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Submission on the NSW Draft Aboriginal Cultural Heritage Bill 2018

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Submission on the NSW Draft Aboriginal Cultural Heritage Bill 2018

Abstract

We welcome the opportunity to provide feedback on the Draft Aboriginal Cultural Heritage Bill 2018 ('the Draft Bill'). We appreciate the move towards independent Aboriginal cultural heritage ('ACH') legislation and some of the new governance concepts, namely:

- The establishment of an ACH Authority
- Local mapping and strategic planning
- State of ACH reports
- Aboriginal ownership of ACH
- Conservation agreements and management plans

We have examined the Draft Bill against the five reform aims identified by the NSW Office of Environment and Heritage ('OEH'):

1. Broader recognition of ACH values
2. Decision-making by Aboriginal people
3. Better information management
4. Improved protection, management and conservation of ACH
5. Greater confidence in the regulatory system

Our submission elaborates on the following serious areas of concern:

- Status of Aboriginal people with traditional or familial links to ACH
- ACH Authority independence, formation, status and powers
- Local panel membership, coordination and resourcing
- Ministerial discretions
- Multiple exemptions from the assessment pathway
- Registration and use of intangible ACH
- Inequitable appeal rights, inconsistent penalties and broad defences

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Submission on the NSW Draft Aboriginal Cultural Heritage Bill 2018

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17 April 2018

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Executive summary

We welcome the opportunity to provide feedback on the Draft Aboriginal Cultural Heritage Bill 2018 (**‘the Draft Bill’**). We appreciate the move towards independent Aboriginal cultural heritage (**‘ACH’**) legislation and some of the new governance concepts, namely:

- The establishment of an ACH Authority
- Local mapping and strategic planning
- State of ACH reports
- Aboriginal ownership of ACH
- Conservation agreements and management plans

We have examined the Draft Bill against the five reform aims identified by the NSW Office of Environment and Heritage (**‘OEH’**):

1. Broader recognition of ACH values
2. Decision-making by Aboriginal people
3. Better information management
4. Improved protection, management and conservation of ACH
5. Greater confidence in the regulatory system

Our submission elaborates on the following serious areas of concern:

- Status of Aboriginal people with traditional or familial links to ACH
- ACH Authority independence, formation, status and powers
- Local panel membership, coordination and resourcing
- Ministerial discretions
- Multiple exemptions from the assessment pathway
- Registration and use of intangible ACH
- Inequitable appeal rights, inconsistent penalties and broad defences

We urge the Minister to draft a Bill that reflects the strong preferences expressed by Aboriginal people in earlier consultations.

We urge the Minister to submit a completed and revised Draft Bill to public consultation before introducing a final Bill to Parliament.

Aim 1: Broader recognition of ACH values

Objects and Definitions: Traditional/Aboriginal Owners

The NSW Government acknowledges the ‘strong preference’ expressed by Aboriginal people in earlier consultations, being that only people with cultural authority speak for ACH.¹ This preference is consistent with current Australian and New South Wales law that prioritises the status of Aboriginal people with traditional or familial links to an area.² Draft Bill Section 3 ignores this preference.

Current Australian law defines a person with traditional or familial links to an area as a person who (a) is a direct descendent of the original Aboriginal inhabitants of the area and (b) has a cultural association with the area that derives from the traditions, observances, customs, beliefs or history of those inhabitants.³ The law refers to these people as Traditional Owners, or Aboriginal Owners (in NSW).⁴ The *Aboriginal Land Rights Act 1983* (NSW) (**‘ALRA’**) outlines the process for identifying and registering Aboriginal Owners in NSW.⁵ Unfortunately, the register is largely incomplete.

Where there are no registered Aboriginal Owners, NSW law requires Local Aboriginal Land Councils (**‘LALCs’**) to take action to protect ACH in the area.⁶ LALCs must represent the interests of all Aboriginal people living in an area. This includes people who have recently moved to the area, people with a historical connection to the area, and people with a traditional connection to the area.⁷ There is no legal requirement to prioritise the voices of people with a traditional connection to the area when exercising the protection power.

A complete register of Aboriginal Owners is vital to the establishment of culturally appropriate ACH frameworks and processes, but it takes substantial time and resources to assess applications for registration. The Registrar must also prioritise the assessment of applications from people claiming a traditional

¹ State of NSW and Office of Environment and Heritage, *A proposed new legal framework: Aboriginal cultural heritage in NSW* (2017).

² See *Native Title Act 1993* (Cth) Section 223; *Aboriginal Land Rights Act 1983* (NSW) Sections 52(2)(e), 106(2)(e), 171; *Aboriginal Cultural Heritage Act 2003* (Qld) Section 35(7); *Aboriginal Heritage Act 2006* (Vic) Section 7.

³ See e.g. *Aboriginal Land Rights Act 1983* (NSW) Section 171; *Aboriginal Heritage Act 2006* (Vic) Section 7.

⁴ *Aboriginal Land Rights Act 1983* (NSW) Section 171.

⁵ *Aboriginal Land Rights Act 1983* (NSW) Section 171.

⁶ *Aboriginal Land Rights Act 1983* (NSW) Section 52(4).

⁷ *Aboriginal Land Rights Act 1983* (NSW) Section 54(2A).

association with certain crown land.⁸ Better resourcing of the Registrar would help advance a complete register. It is also possible to streamline the registration process by providing for the automatic registration of people who are party to a registered native title determination or registered Indigenous Land Use Agreement ('ILUA'). These people have already established a cultural connection to the relevant land. We do not support the automatic inclusion of registered native title claimants because the decision to register a native title claim is an administrative one. It is not an assessment of the validity of the claim.⁹ This is also the case with unregistered ILUAs.

Recommendations

Amend Section 3 to include an Object that recognises the priority status of Aboriginal Owners.

Amend Section 3(a)(i) to ensure a *culturally appropriate* legal framework.

Amend Section 3(b) to ensure *culturally appropriate* and effective processes for conserving and managing ACH.

Amend Section 5 to include a definition of Aboriginal Owner (see ALRA Section 171(2)).

Delete ALRA Section 171(3) that requires the Registrar to prioritise applications from people claiming a connection to certain crown land.

Insert new ALRA Section 171(3) to allow for the automatic registration of parties to registered native title determinations and registered ILUAs.

Ensure the Registrar of Aboriginal Owners has sufficient resources to fulfil the function of registering Aboriginal Owners for all NSW.

⁸ Being landowners of lands registered under the *National Parks and Wildlife Act 1974* (NSW) Schedule 14 or land subject to *Aboriginal Land Rights Act 1984* (NSW) Section 36A.

⁹ See *Gudjala No.2 v Native Title Registrar* [2008] FCAFC 157 [66] - [67].

Aim 2: Decision-making by Aboriginal people

ACH Authority: Independence

We support the establishment of the ACH Authority (**'the Authority'**). We also support the Ministerial appointment of members because it allows the Authority to secure the privileges of a NSW Government agency.¹⁰

We do not support the proposal to allow the Minister to remove a Chairperson, Deputy or other member at any time,¹¹ without consultation or reason. This arbitrary power unnecessarily expands the usual Ministerial power to remove members for impropriety, bankruptcy, incapacity or the conviction of a criminal offence. It also allows the Minister to control the Authority by removing members with contrary views. This undermines the protection against Ministerial control assured by Section 7(1).

Recommendation

Delete Schedule 1 Clauses (5)(d) and (5)(2) that allow the Minister to remove a member without cause, at any time.

ACH Authority: Formation

The Draft Bill contains no process for nominating Authority members.¹² The OEH aim to include this process in the final Bill submitted to Parliament,¹³ but Aboriginal people will have no opportunity to comment on the final mechanism. This is not a culturally appropriate way to establish the process for nominating members to the main ACH governance body.

Recommendation

Ensure the Minister submits a completed and revised Draft Bill to public consultation before introducing a final Bill to Parliament.

¹⁰ State of NSW, *Classification and Remuneration Framework for NSW Government Boards and Committees* (2015).

¹¹ Draft Bill Schedule 1 Clauses 5(2), 7(2).

¹² Draft Bill Section 8(3).

¹³ State of NSW and Office of Environment and Heritage, *A proposed new legal framework: Aboriginal cultural heritage in NSW* (2017) p. 16.

ACH Authority: Status

The Draft Bill does not clarify the status of the Authority, beyond it being a NSW Government agency.¹⁴ This allows the Minister to determine member remuneration rates.¹⁵ Considering the changeable nature of political priorities, it is important that the Draft Bill safeguard a minimum status for the Authority. This will ensure a transparent process for determining member remuneration in the years to come.

Recommendations

Delete Schedule 1 Clause 3 that allows the Minister to determine remuneration 'from time to time'.

Insert a new Schedule 1 Clause 3 that safeguards the status of the Authority as a Group B entity under the *Classification and Remuneration Framework for NSW Government Boards and Committees*.¹⁶

Local ACH panels: Membership

The Draft Bill accords no priority to Aboriginal Owners on local panels. This is inconsistent with existing Australian law and the strong preference expressed by Aboriginal people in earlier consultations that only people with cultural authority speak for ACH. It is also unnecessary because existing legal mechanisms provide for the identification of Aboriginal Owners and appointment of interim representatives. As recognised in an earlier submission to this inquiry:

Section 71G(2) of the *National Parks and Wildlife Act* ('NPWA') is... a statutory mechanism that can temporarily resolve 'who speaks for Country' by legally recognising and Ministerially appointing Aboriginal persons to represent those with cultural association until such time as the Aboriginal Owner registration processes undertaken in accordance with the *Aboriginal Land Rights Act* are completed.¹⁷

Draft Bill Section 15 vests the ACH Authority with the power to appoint members. This power could easily extend to the appointment of interim representatives.

¹⁴ Draft Bill Section 7(2).

¹⁵ Draft Bill Schedule 1 Clause 3.

¹⁶ State of NSW, *Classification and Remuneration Framework for NSW Government Boards and Committees* (2015).

¹⁷ Wonnarua Nation Aboriginal Corporation, *Final Submission to ACH Reform* (2016).

We urge the NSW Government to legislate to restrict local panel membership to registered Aboriginal Owners, or interim representatives appointed by the Authority. This provides a culturally appropriate legal framework from within which the Authority can develop more detailed membership policies and procedures.¹⁸ The inclusion of a dispute resolution mechanism will keep the Authority accountable for its appointment decisions.

Recommendations

Amend Section 15 to restrict membership of local panels to registered Aboriginal Owners or interim representatives appointed by the Authority.

Amend Section 15 to include an interim appointment process pending formal registration of Aboriginal Owners for the area (see NPWA Section 71G(2)).

Amend Section 15 to require the Authority to have regard to registration criteria for Aboriginal Owners when making an interim appointment.

Amend Section 15 to include a dispute resolution mechanism that allows Aboriginal people to query appointments by the Authority.

Local ACH panels: Functions and support

We support the local panel functions listed in Draft Bill Section 16, where local panels comprise registered Aboriginal Owners or interim representatives. We see a potential overlap arising between these functions and the current LALC power to take action to protect local ACH. To avoid confusion, we recommend corresponding amendments to the *Aboriginal Land Rights Act 1983* (NSW) to clarify that local ACH panels deal with ACH matters. This clarification will help local ACH panels and LALCs work together to advance the cultural, social and economic development of local peoples.

Recommendation

Delete ALRA Section 52(4)(a) that vests LALCs with the power to take action to protect local ACH.

¹⁸ Draft Bill Section 17.

Local ACH panels: Coordination of establishment

We support the prohibition on delegating Authority power to establish local panels.¹⁹ We do not support the proposal to direct the Authority to vest LALCs with the power to coordinate the establishment of local panels. This totally negates the Section 13(3) power of the Authority to delegate this function to an Authority committee, LALC or other Aboriginal organisation. It also directs the Authority to vest the power in a local body that represents the interests of all Aboriginal people in the area, not just those with a cultural connection to ACH. The statutory power of LALCs to take action to protect ACH²⁰ should not override the legal and community preference for coordination by people with cultural connections to ACH.²¹

It is possible to honour this preference by according coordination priority to bodies comprising only Aboriginal Owners, such as bodies representing the holders of a registered native title determination or registered ILUA. Where necessary, the Authority can form and appoint an interim coordination body. This approach provides a firmer foundation on which to build local panels that are a 'recognised source of cultural authority at the local level'.²²

Recommendations

Amend Section 13(3) to accord appropriate priority to local bodies representing only Aboriginal Owners.

Amend Section 13(3) to allow the Authority to form and appoint an interim body to exercise the coordination power.

Delete Section 13(4) Note that states an intention to vest LALCs with coordinating power.

¹⁹ Draft Bill Section 13(2)(a).

²⁰ *Aboriginal Land Rights Act 1983* (NSW) Section 52(4).

²¹ See e.g. *Aboriginal Cultural Heritage Act 2003* (Qld) Section 14(3); *Aboriginal Heritage Act 2006* (Vic) Sections 3, 7, 131(3)(a).

²² State of NSW and Office of Environment and Heritage, *A proposed new legal framework: Aboriginal cultural heritage in NSW* (2017) p. 7.

Local ACH panels: Remuneration and resourcing

The Draft Bill fails to ensure the fair remuneration of local members and the sufficient allocation of resources to carry out local functions (i.e. mapping, planning, negotiating and advising). It is unfair to expect local people to carry out these functions without any financial guarantee. Financial insecurity also makes it difficult to attract members and plan ahead.

It is possible to amend the Draft Bill to ensure the fair remuneration of local members and adequate resourcing of local panels. Section 65(d) already permits the appropriation of Government funds for any purpose prescribed by the Act. Amending the Draft Bill to require the fair remuneration and adequate resourcing of local panels would allow for the appropriation of money for this purpose.

Recommendations

Insert Section 16(4) to ensure the fair remuneration of local members.

Insert Section 16(5) to ensure the provision of sufficient resources to local panels.

Extend Section 65(d) to state that appropriation purposes include the remuneration of local members and resourcing of local panels.

Aim 3: Better information management

ACH Information System: Access to restricted data

The Draft Bill allows various people to access secret and sensitive information on the restricted access database.²³ It contains no protection for secret women or men's business. It instead allows access by Authority members and other people authorised by the Regulations.²⁴ To ensure a culturally sensitive approach to data collection, the Draft Bill should confirm that people who provide restricted data have the right to determine access conditions and permissions.

Recommendation

Amend Section 19(3)(a) to prohibit any access to restricted data without the written permission of the people who provide it.

²³ Draft Bill Section 19(3).

²⁴ Draft Bill Section 19(7).

Aim 4: Improved protection, management and conservation of ACH

Declarations of ACH: Ministerial discretion and review rights

The Authority can recommend that the Minister declare ACH for protection under the Act.²⁵ The Authority must consult relevant local panels, landholders and land managers before making a recommendation, and have regard to any relevant provisions in the Regulations or local ACH plan.²⁶ It is unclear why the Draft Bill does not also require consultation with leaseholders before the making of a recommendation.

The Draft Bill vests the Minister with final authority to determine whether to declare tangible ACH.²⁷ This reflects the fact that declarations 'provide a high level of permanent protection' and may affect private and public land.²⁸ No one has the right to merits review of this important decision. They can only seek a judicial review. Judicial review cases consider whether the Minister took into account relevant matters. The Draft Bill lists no relevant matters.

Recommendations

Amend Section 18(4) to include leaseholders in the list of relevant parties.

Amend Section 18 to allow any relevant party to seek dispute resolution before the making of a recommendation.

Amend Section 18 to require the Minister to approve recommendations agreed to by all relevant parties, unless contrary to the Objects of the Act.

Amend Section 18 to require the Minister to provide written reasons to the Authority for any refusal to approve a recommendation.

Amend Section 18 to allow any relevant party to seek merits review of a Ministerial decision to refuse/approve a recommendation.

²⁵ Draft Bill Section 18(1).

²⁶ Draft Bill Section 18(4).

²⁷ Draft Bill Section 18(1).

²⁸ State of NSW and Office of Environment and Heritage, *A proposed new legal framework: Aboriginal cultural heritage in NSW* (2017) p. 31.

Conservation agreements: Proposals by public authorities

We welcome the Authority power to execute ACH conservation agreements.²⁹ We have serious concerns regarding the scope of Ministerial power to permit public authorities to develop land subject to a conservation agreement.

The Draft Bill requires public authorities to obtain Ministerial consent to carry out development on land subject to a conservation agreement.³⁰ The Minister may consent if of the opinion that 'there is no practical alternative' to that development.³¹ It is unclear what this means. What is clear is that such development does not have to be for 'an essential public purpose or purpose of special significance to the State'.³²

If the Minister consents, the Minister can direct the Authority to vary or terminate a conservation agreement deemed incompatible with the proposal.³³ No compensation is payable to the Authority, local panel or Aboriginal Owners upon such a direction, despite compensation being available to affected landowners.³⁴

Unlike orders to vary conservation agreements made under the *National Parks and Wildlife Act 1974* (NSW) ('NPWA'),³⁵ the Minister is not required to table a direction to vary or terminate an ACH conservation agreement in Parliament. The Authority has no right to merits review of the Ministerial consent or direction. The Draft Bill provides for dispute resolution as per disputes concerning management plans,³⁶ but it is unclear how that mechanism transposes to conservation agreements.

The above process for dealing with public authority development on land subject to a conservation agreement is concerning in light of the number of permits to destroy ACH issued to public authorities each year.³⁷ The process is unlikely to promote ACH conservation³⁸ or public respect of ACH.³⁹ It undermines the power of the Authority to enter into and enforce conservation agreements, and ignores a valuable opportunity to trigger offset negotiations.

²⁹ Draft Bill Section 28(1).

³⁰ Draft Bill Section 34(1).

³¹ Draft Bill Section 34(2)(b).

³² This is expressly dealt with in Draft Bill Section 34(2)(c).

³³ Draft Bill Section 34(3).

³⁴ Draft Bill Section 34(6).

³⁵ *National Parks and Wildlife Act 1974*(NSW) Section 69I(4).

³⁶ Draft Bill Sections 34(8), 51.

³⁷ See OEH, Current AHIP Register <<http://www.environment.nsw.gov.au>>.

³⁸ Draft Bill Section 3.

³⁹ Draft Bill Section 3.

Recommendations

Amend Section 34(2) to limit Ministerial consent to proposals that are (a) compatible with ACH conservation agreements, (b) for an essential public purpose or (c) for a purpose of special significance to the State.

Amend Section 34 to require the Minister to table a direction to vary or terminate a conservation agreement in Parliament.

Amend Section 34 to require the Minister to prioritise the Objects of the Act and views of the Authority when forming an opinion on consent.

Amend Section 34 to allow the Authority, relevant local panel, or affected Aboriginal Owner to seek merits review of any Ministerial consent or direction to vary or terminate a conservation agreement.

Amend Section 34 to require public authorities to negotiate offset arrangements with local panels affected by a direction to vary or terminate a conservation agreement.

Amend Section 34(8) to include a dispute resolution mechanism that is particular to disputes arising under this Section.⁴⁰

Conservation agreements: Mining and petroleum exemptions

The Draft Bill allows the Minister to direct the ACH Authority to vary or terminate a conservation agreement deemed incompatible with a mining or petroleum authority.⁴¹ The requirement that the Minister consider Authority submissions before making this direction⁴² is meaningless because Section 35 expressly states that an ACH conservation agreement cannot prevent the carrying out of mining and petroleum activities.⁴³ The ACH Authority has no right to merits review of a direction to vary or terminate a conservation agreement, or access to dispute resolution.⁴⁴ The Minister is not required to consider the Objects of the Act or to table the direction in Parliament.⁴⁵ We strongly oppose this exclusion of mining and petroleum applications and activities from the Draft Bill.

⁴⁰ See e.g. *National Parks and Wildlife Act 1974* (NSW) Section 69J.

⁴¹ Draft Bill Section 31(7).

⁴² Draft Bill Section 31(8).

⁴³ Draft Bill Section 35.

⁴⁴ Draft Bill Section 31(7).

⁴⁵ Compare *National Parks and Wildlife Act 1974* (NSW) Section 69D(5).

We reject the argument that the *Mining Act 1992 (NSW)* and *Petroleum (Onshore) Act 1991 (NSW)* offer sufficient protection for ACH. These Acts serve an entirely different purpose to ACH conservation. The Acts do require special consent for mining and petroleum activities on certain reserve lands,⁴⁶ but this does not extend to land subject to an ACH conservation agreement. Landowners, native titleholders and registered native title claimants have some opportunity to negotiate land access arrangements with the holder of an exploration licence, but Aboriginal Owners of other lands have no such opportunity.

Recommendations

Delete Section 31(7) that allows the Minister to direct the Authority to vary or terminate a conservation agreement deemed inconsistent with a mining or petroleum authority.

Delete Section 35 that allows the consent authority for mining or petroleum applications and holder of a mining or petroleum authority to ignore ACH conservation agreements.

Amend the *Mining Act 1992 (NSW)* and *Petroleum (Onshore) Act 1991 (NSW)* to require applicants for mining or petroleum authorities on land subject to an ACH conservation agreement to secure Ministerial consent under the ACH Act.

Insert a new Draft Bill Section 31(7) to prescribe the following:

- The Minister must prioritise the Objects of the Act and views of the ACH Authority in deciding whether to approve mining or petroleum activities on land subject to a conservation agreement.
- The Minister must only approve applications accompanied by an ACH assessment report or approved management plan.
- The Minister can only direct the Authority to vary or terminate a conservation agreement if there is an approved management plan.
- The mining or petroleum proponent has the right to merits review of a Ministerial refusal to approve the application.

⁴⁶ See e.g. *Mining Act 1992 (NSW)* Dictionary; *Petroleum (Onshore) Act 1991 (NSW)* Section 70; *National Parks and Wildlife Act 1974 (NSW)* Sections 41, 54, 58O, 64.

ACH assessment pathway: Exclusion of major projects

The Draft Bill exempts State Significant Development ('**SSD**') and State Significant Infrastructure ('**SSI**') from the Part 5 assessment pathway.⁴⁷ SSD and SSI are projects with large financial and human investment, such as mining, coal seam gas productions, ports, electricity stations and waste facilities.⁴⁸

OEH assert that the Secretary's Environmental Assessment Requirements will 'adopt the key features of the assessment pathway'.⁴⁹ We reject this assurance on the basis that Draft Bill Schedule 4 makes no such direction. OEH assert that the exclusion reflects SSD and SSI exemptions in other Acts. We reject this justification for exempting projects with the greatest potential to harm ACH from the key ACH protection mechanism.

Recommendations

Delete Section 60(1) that exempts SSD/SSI from special consent procedures.

Amend *Environmental Planning and Assessment Act 1979* (NSW) ('**EPA Act**') Section 4.15 to require the SSD consent authority to consider an ACH assessment report or approved management plan.

Amend EPA Act Section 4.38 to require the SSD consent authority to refuse applications unaccompanied by an ACH assessment report or approved management plan.

Delete EPA Act Section 4.41(d) that exempts SSD applicants from requiring a permit to harm ACH (and do not substitute).

Amend EPA Act Section 5.15 to require SSI applicants to submit an ACH assessment report or approved management plan.

Amend EPA Act Section 5.19 to require the SSI consent authority to consider an ACH assessment report or approved management plan.

Delete EPA Act Section 5.23(1)(d) that exempts SSI applicants from requiring a permit to harm ACH (and do not substitute).

⁴⁷ Draft Bill Section 60(1)(a).

⁴⁸ *State Environmental Planning Policy (State and Regional Development) 2011* Schedule 1.

⁴⁹ State of NSW and Office of Environment and Heritage, *A proposed new legal framework: Aboriginal cultural heritage in NSW* (2017) p. 40.

ACH assessment pathway: Exemption of low impact activities

The *National Parks and Wildlife Regulation 2009* (NSW) Reg 80B lists many ‘low impact activities’. We do not support the exemption of these activities from the ACH assessment pathway. The list refers to low environmental impact activities, not low ACH impact activities. Stage 1 of the proposed ACH assessment pathway is well equipped to weed out low ACH impact activities. The strict liability offence for harming ACH provides additional protection by exempting activities that cause trivial or negligible harm.

Recommendation

Do not exempt low impact activities from the assessment pathway.

ACH management plans: Balancing of proponent interests

The Draft Bill states that management plan negotiations must ensure a balance ‘between the obligations of the proponent and the authorised harm’ to ACH.⁵⁰ This phrase is unclear. It seems to import an additional priority into the Objects of the Act, being the balancing of proponent interests with ACH interests. Draft Bill Section 49(4) strengthens this view. It requires the Authority to consider the impacts of the proposal on the Aboriginal community *and* proponent in deciding whether to approve an ACH management plan.

Provisions that direct the Authority to accord equal priority to proponent interests are contrary to the proposed Objects of the Act. Such provisions weaken the independence of the Authority and strengthen the merits review case of proponents. A direction that the Authority consider the actual Objects of the Act is sufficient to protect proponent interests that correspond with the public interest.

Recommendations

Delete Section 48(2)(c) that requires a balance between Aboriginal and proponent interests.

Amend Section 49(4) to require the Authority to have regard only to the interests of the Aboriginal community and Objects of the Act in deciding whether to approve a management plan.

⁵⁰ Draft Bill Section 48(2).

Intangible ACH: Registration and use

The Draft Bill proposes a disturbing system for managing intangible ACH. We use the case of Traditional Knowledge on native plant uses and properties to highlight multiple areas of serious concern. Product developers' prize this knowledge because it helps pinpoint commercially valuable species from within a pool of thousands.

Aboriginal groups with traditional links to an area hold Traditional Knowledge on native plants that grow in that area. The Draft Bill does not recognise the special status of these groups. It instead allows groups comprised of non-Aboriginal people, and people with traditional links to other areas, to apply for exclusive rights to exploit this knowledge.⁵¹ For example, Draft Bill Section 37(c) allows joint management boards to register for exclusive rights to exploit Traditional Knowledge. These boards comprise non-Aboriginal people from government, environmental organisations and neighbouring properties. It is inconceivable that NSW law would allow groups comprising non-Aboriginal people to register for exclusive rights to exploit Traditional Knowledge.

A single plant species can grow across many tribal lands. Each Aboriginal Owner group may hold similar knowledge on the plant's uses and properties. Each may have different aspirations in relation to that knowledge. Each may have different rules regulating the use of the knowledge. The Draft Bill allows a single group or person to secure exclusive rights to exploit a piece of knowledge, without the consent of and to the exclusion of other cultural authorities for identical or similar knowledge.⁵² These knowledge holders may not share the aspiration to make the knowledge publically available in the public online portal, or to benefit from its authorised commercial use. The Draft Bill requires the Authority to consult 'relevant' local panels and strategic plans,⁵³ but this is insufficient to ensure the consent of all cultural authorities.

The Draft Bill allows the Authority to delegate the registration of intangible ACH to a single member of the ACH Authority, an LALC, a NSW Government agency, the head of a Public Service agency, a local council, and to anyone else prescribed by the regulations.⁵⁴ Final determinations to register intangible cultural heritage are complex cultural decisions that may require consideration of

⁵¹ Draft Bill Section 37.

⁵² Draft Bill Section 38(1).

⁵³ Draft Bill Section 36(2)(a).

⁵⁴ Draft Bill Sections 13(1), 13(2).

sensitive matters beyond the local and regional level. We think it inappropriate to allow the Authority to delegate this function.⁵⁵

Of most concern is that the Authority must register secret knowledge on a *public online portal*, to trigger the exclusive right to exploit that knowledge.⁵⁶ We strongly oppose this compulsory disclosure requirement for three reasons. First, the knowledge loses its secrecy as soon as it is registered.⁵⁷ This jeopardises future commercial opportunities for registered owners, such as securing a patent over that knowledge or a market niche for a new plant-based product. Second, the Draft Bill allows free public access to the knowledge for non-commercial purposes.⁵⁸ This allows a researcher to access and publish the knowledge in a book or other format.⁵⁹ Any person can freely use that knowledge to develop a new product. Third, the Draft Bill does not define 'use'. The common definition refers to direct application in research and development. This does not include use as a lead in product development. Application of this definition would mean that any person could freely use knowledge from the portal as a lead in product development.

The criminal prosecution of unauthorised commercial uses depends upon enforcement action by the NSW Government. Civil proceedings depend upon enforcement action by the Authority. Both proceedings are expensive, risky and unlikely to deliver favourable outcomes under the Draft Bill.

Recommendations

Delete Sections 36-38, with a commitment to insert sensible provisions later.

We offer to work with the NSW Government to develop these provisions.

⁵⁵ Draft Bill Section 13(1).

⁵⁶ Draft Bill Section 36(3).

⁵⁷ Draft Bill Section 19(3).

⁵⁸ Draft Bill Sections 19(3)(b), 38(1).

⁵⁹ Copyright only prohibits a researcher from reproducing the exact words used in the portal, not the idea behind them.

Aim 5: Confidence in the regulatory system

Defences: Low impact activities

The Draft Bill allows the Regulations to exempt ‘low impact activities’ from the strict liability offence of harming ACH.⁶⁰ We do not support the exemption of the proposed low environmental impact activities from an Act intended to protect ACH. We believe the exemption of activities that cause trivial or negligible harm to ACH is sufficient.⁶¹ We recommend the final Bill vest the Authority with power to define ‘trivial or negligible’.

Recommendations

Amend Section 43(1) to exclude exemptions for low impact activities from the strict liability offence.

Amend Section 41(2) to authorise the Authority to define trivial and negligible.

ACH Management Plan: ACH Code of Practice

Draft Bill Section 54(1) empowers the ACH Authority to prepare and submit to the Minister a draft Code of Practice for the purposes of assessing whether proposed activities will harm ACH. The Minister may make any modifications ‘as the Minister considers appropriate’.⁶² There is no requirement for the Minister to consult or negotiate these changes with the ACH Authority, and no right to merits review of this unilateral decision.⁶³

Recommendation

Amend Section 54 to state that the Minister may only modify the submitted Code of Practice with the approval of the Authority.

⁶⁰ Draft Bill Section 43(1).

⁶¹ Draft Bill Section 42(2)(b).

⁶² Draft Bill Section 54(3).

⁶³ Draft Bill Section 54(4).

Offences and penalties: Major discrepancy with other Acts

The Draft Bill penalties for each Tier are significantly different to similar penalties in the EPA Act.⁶⁴ For example, the maximum Tier 1 penalty under the EPA Act for failing to comply with an order is \$5 million for corporations and \$1 million for individuals. Under the Draft Bill, the maximum Tier 1 penalty for failing to comply with a stop work order is \$1.65 million for corporations and \$3300 000 for individuals.⁶⁵ We do not consider EPA Act contraventions more serious than ACH Act contraventions. We also query why the Draft Bill does not carry over the offence for knowingly destroying ACH in circumstances of aggravation.⁶⁶

Recommendations

Ensure all Draft Bill penalties and offences equate with similar offences and penalties in the EPA Act.

Ensure all offences and penalties meet or exceed those under current law.

Compliance and enforcement: Resourcing

The Authority must bring enforcement proceedings for civil offences. The Draft Bill makes no express provision for funding to fulfil this important enforcement function.

Recommendation

Amend Section 65 to allow Parliament to appropriate sufficient funds for enforcement actions.

⁶⁴ *Environmental Planning and Assessment Act 1979* (NSW) Section 9.52-9.54.

⁶⁵ Draft Bill Section 119.

⁶⁶ *National Parks and Wildlife Act 1974* (NSW) Section 86(1).

Conclusion

We welcome some of the innovative concepts contained in the Draft Bill. We highlight some serious concerns in the detail, and propose feasible ways forward. We are happy to discuss these matters further.

Most importantly:

We urge the Minister to draft a Bill to reflect the strong preferences expressed by Aboriginal people in earlier consultations.

We urge the Minister to submit a completed and revised Draft Bill to public consultation before introducing a final Bill to Parliament.

We believe these two measures will help secure the community support needed to implement this legislative milestone.

Summary of recommendations

Aim 1: Broader recognition of ACH values	
<i>Objects and Definitions: Traditional/Aboriginal Owners</i>	<p>Amend Section 3 to include an Object that recognises the priority status of Aboriginal Owners.</p> <p>Amend Section 3(a)(i) to ensure a <i>culturally appropriate</i> legal framework.</p> <p>Amend Section 3(b) to ensure <i>culturally appropriate</i> and effective processes for conserving and managing ACH.</p> <p>Amend Section 5 to include a definition of Aboriginal Owner (see ALRA Section 171(2)).</p> <p>Delete ALRA Section 171(3) that requires the Registrar to prioritise applications from people claiming a connection to certain crown land.</p> <p>Insert new ALRA Section 171(3) to allow for automatic registration of parties to registered native title determinations and registered ILUAs.</p> <p>Ensure the Registrar of Aboriginal Owners has sufficient resources to fulfil the function of registering Aboriginal Owners for all NSW.</p>
Aim 2: Decision-making by Aboriginal people	
<i>ACH Authority: Independence</i>	Delete Schedule 1 Clauses (5)(d) and (5)(2) that allow the Minister to remove a member without cause, at any time.
<i>ACH Authority: Formation</i>	Ensure the Minister submits a complete and revised Draft Bill to public consultation before introducing a final Bill to Parliament.
<i>ACH Authority: Status</i>	<p>Delete Schedule 1 Clause 3 that allows the Minister to determine remuneration 'from time to time'.</p> <p>Insert a new Schedule 1 Clause 3 that safeguards the status of the Authority as a Group B entity.</p>
<i>Local ACH panels: Membership</i>	<p>Amend Section 15 to restrict membership of local panels to registered Aboriginal Owners or interim representatives appointed by the Authority.</p> <p>Amend Section 15 to include an interim appointment process pending formal registration of Aboriginal Owners for the area.</p> <p>Amend Section 15 to require the Authority to have regard to current registration criteria for Aboriginal Owners when making an interim appointment.</p> <p>Amend Section 15 to include a dispute resolution mechanism that allows Aboriginal people to query appointments by the Authority.</p>
<i>Local ACH panels: Functions and support</i>	<p>Amend Section 13(3) to accord appropriate priority to local bodies representing only Aboriginal Owners.</p> <p>Amend Section 13(3) to allow the Authority to form and appoint an interim body to exercise the coordination power.</p> <p>Delete Section 13(4) Note that states an intention to vest LALCs with coordinating power.</p>
<i>Local ACH panels: Coordination of establishment</i>	<p>Amend Section 13(3) to accord appropriate priority to local bodies representing only registered Aboriginal Owners.</p> <p>Amend Section 13(3) to allow the Authority to form and appoint an interim body to exercise the coordination power, similar to the mechanism provided in NPWA Section 71G (2).</p> <p>Delete Section 13(4) Note that states an intention to vest LALCs with coordinating power.</p>
<i>Local ACH panels: Remuneration and resourcing</i>	<p>Insert Section 16(4) to ensure the fair remuneration of local members.</p> <p>Insert Section 16(5) to ensure the provision of sufficient resources to local panels.</p> <p>Extend Section 65(d) to state that appropriation purposes include remuneration of local members and resourcing of local panels.</p>
Aim 3: Better information management	
<i>ACH Information System: Access to restricted data</i>	Amend Section 19(3)(a) to prohibit any access to restricted data without the written permission of the people who provide it.

Aim 4: Improved protection, management and conservation of ACH	
<i>Declarations of ACH: Ministerial discretion and review rights</i>	<p>Amend Section 18(4) to include leaseholders in the list of affected parties.</p> <p>Amend Section 18 to allow any affected party to seek dispute resolution before the making of a recommendation.</p> <p>Amend Section 18 to require the Minister to approve recommendations agreed to by all affected parties, unless contrary to the Objects of the Act.</p> <p>Amend Section 18 to require the Minister to provide written reasons to the Authority for any refusal to approve a recommendation.</p> <p>Amend Section 18 to allow any affected party to seek merits review of a Ministerial decision to refuse/approve a recommendation.</p>
<i>Conservation agreements: Proposals by public authorities</i>	<p>Amend Section 34(2) to limit Ministerial consent to proposals that are (a) compatible with ACH conservation agreements, (b) for an essential public purpose, or (c) for a purpose of special significance to the State.</p> <p>Amend Section 34 to require the Minister to table a direction to vary or terminate a conservation agreement in Parliament.</p> <p>Amend Section 34 to require the Minister to prioritise the Objects of the Act and views of the Authority when forming an opinion on consent.</p> <p>Amend Section 34 to allow the Authority, relevant local panel, or affected Aboriginal Owner to seek merits review of any Ministerial consent or direction to vary or terminate a conservation agreement.</p> <p>Amend Section 34 to require public authorities to negotiate offset arrangements with local panels affected by a direction to vary or terminate a conservation agreement.</p> <p>Amend Section 34(8) to include a dispute resolution mechanism that is particular to disputes arising under this Section.</p>
<i>Conservation agreements: Mining and petroleum exemptions</i>	<p>Delete Section 31(7) that allows the Minister to direct the Authority to vary or terminate a conservation agreement deemed inconsistent with a mining or petroleum authority.</p> <p>Delete Section 35 that allows the consent authority for mining or petroleum applications and holder of a mining or petroleum authority to ignore ACH conservation agreements.</p> <p>Amend the <i>Mining Act 1992</i> (NSW) and <i>Petroleum (Onshore) Act 1991</i> (NSW) to require applicants for mining or petroleum authorities on land subject to an ACH conservation agreement to secure Ministerial consent under the ACH Act.</p> <p>Insert a new Draft Bill Section 31(7) that prescribes the following:</p> <ul style="list-style-type: none"> • The Minister must prioritise the Objects of the Act and views of the ACH Authority in deciding whether to approve mining or petroleum activities on land subject to a conservation agreement. • The Minister must only approve applications accompanied by an ACH assessment report or approved management plan. • The Minister can only direct the Authority to vary or terminate a conservation agreement if there is an approved management plan. • The mining or petroleum proponent has the right to merits review of a Ministerial refusal to approve the application.
<i>ACH assessment pathway: Exclusion of major projects</i>	<p>Delete Section 60(1) that exempts SSD.SSI from special procedures for consent.</p> <p>Amend <i>Environmental Planning and Assessment Act 1979</i> (NSW) ('EPA Act') Section 4.15 to require the consent authority to consider an ACH assessment report or approved management plan.</p> <p>Amend EPA Act Section 4.38 to require SSD consent authority to refuse applications unaccompanied by an ACH assessment report or approved management plan.</p> <p>Delete EPA Act Section 4.41(d) that exempts SSD applicants from requiring a permit to harm ACH (and do not substitute).</p> <p>Amend EPA Act Section 5.15 to require SSI applicants to submit an ACH assessment report or approved management plan.</p> <p>Amend EPA Act Section 5.19 to require SSI consent authority to consider an ACH assessment report or approved management plan.</p> <p>Delete EPA Act Section 5.23(1)(d) that exempts SSI applicants from requiring a permit to harm ACH (and do not substitute).</p>
<i>ACH assessment pathway: Low impact activities</i>	<p>Do not exempt low impact activities from the assessment pathway.</p>

<i>ACH management plans: Balancing of proponent interests</i>	Delete Section 48(2)(c) that requires a balance between Aboriginal and proponent interests. Amend Section 49(4) to require the Authority to have regard to the interests of the Aboriginal community and Objects of the Act in deciding whether to approve a management plan.
<i>Intangible ACH: Registration and use</i>	Delete Sections 36-38, with a commitment to insert sensible provisions later.
Aim 5: Confidence in the regulatory system	
<i>Defences: Low impact activities</i>	Amend Section 43(1) to exclude exemptions for low impact activities from the strict liability offence. Amend Section 41(2) to authorise the Authority to define trivial and negligible.
<i>ACH Management Plan: ACH Code of Practice</i>	Amend Section 54 to state that the Minister may only modify the submitted Code of Practice with the approval of the Authority.
<i>Offences and penalties</i>	Ensure Draft Bill penalties and offences equate with similar offences and penalties in the EPA Act. Ensure all offences and penalties meet or exceed those under current law.
<i>Compliance and enforcement</i>	Amend Section 65 to allow Parliament to appropriate sufficient funds for enforcement actions.