requirements for monitoring and reporting that can help measure and build the evidence base to support protection of ACH.

Recommendation 18: NSWALC supports improved monitoring and reporting about the state of ACH.

11. Open standing provisions which will allow any person to seek civil enforcement

The Draft Bill provides that any person may bring proceedings in the Land and Environment Court to remedy or restrain a breach of the Act of regulations. Open standing provisions will allow any person to seek civil enforcement. However, these provisions come with the risk of having to pay other the costs of other parties when unsuccessful. This can be a significant barrier in accessing justice.

Recommendation 19: NSWALC supports the open standing provisions, but costs should not be borne by Aboriginal people.

12. Maximum penalty amounts for most serious offences increased

The Draft Bill proposes to increase maximum penalty amounts for most serious offences to \$1,650,000 for a corporation and \$330,000 for an individual (and up to one year imprisonment).

These penalties should be higher. Aboriginal people should also have roles in determining penalties.

See additional recommendations at section 41 and 119 in the table at Part C.

Recommendation 20: NSWALC recommends penalty amounts are increased to align with the *Protection of the Environment Operations Act 1997* (NSW pollution law) ie. \$5 million for corporations and \$2 million for individuals. Imprisonment must be retained.

Key concerns with the Draft Bill

This section outlines NSWALC's key concerns with the Draft Bill and key amendments NSWALC is seeking. More detailed comments and recommendations are provided in the table at Part C.

1. Proposed Ministerial functions

NSWALC opposes the proposed approval and decision making functions for the Minister outlined in the Draft Bill. In support of self-determination and recognising Aboriginal ownership of ACH, NSWALC is of the view that the ACH Authority should have all decision making functions— particularly in relation to:

- a. Declaring Aboriginal heritage (s.18, Draft Bill),
- b. Approving maps and mapping methodology (s.20, Draft Bill),
- c. Approving the Code of Practice (s.54, Draft Bill) and
- d. Making interim protection orders (s.79, Draft Bill).

There can still be appropriate oversight without the Minister making key decisions. At a minimum, any Ministerial decisions must be guided by clear parameters and criteria, including recommendations of Aboriginal people, to safeguard against unfettered, discretionary decision making.

See additional recommendations at sections 8, 18, 20, 43(2), 54, 64, 67, 78, 79 and Schedule 1 in the table at Part C.

Recommendation 21: Proposed decision making functions of the Minister should be removed and provided to the ACH Authority.

2. Interactions with the planning and land use systems

As currently drafted there are some proposed exclusions to the ACH process, including state significant development and complying development. The ACH Bill should apply to all development and land use activities. This will bring increased clarity and better integration with planning and land use laws.

See additional recommendations on sections 60-62 and Schedule 2 in the table at Part C.

Recommendation 22: Proponents should not be allowed to make development applications without an agreed ACH Management Plan.

Recommendation 23: The legislation should include safeguards to ensure any changes or modifications to developments require consultation with and concurrence of the ACH Authority and Local ACH Consultation Panel.

3. Appeal rights for proponents

The Draft Bill entrenches the existing imbalance of proponent rights over Aboriginal peoples. We reject this as it is contrary to the intent of the reforms and proposed objects set out in the Draft Bill.

Providing proponents with additional rights to appeal on the merits of the decision is unnecessary. It is also contrary to decision making by Aboriginal peoples as the Courts will be asked to make decisions, taking this out of Aboriginal people's hands. Proponents will have judicial review rights in relation to decision making processes.

See additional recommendations at sections 52, 76, 83 and 93 in the table at Part C.

Recommendation 24: NSWALC does not support merits appeals for proponents.

4. The proposed timeframes for negotiation and determination are far too short

The Draft Bill outlines that key timeframes will be outlined in regulations (not yet developed). The proposed timeframes for negotiation and determination outlined in the proposals paper (p.43) are far too short eg. a negotiation period of only 10 days for a basic ACH Management Plan (**ACHMP**).

See additional recommendations at sections 50 and 59 in the table at Part C.

Recommendation 25: Any mandatory timeframes must allow for meaningful consultation and genuine input by Aboriginal people; timeframes must be culturally appropriate with allowances for cultural priorities. Certain times of the year should also be excluded eg. Christmas and New Year periods, NAIDOC week.

5. The harm offence

The Draft Bill outlines that the harm offence will apply only to Aboriginal objects, ancestral remains and declared Aboriginal sites. There does not appear to be any protection for undeclared ACH. NSWALC is of the view that all ACH must be protected, regardless of significance.

We do not support the removal of the higher penalty for the strict liability offence of harming declared ACH.

Further, extra elements of 'recklessly or intentionally' have been added to the 'knowing' offence that will make them harder to prove. These elements, along with the proposed exception of 'trivial or negligible' harm, should be removed.

See additional recommendations at sections 40-41 in the table at Part C.

Recommendation 26: The harm offence should apply to all ACH.

Recommendation 27: The harm offence should apply to all development and land use activities.

Recommendation 28: The 'reckless or intentional' and 'trivial or negligible' elements added to the harm offences should be removed.

Recommendation 29: The offence for breaching an ACHMP should be retained.

Recommendation 30: The strict liability offence for harming ACH should re-instate imprisonment and increase the penalty amount for declared ACH.

6. Decision making criteria on ACH Management Plans

Under the current NPW Act the NSW Government has the power to issue Aboriginal heritage impact permits (**AHIPs**) to harm or desecrate ACH (section 90, NPW Act).

The draft Bill will replace AHIPs with ACH Management Plans (**ACHMPs**) that are to be negotiated between a proponent and a Local ACH Consultation Panel, and approved by the ACH Authority.

ACHMPs, if approved, will authorise harm to ACH, and may include measures to minimise harm or conserve ACH.

The decision making criteria on ACHMPs is proposed to include objects of the Act, impacts on Aboriginal community, impact on proponents and public interest. 'Impact on proponents' and 'public interest' are not in line with the intent of the reforms. These considerations should be removed.

See additional recommendations at section 49 in the table at Part C.

Recommendation 31: Decision making criteria should be based on recommendations by Aboriginal peoples and the objects of the Act. As noted above, the objects of the Act should focus on the protection of ACH.

7. Safeguards in mapping, assessment pathway and Aboriginal Cultural Heritage Management Plan processes are needed

A new ACH Assessment Pathway is proposed to replace the current 'due diligence' process. The ACH Assessment Pathway will rely on the proponent to check maps of 'known and likely' ACH to trigger further assessment and consultation. Details are to be set out in a Code of Practice developed by the ACH Authority and approved by the Minister.

NSWALC has concerns that the process is still proponent driven, because the proponent will decide whether they need to proceed through the pathway and prepare the assessment report. The ACH Authority will have very limited ability to oversee the pathway process or importantly require that any assessment report is compliant with the ACH Assessment Pathway Code of Practice. Assessment reports will form the basis of any ACHMP negotiations and will be advice that is bought by proponents and could down-play the presence or significance of ACH. NSWALC is of the view that the level of input by the Local ACH Consultation Panel and oversight by the ACH Authority needs to be improved, particularly in the preparation and review of assessment reports.

As currently drafted it is unclear whether there are any ramifications for breaches or non-compliance with the ACH Assessment Pathway Code of Practice.

Furthermore, the Draft Bill does not include processes for the unexpected discovery of ACH to ensure that proponents are required to follow the ACH Assessment Pathway. The proposals paper states that proponents will be required to complete the ACH assessment pathway where development or land management activities result in the discovery of previously unknown Aboriginal cultural heritage (page 39).

See additional recommendations at sections 19-21 and 39-62 in the table at Part C.

Recommendation 32: Further safeguards are needed in the ACH Assessment Pathway to ensure that proponents cannot bypass assessment and consultation with Aboriginal peoples.

Recommendation 33: The Local ACH Consultation Panel must have visibility of and meaningful input into all ACH processes, including in the preparation of assessment reports.

Recommendation 34: The ACH Authority must be provided with the power to properly oversight the Assessment Pathway and reject inadequate assessment reports.

Recommendation 35: The legislation should specify that the ACH Assessment pathway applies to all development and land use activities including state significant projects and complying development.

Recommendation 36: We do not support checking a map as a sufficient step by itself to confirm that no sites are likely to exist, and effectively make important decisions about ACH management and protection, at the expense of consultation with Aboriginal people.

Recommendation 37: The legislation needs to clearly outline the process for unexpected finds of ACH, including requiring proponents to follow the ACH Assessment Pathway.

Recommendation 38: The assessment pathway and negotiation of ACHMPs should be based on the following principles:

- Harm avoidance and minimisation
- 'Intergenerational equity of access to heritage' which would reflect the proposed definition of ACH significance in s.4 of the Draft Bill.
- The principle of free, prior and informed consent, which reflect the reform aim of decision making by Aboriginal people.

8. Proposed to retain broad defences

The draft Bill proposes to retain broad defences that will be available to proponents if ACH is harmed. We do not support the range of broad defences under the current laws which are replicated in the draft Bill.

See additional recommendations at sections 42-45 in the table at Part C.

Recommendation 39: Defences should be limited. Additional defences made by the Minister or in Regulations should be removed. Any defences proposed to be outlined in Regulations or Codes must be required to meet minimum standards developed by the ACH Authority.

Recommendation 40: Defences for 'low environmental impact activities' should be removed.

Recommendation 41: The legislation or subsequent regulations or Ministerial Codes of Practice should not provide for defences for large scale assessments and approvals.

Broader reform package

The Draft Bill is one element of a broader reform package. As acknowledged in the Government's 'A proposed new legal framework' (**Proposals paper**), the success of reforms will rely on a range of other factors.

Resourcing

The reforms must be properly resourced in order for the new system to be successful. The new system and administrative structures must not be set up to fail.

The NSW Government has acknowledged that resourcing of the new system is required to ensure it effectively operates, and that work is underway on this.¹⁴

¹⁴ See page 50 of the Proposals Paper

The NSW Government must commit to ensuring all elements of the new system are properly costed including:

- Establishment of the ACH Authority,
- Proper resourcing for the ACH Authority to do its job, including funding for conservation, compliance and enforcement,
- Training and capacity building LALCs, Local ACH Consultation Panels and users of the new system,
- Funding for LALCs and Local ACH Consultation Panels to operate on a day-to-day basis and manage the expected workload associated with negotiating ACH Management Plans (**ACHMPs**), keeping mapping systems up to date, developing strategic plans, and undertaking proactive ACH conservation measures,
- Establishment of the mapping and information systems.

Additional safeguards are needed to ensure that the ACH Authority is not undermined by a lack of resourcing, or that there are not perverse incentives created through the new regime; for example, pressure to approve ACHMPs to receive funding and pressure to utilise ACHMP funds to pay for operational expenses.

The NSW Government must provide the long-term funding for programs and initiatives that are necessary to build capacity for Aboriginal peoples to engage and be employed in the new system for protecting ACH.

Recommendation 42: The NSW Aboriginal Land Council seeks further comprehensive information from the Government regarding resourcing commitments to support the establishment and ongoing costs of the proposed new system.

Recommendation 43: The NSW Aboriginal Land Council seeks a commitment that new laws will be properly funded by Government in an ongoing basis, including capacity building funding for LALCs.

Transition and implementation arrangements

Implementation of the new framework is expected to take a number of years given the new structures, process and the capacity building needed to successfully transition to the new system. The need for capacity building and resourcing will be ongoing.

NSWALC and the Aboriginal Land Rights Network must be central to transitional and implementation arrangements. The Government must also commit to ensuring:

- That the five-year transition plan meets the needs of our network, Government and key stakeholders,
- The transition period provides for genuine establishment and capacity building needs and is done within a suitable time period.

Additionally, given the inadequacies of the current regime, consideration should be given to enlivening the new regime in a staged implementation.

Recommendation 44: The NSW Government must work in partnership with the NSW Aboriginal Land Council, the Aboriginal Land Rights network and Aboriginal communities to transition to the new regulatory regime.

Recommendation 45: The Government must consider staged implementation of the new regime, for example by:

- a. Requiring that the ACH Authority gives concurrence on AHIPs during the transition period,

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| <ul style="list-style-type: none">b. Commencing relevant sections of the legislation early if communities are ready,c. Commencing the development of policies and key elements of the new system as soon as the ACH Authority is established. |
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Education and awareness

NSWALC strongly recommends that education and awareness strategies are developed and implemented urgently to address misconceptions and misinformation about the reform proposals. We are extremely concerned that misunderstandings about the reforms may lead to increased destruction of our heritage.

The Government should provide landowners with incentives to hand back and protect ACH. This should include funding for voluntary protection agreements and amnesties to encourage landowners to protect sites and hand back artefacts.

There are many good examples of land-owners and Aboriginal communities working together to protect Aboriginal sites in NSW. NSWALC is of the view that the reform process presents an opportunity to showcase these examples.

<p>Recommendation 46: The NSW Government should immediately implement education and awareness strategies to clarify the reforms and encourage protection of ACH.</p>

<p>Recommendation 47: The Government should provide landowners with incentives (funding for voluntary conservation agreements and amnesties) to hand back and protect ACH.</p>

<p>Recommendation 48: The NSW Aboriginal Land Council is keen to work with the NSW Government and stakeholders to address any concerns and achieve better outcomes for our heritage and communities.</p>

Development of appropriate Regulations

The Draft ACH Bill provides for numerous important issues to be dealt with via Regulation including:

- Timeframes for negotiation and determination of ACHMPs (see further below)
- Who the ACH Authority can delegate certain functions to
- Reporting requirements for bodies that have been delegated functions of the ACH Authority
- Considerations for the ACH Authority when recommending ACH declarations
- Information to be included in the ACH Information System, who can access the restricted access database and any fees related to accessing the system
- Processes for registering intangible ACH and who can register
- Defences including the low environmental impact list (see further below)
- Mediation processes
- Timeframe for appeals
- Circumstances in which an ACHMP can be terminated or amended
- Processes where a development application has been changed or a development consent is modified
- Requirements relating to payments into and from the ACH Fund, and the keeping of separate accounts
- Terms for interim protection orders
- Who can be an authorised officer for conducting investigations
- Protocols for determining what additional amounts (representing monetary benefits) are payable by offenders in Court orders
- Who the Minister can delegate functions to

- Additional offences punishable by a monetary penalty not exceeding \$5,500

The Government have advised there will be future public consultation processes on any Regulations.

Recommendation 49: Genuine consultation with NSWALC, LALCs and Aboriginal people is needed on all proposed regulations.

Defences - Low environmental impact list and Codes of Practice

As noted above, NSWALC is of the view that there should not be any defences for 'low environmental impact' activities. Such activities can still cause harm and should not be exempt. If there is to be a list, only genuinely low impact activities should be included. As currently drafted activities on the list are too broad and include many activities that cannot reasonably be classed as 'low impact' including mining activities.

NSWALC also asserts that regulations should not provide for additional defences and that the Minister should not be allowed to authorise additional defences by a Code of Practice.

Recommendation 50: NSWALC recommends that an independent assessment of the definitions of low impact activities should be undertaken to ensure that activities are genuinely low impact and do not bypass consultation processes with Aboriginal people where there is a risk of harm to ACH.

Proposed Negotiation and Determination Timeframes for ACH Management Plans

The Proposals Paper outlines proposed mandatory timeframes for:

- a. How long a proponent and the Local ACH Consultation Panels will have to negotiate an ACH Management Plan (the negotiation period) – 10 days is proposed to negotiate a basic ACHMP, and
- b. How long the ACH Authority will have to determine an ACHMP (the determination period) – 5 days is proposed to determine a basic ACHMP.

Clause 50 of the Draft Bill provides that timeframes will be prescribed by the regulation.

NSWALC is of the view that the proposed timeframes are too short. Any mandatory timeframes set out in the regulations must allow for meaningful consultation and genuine input by Aboriginal people; timeframes must be culturally appropriate with allowances for cultural priorities.

While further consultation on appropriate timeframes is needed, negotiation and determination periods should be at least 30 business days for a basic ACHMP.

Recommendation 51: The current proposed timeframes are too short. Any mandatory timeframes set out in legislation must allow for meaningful consultation and genuine input by Aboriginal people; timeframes must be culturally appropriate with allowances for cultural priorities. Further consultation on appropriate timeframes is needed, however, negotiation and determination periods should be at least 30 business days for a basic ACHMP.

Development of appropriate Policies, Guidelines, Codes

The ACH Authority is proposed to develop a range of important policy and procedural documents including:

- ACH Assessment Pathway Code of Practice

- ACHMP Template and Negotiation Guideline
- ACH Assessment Report Template
- Mapping methodology
- Establishment, membership and operation of Local ACH Consultation Panel
- Accreditation of LALCs and reporting requirements
- Strategic Priorities Statement
- Policies on repatriation
- Nomination criteria and guidelines for declared ACH
- Monitoring and reporting framework

These documents will have significant implications for the operation and effectiveness of the new laws, the Aboriginal Land Rights Network and Aboriginal peoples.

As currently drafted the legislation does not establish consultation requirements for the ACH Authority to comply with when developing policies and guidelines, except relating to the establishment, membership and operation of Local ACH Consultation Panels.¹⁵

It is recommended that mechanisms are built into new legislation to ensure that Aboriginal people are consulted, and at a minimum, Aboriginal Land Councils, Aboriginal Owners and Native Title groups are consulted during the development of relevant policies, guidelines, codes and methodologies. As an example, a mechanism is currently built into the ALRA that requires NSWALC to consult with LALCs on certain policies.¹⁶

The Draft Bill outlines that the ACH Authority will develop many of the policies, guidelines, codes and methodologies, however some key documents will need approval from the Minister. This includes the ACH Map, mapping methodology and ACH Assessment Pathway Code of Practice. As noted above, in keeping with the aim of the reforms to provide for decision making by Aboriginal peoples, the ACH Authority should have approval roles in relation to all policies, guidelines and codes, not the Minister.

Recommendation 52: Consultation with the NSW Aboriginal Land Council, LALCs and Aboriginal peoples is needed on all proposed policies, guidelines and codes.

Recommendation 53: The NSW Aboriginal Land Council supports Aboriginal control and self-determination. As such, policies, guidelines and codes should not be approved by the Minister and should instead be approved by the ACH Authority.

Reforms to planning laws and reforms to recognise and support cultural practice

While the reform process provides an opportunity to improve protections for ACH, the Government must do more to:

- Support cultural practices,
- Improve access to Aboriginal sites for Aboriginal people, and
- Better integrate the ACH regime with NSW planning and land use laws.

The Draft Bill proposes some consequential amendments to the *Environmental Planning and Assessment Act 1979*. NSWALC is of the view that the reforms do not go far enough to ensure that all development and land use activities are required to undertake ACH requirements. This is discussed in greater depth in the table at Part C.

¹⁵ s.17, Draft Bill

¹⁶ S. 113 and 114, ALRA

NSWALC recommends that all NSW legislation and policies that affect Aboriginal people's rights and interests should recognise and reflect the new broader definition of ACH and should increase Aboriginal people's access, use and management of lands.

Recommendation 54: The NSW Aboriginal Land Council seeks a commitment that the NSW Government reform NSW planning, land use laws and other laws to improve requirements to protect ACH, and provide for Aboriginal people's cultural rights.

Government reform and consultation process

Unfortunately, community concerns continue to be raised about inadequacies with the Government's consultation process to date. Concerns include:

- Delays to the release of the draft Bill – the Bill was originally due to be released in early September 2017 but was not released until late February 2018,
- Only one week's notice in some instances about Government workshops – as NSWALC has previously recommended short notice severely limits participation and fosters mistrust of government,
- Insufficient materials provided to communities about the Government's proposals – for example only one copy of the Draft Bill was made available per table at some OEH workshops,
- Only small sections of the proposals were presented to participants – this created a sense of distrust, that Government was not providing the full picture or comprehensively explaining the proposed new laws and that participants at workshops were not able to comprehensively discuss all elements of the proposed reforms,
- Less than two months' consultation on the draft Bill - NSWALC has previously called for a minimum three month consultation period with Aboriginal communities on a Draft Bill.

Recommendation 55: Improvements to Government consultation processes are needed. Please refer to NSWALC's 2013 submission for detailed recommendations.

Recommendation 56: The NSW Aboriginal Land Council recommends that the next stage of the reform process must provide clear and accessible information to Aboriginal communities including timelines for proposed changes to the Draft Bill and details about further consultations and transitional arrangements.

Part B - Proposals measured against NSWALC Principles for Reform

The below table measures the Government's proposals against NSWALC Principles for Reform and notes key amendments NSWALC is seeking.¹⁷

NSWALC's Principles for reform	Draft ACH Bill proposals	Key amendments NSWALC is seeking
<p>1. Recognition that Aboriginal communities are the rightful owners of Aboriginal cultural heritage in NSW.</p>	<ul style="list-style-type: none"> • Objects (s.3) include <i>"to recognise that Aboriginal cultural heritage belongs to Aboriginal peoples"</i> • ACH Authority (all Aboriginal people) to make some decisions and administer new laws, however Minister proposed to retain some key decisions • Ownership of certain Aboriginal objects to be vested in ACH Authority on behalf of Aboriginal people (s.24) • Updated repatriation provisions (s.25) 	<ul style="list-style-type: none"> • Minister to have no decision making. ACH Authority should make key decisions, particularly for ACH Declarations, approving ACH Maps, approving Codes of Practice and making interim protection orders. • Include protection as a key object (currently <i>'conserving and managing ACH'</i> – this should also include protection) • Objects should reflect United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) including Articles 11 & 12 right to practice and protect culture, right to redress.
<p>2. The establishment of a legislative system which affects a practical balance between:</p> <ul style="list-style-type: none"> • the 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; 	<p>As currently drafted some potential positives in the Bill include:</p> <ul style="list-style-type: none"> • New Aboriginal administrative structure and decision making • Broader recognition and definitions of ACH, including intangible heritage • A new information system to be managed by Aboriginal people • Clearer links with the planning system and upfront assessment of Aboriginal heritage 	<ul style="list-style-type: none"> • No merits appeals for proponents – judicial review only • ACH Authority to have all key decisions, not the Minister • The ACH Bill should apply to all types of developments including major projects • Proposed minimum timeframes need to be extended. For example a minimum of 30 days to negotiate a 'basic' plan. • Harm offence must include all ACH

¹⁷ The Principles are based in those outlined in the 1996 *'DRAFT NSW Government Green Paper: the Future management of Aboriginal Cultural Heritage in NSW'*. These Principles were endorsed by NSWALC in 2010 and were a component of NSWALC's [submission](#) in response to the NSW Government's 2013 reform model.

<ul style="list-style-type: none"> the need for Government to ensure the economic, social and cultural advancement of other (non-Aboriginal interests) in NSW. 	<ul style="list-style-type: none"> ACH Authority to be the enforcement and compliance authority Inclusion of monitoring and reporting Improved investigation powers and Court orders Open standing provisions which will allow any person to seek civil enforcement (though risk of paying other parties costs if you lose) Some penalty amounts have increased however <p>However as currently drafted the Bill is still too far weighted to proponent rights including:</p> <ul style="list-style-type: none"> Merits appeals available for proponents but not Aboriginal peoples The Minister will still make key decisions on ACH – including declaring ACH, mapping, the Assessment Pathway Code of Practice, and defences via Codes – ACH Authority should have these decisions Major projects will to remain exempted from the proposed ACH process. Further protections and clarifications are needed to ensure state significant development, integrated development and complying development cannot bypass Aboriginal heritage requirements. The proposed timeframes (mostly proposed to be outlined in Regulations) are far too short The harm offence extends to Aboriginal objects, ancestral remains and declared Aboriginal sites – Protection is needed for undeclared Aboriginal heritage sites “recklessly or intentionally” has been added to the ‘knowing’ offence which will make it harder to prove Decision making criteria on ACH Management Plans includes consideration of local Aboriginal peoples 	<ul style="list-style-type: none"> Decisions on ACHMPs should not include consideration of impacts on proponent Offences need to protect all ACH Proposals paper outlines that definition of desecration will be in Bill however it hasn’t been included. Extra elements shouldn’t be added that will make them harder to prove Additional safeguards and minimum standards needed. Still relies on proponent to check map of ‘known and likely’ Aboriginal heritage to trigger further assessment and consultation. Further details and minimum standards are needed for any Codes
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	<p>and objects of the Act (which includes to conserve ACH) but also includes consideration of impacts on proponents and the public interest</p> <ul style="list-style-type: none"> • Still broad defences 	
<p>3. Respect for Aboriginal cultural connections, authorities for Country, and contemporary beliefs, values and practices.</p>	<p>The Draft Bill:</p> <ul style="list-style-type: none"> • Includes objects <i>“to recognise that ACH belongs to aboriginal people and accordingly establish a legislative framework that reflects Aboriginal people’s responsibility for and authority over ACH”</i> and <i>“to recognise ACH as a living culture that is intrinsic to the wellbeing of Aboriginal people”</i> • Includes a broader definition of Aboriginal heritage which includes <i>“living, traditional and historical”</i>, however see above comments re. harm offence • Includes that Aboriginal people will determine significance • Aboriginal people to make some decisions, however Minister to retain key decision making • Principle of self-determination to the extent that Aboriginal peoples will be administering the system, making some key policies, including in relation to Local ACH Consultation Panels 	<p>All ACH must be protected.</p> <p>Safeguards are needed to ensure intangible ACH provisions align with the needs of Aboriginal communities.</p>
<p>4. Recognition that Aboriginal cultural heritage is part of a broader Aboriginal relationship with the land including:</p> <ul style="list-style-type: none"> • 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. 	<ul style="list-style-type: none"> • NSWALC proposed to be represented on ACH Authority • LALCs may be delegated ‘local coordination and support’ roles • Does not provide direct avenues to support hunting, gathering and fishing practices (to varying extents other existing legislation provides some recognition of rights and interests eg. Land Rights, Fishing laws, Biodiversity Conservations laws) • The definition of ACH is broader than the current definition. Includes <i>‘beliefs, knowledge and skills’</i> 	<p>Government must commit to reforms to support Aboriginal people’s cultural practice.</p> <p>The ACH Authority Board should be composed of 13 members including one NSWALC representative plus four representatives from each of the following:</p> <ul style="list-style-type: none"> - Aboriginal Land Councils, - Aboriginal Owners, registered under the <i>Aboriginal Land Rights Act 1983 (NSW)</i>

	<ul style="list-style-type: none"> • New provisions related to intangible cultural heritage which can be protected if registered and not already widely known to the public 	<ul style="list-style-type: none"> - Native Title holders / Prescribed Body Corporates <p>We support a community driven process where each of the above organisations/groups select their own representatives.</p> <p>If the Minister is to appoint ACH Authority members, the legislation must include safeguards to ensure that the Minister’s decision is bound by the results of an Aboriginal community controlled selection process, and that the Minister cannot unjustly remove Board members.</p> <p>We seek commitments that the role of LALCs will genuinely be built on and supported, and not undermined.</p>
5. Provision for the protection and management of culturally significant areas on private and public lands.	<p>ACH on private and public lands can be protected via:</p> <ul style="list-style-type: none"> • ‘Declarations’, however proposed to be made by the Minister on the recommendation of the ACH Authority • Voluntary conservation agreements, however these can be terminated if there are petroleum or mining authorities, • There are offences and penalties for harming ACH, and tools such as stop work, interim protection and remediation orders 	Further amendments are needed to maximize protection of ACH.
6. The establishment of management processes which: <ul style="list-style-type: none"> • recognise cultural rights and responsibilities of local Aboriginal 	<p>New administrative and decision making arrangements include:</p> <ul style="list-style-type: none"> • Aboriginal Cultural Heritage (ACH) Authority made up of only Aboriginal people who will have key functions, 	We support sufficient flexibility for local Aboriginal people to be able to determine the structure and composition of local decision making groups. The legislation should state that

<p>communities, traditional owners and custodians;</p> <ul style="list-style-type: none"> allow for the advocacy of Aboriginal interests; and are clear, transparent and accountable. 	<ul style="list-style-type: none"> Local Aboriginal Land Councils may be delegated '<i>local coordination and support roles</i>' and other roles, Local ACH Consultation Panels to provide advice on local ACH matters. The Bill does not propose to outline who speaks for Country. These issues will be addressed in ACH Authority policy developed in consultation with Aboriginal peoples. This has the benefit of providing for self-determination, rather than legislation defining this. 	<p>Local ACH Panel Members must be Aboriginal persons.</p> <p>Appropriate reporting, community consultation, governance and accountability mechanisms will be essential</p>
<p>7. The identification and mapping of cultural areas/zones in NSW, as a basis for the operation of an Aboriginal Heritage Commission. Such mapping should:</p> <ul style="list-style-type: none"> be consistent with Native Title interests; and recognise the diversity of Aboriginal interests across the State. 	<p>New provisions for mapping included, proposed to be undertaken by Local ACH Consultation panels, support bodies and ACH Authority.</p> <p>No boundaries are proposed, these are proposed to be worked out by the ACH Authority though a consultation process.</p>	<p>We note that the legislation does not propose boundaries, we support the use of LALC boundaries.</p> <p>Protocols and agreements can be developed to manage areas wherever cultural boundaries may cross over or where there are shared cultural interests.</p>
<p>8. Every opportunity should be given to Aboriginal communities and other land users to discuss, negotiate and resolve land use proposals at community levels.</p>	<p>New ACH Management Plans are proposed to be negotiated between local ACH Panels and proponents, to be approved by ACH Authority.</p>	<p>Further safeguards and amendments to ensure that the legislation does not entrench the existing imbalance of proponent rights over Aboriginal people's rights.</p>
<p>9. The establishment of:</p> <ul style="list-style-type: none"> Centralized 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 	<p>The Draft Bill requires</p> <ul style="list-style-type: none"> - A monitoring and reporting framework to improve the evidence base for decisions by government and others relating to ACH, and improve the quality of information provided to the public about actions to conserve ACH, - New provisions that will require public authorities to consider new ACH Strategic Plans in decision making. 	<p>The legislation should include additional requirements for other agencies including the Department of Planning to consult and receive advice from the ACH Authority.</p>

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.	Includes an object <i>“to promote understanding and respect for Aboriginal cultural heritage among all NSW people”</i> .	The functions of the ACH Authority should be updated to encourage increased understanding and work in partnership with Aboriginal Land Councils.
11. Recognise the need for clearly defined accountability to Aboriginal communities as well as an effective appeal process.	Accountability via being a public authority and being required to develop a monitoring and reporting framework. Accountability at the local level is not clear, these arrangements are proposed to be addressed by ACH Authority Policies, procedures etc Appeals: No merits appeals available for Aboriginal peoples, however Aboriginal people will be able to bring breaches to Court.	Merits appeals for proponents should be removed.
12. The establishment of an effective system of prosecution, penalties and reparations.	Maximum penalties for the most serious offences proposed to be \$1.6 million for corporations and \$330,000 for individuals and up to 1 year imprisonment. Court orders can be made including to <i>“prevent, control, abate or mitigate”</i> harm, <i>“make good any resulting harm to ACH”</i> and for compensation. Negotiations on ACHMPs are to include <i>“Aboriginal persons whose cultural heritage is to be impacted will benefit from the obligations of the proponent”</i>	Penalties should be increased and Aboriginal people should have a role in determining penalties.
13. Support international standards and instruments including the United Nations <i>Declaration on the Rights of Indigenous Peoples (UNDRIP)</i> , as the basis for broader	Some elements of UNDRIP are included to some extent: • Self-determination ie. decision making and administration by Aboriginal peoples – however this	Include key elements of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) including Articles 11 & 12 right to

<p>reform of Aboriginal heritage management in NSW.</p>	<p>needs to be strengthened as the Minister is proposed to retain some key roles</p> <ul style="list-style-type: none"> • Right to participate in decision making through representative structures – a community driven process is proposed to form the ACH Authority and the Government are seeking feedback on this. The ACH Authority is proposed to develop policies and guidance around the operation, establishment and membership of the Local ACH Consultation Panels • Right to protect culture and heritage – some new provisions included • Right to repatriation – some new provisions included • Rights to redress – some offences and penalties 	<p>practice and protect culture, right to redress, intergenerational access to heritage</p>
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Part C - Draft ACH Bill

Section of draft Bill	Comment	Recommendations
<p>Part 1 Preliminary (Objects and definitions)</p>		
<p>s.3 – Objects</p>	<p>The new proposed objects are an improvement on the objects in the NPW Act. However, further amendments are needed to ensure that the legislation focuses on the protection of ACH and that Aboriginal heritage must be a key consideration of all development and land use activities.</p> <p>The Victorian <i>Aboriginal Heritage Act 2006</i> (s.3) includes protection of ACH and integration with land and natural resource management as key objects. The ACH Bill must move beyond regulating the destruction of ACH, to recognise that ACH is part of a broader Aboriginal relationship with lands and waters. Aboriginal communities continue to call for this to be recognized.</p> <p>Access to ACH for future generations should also be a key object in the ACH Bill. ACH is the oldest living culture in the world. Its significance goes beyond the local and national level to be of international significance.</p> <p>The proposed objects include achieving better outcomes for the ‘wider NSW community’. The ACH Bill must focus on achieving better outcomes for ACH and Aboriginal people in recognition of the current widespread destruction of ACH. Clarity needs to be provided about the objects reference to the outcomes for ‘the wider NSW community’ to ensure that it is not misapplied in the context of ACH.</p> <p>The legislation should also reflect key international standards including:</p> <ul style="list-style-type: none"> • United Nations Declaration on the Rights of Indigenous Peoples: The UNDRIP sets international standards for the treatment of Indigenous peoples, represents international legal norms and reflects the 	<p>Objects should be updated to:</p> <ul style="list-style-type: none"> • Include key concepts in the United Nations <i>Declaration on the Rights of Indigenous Peoples (UNDRIP)</i> and international standards – including to protect ACH, recognise rights to practice culture, provide rights to redress, intergenerational access to ACH, free prior and informed consent and self-determination; • Promote ACH as an integral part of all development activities and land and natural resource management, • Reference Aboriginal Land Rights and support the ACH functions and roles of Aboriginal Land Councils as embedded in the ALRA. • Focus on protecting ACH rather than regulating harm to ACH. • Ensure that any reference to outcomes for the wider NSW community relates to the benefits of protecting ACH. “the wider NSW community” should be replaced with “...and culturally enrich NSW.” <p>The new legislation should include a preamble that recognizes the ongoing right of Aboriginal peoples to maintain the distinctive spiritual, cultural, social and economic relationship with ACH, including lands, waters and other resources for current and future generations.</p>

	<p>commitment of the United Nations member states to eliminating human rights violations against Indigenous people.</p> <ul style="list-style-type: none"> • ICCPR and ICESCR: The <i>International Covenant on Civil and Political Rights</i> (ICCPR) and the <i>International Covenant on Economic, Social and Cultural Rights</i> (ICESCR) recognise the right of minorities to practice and protect their cultures, as an inherent part of the right to self-determination.¹⁸ • ILO Convention 169: The <i>International Labor Organisation Convention Regarding Indigenous and Tribal Peoples in Independent Countries</i> (ILO 169) recognises the rights of Indigenous peoples to undertake traditional cultural practices and control and use traditional lands.¹⁹ • Convention on the Protection and Promotion of the Diversity of Cultural Expressions: This 2005 <i>United National Economic Social and Cultural Organisation (UNESCO)</i> includes recognition of Indigenous cultures and the importance of these cultures to the ongoing and sustainable development of communities.²⁰ • Convention on Biological Diversity: This year Australia signed the <i>Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization</i> (the Nagoya Protocol) to the Convention on Biological Diversity, which was signed by the Australian Government in 1993.²¹ <p>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</p>	
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¹⁸ 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).

¹⁹ 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).

²⁰ 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 (accessed 1 Feb 2012).

²¹ 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).

	<p>development decisions. They also require 'free, prior and informed consent', particularly in relation to Indigenous people, which moves the role of the State beyond 'consultation.' The more recent instruments recognise broader definitions of ACH, and the cultural significance of lands and waters.</p>	
<p>s.4 – Meaning of 'ACH' and related key terms</p>	<p>ACH All Aboriginal heritage including contemporary heritage is important to Aboriginal people. The new proposed definition of ACH is improvement on the current laws. However, we seek to ensure that the definition captures water, totems, plants, bush medicines, and ecology. We understand that the term 'environment' does capture water and other elements of ACH. The definition should not inadvertently limit or exclude what can be protected.</p> <p>While there is a new definition of ACH, we are concerned that the offence provisions only applies to 'declared' ACH. This is a significant gap (see comments below at ss.40-41).</p> <p>Aboriginal object The Bill retains the definition of Aboriginal object with some minor changes.</p> <p>ACH significance NSWALC has previously raised concerns regarding the use of '<i>significance</i>' as it may limit what can be protected. 'Significance' appears in the current laws in relation to:</p> <ul style="list-style-type: none"> • Objects of the NPW Act (s2A, (1)(b)(i)) • Declaration of Aboriginal Places if, in the opinion of the Minister, the place is or was of special significance (s84, NPW Act) • Factors to be considered in determining an AHIP includes significance of the object or place (s90K, NPW Act) <p>While the current laws include <i>significance</i> they do not include a definition. The proposed definition includes '<i>significance to Aboriginal people or communities</i>'. It is important that Aboriginal people determine the significance of ACH. All ACH must be protected, regardless of significance.</p>	<p>A broad all-encompassing definition of ACH that captures the tangible and intangible, as well as whole of landscape values is supported. However, the definition:</p> <ul style="list-style-type: none"> - Must ensure that both tangible and intangible ACH are primary components; specifically, that intangible aspects are not separated from intangible aspects by being drafted in parenthesis; and - Must be accompanied by enforceable mechanisms to protect ACH (discussed further below). <p>References to 'land' should be changed to 'land and water' to include ACH located in NSW territorial waters.</p> <p>All ACH should be protected, regardless of significance.</p> <p>A review of the definition of ancestral remains is needed to ensure that important Aboriginal burial grounds are not excluded.</p> <p>Definition of ACH in S.4(1) "<i>living, traditional and historical practices</i>" – suggest changing <i>and</i> to <i>or</i> – to clarify that ACH can be either of these.</p> <p>To ensure all ACH is captured in the new definitions and to clarify how different types of ACH will be protected we recommend Government provide case studies and broad explanatory examples in the second reading speech of:</p> <ul style="list-style-type: none"> - How the new definitions would apply to various types of ACH, and - How these would be protected under the new laws.

	<p>Aboriginal ancestral remains As currently drafted, Aboriginal burial grounds will not be protected if they are in a cemetery where non-Aboriginal people are also buried. This could exclude some significant burial sites from protection.</p> <p>Aboriginal materials The proposals paper states that there will be a definition of '<i>materials</i>' (p. 11), however this is not included in draft Bill. We seek clarification regarding this. The definition of 'objects' references materials.</p> <p>Intangible ACH The inclusion of intangible ACH and recognition that ACH is a living culture intrinsic to the wellbeing of Aboriginal people is supported. However, as discussed further below, some additional safeguards are needed.</p>	
<p>s.5 – Definitions generally</p>	<p>ACH Maps Clarification is needed regarding whether ACH Maps includes both State and local maps. This is important as the Proposals paper indicates that the Minister only needs to approve the State map, not the local map. See also comments on section 20 below.</p> <p>Desecration The Proposals paper states that there will be a definition of 'desecration' (p.11) however this is not included in the Draft Bill. See comment on desecration at s.40 below.</p>	<p>Clarification of the definition of ACH Maps is needed.</p> <p>The legislation must include a definition of desecration that is appropriate to ACH and is based on Aboriginal people's understandings. See further s.40 below</p>
<p>Part 2 Aboriginal Cultural Heritage Authority and Local Consultation Panels</p>		
<p>Division 1 Establishment and management of ACH Authority</p>		
<p>S.7 Status of ACH Authority</p>	<p>NSWALC supports that the ACH Authority is not subject to the control or direction of the Minister.</p> <p>However, as discussed further below, we are concerned that:</p> <ol style="list-style-type: none"> a. The Minister is proposed to retain decision making in a number of key areas, and 	<p>NSWALC supports:</p> <ul style="list-style-type: none"> • The establishment of a genuinely independent ACH Authority to undertake all key decision making and administrative functions.

	<p>b. That this decision making is discretionary and unfettered, c. There are a number of areas where the Minister will be able to significantly influence the ACH Authority via decisions such as who is on the ACH Authority Board and resourcing.</p> <p>While some transitional arrangements are needed, minimal functions for the Minister must be a priority if the reforms are to achieve their intent of decision making by Aboriginal people.</p> <p>In support of self-determination and recognising Aboriginal ownership of ACH, NSWALC does not agree with the scope of the proposed functions for the Minister and seeks for the ACH Authority to have these functions.</p> <p>One of the key improvements in the ACH Bill is that it provides for Aboriginal people to make decisions about ACH. This is one of the key reform aims, however is significantly undermined by the proposed roles and decision making of the Minister.</p> <p>We note that there are other bodies (eg. Local Government) that make decisions with implications for proponents and land holders that do not have the same level of Ministerial involvement.</p> <p>We also note, there are a number of NSW Government agencies that can exercise their functions independently of the relevant Minister. These include the Ombudsman, Law Enforcement Conduct Commission and the NSW Crime Commission. These agencies are required to report on their activities, and to 'consult' on certain activities in specified cases, but the Minister does not make decisions. This level of oversight for these agencies and meets the requirements of responsible government.</p> <p>NSWALC is another example of a framework that has been developed that gives a statutory body independence from Government, while still including measures that allow the system of responsible government to be maintained.</p>	<ul style="list-style-type: none">• That the ACH Authority is not subject to the control or direction of the Minister.
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	<p>In our view, the ACH Authority should not be established as a standard NSW Government Agency and the Government should not adopt standard provisions in relation to it. The ACH Authority requires a high level of independence from government to ensure its legitimacy in the Aboriginal community and its effectiveness in making independent decisions about ACH.</p>	
<p>S.8 Board of ACH Authority</p>	<p>Ministerial appointment The Draft Bill outlines that the Minister will appoint ACH Authority members based on the results of a community driven process. NSWALC does not support Ministerial appointment. If the Minister is to retain the appointment function, this should be bound by the results of a community controlled process. This will better meet the reform objectives of greater self-determination and empowerment of Aboriginal people.</p> <p>ACH Authority Board NSWALC recognises and respects that there will be many views on the establishment of the ACH Authority Board. This is a critical element of the new system and Aboriginal people must have confidence in how it is formed.</p> <p>There have been many discussions about the issues and benefits of various models. Aboriginal communities have generally supported:</p> <ul style="list-style-type: none"> • Proven credentials for ACH Authority Board members – however credentials should be based on Aboriginal community inputs and belonging to recognised Aboriginal groups, not on university degrees. • There must be safeguards against cultural frauds being eligible to sit on the ACH Authority Board, • A community driven process should be undertaken to ensure that ACH Authority will not be ‘hand-picked’ by the Minister. <p>To address these issues, NSWALC proposes the following eligibility criteria and process for nominating NSW Aboriginal People to the ACH Authority Board.</p>	<p>NSWALC supports the proposal that only Aboriginal people can be on the ACH Authority Board (S.8(2)). The Draft Bill should clarify only Aboriginal people from NSW are eligible.</p> <p>The ACH Authority Board should be comprised of 13 members being one NSWALC representative plus four representatives from each of the following:</p> <ul style="list-style-type: none"> - Local Aboriginal Land Council membership, - Aboriginal Owners, registered under the <i>Aboriginal Land Rights Act 1983 (NSW)</i>, - Native Title holders / Prescribed Body Corporates. <p>We support processes where NSWALC, the Registrar, ALRA and NTSCORP seek nominations from the Aboriginal Land Council membership, Aboriginal Owners, and Native Title holders respectively.</p> <p>If the Minister is to appoint ACH Authority members, the legislation must include safeguards to ensure that the Minister’s decision is bound by the results of the above recommended selection process, and that the Minister cannot unjustly remove Board members.</p> <p>NSWALC supports proposed section 8(4) which provides for a representative of NSWALC on the ACH Authority Board.</p>

	<p>Eligibility NSW Aboriginal People should be eligible to be on the ACH Authority Board if they belong to one of the following recognised Aboriginal groups or organisations:</p> <ul style="list-style-type: none"> - Aboriginal Land Councils, - Aboriginal Owners, registered under the ALRA, - Native Title holders / Prescribed Body Corporates <p>This model recognises and builds on the existing legislated groups in NSW with authority and functions relating to ACH. NSWALC firmly believe this model provides a robust, coherent and complementary framework for new laws.</p> <p>Building on the Aboriginal Owners register Aboriginal Owners under the <i>Aboriginal Land Right Act 1983</i> and the <i>National Parks and Wildlife Act 1974</i> are defined as Aboriginal persons who are:</p> <ul style="list-style-type: none"> (a) <i>directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated,</i> (b) <i>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</i> (c) <i>have agreed to have their names added to the Register of Aboriginal Owners maintained by the Registrar of the Aboriginal Land Rights Act 1983.²² That is, the Registrar of the Aboriginal Land Rights Act determines who is eligible to join the register.</i> <p>Useful features of building on the Aboriginal Owners register include:</p> <ul style="list-style-type: none"> - It has already been established; 	<p>The NSW Government should resource the expansion and maintenance of the Aboriginal Owners Register under the <i>Aboriginal Land Rights Act (NSW)</i> to cover the whole of NSW.</p> <p>The views of Aboriginal peoples must be prioritised in finalising provisions relating to the ACH Authority Board.</p>
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²² 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)).

	<ul style="list-style-type: none"> - It provides a ‘test’ for Aboriginal Ownership that is less onerous than proving Native Title; - Aboriginal Owners automatically become members of LALCs so the Aboriginal Owners Register will complement existing structures instead of creating new structures. <p>As outlined in NSWALC’s 2013 submission, further consideration should be given to expanding the Aboriginal Owners Register across NSW.²³ This will have applicability to both the ACH Authority and Local ACH Consultation Panels. The expansion process will need to be resourced.</p> <p>Further consideration and consultation with Aboriginal communities is needed regarding appropriate processes relating to the registration of Aboriginal Owners. The Aboriginal Land Rights Network made a number of suggestions to tailor and improve the operation of the Aboriginal Owners Register in consultations hosted by NSWALC in 2012²⁴. This could include consideration of the current definition of Aboriginal Owners and ensuring the registration process is conducted by an Aboriginal controlled organisation.</p> <p>Process NSWALC supports an Aboriginal community driven process to seek nominees for the ACH Authority Board via the following:</p> <ol style="list-style-type: none"> 1. Each of the above organisations/groups run a process to receive nominations from those who are eligible. For instance, NSWALC would 	
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²³ 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.

²⁴ NSWALC Outcomes Report: Proposals to reform ACH Laws in NSW, see pages 19-20, available at: http://alc.org.au/media/87820/Aboriginal%20Culture%20and%20Heritage%20Reforms%20Proposal_FINAL_lowres.pdf

	<p>run an expression of interest (EOI) process for Aboriginal Land Council members.</p> <ol style="list-style-type: none">2. Each of the above organisations / groups will assess nominations against established criteria. Criteria will include Aboriginality, diverse regional representation, cultural knowledge and gender balance. Further discussion with Aboriginal Owners and Native Title holders is needed to determine suitable processes to assess EOIs. However, this could include NTSCORP and the Registrar, ALRA (in a process agreed with Aboriginal Owners) running the EOI process for these groups or establishing special independent panels of Aboriginal persons to.3. Each of the above organisations / groups (or special panels) then put forward nominees from their group.4. These nominations will then go to the Minister to appoint. <p>Individuals should only be able to nominate for membership of the ACH Authority Board on the basis of their membership to one of the above identified organisations or groups.</p> <p>Composition</p> <p>NSWALC supports a Board made up of 13 members composed of one NSWALC representative plus four representatives from each of the following:</p> <ul style="list-style-type: none">- Aboriginal Land Councils nominated by NSWALC,- Aboriginal Owners, registered under the ALRA,- Native Title holders / Prescribed Body Corporates. <p>NSWALC representation</p> <p>It is essential that NSWALC is represented on the ACH Authority to build on and strengthen ACH provisions in the <i>Aboriginal Land Rights Act</i> and to establish a unified and workable framework for ACH in NSW.</p>	
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	<p>Skills</p> <p>NSWALC notes that Government is seeking feedback on whether the ACH Bill should include a skills requirements for ACH Authority Board members. In feedback received from our Network a solely skills based approach (whereby university degrees are needed) has not been broadly supported. However, there has been acknowledgement that there must be some minimum credentials for Board members.</p> <p>The above model will ensure nominees have appropriate credentials as they will be need to be assessed and endorsed by key representative Aboriginal groups. These groups have already undergone rigorous processes to prove Aboriginality and community credentials.</p>	
<p>S.10 Committees of the Board of the ACH Authority</p>	<p>The ACH Authority will be able to establish committees. This is drafted broadly to allow the ACH Authority the flexibility to use this power for a range of purposes as it sees fit. We note that section 13(2) does contain restrictions on what functions the ACH Authority can delegate.</p> <p>While not included in the Draft Bill, the proposals paper outlines that LALCs must meet certain standards prior to being delegated functions. Similar standards should apply to committees, particularly given the scope of functions that could be delegated to committees.</p>	<p>Transparency, accountability and standards are needed around the use of committees to ensure that only appropriate functions are carried out by committees.</p> <p>Clarification is needed regarding whether committees will only be utilised for advisory functions, rather than decision making.</p>
<p>Part 2, Division 2 Functions of ACH Authority</p>		
<p>s. 12 Functions of ACH Authority</p>	<p>Under the current NPW Act the Minister and the Office of Environment and Heritage (OEH) have all decision making and administrative roles. The Aboriginal Cultural Heritage Advisory Committee (ACHAC) is advisory only.</p> <p>As noted above, NSWALC supports decision making and administrative roles going to an Aboriginal controlled body.</p> <p>However, NSWALC seeks for the ACH Authority, not the Minister, to have all key functions including:</p> <ol style="list-style-type: none"> a. Approving ACH declarations – see comments on section 18 b. Approving ACH maps – see comments on section 20 	<p>Compliance and enforcement should be listed as a function of the ACH Authority – this is a key element of the reform proposals.</p> <p>The following should also be functions of the ACH Authority:</p> <ul style="list-style-type: none"> • To develop a Strategic Plan or priorities statement • To work in partnership with Aboriginal Land Councils to promote public awareness of ACH (see s.132(2)(c) Victorian <i>Aboriginal Heritage Act</i>) • To advise the Minister administering the <i>Environmental Planning and Assessment Act</i> proposed amendments to planning schemes which may affect the protection,

	<ul style="list-style-type: none"> c. Making additional Codes of Practice that provide defences – see comments on s.43(2) d. Approving the ACH Assessment Pathway Code of Practice – see comments on s.54 e. Approving Funding allocation strategy – see comments on s.64 and s.67 f. Making interim protection orders – see comments on s78- 79 <p>A key criticism of the current system is the poor compliance and enforcement regime, and that Aboriginal people have no role. The ACH Authority is proposed to undertake these roles in the new legislation. Compliance and enforcement should be listed as a specific function.</p> <p>The Draft Bill provides that the Minister is to approve a monitoring and reporting framework for the ACH Authority (s.12(2)(l)). However, the proposals paper (p.28) does not refer to this being approved by the Minister. Clarification is needed, noting NSWALC’s comments above that the Minister’s functions should be limited.</p> <p>It would also be helpful to clarify that a function of the ACH Authority is to prepare a plan or statement of strategic priorities similar. This would assist in linking various components of the ACH reforms including the monitoring and reporting framework, ACH Report, funding allocation strategy, ACH strategic plans and any other relevant components.</p> <p>The following functions of the ACH Authority should be added:</p> <ul style="list-style-type: none"> 1. To work in partnership and complement the work of Aboriginal Land Councils to protect and promote ACH, and 2. To provide advice to the Minister for Planning given the importance of the planning system to ACH. 	<p>management or conservation of places or objects of ACH significance (see Victorian <i>Aboriginal Heritage Act</i> s.132(2)(cb))</p>
<p>s.13 Delegation of certain functions of ACH Authority</p>	<p>The Draft Bill provides broad powers for the ACH Authority to delegate most of its functions to other bodies, with some exceptions. While this may</p>	<p>Delegation of functions NSWALC supports Aboriginal Land Councils being delegated a range of functions in the new system including local coordination</p>

<p>provide flexibility, the legislation should clearly articulate key roles for Aboriginal Land Councils.</p> <p>The ACH Authority will be able to delegate a range of functions to LALCs, including local coordination and support (though Committees or other Aboriginal organisations are also able to undertake local support). The Draft Bill states that LALCs ‘may’ be delegated ‘<i>local coordination and support roles</i>’ (s.13) “<i>unless the LALC chooses not to exercise that function or does not have capacity to exercise that function</i>” (consultation note on page 7 of the Draft Bill).</p> <p>The first right of refusal for LALCs is currently only reflected in a consultation note. We understand that the Bill has been drafted as enabling legislation and provides options other than LALCs to ensure the Act remains operational if for some reason a LALC cannot, or chooses not to seek these delegations. NSWALC seeks a commitments that LALCs will be first option.</p> <p>This is consistent with the OEH proposals paper which states that draft Bill will ‘<i>build on and strengthen cultural heritage provisions in the ALRA</i>’ (Minister’s foreword, p.vii) and that the ‘<i>draft Bill builds on the ALRA and to provide LALCs with further opportunities to exercise these functions</i>’ (p.19). LALCs are publicly accountable authorities, and have rigorous reporting, governance and oversight requirements under the ALRA.</p> <p>We note that the proposals outlined to date propose that LALC will need to satisfy certain requirements before taking on any delegated legislative functions. We note that the accreditation process is proposed to be developed by the ACH Authority in consultation with NSWALC at a later date.</p> <p>We note the proposal for entities other than LALCs to undertake certain delegated functions. While we understand that further detail regarding proposed accreditation arrangements is yet to be determined, NSWALC is of the view that where a LALC is unable to meet accreditation and any</p>	<p>and support, administering local information systems and becoming authorised officers. This must be properly resourced by Government.</p> <p>Local coordination and support NSWALC supports LALCs as the key local support and administrative body. Aboriginal controlled administrative and governance structures, at both the local and state levels are needed for the management and protection of ACH.</p> <p>LALCs should have the first right of refusal. Any other body proposed to become accredited instead of a LALC should only be delegated functions as an interim measure (time limited) only until such time as the relevant LALC is able to take on those functions.</p> <p>NSWALC also seeks for clear processes to be established to ensure that where a LALC wishes to become accredited, a transitional process for the LALC to become accredited should commence.</p> <p>Any accreditation process must genuinely promote capacity. The right balance will be needed to ensure that LALCs are both properly supported to take on new functions in a timely manner, and that any accreditation process is not unnecessarily onerous.</p> <p>NSWALC should be added to list of potential delegates at 13(1).</p>
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	<p>alternative body is proposed, accreditation of an alternative body should be time limited for the duration of a capacity building program for the LALC.</p> <p>The proposal for other bodies to become accredited will need to be carefully considered, particularly in light of a range of practical issues such as boundary considerations, clarity of arrangements for key users of the system such as proponents and local government, and that the reforms do not duplicate or create unnecessary uncertainty.</p> <p>We note that the regulations will outline who the ACH Authority may delegate certain functions to. All regulations need to be developed in consultation with Aboriginal peoples.</p> <p>While more operational, to ensure the new system is workable clear interactions and reporting arrangement are needed between the ACH Authority and any delegating bodies.</p> <p>We note that in light of the significant capacity and resourcing demands associated with compliance and enforcement activities, it is intended that the ACH Authority will be able to delegate functions to an appropriate NSW government agency for a transitional period. This will be a decision of the ACH Authority once established. This should not prevent proper resourcing being provided to the ACH Authority.</p>	
<p>Role of LALCs</p>		
<p>Various sections</p>	<p>Under the current NPW Act LALCs do not have any legislated roles. LALCs are referenced in current OEH consultation policy only.</p> <p>The proposals paper states (p.20) that the Draft Bill will outline functions of local coordination and support bodies (LALCs) and lists these as:</p> <ul style="list-style-type: none"> • <i>Coordinating the formation of consultation panels and supporting their operation...</i> • <i>Gathering ACH information, preparing maps and administering the ACH Information System database at the local level</i> 	<p>Local coordination and support – see above recommendations</p> <p>NSWALC supports LALCs taking on increased and meaningful roles in the new system in recognition of LALCs existing ACH roles under the ALRA. This includes providing roles for LALCs in all key ACH matters, including administrative, consultation and review points. Government will need to properly resource new roles.</p>

	<ul style="list-style-type: none"> • <i>Preparing ACH Strategic Plan, seeking and investing funding for conservation outcomes and being a point of contact for ACH nominations and intangible ACH applications</i> • <i>Being the first point of contact for development proponent and coordinating contact</i> <p>However, the Draft Bill only includes reference to:</p> <ul style="list-style-type: none"> • A role to ‘support’ Local ACH Consultation Panel operation – s.12(2)(a) and s.13(3) – LALCs among others, may be delegated this function. • ‘Support body’ assisting in preparing ACH maps s.20(3) • Support body assisting in preparing ACH Strategic Plans s.21 • LALCs, among other Aboriginal organisations, may register intangible cultural heritage s.37(b) <p>LALCs could also be delegated other functions such as administering the local database, and undertaking enforcement or compliance as ‘authorised officers’.</p> <p>LALCs have consistently called for increased roles, and that these roles must be properly resourced by Government. LALCs are seeking meaningful roles in the new system that builds on LALCs existing roles to improve, protect and foster the best interests of Aboriginal people and to protect and promote Aboriginal culture and heritage. LALCs must not be <i>‘just minute takers’</i>.</p> <p>The centrality of LALCs roles as the peak local Aboriginal organisation, particularly in relation to ACH, land and natural resources, local government and planning processes is already embedded and recognised. We do not support any winding back of LALCs’ roles.</p> <p>While it appears that the intention is for a capacity building and resourcing program to be implemented to support LALCs, the level of resourcing is not known.</p>	<p>It is essential that Government provides resourcing and capacity building to support LALCs undertake new functions.</p> <p>Any policies, procedures, guidelines relating to LALCs should be developed in consultation with NSWALC and LALCs.</p>
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	<p>There are many operational and practical matters relating to the proposal for LALCs to be local support bodies, including how they will work and interact with Local ACH Consultation Panels and the ACH Authority. NSWALC looks forward to working closely with Government to further develop these arrangements.</p>	
<p>Part 2, Division 3 Local ACH Consultation Panels</p>		
<p>S.14 – Establishment of Local ACH Consultation Panels</p> <p>s.15 – Membership of Local ACH Consultation Panels</p> <p>S.16 – Functions of Local ACH Consultation Panels</p>	<p>New Local ACH Consultation Panels are proposed to be established to provide local advice on local ACH matters and “<i>represent ACH authority in relation to the area or aspect for which they are established</i>” (s.16(1)(a).</p> <p>The ACH Authority is proposed to develop policies and guidance around the operation, establishment and membership of the Local ACH Consultation Panels – ie. The Draft Bill does not propose to outline who speaks for Country. It is understood the Local ACH Consultation Panels are intended to be chosen by Aboriginal communities based on policies and procedures set by the ACH Authority. One possibility is that a process could be run by the local coordination and support body to select the Local ACH Consultation Panel.</p> <p>NSWALC recognises that there are differing views regarding the composition of Local ACH Consultation Panels, and that further consultations on this issue are proposed to be held by the ACH Authority once established. The ACH Authority policies will need to be sufficiently flexible to accommodate the differing circumstances and needs of Aboriginal communities across NSW, and recognise that ACH includes traditional, historic and contemporary elements</p> <p>Further consideration is needed of the appropriate community and representative authority of Local ACH Consultation Panels, particularly given they will be negotiating with proponents and making recommendations to the ACH Authority on behalf of Aboriginal communities with regard to ACH.</p>	<p>The legislation should state that Local ACH Consultation Panels members must be Aboriginal persons.</p> <p>NSWALC supports sufficient flexibility for local Aboriginal people to be able to determine the structure and composition of local decision making groups.</p> <p>NSWALC supports new laws providing for genuine decision-making powers to be given to local Aboriginal peoples in relation to the day-to-day management and protection of Aboriginal heritage and to be the sole determiners of ACH.</p> <p>Safeguards to ensure appropriate Local ACH Consultation Panels are established should be included, for example, Local ACH Consultation Panels should be established for a genuinely local area rather than large portions of the State.</p> <p>Appropriate accountability, reporting and consultation requirements for Local ACH Consultation Panels are needed.</p> <p>While we note that the legislation does not propose boundaries, we support the use of LALC boundaries. Protocols and agreements can be developed to manage areas wherever cultural boundaries may cross over or where there are shared cultural interests.</p>

<p>Boundaries</p> <p>While not proposed to be outlined in the Draft Bill, further consideration of boundaries is needed. NSWALC consultations in 2012 suggested using existing Aboriginal Land Council boundaries with protocols or agreements where boundaries do not align with cultural boundaries or for areas that are shared.</p> <p>Other benefits of building on existing Aboriginal Land Council boundaries include that they are clearly defined, that the government already holds the mapping and spatial data and that they are legislated.</p> <p>Accountability and consultation</p> <p>Detail in relation to Local ACH Consultation Panels is proposed to be developed by the ACH Authority, it is essential that mechanisms are put in place to ensure that Local ACH Consultation Panels have clear accountabilities to Aboriginal communities in order to promote overall confidence in the new system. Appropriate reporting, community consultation, governance and accountability mechanisms will be essential.</p> <p>Further consideration is needed of issues such as accountability of the Local ACH Consultation Panels, how they consult with the Aboriginal community, ethical standards, code of conduct, conflict of interest issues etc.</p> <p>While there has been general support from the Aboriginal Land Rights Network that making decisions about Aboriginal culture and heritage must involve Aboriginal people recognised by their communities, until the ACH Authority determines the criteria or process by which Local ACH Consultation Panels will be formulated, it is uncertain that Local ACH Consultation Panels will be supported by LALCs.</p> <p>NSWALC is of the view that LALC representatives should be included on Local ACH Consultation Panels. This could include requiring at least one LALC member or a percentage of LALC members to be on Local ACH Consultation</p>	<p>LALC representation should be included on Local ACH Consultation Panels in order to promote a well-functioning Local ACH Panel, and in recognition of LALC’s existing ACH roles.</p> <p>Further consideration of the Local ACH Consultation Panels function to <i>“represent ACH authority in relation to the area or aspect for which they are established”</i> (s16(1)(a)) is needed to ensure that this does not conflict with or undermine the existing LALC ACH roles.</p>
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	<p>Panels to build in a complementary framework with the Aboriginal Land Rights regime. NSWALC looks forward to working closely with Government and the ACH Authority to further develop arrangements for the establishment of Local ACH Consultation Panels.</p>	
S.17 Consultation with Aboriginal Community	<p>The ACH Authority will be required to consult with Aboriginal people on the development of policies relating to the establishment, membership and operation of Local ACH Consultation Panels.</p>	<p>It is recommended that mechanisms are built into new legislation to ensure that Aboriginal people are consulted on all policies and guidelines including Aboriginal Land Councils, Aboriginal Owners and Native Title groups, and minimum consultation requirements are included.</p>
<p>Part 3 Aboriginal Cultural Heritage declarations and information (mapping)</p>		
S.18 Declarations of ACH	<p>Under the current NPW Act, the Minister gazettes an 'Aboriginal Place' if, in the opinion of the Minister, the place is or was of special significance with respect to Aboriginal culture (s.84). There are many problems with current laws including that:</p> <ul style="list-style-type: none"> Aboriginal people do not have a formal role in this process, The Minister has a wide discretion and no timeframe to make a decision, Only a very small number of Aboriginal Places have been declared, approximately 120, despite there being thousands of important Aboriginal sites in NSW. <p>Section 18(1) of the Draft Bill outlines that the Minister will still decide whether to 'declare' ACH, on the recommendation of the ACH Authority. As noted above, the ACH Authority should have the power to make this decision not Minister. It should be noted that other bodies such Local Government have powers to make decisions that have ramifications for planning and development without requiring approval of the Minister.</p> <p>It is not appropriate that the protection of ACH depends on the discretion of the Minister to make an ACH declaration. This is contrary to the aims of the</p>	<ul style="list-style-type: none"> The ACH Authority should make decisions about declaring ACH, not the Minister. If the Minister is to have a role, the Minister's decision should be based on the recommendations of Aboriginal people and the ACH Authority and additional safeguards are needed (see left column). S.18(1)(a) – insert 'water' after land. S.18(1)(a) – the word 'reduce' should be removed and replaced with 'harm'. Section 18(2) needs to be amended to clarify that the Minister cannot approve activities unless agreed to by the ACH Authority and a Local ACH Consultation Panel. The legislation should provide: <ul style="list-style-type: none"> Merits appeals for Aboriginal peoples if an ACH declaration is refused.

<p>reforms and the objects of the Draft Bill to establish a legislative framework that reflects Aboriginal people’s authority over ACH.</p> <p>If the Minister is to retain a role, parameters and safeguards are needed including:</p> <ol style="list-style-type: none"> i. Timeframes for the Minister to make a decision. The <i>Heritage Act 1977</i> (NSW) includes requirements for the Minister to make a decision on a Heritage Council recommendation within 14 days (section 34). ii. Obligation on the Minister to consider and determine nominations that are validly made. iii. Decision making criteria should be added to ensure that the Minister’s decision is based on the recommendations of Aboriginal people and the ACH Authority. iv. Requirements to provide reasons for decisions to the ACH Authority, Local ACH Consultation Panels and LALCs. v. Inclusion of merits appeals for Aboriginal peoples if an ACH declaration is refused. <p>As discussed further below, the harm offences in the Draft Bill will only apply to Aboriginal objects, Aboriginal ancestral remains, and declared ACH. The Draft Bill does not protect undeclared ACH; this gap would lead to greater harm to ACH. By contrast, the Victorian <i>Aboriginal heritage</i> legislation provides for all ACH to be protected.</p> <p>Under s.18(2) of the Draft Bill, a declaration can authorise certain activities, including activities that harm ACH, despite the declaration. Importantly, such authorised activities that may otherwise breach the harm offence are exempt from the operation of the offences by section 45(a) of the Draft Bill. The Proposals paper states that the inclusion of such authorisations in a declaration will be a matter for negotiation between the landowner and the Local ACH Consultation Panel (p.31). However, as currently drafted the Minister could include authorisation of harmful activities without consultation with or the agreement of the Local ACH Consultation Panel.</p>	<ul style="list-style-type: none"> - An additional category of interim conservation order (or similar) to prevent harm to ACH while a nomination is being assessed. • The legislation needs to include additional mechanisms to protect ACH.
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	<p>In this regard the Draft Bill is inconsistent with the proposals paper. S.18(2) should be removed, or amended to provide that the Minister can only provide that certain activities can be carried out despite the declaration with the agreement of the ACH Authority and Local ACH Consultation Panel.</p> <p>As currently drafted, the mechanisms outlined in the Draft Bill fall short of providing increased and comprehensive protections for ACH. Other mechanisms should be included in the legislation:</p> <ul style="list-style-type: none"> • Compulsory acquisition of land – the <i>Heritage of Western Australia Act 1990</i> (section 73) includes both voluntary and compulsory acquisition of land where items of cultural significance are under threat • Interim conservation order – a separate category of ‘interim conservation orders’ should be included to protect ACH that is in the process of being declared or considered. 	
<p>S.19 Establishment and management of ACH Information System</p>	<p>Under the current NPW Act:</p> <ul style="list-style-type: none"> • Mapping is owned and managed by OEH, • There are no formal roles for Aboriginal peoples in managing the Aboriginal Heritage Information Management System (AHIMS), • A range of non-Aboriginal organisations and public authorities can access AHIMS, including sensitive information, • There are no proper protections on the access and use of information, • AHIMS is not comprehensive and is inaccurate. <p>The Draft Bill proposes new and updated mapping products to be used for operational, regulatory and strategic planning purposes including:</p> <ul style="list-style-type: none"> - A restricted access database for information not appropriate for general access by the public and may only be accessed by the Local ACH Consultation Panels, Board of the ACH Authority, persons engaged in the administration of the Act, and persons authorised by Regulations, and 	<p>NSWALC supports information and mapping systems to be managed and owned by Aboriginal people, including a restricted access database for Aboriginal people only.</p> <p>The legislation should include safeguards to protect Aboriginal people’s knowledge and information from misuse and unauthorised access, including ensuring that any information held on the restricted database is not able to be obtained via <i>Government Information (Public Access) Act 2009</i> requests.</p> <p>The legislation should include offences and penalties for unauthorised access, collection, use, and disclosure of information on the ACH information system.</p>

	<p>- A public online portal.</p> <p>Registers and mapping are to be managed by the ACH Authority. LALCs, support bodies and Local ACH Consultation Panels may be delegated information system administration functions.</p> <p>More details about operational elements are proposed to be outlined in Regulations.</p> <p>The current system is extremely deficient so a new information system, managed by Aboriginal peoples is a positive step. However, the new system will need to be well-funded, kept up to date, and have appropriate security and access restrictions. Given the risks of vandalism to Aboriginal sites as well as cultural sensitives, the exact location of sites must be kept confidential.</p> <p>Given the importance of the information system and mapping it would be beneficial to create a clearer link between the information system (s.19), ACH maps (s.20) and the first step of the ACH assessment pathway (s.55).</p> <p>To deter unauthorised access of the information system we recommend introducing an offence of accessing the information system without authority. Other operational safeguards could also be added and ensuring that any information held on the database is not able to be obtained via <i>Government Information (Public Access) Act 2009</i> requests.</p> <p>In line with providing for an improved monitoring and reporting framework, appropriate details of ACHMPs should be kept on a public register. This is similar to the current AHIP register requirements under the NPW Act. This will also promote transparency.</p>	<p>The legislation should clarify that the ACH Authority does not own Aboriginal people’s information and knowledge.</p> <p>The legislation should clarify that the public portal will not contain details of specific locations of Aboriginal sites, but will be a sensitivity later containing known and likely sites.</p>
<p>S.20 Preparation and approval of ACH Maps</p>	<p>It is proposed that ACH Authority prepare maps containing data about ACH.</p>	<p>The ACH Authority should have decision making on ACH Maps and the mapping methodology.</p>

	<p>Local ACH Consultation Panels and their support bodies are proposed to prepare local maps.</p> <p>Maps and the mapping methodology are to be approved by Minister.</p> <p>NSWALC does not support the Minister approving maps and the mapping methodology.</p> <p>If the Minister is to retain this power, the legislation must include parameters around approval/ non-approval of maps and the scope of approving amendments or replacing ACH maps. The legislation should:</p> <ul style="list-style-type: none"> - Include an obligation on the Minister to ensure that the map accurately includes known and likely ACH, and is kept up to date, - Decision making criteria to ensure the Minister’s decision is based on express considerations and the recommendations of the Local ACH Consultation Panels and the ACH Authority, - Provide that that the Minister can only amend the ACH map either on the advice of the ACH Authority, Local ACH Consultation Panel or local support body, - Provide that the Minister must provide reasons for decisions. <p>It is important to note that any delay by the Minister will mean that the first step of the assessment pathway is not triggered, so it is critical that this process happen immediately.</p> <p>The proposals paper outlines that the Draft Bill will specify that the NSW (State) ACH Map will include known and likely ACH but not publicly identify specific location or details (p.25). However the Bill does not specify this.</p> <p>The proposals paper also outlines that the Minister will approve the NSW (State) ACH Map, not local maps. However, the Bill is not clear on who approves local ACH maps and how they relate to ACH maps.</p>	<p>If the Minister is to retain decision making:</p> <ul style="list-style-type: none"> • The legislation must include safeguards and decision making criteria (see left column), and • Aboriginal people should have merits appeals. <p>The legislation should clarify that local maps are not approved by the Minister.</p> <p>The relationship between local maps and the ACH Map should be clarified.</p> <p>As alternatives to the Minister making a decision about maps, if oversight or peer review of technical issues is needed, consideration could be given to requiring a ACH Authority Committee or an independent expert body to do this, not the Minister.</p>
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	<p>As alternatives to the Minister making decisions about maps, if oversight or peer review of mapping quality or technical issues is needed, consideration could be given to requiring a ACH Authority Committee or an independent expert body to do this, not the Minister.</p> <p>Given the importance of mapping to the new system, all maps will need to be precautionary. Our concerns regarding the use of mapping in the regulatory process are discussed at s.55 below.</p>	
<p>S.21 ACH Strategic Plans</p>	<p>Clarification is needed regarding whether the ACH Authority will need to prepare an overarching state-wide plan or statement of strategic priorities (see also recommendation in section 12 above).</p> <p>The proposal paper (p.27) notes that ACH strategic plans may include priorities for various aspects of ACH, including cultural practice and promotion of cultural heritage. These are not included in the Draft Bill.</p> <p>The proposal paper noted that the Draft Bill will require government agencies and public authorities to consider strategic plans. The Draft Bill only refers to public authorities having to take into consideration relevant ACH strategic plans and makes no reference to government agencies.</p> <p>While this is an improvement on the current system, stronger requirements, such as the following, should be included:</p> <ul style="list-style-type: none"> - Consequential amendments requiring public authorities to consider ACH Strategic Plans and consult with the ACH Authority and Local ACH Consultation Panels on ACH matters, - Power for the ACH Authority to direct public authorities to properly consider ACH strategic plans, - The relevant instrument should not be able to be approved unless it has considered ACH. <p>Further clarification is needed regarding how ACH strategic plans will be given effect.</p>	<p>ACH laws must integrate with planning and local government laws to ensure that Aboriginal heritage is properly considered in strategic planning processes, including Local Environmental Plans, planning proposals and re-zoning applications.</p> <p>The legislation should include stronger requirements for public authorities and government agencies to consider ACH Strategic Plans and mapping.</p>

<p>S.22 State of ACH reports</p> <p>S.23 Annual report of ACH Authority</p>	<p>The Draft Bill proposes that the ACH Authority prepare regular reports on the state of ACH in NSW, and an annual report.</p>	<p>NSWALC supports increased monitoring and reporting on ACH. This can assist to build an evidence base to support the protection of ACH.</p> <p>Monitoring and reporting should include cumulative impacts on ACH.</p>
<p>Part 4 Conservation of Aboriginal cultural heritage</p>		
<p>Division 1 Ownership and care arrangements</p>		
<p>S.24 Ownership of certain Aboriginal objects or ancestral remains vested in ACH Authority on behalf of Aboriginal people</p>	<p>Under the current NPW Act, the 'Crown' owns certain Aboriginal objects and ancestral remains. These certain Aboriginal objects are Aboriginal objects not in private ownership prior to October 1967.</p> <p>The Draft Bill outlines that the ACH Authority is to hold certain Aboriginal objects and ancestral remains on behalf of Aboriginal people</p> <p>Some of this includes Aboriginal objects and ancestral remains held in museums. Museums currently hold hundreds of thousands of Aboriginal objects <i>"on behalf of the Crown"</i>. As such it is essential that proper resourcing is provided to the ACH Authority to ensure ACH can be repatriated.</p>	<p>We strongly support the removal of the false assertion that the Crown owns ACH.</p> <p>It is an improvement that certain ACH will be held by the ACH Authority on behalf of Aboriginal people.</p>
<p>s.25 Repatriation etc of Aboriginal objects, ancestral remains or other material that property or under control of ACH Authority</p>	<p>The current NPW Act has some provisions for 'disposing' of Aboriginal objects which may include returning to Aboriginal owners.</p> <p>The Draft Bill includes some improved processes for ACH to be returned to Aboriginal communities, including requiring consultation with the Local ACH Consultation Panel.</p>	<p>The ACH Authority must be properly resourced to carry out these functions.</p> <p>NSW Government must increase and provide active support for inter-state and overseas repatriation.</p> <p>Local coordination and support bodies (LALCs) should also be notified and consulted where appropriate.</p>
<p>S.27 Notification of Aboriginal objects, ancestral remains or other materials</p>	<p>The current NPW Act (s.89A) requires people to notify OEH of any Aboriginal object, including any Aboriginal object, not owned by the Crown, that is 'real property' (land). Failure to notify OEH is an offence.</p>	<p>The legislation should include clearer provisions regarding the notification of ACH.</p> <p>Consideration should be given to adding provisions to relevant State Environmental Planning Policies (SEPPs) that currently</p>

	<p>The Draft Bill includes similar provisions however is limited to ACH that are the property or under the control of the ACH Authority. The Draft Bill should require mandatory reporting of ACH. The regime needs to make it clear that if proponents come across unexpected discoveries of ACH during a project, then they must complete stage 2 onwards of the assessment pathway. It needs to be clear that checking the map alone would not constitute reasonable steps.</p> <p>The legislation should clearly to alert local government, other public agencies, contractors etc that they must report ACH. The relationship of this provision to the unexpected finds process, the operation of the harm offence, and defence of the ACHAP should be clearer.</p> <p>Consideration should be given to adding provisions to relevant State Environmental Planning Policies (SEPPs) that currently include a duty to stop work and report, stating that it is an offence under the ACH Act not to report finds.</p> <p>Consideration should be given to the provisions and wording in the Victorian <i>Aboriginal Heritage Act</i> (s.24) which requires reporting of the discovery of ACH, and applies to places, not just objects.</p> <p>As currently drafted, there are no exemptions or defences for Aboriginal people who do not want to disclose the location of Aboriginal sites due to Aboriginal cultural obligations or sensitivities. There are provisions in other legislation that create defences or exemptions for Aboriginal peoples, for example the <i>Biodiversity Conservation Act</i> provisions includes defences for hunting and gathering.</p>	<p>include a duty to stop work and report, stating that it is an offence under the ACH Act not to report finds.</p> <p>Consideration should be given to the provisions and wording in the Victorian <i>Aboriginal Heritage Act</i> (s.24) which requires reporting of the discovery of ACH, and applies to places, not just objects.</p> <p>The legislation should include exemptions or defences so that Aboriginal people are not required to disclose the location of ACH due to cultural obligations or sensitivities.</p>
<p>Ss28- 35 ACH conservation agreements</p>	<p>Sections 28 – 35 of the Draft Bill provide for voluntary agreements to be made between land owners and the ACH Authority.</p>	<p>This section needs to be re-drafted to:</p> <ul style="list-style-type: none"> - Reflect the unique and irreplaceable nature of ACH and better align with the intent of the reforms and reform model, - Include increased roles of Local ACH Consultation Panels, and - Include exemptions to rates and taxes.

	<p>Land subject to an ACH conservation agreement should be exempt from certain rates and taxes, as currently applies to land subject to a conservation agreements under the NPW Act. The new legislation should include:</p> <ul style="list-style-type: none"> • Exemptions from local government rates (this will require an amendment to s555(1)(b1) of the <i>Local Government Act 1993</i>) • Exemptions from / reductions to land tax (this will require an amendment to section 10(1)(p(1)) and section 10(2C) of the <i>Land Tax Management Act 1956</i>) 	NSWALC supports providing incentives to land holders to protect ACH.
S.29 General provisions relating to ACH conservation agreements	S.29(5)&(6) outline that relevant Ministers (Forestry & Crown lands) must consent to certain ACH Conservation agreements.	S.29(5)&(6): The relevant Ministers should be required to take into account the impact of their decision on ACH.
S.30 Content of ACH conservation agreements	The Draft Bill outlines possible terms for ACH conservation agreements.	NSWALC supports the inclusion of access to sites for Aboriginal peoples and development restrictions in ACH conservation agreements.
S.32 Registration of ACH conservation agreements	The Draft Bill outlines that ACH conservation agreements are to recorded on relevant property registers and land titles.	NSWALC supports such registration of ACH conservation agreements.
S.31 Duration and variation of ACH conservation agreements	<p>S.31(7) outlines that ACH conservation agreements may be varied or terminated if a mining or petroleum authority is granted. This is in conflict with the intent of the reforms.</p> <p>Conservation agreements should provide in-perpetuity protection. Allowing unilateral termination of an agreement would contradict this purpose.</p> <p>Section 31 does not include any provisions to require consultation with Local ACH Consultation Panels.</p>	<p>Section 31(7) should be removed.</p> <p>Section 31 should require consultation with Local ACH Consultation Panels.</p>
S.35 Activities authorized by mining or petroleum	The Draft Bill outlines that mining and petroleum activities may still be carried out despite a conservation agreement. This is not in line with the intent of the reforms, and significantly undermines protection of ACH.	Section 35 should be removed.

<p>authorities not affected by ACH conservation agreement</p>		
<p>S.36 Registration of intangible ACH</p>	<p>Aboriginal peoples currently have very limited options to protect cultural knowledge from misuse and misappropriation. The current NPW Act does not include any protections for intangible ACH. While there are some Commonwealth laws in place that can help Aboriginal people to protect intangible ACH (such as copyright, trade mark and patent laws), these all have their deficiencies and are not tailored to the unique nature of ACH.</p> <p>The Draft Bill provides a new mechanism to prevent the unauthorised use of intangible cultural heritage for commercial purposes. We note this is largely modelled on new provisions in the Victorian <i>Aboriginal Heritage Act 2006</i>. We broadly support the inclusion of this provision, however some further safeguards and assurances are needed.</p> <p>S36(3) requires the ACH Authority to record any intangible agreement on the public online portal. Protections are needed to ensure that culturally sensitive and private information is not published. Clarification is needed regarding the level of detail the public portal will include. It will be important to ensure that in seeking to protect intangible ACH, it is not inadvertently and inappropriately revealed.</p> <p>We acknowledge that the protection of knowledge and intangible ACH can be complex and present challenges. ACH can be a shared heritage held by one or more Aboriginal groups, can involve sensitive information and elements may already be in the public domain.</p> <p>As such, we understand that the proposals outlined in the Draft Bill are intended to fill a gap. However, we encourage the NSW Government to work with the Federal Government to develop a coherent national framework to support Aboriginal people’s intangible heritage and cultural and intellectual</p>	<p>New laws must include enforceable rights that recognise and protect Aboriginal peoples cultural and intellectual property rights in line with Article 31 of the United Nations <i>Declaration on the Rights of Indigenous Peoples</i>.</p> <p>NSWALC supports the inclusion of provisions to protect intangible ACH, however some further safeguards and assurances are needed including that sensitive information will not be revealed publicly.</p> <p>We recommend that the NSW Government adopt recommendations in the IP Australia discussion paper that are within the NSW Government’s jurisdiction.</p>

	<p>property rights. Australia needs a legislative scheme which protects ACH and fulfils our obligations under Article 31 of the UNDRIP.</p> <p>We draw the Government's attention the work of the World Intellectual Property Organisation (WIPO), UNDRIP, and Convention on Biological Diversity, that provide useful guidance in this regard.</p> <p>We also note that IP Australia has recently released a discussion paper '<i>Indigenous Knowledge: Issues for protection and management.</i>'²⁵ The NSW Government should implement the proposed solutions in this report within the NSW Government's jurisdiction.</p>	
<p>S.37 Registered holders of intangible cultural heritage and s.38 Offence to use registered intangible cultural heritage for commercial purposes without agreement</p>	<p>As currently drafted there appears to be no provision for Aboriginal individuals to use knowledge they hold for commercial purposes if they are not the 'registered holder'. While the Regulations may make provision for this (s.37(f)) as currently drafted we are concerned that Aboriginal people could be prosecuted for using their knowledge if they are not the 'registered holder'.</p> <p>We also note that s.37 includes Local ACH Consultation Panels as being capable of being declared to be the registered holders of intangible ACH. It is not clear to us how Local ACH Consultation Panels can hold property as they will not be legal entities.</p>	<p>Amendments are needed to ensure that Aboriginal individuals who hold cultural knowledge can use that knowledge for commercial purposes.</p> <p>NSWALC supports strong offences and penalties for the misuse of intangible ACH.</p>
<p>Part 5 Aboriginal cultural heritage regulatory system</p>		
<p>S. 39 ACH to which this Part applies</p> <p>S.40 Definitions</p>	<p>Harm</p> <p>NSWALC is concerned that the definition of harm and associated offence provisions for ACH only includes Aboriginal objects, ancestral remains and 'declared ACH' – this presents a significant gap in relation to undeclared ACH.</p>	<p>Undeclared ACH (in addition to Aboriginal objects, ancestral remains and declared sites) should be protected.</p> <p>The definition of harm should include act or omission.</p> <p>ACH must be protected regardless of significance.</p>

²⁵ See IP Australia discussion paper '*Indigenous Knowledge: Issues for protection and management*' https://www.ipaustralia.gov.au/sites/g/files/net856/f/ipaust_ikdiscussionpaper_28march2018.pdf

	<p>Currently under s. 5 of the NPW Act (Definitions) the definition of harm includes act or omission. The word ‘omission’ is not included in the definition of harm in the Draft Bill. This should be included.</p> <p>Desecration</p> <p>The proposals paper (p.11) states that the new legislation will include a definition of desecration. However, this is not currently included in the Draft Bill and the word desecration has been removed from the harm offence currently contained in the NPW Act. The new legislation should include a definition of desecration and associated offences that:</p> <ul style="list-style-type: none"> • Includes physical and non-physical/intangible elements of Aboriginal heritage • Includes unauthorised entry into and inappropriate use of ACH sites • Includes inappropriate use of or treating Aboriginal ancestral remains or Aboriginal objects contrary to Aboriginal beliefs and customs • Includes inappropriate development on a song line / dreaming story • Includes development too close to ACH • Includes vandalising ACH including Aboriginal grave sites. <p>We note that a definition of desecration is included in s.3 of the <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i> (Cth) which could provide a useful starting point:</p> <p><i>“For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:</i></p> <p><i>(a)in the case of an area:</i></p> <p><i>(i)it is used or treated in a manner inconsistent with Aboriginal tradition;</i></p> <p><i>(ii)by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or</i></p> <p><i>(iii)passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or</i></p>	<p>The definition of desecration should include:</p> <ul style="list-style-type: none"> • Physical and non-physical/intangible elements of Aboriginal heritage • Unauthorised entry into and inappropriate use of ACH sites • Inappropriate use of or treating Aboriginal ancestral remains or Aboriginal objects contrary to Aboriginal beliefs and customs • Inappropriate development on a song line / dreaming story • Development too close to ACH • Vandalising ACH including Aboriginal grave sites.
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	<p><i>(b)in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition; and references in this Act to injury or desecration shall be construed accordingly.”</i></p>	
<p>S.41 Offence to harm ACH</p>	<p>The NPW Act currently contains some offences for harming or desecrating ‘Aboriginal objects’ or gazetted ‘Aboriginal places’ (section 86). They include:</p> <ul style="list-style-type: none"> • A ‘strict liability’ offence for harming or desecrating Aboriginal objects or places. This does not require someone to know that it is an Aboriginal object or place they are causing harm to in order for them to be prosecuted, • An offence for ‘knowingly’ harming an Aboriginal object. <p>Under the current NPW Act there are also offences for:</p> <ul style="list-style-type: none"> • Failing to notify OEH of the location of an Aboriginal object (<i>see comments at s.27 above</i>) • Contravening any condition of an Aboriginal Heritage Impact Permit (AHIP) <p>Under the previous provisions in the NPW Act, between 2005 and 2010, 10 prosecutions were made for damaging or destroying Aboriginal heritage, with maximum fines of \$1,600 issued.</p> <p>The laws were amended in 2010 to increase fines and penalties but also broadened the range of defences available to proponents. There has only been one prosecution²⁶ since the increased penalties came into force. Ausgrid was fined \$4,690 for ‘harming’ an Aboriginal rock engraving of a footstep at Cromer in Sydney’s Northern Beaches. The ‘Ausgrid’ case demonstrated a number of clear failings of the current laws:</p> <ul style="list-style-type: none"> • Fines continue to be too low and do not reflect the level of harm caused, • The low fine amounts do not act as a deterrence, 	<p>All ACH, regardless of whether it has been ‘declared’ should be included in the offence provisions.</p> <p>Desecration offences need to be added.</p> <p>The ACH Bill should explicitly state that evidence of the specific significance of ACH is not required for the Court to find that the harm caused by an offence was severe.</p> <p>The legislation should include a specific offence for contravening an ACHMP.</p> <p>Extra elements should not be added to offences that will make them harder to prove. Specifically, the offences should remove:</p> <ul style="list-style-type: none"> - Recklessly or intentionally - Trivial or negligible <p>Maximum penalties should be increased. This should include imprisonment for relevant people in corporations.</p> <p>The strict liability offence should re-instate:</p> <ul style="list-style-type: none"> - Imprisonment, and - The higher penalty amount for harming declared ACH. <p>The harm offence should apply to all development and land use activities.</p>

²⁶ See <http://www.environment.nsw.gov.au/media/OEHMedia13042302.htm>

	<ul style="list-style-type: none">• Power inequities where government departments and communities are not resourced to the same extent as big companies,• The system of fining does not benefit the Aboriginal community that has suffered the harm. Instead the fine is directed back to government, where instead it could be directed to the Aboriginal community as compensation, to rehabilitate the site, undertake other work to protect and promote Aboriginal heritage, and• The time taken to investigate a matter is unacceptable, given the OEH took 2 years to investigate and decide to prosecute the proponent. <p><i>Application to ACH</i> We seek to ensure the offences apply to all ACH, including ACH that may not be 'declared'. There are a range of scenarios that could mean ACH is not declared (eg. newly uncovered, not revealed due to cultural sensitivities, an ACH declaration application is pending, or the Minister has refused to declare the ACH). The Victorian legislation includes offences for all ACH, regardless of whether it has been 'declared'.</p> <p><i>'Knowing' offence</i> Section 41(1)(a) includes a new element of 'intentionally or recklessly'. We are concerned that this will make any prosecution harder to prove.</p> <p>We note that aggravating circumstances has also been removed from the knowing offence. The rationale for this is not clear.</p> <p><i>Penalties</i> We note that maximum penalties are proposed to be increased from the current NPW Act. However, these amounts are not sufficient to reflect the importance and nature of ACH. Maximum penalties should be increased. See also comments on penalties at s.119 below.</p> <p><i>Strict liability offence</i></p>	
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	<p>We are concerned that the imprisonment component for strict liability offences has been removed. These should be re-instated.</p> <p>The proposals paper states that declared ACH will have high level of protection (p.30). However, this is not reflected in the Draft Bill. In fact, the Draft Bill removes the current higher penalty for the strict liability offence of harming an Aboriginal Place.</p> <p>Trivial or negligible</p> <p>Both harm offences outline that a person is not guilty of an offence if the harm is “trivial or negligible.” We are concerned that the way a Court could interpret this may be different to how the local Aboriginal community would interpret it. We also query whether <i>harm</i> as defined in the Bill can ever be <i>trivial or negligible</i>.</p> <p>Application to development and land use activities</p> <p>The scope of the harm offence needs to be clarified. Harm offences should apply to all development and land use activities including ordinary development, major projects, smaller government infrastructure, resource exploration, Part 5 activities under the <i>Environmental Planning and Assessment Act</i> and complying development.</p>	
<p>S.43 Defence – acts authorized by the regulations</p>	<p>The defence provisions are critical to the Bill achieving the overall aim of improving protection of ACH. The 1996 Evatt Review recommended that limited defences should be a key element of any State and Territory ACH laws:</p> <p><i>“Minimum standards for State and Territory laws should include:</i></p> <ul style="list-style-type: none"> - <i>Criminal sanctions with adequate penalties;</i> - limited defences; - <i>provision to ensure that criminal sanctions are effectively enforced;</i> 	<p>NSWALC does not support the range of broad defences under the current laws which are replicated in the Draft Bill.</p> <p>Defences should be limited. Additional defences made by the Minister or in Regulations should be removed. Any defences proposed to be outlined in Regulations or Codes must be required to meet minimum standards developed by the ACH Authority.</p> <p>Defences for ‘low environmental impact activities’ should be removed.</p>

	<p>- <i>provision to enable Aboriginal people to act as inspectors, to monitor compliance and to launch prosecutions</i>²⁷ (emphasis added)</p> <p>In accordance with this, defences should be very limited and contained in the legislation alone. We do not support the proposed regulation making power for defences in section 43(1). In particular we do not support the making of a low environmental impact defence by Regulation. This does not provide for minimum standards to ensure that ‘low environmental impact’ activities are genuinely low impact, and that there is no requirement for concurrence or consultation with the ACH Authority.</p> <p>We do not support the Minister having the power to make Codes of Practice that provide defences as outlined at section 43(2). The Minister should not be able to make additional defences via such Codes without reference to any standards, consultation or Parliamentary oversight. If there are to such Codes, these should be made by ACH Authority, not the Minister.</p> <p>We note that while the current NPW Act includes a broad range of defences, there are restrictions on the type of regulations that the Minister can introduce ie. minimum standards and consultation – see s 87(5) NPW Act. The legislation should reflect these requirements that the regulations meet minimum standards and require consultation before introducing regulations.</p> <p>The consultation note in this section flags a new defence for large scale ACH assessments and approvals for certain types of activities. This proposal has not been previously flagged and is extremely alarming. Wholesale ‘approvals’ for certain types of activities without individual assessments are contrary to the intent of the reforms and are strongly opposed.</p>	<p>The legislation or subsequent regulations or Ministerial Codes of Practice should not provide for defences for large scale assessments and approvals.</p>
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²⁷ Elizabeth Evatt, ‘Review of the Aboriginal and Torres Strait Islander Heritage Protection Act’, 1996, page 106, available at: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/IndigLRes/1996/1.html?stem=0&synonyms=0&query=evatt%20review%201996>

<p>S.44 Defence – taking reasonable steps to avoid harm</p>	<p>NSWALC is concerned that the proposed ‘reasonable steps’ defence amounts to the retention of the ‘due diligence’ defence, noting it now refers to the ACH Assessment Pathway Code of Practice.</p> <p>This defence is far too broad.</p>	<p>Checking the map alone does not constitute reasonable steps.</p> <p>The ‘due diligence’ regime should not be carried over into new legislation in the guise of ‘reasonable steps’. An independent assessment of the ‘taking reasonable steps’ defence regime and consultation process to determine its effectiveness in protecting Aboriginal heritage should be undertaken.</p>
<p>S.45 Activities exempt from application of this Division</p>	<p>The Draft Bill includes an exemption for “<i>activities that are described in the declaration as activities that may be carried out despite the declaration</i>” (S.45(a)). This is new and allows for the Minister to authorize in a declaration activities that can harm ACH. The ACH Authority or Local ACH Consultation Panels do not have a specified role in this. See comments above at s.18.</p>	<p>NSWALC does not support exemptions for activities authorized by the Minister.</p> <p>If section 45(a) is to be retained, any allowable activities should be authorized with the agreement of the Local ACH Consultation Panel and ACH Authority only.</p>
<p>S.46 Nature and purpose of ACH management plan</p>	<p>Under the current NPW Act the NSW Government has the power to issue Aboriginal heritage impact permits (AHIPs) to harm, destroy or desecrate Aboriginal heritage (section 90, NPW Act).</p> <p>The Draft Bill will replace AHIPs with ACH Management Plans (ACHMPs). ACHMPs will be negotiated between a proponent and Local ACH Consultation Panel, and approved by the ACH Authority. ACHMPs, if approved, will authorize harm to ACH, and may include measures to conserve or minimise harm.</p> <p>The purpose and nature of ACH management plans should be to ‘protect, conserve and minimise harm’. The concept of upfront avoidance and harm minimisation is included in <i>Biodiversity Conservation Act</i>.</p> <p>The Draft Bill does not include any guidance on ‘class of proponents’. Safeguards should be added to section 46(2) to ensure it is clear who the negotiating parties are, obligations, what harm is authorised, and whether a person fits into a class.</p>	<p>This section should be amended to clarify that the purpose of ACHMPs includes protection, conservation and harm minimisations.</p> <p>Section 46(2) should clarify ‘class of proponents’ (see left column).</p> <p>Section 46(3) should specify that ACH management plans ‘must’ recommend measures to conserve or minimise harm, not ‘may’.</p>

<p>S.47 Assessment of activities that may require a plan</p>	<p>Section 47 of the Draft Bill outlines that proponents must follow the steps in the ACH Assessment Pathway Code of Practice before submitting an ACHMP to the ACH Authority.</p>	<p>The legislation should clarify that the proponent must follow the steps in the assessment pathway before commencing negotiations of an ACHMP.</p> <p>A clear link should be added to ensure that the pathway applies to all development projects including Part 5 of the <i>Environmental Planning and Assessment Act</i>.</p>
<p>S.48 Negotiation of plans by proponents and Local ACH Consultation Panel</p>	<p>Section 48 requires that ACHMPs are negotiated in accordance with the ACH Assessment Pathway Code of Practice, which will include a negotiation framework.</p> <p>Section 48(2)(b) requires that negotiations are to be conducted to ensure that the outcomes are directly related to ACH and to promote the objects of the Act. This needs to be tightened to make it clear that the negotiations are about protecting ACH. As the objects are currently drafted, this is not sufficiently clear. It is recommended that this be changed to make clear that the outcomes are to protect ACH.</p> <p>Section 48(2)(c) of the draft Bill includes a provision on proportionality between ACH impacts and obligations assumed by proponents within an ACHMP. It is understood that guidance on operational consideration of and determination of proportionality is intended to be developed by the ACH Authority in the ACHMP Code of Practice and Negotiation framework. As noted above, the ACH Authority should approve the Code of Practice and framework, not the Minister.</p> <p>We note that section 48(2)(d) refers to ‘impact’ while the rest of the section refers to ‘harm’. It is not clear why a different term is used. We are concerned about how this could be interpreted.</p> <p>As currently drafted the proposals will allow ‘compensation’ and ‘offsets’ for harm to ACH. While it may be useful in some instances to have compensatory and offsetting mechanisms available, there are concerns that these</p>	<p>This section should emphasise the minimisation of harm to and protection of ACH.</p> <p>The Draft Bill should include the following principles:</p> <ul style="list-style-type: none"> - Harm avoidance and minimisation - ‘Intergenerational equity of access to heritage’ which would reflect the proposed definition of ACH significance in s.4. - The principle of free, prior and informed consent, which reflect the aim of reforms as decision making by Aboriginal people. <p>The legislation should include safeguards to prevent unintended and inappropriate consequences of compensatory or offsetting proposals.</p> <p>Resourcing and funding must be provided for Local ACH Consultation Panels to access relevant expertise and independent advice.</p>

	<p>mechanisms are not best practice standards for protection, are open to abuse, corruption, a ‘sites for sale’ approaches to managing heritage, and an overall reduction in ACH.</p> <p>As such, the legislation, Codes and Guidelines must include safeguards for any unintended consequences that could be created by such proposals.</p> <p>The Draft Bill currently does not include a ‘stop the clock’ provision. Such a provision should be added to the legislation to ensure ensure further time can be allowed for negotiation, for example, if the ACH Authority refers a draft plan back to the proponent and Local ACH Consultation Panel (under S.49(2)(c)). Timeframes must also be culturally appropriate with allowances for cultural priorities such as sorry business.</p> <p>Local ACH Consultation Panels need to be appropriately supported and resourced to negotiate ACHMPs, particularly complex ACHMPs.</p>	
<p>S.49 Approval of plans by ACH Authority</p>	<p>Under the current NPW Act the OEH approves AHIPs, and can take into account a range of factors, many inappropriate to ACH. Significantly, Aboriginal people have no formal role in this process.</p> <p>The Draft Bill provides for the ACH Authority to approve ACHMPs and includes some decision-making criteria.</p> <p>The process for Aboriginal people to refuse an activity or development in line with the United Nations <i>Declaration on the Rights of Indigenous peoples</i> is supported, however needs to be strengthened.</p> <p>Consideration should be given to preventing the ACH Authority approving an ACHMP that is opposed by the Local ACH Consultation Panel, unless there has been some gross deficiency in the negotiation process, the panel has not been properly informed or the harm is not appropriate or acceptable.</p>	<p>Support that Aboriginal people (ACH Authority), not OEH, makes decisions about ACHMPs.</p> <p>Decision making criteria to should be limited to a recommendation of the Local ACH Panel and objects of the Act (if NSWALC’s above recommendations on the objects of the Act are accepted).</p> <p>Section 49(3) should be amended to include safeguards to ensure proponents and the ACH Authority cannot bypass Local ACH Consultation Panel recommendations.</p>

	<p>Section 49(3) allows the proponent to submit an ACHMP to the ACH Authority for approval if the negotiation period has expired and the Local ACH Consultation Panel has not agreed. This section should be amended. In the majority of cases it would not acceptable for a proponent to be able to request ACH Authority approve an ACHMP where the Local ACH Consultation Panel has not agreed. Requirements should be added that the ACH Authority must:</p> <ul style="list-style-type: none"> - Consider the reasons why negotiations were not finalised in the negotiation period, and include discretion for the ACH Authority to extend the negotiation period, - Provide an opportunity for the Panel (or support body if Panel is not operating) to have input, and - Consider advice provided by the Panel (or support body if Panel is not operating). <p>Section 49(3)(a) should be amended to prevent proponents from presenting their own preferred version of an ACHMP to the ACH Authority which the local ACH Consultation Panel has not been given adequate time to review. There should also be limits to a proponent’s ability to introduce new evidence that has not been before the Local ACH Consultation Panel.</p> <p>Section 49(4) outlines proposed decision making criteria for an ACHMP. Consideration of ‘impact on the proponent’ and ‘public interest’ should be omitted. These are new insertions and are not in line with the intent of the new laws ie. decision making by Aboriginal peoples. The concept of public interest is not used in similar legislation eg. Victorian <i>Aboriginal Heritage Act 2006</i>. We are also concerned that public interest is a vague term that could be misapplied to ACH.</p>	
<p>S.50 Negotiation and determination periods for plans</p>	<p>The Draft Bill outlines that negotiation and determination timeframes are to be specified in Regulations. The proposed timeframes outlined in the proposals paper are far too short for both negotiation and determination.</p>	<p>The legislation should outline that timeframes must:</p> <ul style="list-style-type: none"> i. Be culturally appropriate with allowances for cultural priorities such as Sorry Business, ii. Exclude certain times of the year eg. Christmas, NAIDOC,

	<p>Timeframes in the new system will be critical. For example, if the Local ACH Consultation Panel and the Proponent do not come to an agreement in the negotiation period then it is up to the ACH Authority to reach a decision (under s 49(3)).</p> <p>Additional considerations regarding timeframes must make allowances for:</p> <ul style="list-style-type: none"> • Circumstances where the Local ACH Consultation Panel and the proponent do not come to an agreement for whatever reason and the proponent takes a draft ACHMP to the ACH Authority. The ACH Authority will need further time to consult and consider. • The ACH Authority should be able to set a timeframe when referring ACHMPs back to the proponent and Panel for further consideration. • The time period should be extended for mediation. <p>We also note that OEH currently has 60 days to determine AHIPs.</p>	<p>iii. At a minimum require 30 business days for negotiating a basic plan and 30 business days for determining a basic plan.</p>
<p>S.51 Resolution of disputes</p>	<p>The Draft Bill provides that proponents or panels may request the ACH Authority appoint an independent mediator to assist in resolving disputes relating to ACHMPs.</p> <p>Mediation should be mandatory prior to any review or appeal.</p> <p>Consideration should also be given to requiring the ACH Authority to keep a list of independently accredited mediators that meet minimum standards. Requirements could also be included specifying that any proposed mediator should not be an employee or former employee of the proponent or similar company, that the mediator is free of any conflicts of interest, and that clear processes are established to address any concerns raised by Aboriginal community members.</p>	<p>NSWALC generally supports the inclusion of provisions to assist in resolving disputes.</p> <p>Consideration should be given to further strengthening these provisions.</p> <p>Mediation should be mandatory prior to any review or appeal.</p> <p>The legislation should provide ‘stop the clock’ mechanisms in the case of mediation.</p> <p>The ACH Authority should be required to keep a list of independently accredited mediators that meet minimum standards.</p>
<p>S.52 Appeal against refusal of or failure to approve proposed plan</p>	<p>The Draft Bill provides proponents with the right to appeal a refusal (or a deemed refusal) of a ACHMP to the Land and Environment Court. .</p>	<p>NSWALC does not support merits appeals for proponents. Section 52 should be removed.</p>

	<p>This section is extremely problematic. If the ACH Authority refuses an ACHMP, it seems likely that a proponent would appeal. Furthermore, this section provides rights to the proponent to appeal where an ACHMP has not been agreed by the Local ACH Consultation Panel.</p> <p>We are concerned that with rights to ACH Authority review (s.49(3)) and appeal rights (s.52) proponents effectively get two extra opportunities to secure a favorable outcome.</p> <p>Proponent appeal rights should be limited to judicial review only.</p> <p>If the Land and Environment Court were to step into the role of the ACH Authority, this would undermine the objects of the Act and the status of the ACH Authority. We also note that the Court will look at whether the ACHMP has considered the factors in s 49(4) – see comments above.</p> <p>If merit appeals are to be retained:</p> <ul style="list-style-type: none"> • Equitable merit appeals should be allowed for relevant Aboriginal people and Aboriginal organisations. • The Bill should give rights to Aboriginal people to ‘join’ a developer’s merits appeal in Court (as an opposing party) – This could be modelled on s8.12 of the <i>Environmental Planning and Assessment Act</i> • Proponents should be prevented from presenting their own preferred version of an ACHMP to the ACH Authority which the Local ACH Consultation Panel has not reviewed. • There should be limitations on a proponent’s ability to introduce new evidence to the ACH Authority or the Court that has not been before the Local ACH Consultation Panels. • The review should be heard by, or with the assistance of, a Commissioner with expertise in Aboriginal culture heritage (see also recommendation at Schedule 4, below). 	<p>If appeals for proponents are to be retained, amendments to the legislation are needed (see left column).</p>
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	<ul style="list-style-type: none"> Limiting the period in which proponents can appeal a decision of the ACH Authority to 28 days. Currently the timeframe is proposed to be outlined in the regulations (s.52(2)). <p>We are also concerned regarding potential costs of proponent-driven appeals. The ACH Authority will bear the cost of ‘defending’ their decisions to refuse ACH Management Plans in Court, which could lead to less resources spent on actual ACH protection.</p>	
<p>S.53 Amendment or termination plan</p>	<p>Section 53 outlines that the ACH Authority may amend or terminate an ACHMP:</p> <ul style="list-style-type: none"> By a further plan approved by the ACH Authority, or By written notice in circumstances authorized by regulations. 	<p>Notification and consultation with Local ACH Consultation Panels and support body should be required in respect to any proposed amendment or termination of an ACHMP.</p>
<p>S.54 ACHAP Code of Practice</p>	<p>Section 54 outlines that the ACH Authority is to prepare a draft ACH Assessment Pathway (ACHAP) Code of Practice that is to contain details about steps proponents need to take and a negotiation framework for ACHMPs. This code of practice is fundamental to operation of the assessment pathway. The Minister is proposed to approve this Code.</p> <p>The ACHAP process will replace the current ‘due diligence’ process. NSWALC has not supported the due diligence process or guidelines as they can bypass consultation with Aboriginal peoples and assessment, and rely on proponents determining whether any Aboriginal heritage is present and will be impacted.</p> <p>We are concerned that the new process does not address these issues because the process is still proponent driven and relies on the proponent checking a map to trigger consultation. We are also concerned that the Minister has decision making on the ACHAP Code of Practice, that there are no requirements to consult with Aboriginal people on the development of the Code, and there are no parameters or criteria around the Minister’s decision.</p>	<p>The ACH Authority should have decision making authority on Code of Practice, not the Minister. If the Minister is to retain this decision, criteria for decision making should be included.</p> <p>Further safeguards are needed in the ACHAP to ensure that proponents cannot bypass assessment and consultation with Aboriginal peoples.</p> <p>The legislation should also require:</p> <ul style="list-style-type: none"> Consultation with Aboriginal people in the development of the ACHAP Code of Practice, Further oversight and input by the ACH Authority in the ACHAP process, If there has been overlooked, new information becomes available, or there is incorrect or incomplete information on the map, the ACH Authority, LALC or Local ACH Consultation Panel should be able to request that a proponent proceed to a preliminary investigation (stage 2 of ACHAP), Any updates to the regulatory map after a proponent has undertaken Step 1 – ACH map review, should apply to the

	<p>The ACH Authority should have further oversight of the ACHAP process. While we understand that there are some requirements for the ACH Authority to be notified by proponents (S.56 Stage 2 of assessment) and to undertake a review of the assessment report (s.59), there is scope for the ACH Authority to take a more proactive oversight role. This will assist in ensuring that the ACHAP Code is being properly followed and that any issues can be identified and addressed earlier.</p> <p>A provision should be added that requires the ACH Authority to develop and maintain registers of accredited experts. This should include any experts that may be engaged by proponents to prepare reports (if not the Local ACH Consultation Panel). The ACH Authority should also have a role in engaging experts to ensure their independence. Similar provisions are used in other legislation that require Local Councils, government departments (and NSWALC) to keep and maintain registers of suitability qualified and experienced people to undertake certain roles. This adds rigour to the process by ensuring greater oversight, people with appropriate expertise are involved, and minimises the risk of ACHAP being misused or abused.</p>	<p>project and the proponent must be required to comply with the ACHAP Code of practice.</p> <p>The legislation should specify that the ACH Assessment Pathway applies to all development and land use activities including state significant projects and complying development.</p> <p>Processes that further weigh the process in favor of development are not supported. Proper criteria and guidelines must be developed by and in consultation with Aboriginal people.</p> <p>The legislation needs to clearly outline the process for unexpected finds of ACH, including requiring proponents to follow the ACH Assessment Pathway.</p>
<p>S.55 Stage 1 of assessment (map review)</p> <p>S.56 Stage 2 (preliminary investigation)</p> <p>S.57 Stage 3 (scoping assessment)</p> <p>S.58 Stage 4 (detailed assessment and</p>	<p>Under the current NPW Act there is no requirement for proponents to consult about proposed developments unless ACH is indicated on a map or the proponent is otherwise aware of ACH. Under the current NPW Act the Government manages and owns the mapping system.</p> <p>The Draft Bill sets out a process that still relies on proponent to check a map to trigger further assessment and consultation.</p> <p>It is understood that the map will be a sensitivity layer of 'known and likely' ACH. If a proponent's activity falls within an area mapped as sensitive they will continue to the second step of the ACHAP.</p> <p>If a proponent's activity falls outside the sensitivity area, it is understood that no further action is required. However, the Draft Bill should clarify that any Part 4 and Part 5 EP&A Act activities that require an Environmental Impact</p>	<p>NSWALC does not support checking a map as a sufficient step by itself to confirm that no sites are likely to exist, and effectively make important decisions about ACH management and protection, at the expense of consultation with Aboriginal people.</p> <p>Processes that do not allow Aboriginal people to have a say over activities and developments and/or bypass proper consultation and assessment mechanisms are not supported.</p> <p>The Local ACH Consultation Panel must have visibility of and meaningful input into all ACH processes, including in the preparation of assessment reports.</p>

<p>final assessment report)</p>	<p>Statement (EIS) will be required to complete the ACHAP regardless of whether the proposed activity is located within the sensitivity area.</p> <p>While early engagement with Aboriginal people regarding potential impact on ACH is positive, the proposed process still relies on a proponent to check a map first, and then the proponent to lead the process. An alternative approach could be to require further assessment in all areas other than those expressly mapped by Aboriginal peoples as being “no ACH”.</p> <p>We also note that, while the current due diligence code of practice is flawed, it encourages the proponent to consider any other sources of information the person is aware of. This does not appear in the Draft Bill.</p> <p>Assessment reports will form the basis of any ACHMP negotiations and will be advice that is bought by proponents and could down-play the presence or significance of ACH. NSWALC is of the view that the level of input by the Local ACH Consultation Panel and oversight by the ACH Authority needs to be improved, particularly in the preparation and review of assessment reports</p> <p>Local ACH Consultation Panels and their support bodies (LALCs) must be properly resourced to prepare reports and supporting materials.</p> <p>The ACH Authority should be required to establish and maintain an accredited list of people who are able to prepare reports (as per comments at s.54).</p> <p>The proposals paper states that <i>“the draft Bill will include powers to establish processes for the unexpected discovery of Aboriginal objects and/or human ancestral remains. Proponents will be required to complete the ACH assessment pathway where development or land management activities result in the discovery of previously unknown ACH.”</i> However, there is no ‘unexpected find’ process outlined in the Bill.</p>	<p>Section 58 must provide the Local ACH Consultation Panel with an opportunity to have input into and endorse (or not endorse) the assessment report.</p> <p>The Local ACH Consultation Panel’s recommendation or views on the assessment report should be provided to the ACH Authority.</p>
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	<p>The legislation should clearly express that proponents will be required to document the stages of the assessment pathway process as evidence of completing their obligations under the legislation. While it is understood the ACHAP Code of Practice is intended to explain the detailed procedural requirements to be followed, proponents obligations should be clearly provided in the legislation.</p> <p>Stages 2 and 3 end with an assessment of whether an ACHMP is still required. It is not clear who is to undertake this assessment or how it is recorded or communicated. This needs to be clearly stated in the legislation. If it is the proponent, it is critical that the Panel and/or ACH Authority has oversight of this assessment, to ensure the proponent’s assessment is adequate. Otherwise, the only oversight Aboriginal people will have of the Pathway assessment will be at the review stage.</p> <p>We are also concerned that as currently drafted Aboriginal people have no role in the crucial step of preparing, reviewing or having input into the detailed assessment and final assessment report (s.58).</p>	
<p>S.59 Review of Assessment Report by ACH Authority</p>	<p>Section 59 outlines that the ACH Authority is to review assessment reports to determine if they have been completed in accordance with the ACHAP Code of Practice.</p> <p>As currently drafted, there are no repercussions if the proponent does not meet the ACHAP CoP requirements. While the ACH Authority may require one further assessment (s.59(3)), if that assessment is inadequate the proponent can still proceed to the ACHMP stage.</p> <p>Given that the assessment report will be the basis for negotiating ACHMPs, it is essential that they reflect the Local ACH Consultation Panel’s views. Consideration should be given to:</p> <ul style="list-style-type: none"> - Allowing the ACH Authority to request further information, - Allowing the ACH Authority to ‘stop the clock’ and request more information and / or the views of the Local ACH Consultation Panel, 	<p>The proposed timeframe for review of the ACH Assessment Report should be increased to 30 days.</p> <p>The ACH Authority must be provided with the power to properly oversight the Assessment Pathway and reject inadequate assessment reports.</p> <p>Amendments to this section are needed to:</p> <ul style="list-style-type: none"> - Ensure that ACHMPs cannot be negotiated on the basis of inadequate assessment reports - Ensure that the panels views are considered in the review stage.

	<p>- Allowing the ACH Authority to undertake a more comprehensive review of the ACH report, not just as to whether it is complete.</p> <p>We are also concerned that 10 business days for the ACH Authority to review the report is a very short time frame. We note that other review provisions are generally 21 or 30 days.</p>	
<p>S.60 Development applications to which this Division applies</p> <p>S.61 Assessment and requirements for relevant development applications</p>	<p>The current NPW Act does not integrate with any planning or development laws. This creates confusion and often results in Aboriginal heritage not being properly considered in development assessment and consent processes.</p> <p>The Draft Bill outlines that Aboriginal heritage will generally need to be considered before planning approvals are obtained. This is a significant improvement. However, we are concerned there are exceptions for some development categories including eg. state significant development and complying development. These development types can and have unlawfully destroyed ACH. As such, they should not be exempt.</p> <p>Major projects and complying developments should not be exempt from requirements to follow the ACHAP and obtain an ACHMP.</p> <p>We note that the interactions with the Draft Bill and the NSW planning system are complex.</p> <p>The proposals paper outlines that the Secretary’s Environmental Assessment Requirements (SEARs) for state significant development and state significant infrastructure are proposed to be updated to adopt key features of ACH Management Plan negotiation process and supporting guidelines.</p> <p>However, the proposals paper and Draft Bill are silent or unclear on assessment pathways and approval requirements for complying, integrated developments and other types of developments, or what alternative processes will apply.</p>	<p>Requirements to obtain an ACHMP prior to obtaining development consent should apply to all development and land use activities including major projects, smaller government infrastructure, resource exploration and Part 5 activities under the <i>Environmental Planning and Assessment Act</i>.</p> <p>Clearer provisions are needed regarding complying and integrated development. For example, requirements for private certifiers will need to be updated.</p> <p>The legislation should require all planning proposals, rezoning applications and strategic planning to comply with Aboriginal heritage requirements.</p> <p>OEH and the Department of Planning should urgently prepare advice on how various development processes would work under the new laws.</p> <p>The integrated development process needs more clarity including the timing, sequence of assessment processes (and pathway), requirement for Local ACH Consultation Panel input, and interaction between consent authorities and ACH Authority.</p> <p>The ACH Authority should be able to withdraw concurrence or approval for integrated development if the ACH Authority’s conditions are not to be included in the final approval (see below comments at Schedule 4 on amendments to Planning Regulation).</p>

	<p>Crown development should explicitly be subject to ACH considerations (amendment to s4.44(2) of <i>Environmental Planning and Assessment Act</i> to insert 'or ACH approval').</p> <p>Clear processes are needed for 'designated developments' (under Part 4 <i>Environmental Planning and Assessment Act</i>) and their relationship to requirements for environmental impact statement should be addressed in the ACH Bill.</p> <p>Integrated development The integrated development process needs more clarity including the timing and sequence of development assessment processes (and assessment pathway). Requirements for Local ACH Consultation Panel input should be included, and interaction between consent authorities and the ACH Authority need to be clarified.</p> <p>The ACH Authority should be able to withdraw concurrence or approval if the ACH Authority's conditions are not to be included in the final approval (see below comments at Schedule 4 on amendments to Planning Regulation).</p> <p>The ACH Authority and Local ACH Consultation Panels must have sufficient time to review (and autonomy to determine) integrated development applications.</p> <p>For integrated development, the Secretary should not have 'step in' powers related to ACH – amendments to the <i>Environmental Planning and Assessment Act</i> needed to exempt the ACH Authority from Planning Secretary's step in power.</p> <p>Assessment and requirements for relevant development applications</p>	<p>Further safeguards are needed to ensure a proponent cannot make a development application with only a draft ACHMP.</p> <p>We also seek clarification regarding whether consent authorities will be required to check the ACH regulatory map to confirm whether the proposed development activity is within the sensitivity area or confirming which stage of the ACHAP a particular proponent participated in with the ACH Authority.</p>
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	<p>We are concerned that proponents can make a development application with only a draft ACHMP if:</p> <ul style="list-style-type: none"> - negotiations with the Local ACH Consultation Panel have been unsuccessful by the end of the negotiation period, or - if a draft ACHMP has been agreed but the ACH Authority has not approved the ACHMP within the determination period. <p>In these circumstances, the interaction with the relevant planning authority is unclear, including how they would know how to take ACH into consideration. It also risks that a consent authority could (even unintentionally) approve development without the ACHMP process being followed.</p> <p>Clarification is needed regarding the proponents obligations to disclose to a consent authority their ACHMP requirements, and how consent authorities are able to check this.</p> <p>This issue could be addressed by providing practice notes to consent authorities and support to easily check the bona fides of the proponents' disclosure. We also seek clarification regarding whether consent authorities will be required to check the ACH regulatory map to confirm whether the proposed development activity is within the sensitivity area or confirming which stage of the ACHAP a particular proponent participated in with the ACH Trust.</p>	
<p>s.62 Changes to proposed development during or after determination of relevant development application by consent authority</p>	<p>We note that under the current <i>Environmental Planning and Assessment Act 1979</i> modifications must generally be incremental ie. substantially the same development as from the original consent, and modifications may require consultation with relevant agencies or the public.</p> <p>Furthermore, it is understood that a consent authority may from time to time need to issue conditions of consent that are inconsistent with the ACHMP. For example, where a shift in the footprint of a proposed building is</p>	<p>The legislation should include safeguards to ensure any changes or modifications to developments require consultation and concurrent with the ACH Authority and Local ACH Consultation Panel.</p>

	<p>required as a result of biodiversity that was not originally accounted for in the site plans.</p> <p>Given this, clear requirements are needed for consent authorities to:</p> <ul style="list-style-type: none"> • <u>consult with the ACH Authority</u> before issuing inconsistent conditions of consent if the inconsistency is minor and will not impact on the level or nature of the harm (e.g. the ACHMP sets out certain details around site access that must now be altered but this alteration does not change the impact on ACH values) <i>or</i> • <u>obtain the concurrence of the ACH Authority</u> before issuing inconsistent conditions of consent, if the inconsistency will result in an increase in harm to ACH values or change the nature of harm that would occur <p>The ACH Authority must consult with the Local ACH Consultation Panel if required during the concurrence period. If the ACH Authority does not provide concurrence, the consent authority must not be able to impose the proposed condition of consent.</p>	
<p>Part 6 Financial provisions</p>		
<p>Sections 63 – 70 relating to the ACH Fund, Funding Allocation Strategy, keeping of accounts, acquisition of property by gift</p>	<p>Sections 63 to 70 include new provisions to guide the prioritisation of funding on ACH conservation in NSW.</p> <p>New provisions to guide the prioritisation of funding on ACH conservation in NSW is a positive step. However, some further clarifications and safeguards are needed.</p> <p>Section 67 Funding allocation strategy: The Minister has powers to approve and modify the ACH Authority’s funding allocation strategy. NSWALC has concerns regarding the scope of decision making provided to the Minister in this section.</p>	<p>The Minister should not approve or modify the Funding Allocation Strategy. If the Minister is to retain this decision, parameters around the Minister’s decision making are needed.</p> <p>NSWALC support the inclusion of an ACH Fund and proposals to support spending on ACH conservation. However, this section would benefit from clearer drafting to:</p> <ul style="list-style-type: none"> - Ensure that funds can only be spent for appropriate purposes eg. ACHMP monies must not be spent by the ACH Authority for administrative purposes, and - Clarify that the scope of the funding allocation strategy is limited to the conservation aspect of the ACH Fund, not to the whole ACH Fund.

	Section 69 Acquisition of property by gift: Section 69 allows the ACH Authority to be gifted property for conserving ACH. The legislation should also allow the ACH Authority to acquire or purchase property to protect ACH. We note that section 145 of the NPW Act allows the Minister to acquire land for reservation or other purposes.	The legislation should allow the ACH Authority to acquire or purchase property to protect ACH.
Part 7 Regulatory compliance mechanisms		
s.73 ACH Authority may make stop work order	Section 83 provides for the ACH Authority to issue stop work orders if an action is being, or about to be carried out that will result in a contravention of this Act.	NSWALC supports that the ACH Authority will be able to issue stop work orders, including that orders may be issued verbally. This section should be updated to ensure that the ACH Authority can issue stop work orders for all development and land use activities, including major projects, resource exploration, government infrastructure projects and exempt and complying development.
s.76 Appeal against stop work order	Section 76 provides a merits appeal for land holders against stop work orders.	NSWALC does not support merits appeals for stop work orders. Appeals should be limited to judicial review only. The legislation should include merit appeal rights for relevant Aboriginal people and Aboriginal organisations in relation to a refusal to issue a stop work order. If merit appeals are to be retained, the Bill should give rights to Aboriginal people to 'join' a developer's merits appeal in Court (as an opposing party) – This could be modelled on s8.12 of the <i>Environmental Planning and Assessment Act 1979</i> ..
S.79 Making of interim protection orders	Section 79 provides for the Minister to make interim protection orders.	The ACH Authority should have the power to make interim protection orders, not the Minister. If the Minister is to retain this function, safeguards on the Ministers powers are needed, for example see recommendations at s.18 above.

S.81 Notice of making of interim protection order	Section 81 requires the Minister to notify the land holder, the local council and any other person the Minister thinks fit of an interim protection order.	The Minister should also provide notice to the ACH Authority, the Local ACH Consultation Panel and the relevant LALC for the area.
S.83 Appeal against interim protection order	Section 83 provides a merits appeal for land holders against interim protection orders.	NSWALC does not support merits appeals for interim protection orders. Appeals should be limited to judicial review only. The legislation should include merit appeal rights for relevant Aboriginal people and Aboriginal organisations in relation to a refusal to issue an interim protection order. If merit appeals are to be retained, the Bill should give rights to Aboriginal people to 'join' a developer's merits appeal in Court (as an opposing party) – This could be modelled on s8.12 of the <i>Environmental Planning and Assessment Act 1979</i> .
S.85 Orders for remediation work relating to harm to ACH	Sections 84-92 provide for the ACH Authority to make remediation orders.	NSWALC supports the proposed remediation provisions.
S.93 Appeals	Section 93 provides a merits appeal for proponents against remediation orders.	NSWALC does not support merits appeals for remediation orders. Appeals should be limited to judicial review only.
Part 8 Investigation powers		
S. 94-118	Part 8 of the Draft Bill provides for new and more comprehensive powers to investigate potential breaches of the ACH Act. ACH is unique and irreplaceable. This calls for strong investigation powers that will play an important role in the new system as both a tool to enforce compliance as well as a useful and practical deterrent.	NSWALC supports the proposed investigation powers which should allow authorised officers to properly investigate alleged breaches of the ACH laws. Investigation powers must not be weakened under any circumstances.
Part 9 Criminal and civil proceedings		
S.119 Maximum monetary penalty	Under the current NPW Act key penalties are as follows: - The maximum penalties for 'knowingly' harming or desecrating an Aboriginal object are: • For individuals, \$275,000, or imprisonment for 1 year, OR \$550,000	Maximum penalties should be higher and at least brought into line with <i>Environmental Planning and Assessment Act 1979</i> and

	<p>or imprisonment for 2 years in circumstances of aggravation</p> <ul style="list-style-type: none"> • For corporations, \$1.1 million <p>- The maximum penalties for harming or desecrating an Aboriginal object (strict liability offence) are:</p> <ul style="list-style-type: none"> • For individuals, \$55,000, OR \$110,000 in circumstances of aggravation • For corporations, \$220,000 <p>The maximum penalties for harming or desecrating an Aboriginal place (strict liability offence) are:</p> <ul style="list-style-type: none"> - For individuals, \$550,000, or imprisonment for 2 years, or both - For corporations, \$1.1 million <p>The Draft Bill provides for a tiered penalty system. The maximum penalty amounts for the most serious offences are proposed to be:</p> <ul style="list-style-type: none"> - \$1,650,000 for a corporation, and - \$330,000 for an individual. <p>The Draft Bill also provides for additional daily penalties.</p>	<p><i>Protection of the Environment Operations Act 1997</i>, that is maximum for corporations of \$5million, and maximum for individuals of \$1million to \$2million.</p> <p>Local Aboriginal communities should have key roles in determining penalties for individuals or corporations that have damaged or destroyed Aboriginal heritage.</p> <p>Fines should be directed to the local Aboriginal community where the offence occurred.</p>
<p>S.123 Penalty notice for certain offences</p>	<p>S.123 provides for authorised officers to issues penalty notices.</p>	<p>Given that much of the detail of the new system will be outlined in policies, Codes and Guidelines, s123(2) should extend the regulation making power for penalty notice offences to include non-compliance policies, codes, guidelines.</p>
<p>S. 132 Civil proceedings to remedy or restrain breaches to this Act or Regulation S.133 Civil proceedings for enforcement of ACH conservation agreements and</p>	<p>Sections 132 and 133 provides for civil proceedings.</p> <p>We note the 1996 ACH Working Group Green Paper proposed that the local Aboriginal heritage bodies <i>“be able to initiate prosecutions for breach of any provisions of the new act.”</i></p>	<p>NSWALC supports the inclusion of civil proceedings. However, we note that this can be costly for Aboriginal people and groups. Resourcing for this should be provided.</p>

other conservation obligations		
S.137 Orders for restoration and prevention	Section 137 provides that the Court may order the offender to prevent harm or make good any harm to ACH.	NSWALC supports the inclusion of the proposed provisions relating to restoration and prevention orders.
Ss.138-139 Orders for and recovery of costs, expenses and compensation	Sections 138 and 139 outline that the Court can make orders for and recovery of costs, expenses and compensation	NSWALC supports the inclusion of the proposed provisions relating to orders for and recovery of costs, expenses and compensation.
S.143 Offence for failing to comply with Court order	Section 143 provides an offence for failing to comply with a Court order, with a penalty set at a maximum of \$110,000 for a corporation and \$22,000 for an individual, with additional daily penalties.	Penalties for not complying with Court order should be increased.
Part 10 Miscellaneous		
S.150 Delegation of functions by Minister	Section 150 provides for the Minister to delegate any functions to a government agency or persons authorised by the Regulations.	The Minister should be able to delegate functions to the ACH Authority. Consultation and / or concurrence of the ACH Authority should be required for any proposed Ministerial delegation.
S.154 Regulations	Section 154(2) outlines that the regulations may create offences punishable by a monetary penalty up to \$5,500.	The maximum penalty for additional offences should be increased.

Schedules		
<p>Sch 1 Members and procedure of the Board of the ACH Authority</p>	<p>Clause 4 Deputies NSWALC is concerned about Minister’s powers to appoint and revoke deputies. This must be in accordance with the community driven process.</p> <p>Clause 5 Vacancy in office of member NSWALC is concerned that the Minister will have powers to remove members at any time. Further safeguards are needed in relation to this significant power.</p> <p>While we note that removal from office is subject to procedural fairness to protect people from unjust removal, the current discretion is too broad and will undermine the independence of the ACH Authority. This is critical for the ACH Authority Board to fulfil their role and the public’s perception of them. The Minister should not have unfettered discretion to remove Board members.</p> <p>The Draft Bill should be amended to reflect that grounds for removal from office are in specific circumstances only, for example for misbehaviour, incompetence, corruption or dysfunction. Clause 7(2) should also include safeguards on the Minister’s decision to remove the Chairperson or Deputy Chairperson.</p> <p>Board members should not be required to seek leave from the Minister to be absent from meetings, this leave should be sought from the ACH Authority Board. We suggest seeking amendments to clause (1)(e) to reflect this.</p>	<p>Clause 4 must make clear that the community driven process applies for deputy appointments.</p> <p>Clause 5 and Clause 7 must ensure that ACH Authority Board members cannot be unjustifiably removed from office at the discretion of the Minister.</p> <p>Grounds for removal from office must be in limited and reasonable circumstances only, for example for misbehaviour, incompetence, corruption or dysfunction.</p>
<p>Schedule 2 Amendment of Heritage Act 1977</p>	<p>The draft Bill provides a role for the ACH Authority in State Heritage Register listings that involve ACH values.</p>	<p>NSWALC supports the ACH Authority to have a decision making role under the <i>Heritage Act</i> when a listing on the State Heritage Register includes ACH values.</p>

<p>Schedule 4 Amendment of other Acts and instruments (including Environmental Planning and Assessment Act 1979)</p>	<p>The Draft Bill proposes some consequential amendments to other Acts.</p> <p>The Draft Bill should include amendments (including to the <i>Land and Environment Court Act</i> and/or Court rules) that require all appeals under the ACH Act to be heard by a judge and a commissioner with expertise in ACH.</p> <p>The proposals paper outlines that the Department of Planning and Environment’s Secretary’s Environmental Assessment Requirements (SEARs) will be updated for State Significant Development and State Significant Infrastructure. The Draft Bill should specify that Schedule 2 of the <i>Environmental Planning and Assessment Regulation</i> should be updated to require that the ACH Authority will have input and consultation on environmental impact statements.</p> <p>Negotiated ACH Management Plans should be binding pre-requisites for major projects, infrastructure projects, and resource exploration under Part 5 of the <i>Environmental Planning and Assessment Act</i>.</p> <p>As noted at s.60 above, for integrated development, the Secretary (of the Department of Planning) should not have ‘step in’ powers for ACH. The Planning Act should be amended to exempt ACH Authority from Planning Secretary’s step in power. The ACH Authority should be able to withdraw concurrence or approval if the ACH Authority’s conditions are not to be included in the final approval.</p> <p>Crown development should explicitly be subject to ACH considerations (amendment to s4.44(2) of the <i>Environmental Planning and Assessment Act</i> to insert ‘or ACH approval’).</p>	<p>Relevant legislation should be updated to:</p> <ul style="list-style-type: none"> - Require all appeals under the ACH Act to be heard by a judge and a commissioner with expertise in ACH - Require consultation with the ACH Authority on environmental impact statements - Require ACHMPs as pre-requisites for all development and land use activities - Exempt the ACH Authority from the Planning Secretary’s step in power for integrated development
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