THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CCWG:BMlb080724

8 July 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: Ashna.Taneja@lawcouncil.au

Dear Dr Popple,

Nature Positive Reforms (Stage 2) - Parliamentary Inquiry

The Law Society appreciates the opportunity to provide input into a Law Council submission to the Senate Environment and Communications Legislation Committee in response to its inquiry into the terms of the Nature Positive (Environment Information Australia) Bill 2024, the Nature Positive (Environment Protection Australia) Bill 2024, and the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024. The Law Society's Climate Change Working Group contributed to this submission.

CEO powers

The Nature Positive (Environment Protection Australia) Bill 2024 establishes a Commonwealth statutory entity, Environment Protection Australia (EPA) and the Chief Executive Officer of the EPA (CEO) as a key decision maker. Various schedules of the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 transfer decision making powers and functions under a range of environmental legislation to the CEO.[1]

The proposed new section 515AAA to be inserted into the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) also provides:

> 515AAA Delegation to CEO or member of staff of EPA
>
> (1) The Minister may, by signed instrument, delegate all or any of the Minister's powers or functions under this Act to:
> (a) the CEO; or
> (b) a member of the staff of EPA.

The Minister's decision-making can in this way be delegated in relation to, among other things, controlled actions, assessment processes and approval of controlled actions under the EPBC Act. These are significant potential powers to delegate. Against this background, the CEO is

[1] See, for example, Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (Cth) schs 2-10.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
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an independent entity and not subject to direction by the Minister.[2] The Minister may issue a statement of expectations[3] to which the CEO must respond,[4] but the CEO is not bound by the statement of expectations.

We suggest that further consideration should be given as to whether there are any circumstances in which the Minister should be able to direct the CEO, including where the Minister has delegated substantive functions under the EPBC Act to the CEO. It may also be appropriate for the CEO to be required to apply the Minister's statement of expectations or to be required to have regard to the statement of expectations, when exercising powers or functions.

In our earlier submission, which we enclose, we suggested that there needs to be a clear delineation of functions where the same body has both approval and enforcement functions. We suggested that while it was not proposed to establish an independent skill-based board to advise the CEO, such an independent board could perform important functions which would enhance the integrity and transparency of the proposed model, such as advising on the appointment of the CEO and determining policies and long-term strategies. It would also be appropriate, in our view, for an independent board to sign off on prosecutions. Without this key plank in the governance structure, we are concerned that while the present model ensures the independence of the CEO, the CEO's powers are potentially unconstrained, and not subject to appropriate review.

Limits on reviews

In our earlier submission we also expressed our concern on the proposed limits on the review of decisions made by the EPA, given the EPA's wide-ranging powers. We reiterate our concern in relation to this issue as well as our support for the Law Council's previous advocacy on the importance of standing, particularly in this context.

Environment Protection Orders

An example which illustrates the practical implications of the limits on review, relates to environment protection orders (EPOs). The Minister (and, after the transfer, the CEO) will have the power to issue an EPO under the EPBC Act in certain circumstances. These can include orders to stop works, do works in a certain way, etc, and may have material impact on a recipient. These are not subject to natural justice requirements and merits review is not available.

We suggest that the legislation could provide that, after the initial EPO order of a certain duration is made, there is a requirement to make any extension of the term of the order subject to natural justice. If an EPO has a duration longer than a specified period, we consider that there should be the ability to seek a merits review.

Offences for environmental auditors

We are concerned that the penalties for offences by environmental auditors may be disproportionately high[5] and may limit the number of qualified and experienced persons willing to act in these roles. The legislation should require a high standard of activity but have regard

[2] Nature Positive (Environment Protection Australia) Bill 2024 (Cth) proposed s14: 'Subject to this Act and any other Act, the CEO has discretion in the performance or exercise of the CEO's functions or powers and is not subject to direction by any person in relation to the performance or exercise of those functions or powers.'
[3] Ibid s16.
[4] Ibid s17.
[5] Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (Cth) sch 11 s 461.

to the fact that the regime relies on persons being willing to do this work – and on their insurers being willing to allow them to do so. If key functions under the Act are to be given to third party auditors rather than the EPA or the Department, this should be recognised appropriately.

Penalties under the EPBC Act

We note that the Nature Positive (Environment Amendments and Transitional Provisions) Bill 2024 would introduce a strong civil penalty-based compliance regime for the new EPA, for penalties under the EPBC Act, based on existing schemes under the *Corporations Act 2001* (Cth) and the *Australian Investments and Securities Commission Act 2001* (Cth).[6] We query whether the materially increased maximum penalties for offences under the existing EPBC are warranted. A well-resourced, well-educated and experienced enforcement team working with proponents to support compliance may be a more effective means of obtaining better compliance across the board.

Please do not hesitate to contact Liza Booth, Head of Commercial and Advisory Law Reform on 02 99260202 or liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,

Brett McGrath
President

Encl.

[6] Ibid sch 11 item 47.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CCWG/EP&DC/IIC:BMlb220324

22 March 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: Ashna.Taneja@lawcouncil.au

Dear Dr Popple,

Nature Positive Laws: Reforming the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

The Law Society appreciates the opportunity to provide input into a Law Council submission in response to the Commonwealth Government's proposed new Nature Positive Laws, which would reform the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The Law Society's Climate Change Working Group, and the Environmental Planning and Development and Indigenous Issues Committees contributed to this submission.

Assessment and Approval Pathways

The Law Society supports the proposed rationalisation of the assessment and approvals processes through the establishment of the dual low impact and standard pathways. We make the following observations.

The "not inconsistent" test

Under the proposed arrangements, as outlined in the *Consultation on National Environmental Laws* papers,[1] the CEO of the new Environmental Protection Authority (EPA) is not permitted to either make an "approval not required" decision (Low Impact Pathway) or approve an application to take an action (Standard Pathway) unless the CEO is satisfied that the action "is not/would not be inconsistent with" relevant National Environmental Standards (NES).[2] In the case of Standard Pathway applications, the CEO must also be satisfied that the decision "would not be inconsistent with" a wide range of other instruments, including international agreements, statutory plans/strategies, statements, and principles.[3] In addition, the CEO must "have regard to" a further extensive range of matters, instruments and principles when

[1] Department of Climate Change, Energy, the Environment and Water, Consultation on National Environmental Laws 30-31 October 2023 ('October 2023 Papers') and Consultation on National Environmental Laws 13-14 December 2023 ('December 2023 Papers').
[2] October 2023 Papers, 9-12, [3.1] - [3.4].
[3] Ibid 11-12, [3.4].

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
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deciding whether to approve the taking of an action and in imposing any conditions of approval.

We acknowledge that this process is designed to align with the Government's stated intention to introduce significant environment protection and biodiversity conservation reforms that represent a paradigm shift from merely managing environmental decline to achieving nature positive repair and restoration of the environment. Arguably, a more stringent test that requires the CEO to be satisfied the proposed action "is consistent with" any relevant NES or statutory document would be warranted to achieve this aim.

We are also concerned that, on the face of the proposals, there may be insufficient flexibility to accommodate reasonable actions that might not otherwise be characterised as "not inconsistent with" prescribed matters. For example, if land clearing is listed as a key threatening process under a future recovery strategy, an action that involved any land clearing would fail the "not inconsistent" test. This appears to be the case, notwithstanding mitigation actions that may be taken and despite the provisions contemplating mitigating actions as mandatory matters for consideration by the CEO prior to approving an action.[4] The volume of matters that must be considered and the varying tests to be applied make the framework challenging to navigate and do not foster certainty.[5] Robust assessment is strongly supported, but the framework must be clear if another fundamental aim of the reforms, "speeding up decisions and making it easier for companies to do the right thing",[6] is also to be achieved.

Standard Pathway - flexibility on reporting requirements

As a matter of general principle, we support the requirement for applicants under the Standard Pathway to provide a reasonable estimate of category 1 and 2 greenhouse gas (GHG) emissions,[7] subject to our comments below.

We suggest that consideration should be given to affording some applicants flexibility in relation to the information or documents required to support applications relating to low impact actions, where the reporting requirements may be overly onerous for those applicants, particularly where the applicant is an individual or a small business. An application by a farmer, for example, to fence land or plant a crop may meet the required standard of environmental significance[8] requiring an application via this pathway, because of the intended location of the action, but the action itself may have a low impact. The requirement to report on estimated GHG emissions in such cases may be onerous, where the applicant is not otherwise subject to any such reporting obligations. In such cases, we suggest that it may be more appropriate for the CEO of the EPA to provide some flexibility, by providing project specific requirements based on a materiality benchmark, or by exempting such applications from this specific requirement, so as not to overburden projects which may result in no material emissions.

[4] Ibid 12-13 [3.5].
[5] Ibid 9-13. See the matters under paragraph 3.1 that must be considered (and must not be considered) in making a decision whether approval is required; the requirements under paragraph 3.4 that must be satisfied to approve the taking of an action listed, and the mandatory considerations under paragraph 3.5 in deciding whether to approve the taking of an action.
[6] Department of Climate Change, Energy, the Environment and Water, Nature Positive Plan: better for the environment, better for business, December 2022, iii ('Nature Positive Plan').
[7] Some of our members consider that it would be appropriate for larger entities, otherwise subject to reporting obligations, to also provide estimates of Scope 3 GHG emissions.
[8] For example, the proposed action will take place in an area that is the designated habitat of a protected species.

Low Impact Pathway - Flexibility on reporting requirements

We note that this is a voluntary process to seek confirmation from the CEO of the EPA that an action does not require an approval, because it is not environmentally significant for protected matters, and is designed to provide certainty to applicants. However, we suggest that retaining the requirement to provide the prescribed estimates of GHG emissions for all applicants may lead to certain parties 'self-assessing' and avoiding use of this process.

The same comments are relevant here in relation to providing exceptions to any proposed requirement for reasonable estimates of category 1 and 2 GHG emissions for those applicants identified above. We do not suggest that it is appropriate to provide an exception for larger entities, for which the reporting impact may be less significant.

Exhibiting statutory documents

It is unclear, on the information provided, what the process for adoption of future statutory documents, such as recovery strategies, may be. As the CEO of the EPA must assess whether approving the taking of an action is consistent with certain statutory documents, we consider that adoption of these instruments should be subject to public exhibition.

Timeframes for assessment of applications

It is noted that an application for approval may lapse where the proponent has not responded to a request to do a particular thing, or where the proponent is not contactable. For clarity and certainty, we suggest that a minimum timeframe is prescribed, and that lapsing should not affect appeal rights.

First Nations engagement and participation in decision-making

The issue of appropriately engaging with First Nations people in decision-making processes, particularly in relation to appropriate assessment and approval pathways, where First Nations rights and interests are affected, is critical. We understand that the National Environmental Standards, yet to be developed, will address this issue in more detail. We would welcome the opportunity to provide more information at the appropriate time and take this opportunity to provide for the Law Council's information the attached submission recently made by the Law Society of NSW to the Department of Industry, Science and Resources in respect of its consultation on clarifying consultation requirements for offshore oil and gas storage regulatory approvals. The issues raised in respect of that consultation, in relation to the nature of how governments should engage with First Nations people in processes relevant to First Nations cultural heritage, are also relevant in this context.

We also note the recent decision of the Full Court of the Federal Court of Australia in *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26. The Full Court found that, in making a determination on a future act, the Native Title Tribunal erred in not taking into account environmental concerns as part of its mandatory consideration of the public interest. We also note that, in discussing the interaction of decision-making powers and native title interests, the Court commented specifically on underlying policy, stating at [236] – [237] as follows:

> 236 The Parliament chose to give the effective veto in relation to the doing of particular future acts to the Tribunal rather than the native title party. This policy choice has recently received some scrutiny: see Joint Standing Committee on Northern Australia, 'A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge' (October 2021), Recommendation 4:

> The Committee recommends that the Australian Government review the *Native Title Act 1993* with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime.

237 The Committee recommended that such review specifically address, *inter alia*:

> • the current operation of the future act regime and other relevant parts of the NTA including s 31 (right to negotiate), s 66B (replacement of the applicant) and Part 6 (the operation of the NNTT)
>
> • developing standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the United Nations Declaration of the Rights of Indigenous People (UNDRIP)

In order to be consistent with Australia's international obligations, and with domestic arrangements, including the National Agreement on Closing the Gap, First Nations people must play a genuine part in decision-making in respect of these reforms. We suggest that there is an opportunity now to closely consider and implement Recommendation 4 of the Juukan Gorge Final Report.[9]

Matters of National Environmental Significance

While we note the key intent of the Nature Positive Plan is to deliver a conceptual shift from a defence of the status quo to net improvement of the environment, careful calibration of the tests to "maintain and improve conservation", "minimise harm" and "address detrimental cumulative impacts" is required to avoid internal inconsistency. For example, the latter two could be characterised as assuming impacts contrary to "maintain and improve conservation".

Strategic Assessments

In certain prescribed circumstances, the CEO of the EPA may suspend a strategic assessment approval. This may adversely impact an affected person relying on that approval through no fault of that person. In our view, any proposed suspension should consider submissions not only from the approval holder but also persons seeking to rely on that approval. We would also suggest that a variation should be considered as a remedy before suspension.

Accreditation to undertake assessments

We acknowledge the extensive accreditation process proposed and note the Government's intention to implement a framework where state and territory agencies will be able to apply to become accredited under national environmental law and to provide a single decision-maker for projects. We strongly support streamlining decision-making processes to avoid duplication.

Ministerial Call in Power

Under this proposed power, the Minister may elect to make an environmental approval decision that would otherwise be made by the CEO of the EPA or an accredited decision-maker. In making this decision, the Minister must 'have regard to' various factors, which include, in addition to a number of other factors, the NES, social and economic matters, and other matters the Minister considers relevant.[10]

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[9] Joint Standing Committee on Northern Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (October 2021).
[10] October 2023 Paper.

Recommendation 3 of the Samuel Review stated as follows:

> b. The Act should require that activities and decisions made by the Minister under the Act, or those under an accredited arrangement, be consistent with National Environmental Standards.
> c. The Act should include a specific power for the Minister to exercise discretion to make a decision that is inconsistent with the National Environmental Standards. The use of this power should be a rare exception, demonstrably justified in the public interest and accompanied by a published statement of reasons which includes the environmental implications of the decision.

The proposed power does not align with this recommendation, as the Minister must only 'have regard to' the NES, rather than ensure any decision is consistent with those standards, and can have regard to a wide range of other factors in making a decision.

The Minister must publish the reasons for electing to make an approval decision and the reasons for the final decision on approval as soon as practicable,[11] but is not obliged to publish a statement which includes the environmental implications of the decision, nor does the decision have to be demonstrably justified in the public interest. We query how this very broad power aligns with the third essential guiding principle of the reforms, 'restoring integrity and trust to systems and environmental laws' and to principles of transparency and accountability.

We suggest that the Minister's proposed call-in power is very broad, relatively unfettered, and has the potential to cut across the independence of the EPA as the primary decision-making body, particularly as the Minister can exercise those powers at any time before a determination is made. If the power is to be available, the circumstances for exercise, including but not limited its exercise in relation to the 'national interest exemption', should be clearly prescribed and parameters for what is deemed 'critical' clearly specified in the legislation.

An independent EPA

The establishment of an independent national EPA is a key plank of the reforms.

> The EPA will undertake assessments and make decisions about development proposals, including approval conditions. It will issue permits and licenses and undertake compliance and enforcement activities. The EPA will establish and publish its compliance and enforcement policy. The EPA will make decisions in accordance with National Environmental Standards and be supported by an advisory group to ensure it has access to relevant skills of the reforms.[12]

In designing the governance structures underpinning a regulatory model, establishing roles for strategic guidance, management of risk, integrity and transparency are all relevant factors in maintaining independence. In our view, there are several critical points where the issue of independence comes into focus under the proposed model.

We note that it is not proposed to establish and independent skill-based board to advise the CEO of the EPA, on the basis that this is not appropriate "[g]iven the Minister's role in sensitive environmental decision making'.[13]

In our view, it is critical for there to be a clear delineation of functions where the same body has both approval and enforcement functions. An independent skills-based board should appoint, or at least advise, on the appointment of the CEO. Such a board could also determine policies and long-term strategic plans, including policies and plans relating to organisational governance and risk management, oversee management of the EPA, and produce guidelines

[11] Ibid.
[12] Nature Positive Plan (n 6) 28.
[13] Ibid 29. This is a reference to the Minister's call in power and specifically the national interest exemption.

about criminal prosecutions.[14] We consider that it is appropriate for an independent board to sign off on prosecution actions. We note also that the concerns raised above in relation to First Nations engagement and partnership continue to be relevant in this context.

Limits on reviews

We consider that the proposed limits on the review of decisions made by the EPA are concerning, given the EPA's wide-ranging powers. The Government has chosen not to retain the right to limited merits review of decisions contained in the EPBC Act, contrary to recommendation 13 of the Independent Review of the EPBC Act. The stated rationale for not including such rights of review is as follows:

> Legislating National Environmental Standards, greater transparency and establishing an independent EPA are more effective ways to improve and assure the quality of decision making. Limited merits review may also prevent projects from proceeding in a timely manner, as matters are held up by courts, which can lead to unreasonable and unfair costs for proponents. Members of the public will continue to be able to bring legal claims against decisions of the EPA or the minister for errors of law.[15]

We suggest that the restrictions set out in Recommendation 13 address some of these concerns and we endorse the Law Council's previous advocacy on the importance of standing, particularly in this context.[16]

Closed consultation

We acknowledge that the Law Council has previously communicated its concerns to the Minster about the closed consultation to date in relation to development of the exposure draft legislation and the difficulty in providing valuable input on the proposals without access to the exposure draft provisions. We would appreciate the opportunity to participate in any later stages of consultation, as greater detail in relation to the legislation and its implementation emerges.

Please do not hesitate to contact Liza Booth, Head of Commercial and Advisory Law Reform on 02 99260202 or liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,

Brett McGrath
President

Encl.

[14] The Board of the NSW Environment Protection Agency has these powers: https://www.epa.nsw.gov.au/about-us/our-organisation/epa-board
[15] Nature Positive Plan (n 3) 5.
[16] Law Council of Australia, Statutory Review of the *Environment Protection and Biodiversity Conservation Act 1999*, 20 April 2020, Appendix 2.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC:BMvk080324

8 March 2024

Department of Industry, Science and Resources
Industry House
10 Binara Street
Canberra

By webform

Dear Sir/Madam,

Clarifying consultation requirements for offshore petroleum and greenhouse gas storage regulatory approvals

The Law Society of NSW is grateful for the opportunity to contribute to a submission in respect of the consultation paper on clarifying consultation requirements for offshore petroleum and greenhouse gas storage regulatory approvals (**consultation paper**).

Comments in principle

We agree with the view stated in the consultation paper that "consultation is essential to good decision-making and is mutually beneficial to all parties." This issue, as it relates to consultation with First Nations people, is one that has been canvassed exhaustively in respect of the preservation of Aboriginal cultural heritage, and in the federal jurisdiction, most recently in relation to the final report into the inquiry into the destruction of the 46,000 year old caves at Juukan Gorge (***Juukan Gorge Report***)[1]. In considering the sufficiency of consultation requirements, our view is that the regulatory approach must at first instance be consistent with international law obligations that provide for the protection of all aspects of Aboriginal cultural heritage, including art 27 of the *International Covenant on Civil and Political Rights*, arts 11 and 12 of the *United Nations Declaration on the Rights of Indigenous Peoples* (**Declaration**). Article 11 of the Declaration states:

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

Article 12(1) of the Declaration provides:

> Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have

[1] Commonwealth Joint Standing Committee on Northern Australian, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge,* October 2021, online: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

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> access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

Further Art 8(j) of the Convention on Biological Diversity states that:

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

In this context, it is also worth noting that the *Juukan Gorge Report* at [7.80] set out minimum standards that should apply in respect of Aboriginal cultural heritage legislation. While these standards do not all directly touch on the consultation requirements, they are all relevant to underpinning a holistic approach to genuine consultation:

- a definition of cultural heritage recognising both tangible and intangible heritage
- a process by which cultural heritage sites will be mapped, which includes a record of past destruction of cultural heritage sites (with adequate safeguards to protect secret information and ensure traditional owner control of their information on any database)
- clear processes for identifying the appropriate people to speak for cultural heritage that are based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist
- decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage
- a requirement that site surveys involving traditional owners are conducted on country at the beginning of any decision making process
- an ability for traditional owners to withhold consent to the destruction of cultural heritage
- a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent as set out in the UNDRIP
- mechanisms for traditional owners to seek review or appeal of decisions
- adequate compliance, enforcement and transparency mechanisms
- adequate penalties for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners
- the provision of adequate buffer zones around cultural heritage sites
- a right of timely access by Aboriginal and Torres Strait Islander peoples to protected cultural heritage sites
- a process by which decisions can be reconsidered if significant new information about cultural heritage comes to light.

Specific comments

In our view, a relatively flexible approach to consultation should be adopted, that allows for the specific circumstances relevant to First Nations rights in the various states and territories. For example, in NSW, in order to be effective, meaningful consultation would have to be sensitive to the interaction of the *Aboriginal Land Rights Act 1983* (NSW) and the *Native Title Act 1993* (Cth). Existing protocols for communicating with First Nations communities should be observed in order for consultation to be effective. By way of example, we note that regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) requires that, for high level native title decisions, Prescribed Body Corporates (**PBCs**) must consult with the common law native title holders and obtain their consent. Further, PBCs must use a traditional decision making process if one exists. If there is no traditional process, native title holders must agree upon an alternative decision making process.

We suggest that it is undesirable to limit who can speak for Aboriginal cultural heritage, as a broad range of people can be affected, particularly in respect of water rights, which is an evolving area of jurisprudence.

In our view, regulation 25(1)(e) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (**Offshore Environment Regulations**) should be amended. As it is currently drafted, identifying relevant persons for consultation is a subjective decision of the titleholder. This leaves the process potentially open to irrelevant factors, and to distortion by commercial considerations. In our view, there should be an objective approach to identifying relevant persons for consultation, informed by a public notification process similar to processes provided for in the native title scheme. We note that in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (***Tipakalippa***), the Full Court of the Federal Court, in considering the Appellant's argument that a construction of "interests" that required Mr Tipakalippa and the Munupi clan to be consulted would be unworkable, said at [96]:

> We consider the authorities in relation to processes under the NTA to be illustrative of how a seemingly rigid statutory obligation to consult persons holding a communal interest may operate in a workable manner. Whilst some differences in statutory language exist, the most relevant assistance is to be gained from those authorities that have considered s 251B of the NTA

In the consideration of an appropriately objective consultation process, we suggest that it would be helpful to review [86] – [109] of *Tipakalippa*.

We also suggest consideration of the approach in NSW to Crown land management, where local councils deal with Crown land in a way that ensures compliance with the *Native Title Act 1993* (Cth), whether or not there has been a determination. Before a local council carries out an activity on Crown land, it must first determine whether there is a valid native title pathway, and there must be consideration whether the activity is permitted under the 'future act' regime in the *Native Title Act 1993*. Native title requirements should be considered at the start of project planning so that any native title considerations can be addressed in the site selection and project planning phase.[2]

Timeframes must be flexible and responsive to matters including the significance and complexity of the project, and the ability of the relevant stakeholders to make decisions in an informed way and to engage with the consultation material and their own communities.

In considering whether cultural heritage is adequately considered through, for example, the definition of "environment" in regulation 5 of the Offshore Environment Regulations, we restate our position on what should be protected, as set out in our submission to the Law Council of Australia dated 28 July 2020 in respect of the inquiry into the destruction of the caves at Juukan Gorge, attached.

Finally, we note that the key deficiency in Aboriginal cultural heritage protection in NSW is that there is no clear path for First Nations people to say no to the destruction of Aboriginal cultural heritage, nor are Aboriginal groups properly resourced in relation to the protection of Aboriginal cultural heritage. This also appears to be true in this regulatory framework and, in our view, and consistent with the international rights outlined above, the offshore environment scheme should provide for a clear pathway to prohibition of the destruction of Aboriginal cultural heritage.

[2] See Division 8.3, *Crown Land Management Act 2016* (NSW).

Thank you for the opportunity to contribute. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on 02 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

Brett McGrath
President

Encl.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC:RHvk1957907

28 July 2020

Ms Margery Nicoll
A/Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: leonie.campbell@lawcouncil.asn.au

Dear Ms Nicoll,

Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia

Thank you for your memorandum dated 7 July 2020 inviting input from the Law Society of NSW to a Law Council of Australia submission to the inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia ("inquiry").

The Law Society's submissions are informed by its Indigenous Issues Committee and are directed to paragraph (g) of the inquiry's terms of reference, in respect of the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions. We enclose submissions made in the context of two previous attempts to reform the Aboriginal cultural heritage protection models in NSW. The submissions responded to a 2014 Discussion Paper and a 2018 draft Aboriginal Cultural Heritage Bill. These submissions are provided to set out in more detail the deficiencies in the NSW framework. The discussion below is intended to provide a high level review of the shortcomings of the NSW protection of Aboriginal cultural heritage.

International obligations

In the Law Society's view, the obligation to protect all aspects of Aboriginal heritage arises under various international instruments to which Australia is a party. This includes art 27 of the *International Covenant on Civil and Political Rights*, and art 11 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("Declaration"). Relevantly, art 11 states:

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

Article 12(1) of the Declaration provides:

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

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

What should be protected?

Australia's international obligations are not only in relation to parts and features of the landscape that reflect traditional aspects of Indigenous cultures. They extend to "historical Aboriginal landscape",[1] as well as parts and features of the lands which are significant to cultures of contemporary Aboriginal communities. Cultural values can be derived from post-contact events, history, and relationships to land and water, as well as being embedded in traditions and relationships that are derived from, or as part of a continuity of pre-contact society. Social and cultural values are dynamic, and can change over time.[2] The assessment of Aboriginal cultural heritage values must include all aspects of values in the Burra Charter,[3] not merely an assessment of archaeological significance.[4] It will also be necessary to have regard to a broader landscape context when assessing values, before land management decisions are taken.[5]

Some of the cultural landscape interconnections were considered in *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465 ("*Darkinjung*") where the Land and Environment Court of NSW found:

> 182. Collectively, these definitions of the cultural landscape make clear that the physical aspects of a site (in this case the engraved figures and stone arrangement) should not be considered in isolation but in association with its surrounding spiritual, cultural and physical environment. Justice Toohey, in the *Walpiri and Kartangarurru Kurintiji land claim* (Exhibit A 18) at [69] - [70], cautioned that:
>
> > the word [site] may mislead by generating a tendency to think of sites as particular features of the landscape occupying relatively little space and rendering unimportant the country around them.
>
> 183. Paul Gordon [an Aboriginal stakeholder] makes this distinction clear:
>
> > The carving on the rock is not the site. The site is the carving and the surrounding area and cultural practice that took place at the site. (Exhibit A11 p 31)
> >
> > We look at an object on rock and we call it a woman site ... Why is it a woman on the rock? It's because of story attached to it and the journey that brings people to her and the journey that she keeps going on, and that's the cultural landscape which we haven't considered at all. We are just looking at an object, right there referring to that woman as an object when to us she is a living ancestral being who is still participating and is still doing things in country. (TS D7/394/26-33)

Further, the Court considered the importance (archaeologically, anthropologically and culturally) in determining the significance of a Women's Site, and its place in the cultural landscape. The proponent in this matter did not contest the significance of the Women's Site,

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[1] See for example, Aboriginal Cultural Heritage and Regional Studies, pp.19-21: http://www.environment.nsw.gov.au/resources/cultureheritage/RegionalStudiesfinalSect2comp2.pdf. An example may be historical camps on pastoral properties (which include burial areas) and which may be highly significant to the Aboriginal people who lived and worked there regardless of where they originally came from. *Mehmet v Carter* [2020] NSWSC 413 at [512]-[614] is an example of a case of a burial dating from 1890 being regarded as an "Aboriginal object" albeit in that case the person was buried on his own country.

[2] *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [329].

[3] The Australia International Council on Monuments and Sites (ICOMOS) Charter for the Conservation of Places of Cultural Significance, known as the Burra Charter, was first adopted at Burra in 1979. See https://australia.icomos.org/publications/burra-charter-practice-notes/

[4] *Darkinjung*, [471].

[5] See also *Darkinjung*, [35], [138]-[146], and [179]-[216].

and that it existed within a cultural landscape. However, it argued that there was no adequate evidence of the existence of a cultural landscape beyond the immediate physical limits of the Women's Site of such importance that it would preclude the proposed development.

The Court found that there was convincing evidence indicating the interrelatedness of the elements of the integrated cultural landscape between the Women's Site and other features in the wider area, summarised by the Court as follows at [206]:

- In Aboriginal belief the culture heroes themselves travelled across the landscape, between sites, and were active between sites in this creation journey, creating a cultural landscape which still exists. For instance, Gordon TS D7/394/26-33.
- The extent of sites in the area, including those which relate to the evidence of past life, points to the fact that Aboriginal people traditionally, actively and intensively utilised an area which includes the Rocla land and probably stretching beyond. The area contains elements such as traditional food and water sources, walking routes, camping places, and abundant rock art, much of it relating to the travels of cultural heroes.
- Aboriginal witnesses referred to ceremonies, camping and other activities performed in and around the actual sites.
- They describe it as the habitat of traditionally important, and in some cases, totemic features of the natural environment. The natural features of this landscape have traditional associations.
- Aboriginal people see this landscape in a holistic way, rather than as dots on a map, and feel a strong attraction to it and a need to protect it as a whole.
- The fact that development has taken place in the regional cultural landscape does not negate its importance in Aboriginal eyes, nor does it mean that it is necessarily appropriate to conduct a quarrying operation within this landscape.

It is also significant to note that the Court highlighted that, although the initial significance of the site might be archaeological, it continues to have contemporary social and cultural value as a tangible aspect of connection to land and culture:

> 167. With respect to this issue, Ross outlines how the ascription of contemporary significance to a place upon the location of tangible evidence in this way in a relatively short time is well documented in Aboriginal cultural heritage literature, and comments that such contemporaneousness of meaning does not necessarily reduce the significance of the meanings being assigned. The discovery of such a site, previously recorded as purely archaeological, corroborates a general sense of connection to country and acts to "map" people physically onto country. In a sense the tangible site supports the associations that people already experience and which previously were reported as vaguer feelings of connection and traditional beliefs. Each of the three Aboriginal groups interviewed by Ross stressed their connection to the country around Calga regardless of the existence of particular archaeological sites but the existence of the site acts as a tangible aspect of this connection. It is through the existence of this site that the women's existing knowledge about the country is reified and gives a specific point of connection to place. Ross explains that this kind of mapping onto country and place is a common occurrence in an ecological approach to Aboriginal cultural heritage management (Exhibit R3 Vol 3 Tab 18 Ross report pp 2766, 2768). […]

Aboriginal cultural heritage protection in NSW – deficiencies in the current framework

There is currently no stand-alone legislative protection for Aboriginal cultural heritage in NSW. The *National Parks and Wildlife Act 1974* (NSW) (NPWA) is the key legislation dealing with the protection of Aboriginal cultural heritage in NSW,[6] alongside the regulation of flora and fauna. In the Law Society's view, this protection regime is anachronistic and contains serious deficiencies.

The most significant failing of the NSW regime is that ownership, management and control of Aboriginal cultural heritage is not vested in Aboriginal people. There is no legislative framework requiring Indigenous involvement in decisions regarding Aboriginal cultural heritage, and there is no clear path for Aboriginal people to say no to the destruction of Aboriginal cultural heritage. Further, Aboriginal groups are not properly resourced in relation to the protection of Aboriginal cultural heritage.

Responsibility for managing Aboriginal cultural heritage in NSW rests with a government agency, Heritage NSW. While an Aboriginal Cultural Heritage Advisory Committee has been established under ss 27 and 28 of the NPWA, it plays only an advisory role on any matter relating to the identification, assessment and management of Aboriginal cultural heritage in NSW.[7]

In the view of the Law Society, decisions in relation to the protection of Aboriginal cultural heritage should be a matter for Aboriginal people. We note the following analysis of the decision in *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51 as one example of the importance of policy settings that embed and prioritise Aboriginal culture and values in legislation that is ostensibly intended to be protective:

> The inability of the NPW Act to adequately protect Aboriginal cultural heritage is in part due to the evidentiary burden of proving the significance of an Aboriginal object. The finding that Ausgrid's offence was of "moderate" environmental harm was a direct result of the inability of the prosecution to lead evidence as to the significance of the particular rock engraving and to prove this significance beyond reasonable doubt. The evidence led by the NSWALC [NSW Aboriginal Land Council] and MLALC [Metropolitan Aboriginal Land Council] failed to indicate why this specific rock engraving was culturally important. It focused on the general importance of rock engravings and the high rate of destruction of Aboriginal cultural heritage. This evidentiary issue ultimately led to the imposition of the relatively mild penalty of $4,690.
>
> In order to effectively protect Aboriginal cultural heritage for Aboriginal people, Aboriginal people should have responsibility for determining the significance of an object or area. This determination should not be hindered by the values, preferences or attitudes of people who are external to the Aboriginal culture. Aboriginal heritage is bound up with belief, law, community, cultural practice and identity. Its protection thus requires a holistic approach and should acknowledge the inability to separate notions of tangible and intangible heritage for Aboriginal people.[8] [footnotes omitted]

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[6] For a list of the different pieces of legislation that have some protection effect on Aboriginal heritage, see NSW Office of Environment and Heritage, *Aboriginal heritage legislation in NSW: How the Aboriginal heritage system works,* (2012, South Sydney), 4-6, online https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/how-aboriginal-heritage-system-works-120401.pdf

[7] See NSW Office of Environment and Heritage, *Aboriginal Cultural Heritage Advisory Committee terms of reference*, online: https://www.heritage.nsw.gov.au/what-we-do/aboriginal-cultural-heritage-advisory-committee/achac-terms-of-reference-n/

[8] Packham, Alison, 'Between a rock and a hard place: legislative shortcomings hindering Aboriginal cultural heritage protection' (2014) 31 *Environmental and Planning Law Journal* 75-91.

Who the appropriate Aboriginal people are to make cultural heritage decisions will be a matter for each state or territory, having regard to the relevant statutory frameworks, and should be determined by the Aboriginal people concerned. We note for example that in NSW, there are two mechanisms for the recognition of Aboriginal land rights: the *Aboriginal Land Rights Act* 1983 (NSW) and the *Native Title Act 1993* (Cth). The two systems differ in the rights they provide, and can sometimes exist in the same land.[9]

We also note that only objects, and places that are gazetted, are currently protected, and there are no protections for sites of significance, nor are Aboriginal cultural knowledge and practices legislatively protected. Under the existing regime, proponents of State Significant Infrastructure or State Significant Development projects are not required to seek Aboriginal heritage impact permits (AHIPs), and are exempt from the harm offences set out in the NPWA. Individual planning assessors may require assessment consistent with policies formulated under the NPWA, but may not. It should be noted that as the project under consideration in the *Darkinjung* decision discussed above was a "major project" under the now-repealed Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW), the NPWA did not have application. While the decision turned on the application of a number of the then NSW Office of Environment and Heritage[10] (OEH) policies, including its policy in respect of cultural landscapes,[11] we understand that these policies were not ordinarily applied by the OEH in decisions regarding AHIP applications.

Further, maximum sanctions for unlawful destruction of Aboriginal cultural heritage are relatively small (maximum penalties for the "knowing offence": $275,000 or imprisonment for one year for individuals; $550,000 or imprisonment for two years for an individual in circumstances of aggravation; and $1,100,000 for corporations under s86(1) of the NPWA) and are unlikely to be effective deterrents. In contrast, maximum penalties for similar offences under the *Protection of the Environment Operations Act 1997* (NSW), the *Environmental Planning and Assessment Act 1979* (NSW) and the *Native Vegetation Act 2003* (NSW) are in excess of $1 million for individuals.

Thank you for considering this submission. Questions may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Richard Harvey
President

Encl.

[9] See NSW Aboriginal Land Council, *Comparison of Land Rights and Native Title in NSW*, Factsheet, 2017, online https://www.aboriginalaffairs.nsw.gov.au/pdfs/land-rights/170110-native-title-fact-sheet-1-comparison-of-land-rights-and-native-title-final.pdf

[10] Until 30 June 2020, the government agency responsible for managing Aboriginal cultural heritage was the NSW Office of Environment and Heritage. From 1 July 2020, responsibility for managing Aboriginal cultural heritage was moved to Heritage NSW.

[11] See *Darkinjung,* [179]-[181].

THE LAW SOCIETY
OF NEW SOUTH WALES

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28 March 2014

Aboriginal Culture and Heritage Reform Secretariat
NSW Office of Environment and Heritage
PO Box 1967
Hurstville BC NSW 1481

By email: ach.reform@environment.nsw.gov.au

Dear Sir/Madam,

Reforming the Aboriginal Cultural Heritage System in NSW

I write to you on behalf of the Indigenous Issues Committee ("Committee") of the Law Society of New South Wales in relation to the Government's Heritage Model (the "Government's Heritage Model") which is set out in *Reforming the Aboriginal Cultural Heritage System in NSW* (the "Discussion Paper").

The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee commends the Government for seeking to introduce standalone legislation for the protection of Aboriginal cultural heritage and to provide protection for a broader range of cultural heritage. The Committee is however concerned about a number of aspects of the Government's Heritage Model and in particular, the deficiencies in the protection it affords to Aboriginal cultural heritage. The generality of the Discussion Paper necessitates that the observations of the Committee also be stated in general terms.

1. Background

The object of Aboriginal cultural heritage legislation should be to protect those parts and features of the landscape that are of cultural value to Aboriginal people including those parts and features that comprise or evidence Aboriginal spiritual, material and economic culture. Values in the landscape include parts and features relating to traditional, historical and contemporary values. The obligation to protect all aspects of Aboriginal heritage arises under numerous international instruments to which Australia is a party, including Article 27 of the International Covenant on Civil and Political Rights. More recently Australia has ratified the United Nations Declaration on the Rights of Indigenous Peoples. Article 11(1) of that Declaration confirms:

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

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Australia's international obligations should not be viewed only in relation to parts and features of the landscape that reflect traditional aspects of Indigenous cultures. They must extend to what has elsewhere been termed the "historical Aboriginal landscape",[1] as well as parts and features of the lands which are significant to the cultures of contemporary Aboriginal communities. That necessity arises because of the history and movement of Aboriginal communities in New South Wales. An example of how contemporary Aboriginal cultures may manifest themselves can be understood in relation to former Aboriginal reserves. In 1980, the Select Committee of the Legislative Assembly upon Aborigines (the "Select Committee") noted:

> The majority of Aboriginal people living outside the urban situation live on reserve areas. Many of those communities have existed for very long periods of time, dating from when the forebears of the present generations were moved from their traditional lands to the reserves. These were established in those parts of the State not then considered to be of economic significance.
>
> As a result of this movement very strong historical and cultural ties have developed. The people presently living on reserve areas have come to regard these areas as their own and have developed a strong affinity with these lands.[2]

In many areas those connections remain and have over time been strengthened. For example, Aboriginal people who have connections to reserves and surrounding areas also include the people who live there. Those with connections to cemeteries and burial grounds associated with those reserves are the families of those who are buried there. Associated with these areas can be areas in which Aboriginal people have exercised hunting and fishing activities. It is not only reserves that have these values. Former town fringe camps may have similar features.

Cultural heritage legislation should acknowledge that cultural values are derived from both traditional and contemporary Aboriginal cultures. Cultural values can be derived from post-contact events, history, and relationships to land and water, as well as being embedded in traditions and relationships that are derived from, or as part of a continuity of pre-contact society.

In making these observations the Committee is not understating, or diminishing, the role that Aboriginal people comprising traditional Aboriginal communities must have in decisions relating to Aboriginal cultural heritage. Their role is central. However, once it is acknowledged that Aboriginal cultural relationships to land and water can be derived from a variety of relationships, it needs to be acknowledged that a wide range of Aboriginal people can inform, and need to participate in, processes directed to recognising and protecting cultural heritage processes.

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[1] See for example, NSW Office of Environment and Heritage, *Aboriginal Cultural Heritage and Regional Studies*, pp.19-21; available online: http://www.environment.nsw.gov.au/resources/cultureheritage/RegionalStudiesfinalSect2comp2.pdf (accessed 7 March 2014)

[2] *First report from the Select Committee of the Legislative Assembly upon Aborigines: Report and Minutes of Proceedings* (1980) (the "Keane Report") at para [4.11], p 64

2. Definition of Aboriginal Cultural Heritage

The Committee notes the proposal to define Aboriginal Cultural Heritage as:

> Aboriginal cultural heritage means the practices, representations, expressions, knowledge and skills – as well as associated objects and artefacts – that Aboriginal people recognise as part of their cultural heritage, insofar as these values are reflected in the landscape.[3]

The Committee supports a broad definition of cultural heritage.

3. Protection of Aboriginal Cultural Heritage

The Committee submits that Aboriginal cultural heritage will not be adequately protected by the Government's Heritage Model.

Indeed, in many respects the protection afforded to Aboriginal cultural heritage under the Government's Heritage Model is significantly less than that afforded to non-Aboriginal heritage under the *Heritage Act 1977* (NSW).

The core difficulty with the Government's Heritage Model is that it removes the current system of requiring consent for any interference with Aboriginal cultural heritage and replaces it with a system that does not require any consent at all. Requiring an up-front plan of management is unrealistic and can only contribute to the vulnerability of Aboriginal cultural heritage.

The Committee further submits that despite general assertions in the Discussion Paper, in crucial respects the Government's Heritage Model is not "flexible". Through the imposition of mandatory timeframes the Government's Heritage Model does not allow for any variation between small and large projects, the extent of disturbance to land, or the likelihood of harm to cultural heritage. The Government's Heritage Model also requires complete assessments upfront, with no guarantee of further negotiation, objection, or further assessment, once the nature of any cultural heritage is identified. Of most concern is the fact that it is simply silent on the critical issue of what happens if highly significant cultural heritage is identified, and the Aboriginal community does not want it destroyed.

3.1. Prohibition on destruction

It can be readily accepted that in relation to many items of Aboriginal cultural heritage, the heritage can be protected by avoidance or removal in accordance with an agreed set of protocols. What is appropriate in any given case is a matter that Aboriginal people should decide. The more difficult issue is where agreement cannot be reached and, contrary to the views of Aboriginal people, cultural heritage will be destroyed. In the Committee's view, in those circumstances there must be a mechanism available for the assessment and protection of cultural heritage with the ability to prevent destruction in appropriate cases.

Under the current legislation that power rests with the Director-General who has the power to grant or refuse an Aboriginal Heritage Impact Permit ("AHIP").[4] Where it is not appropriate for cultural heritage to be removed or destroyed the Director-General can refuse to grant the consent. The Queensland[5], Victorian[6], and Western Australian[7] legislation contains similar

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[3] *Reforming the Aboriginal Cultural Heritage System in NSW* (the "Discussion Paper"), p.13
[4] Section 90C, *National Parks and Wildlife Act 1974* (NSW) ("NPWA").
[5] Under ss 86-89 and ss 102-103 of the *Aboriginal Cultural Heritage Act 2003* (Qld), Aboriginal Cultural Heritage Plans need to provide for avoiding or minimising harm to Aboriginal cultural heritage. If no agreement is reached

mechanisms, although they have not always been implemented in a way that effectively protects Aboriginal cultural heritage.

No such mechanism is set out in the Government's Heritage Model. The Government's Heritage Model says that AHIPs will be replaced by agreements.[8] However, the Discussion Paper does not specify that a Local Aboriginal Cultural Heritage Committee ("Local ACHC") can say "No". It only says that if agreement cannot be reached there is mediation, and if that doesn't work the proponent can "proceed with caution" in accordance with the Plan of Management. In this respect the Government's Heritage Model does not appear to be a scheme for the protection of Aboriginal cultural heritage, and it is manifestly deficient.

The Discussion Paper is silent as to whether a cultural heritage management plan can place prohibitions on the interference with cultural heritage. If that is the intention, then it is a failing of the Discussion Paper that it is not set out to enable all stakeholders to understand it and to make submissions on where it arises. The Committee can only assume that this is not the intention, as it sought clarification of where prohibitions could be imposed, and no clarification was forthcoming other than information that discussions are occurring in the public workshops in relation to the issue.[9] Furthermore, the representation throughout the Discussion Paper that the proponent can "proceed with caution" is misleading if the intention is that the proponent cannot in fact proceed.

The Committee notes that the absence of any mechanism to prevent the destruction of cultural heritage is in contrast to the process in relation to items on the State Heritage Register under the *Heritage Act 1977* (NSW) which anticipates that approvals may not be given.[10]

The Committee is of the view that the Government's Heritage Model should be amended to provide a separate procedure where agreement cannot be reached, similar to that recommended by the independent Aboriginal Culture and Heritage Reform Working Party ("the Independent Working Party").[11] Accordingly, the Committee is of the view that if an agreement cannot be reached there should be no interference with cultural heritage without a permit that can only be issued by an Independent Aboriginal Heritage Commission. The new legislation will need to provide clear criteria for the making of that decision. Any party aggrieved by the decision should be able to appeal to the Land and Environment Court. Such a mechanism is essential to ensure that:

(a) any interference with Aboriginal cultural heritage can occur in a transparent and accountable way; and

(b) there is a proper judicial mechanism for the resolution of disputes.[12]

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in the relation to the plan the Minister may approve a plan or refuse to approve it: see s 107(2), *Aboriginal Cultural Heritage Act 2003* (Qld).

[6] Section 40(2), *Aboriginal Heritage Act 2006* (Vic.)

[7] Section 18(3), *Aboriginal Heritage Act 1972* (WA).

[8] Discussion Paper, p.20.

[9] Letter from Aboriginal Cultural Heritage Reform Secretariat to the Law Society of New South Wales received 19 December 2013, p.2.

[10] See s 63, *Heritage Act 1977* (NSW)

[11] Independent Aboriginal Culture and Heritage Reform Working Party, *Reforming the Aboriginal Cultural Heritage System in NSW: Draft recommendations to the NSW Government: A discussion paper*, ("Independent Working Party Report"), p. 32.

[12] An alternative option would be provide that if agreement cannot be reached an application could be made to the Land and Environment Court to provide approval and impose conditions. In this regard the Land and Environment Court could exercise powers similar to that it currently exercises in its Class 1 jurisdiction.

Such an approach would not detract from the underlying approach of the Government's Heritage Model. Having such a mechanism will provide a safety net that will encourage proper assessments and the negotiation of agreements. For large projects, with a long lead time, it will also encourage proponents to engage in the negotiation process at an earlier stage, and to amend, where relevant, their original plans, which would increase the likelihood of agreement being reached.

3.2. Inadequate timeframes

The Discussion Paper makes numerous references to there not being a "one-size-fits-all" approach.[13] However, the Committee submits that mandatory timeframes are a "one-size-fits-all" approach. Nor are they conducive to a scheme which is presented as "flexible".

The Government's Model identifies the following timeframes:

- Proponent contacts the relevant Local ACHC who then provides formal notice of engagement within the mandatory time frame of 10 days.[14]

- There is then a further 10 days in which the proponent and the Local ACHC may meet to discuss the project's needs, cultural needs, assessment needs, methodologies to be applied, protocols and the project.[15]

- The assessments (archaeological, anthropological, community etc.) are then undertaken and once completed, the proponent and Local ACHC negotiate, update and agree on relevant conditions for the final Project Agreement within the mandatory timeframe. The Local ACHC only has 20 days from the date of the receipt of the assessment to negotiate an agreement which then has to be provided to the ACH Register within 10 days.[16]

- If a dispute over a Project Agreement arises, either party may seek assistance from an approved independent dispute resolution service. A resolution is required within a mandatory 35 day time frame.[17]

- The maximum timeframes for managing unexpected finds is said to be 10 days.[18]

In the Committee's view, these timeframes do not reflect the everyday commercial reality. They are unworkable and onerous for Aboriginal people for reasons including the unavoidable difficulties that often occur in convening committees. In practice they will undermine the ability of Local ACHCs to make decisions in an informed way and to engage with their communities in appropriate cases. This deficiency is exacerbated because the Government's Heritage Model anticipates that a "non-response from a committee will enable the proponent to proceed with their activity without committee input".[19] In the Committee's view it is manifestly unreasonable to assume that a "non-response" equates to agreement. Nor is such a position consistent with the international obligations in relation to Aboriginal cultural heritage.[20]

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[13] Discussion Paper, pp. 3, 6, 17, 44.
[14] Ibid, p.33 (48).
[15] Ibid, pp.31 and 33 (48).
[16] Ibid, p.33 (48).
[17] Ibid, p.33 (48).
[18] Ibid, p.34.
[19] Ibid, p.31.
[20] See Articles 18 and 19 of Declaration on the Rights of Indigenous People which set out the rights of Indigenous peoples to participate in decisions that affect them, and to prior, free and informed consent.

More specifically, the mandatory timeframes do not anticipate or accommodate the possibility that the Local ACHC might consider the assessment to be inadequate or require further information, or that the Local ACHC might want to obtain its own advice in relation to any matter arising from the assessment. Nor do the mandatory timeframes anticipate or accommodate the possibility that the Local ACHC might want to consult with the Aboriginal community about any matter arising from the assessment. Indeed, the entire process appears premised on an assumption that the survey will always be adequate and no further information will be necessary. The Committee submits that this assumption is not reliable.

The Committee notes that the proposed timeframes are the same whether the matter at issue is a small excavation or whether it is a large open pit mine. The timeframes are the same regardless of the volume of matters that the Local ACHC is dealing with at a given point in time.

Nor is there consideration for the fact that in relation to major projects there may be a considerable lead time and many environmental studies undertaken. There is no reason why the process for negotiating an Aboriginal cultural heritage agreement should be limited to the time frames identified in those circumstances. The Committee submits that while this might not be the underlying intention, the Government's Heritage Model will in effect act as a disincentive to engage with cultural heritage issues at the outset. Proponents will be aware that they can always rely on the mandatory timeframe and the pre-existing Plan of Management, and if agreement cannot be reached they can "proceed with caution" and potentially disregard the engagement of Aboriginal peoples.

The Committee's view is that at the very least, the Government's Heritage Model needs to be amended to acknowledge that:

(1) upon the receipt of the assessment there may be concern over the quality of the assessment and the Local ACHC may require further work to be undertaken;

(2) the assessment may identify cultural heritage which requires further research and review to identify how to proceed; and

(3) the assessment may identify cultural heritage in relation to which the Local ACHC may wish to consult with the community before identifying appropriate measures and protection.

In acknowledgment of these matters the Government's Heritage Model should be amended to provide flexibility in the proposed timetables to allow for various circumstances where appropriate.

3.3. ACH Maps and Plans of Management

The Government's Heritage Model places heavy reliance on ACH maps and Plans of Management. It anticipates that ACH maps will, among other things:

(1) Document how and why objects, areas and places are significant and how those values need to be conserved; [21]

(2) Develop and record cultural heritage conservation and management strategies; [22]

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[21] Discussion Paper, p.18.
[22] Ibid, p.19.

(3) Identify areas that require future assessment; [23]

(4) Detail the level of conservation required; [24]

(5) Detail procedures for the management of unexpected finds. [25]

It is also intended that the "Plan of Management could be used as a code-based assessment if needed for certain types of projects".[26] The Plans of Management are presented as the default position in the event that agreement cannot be reached in relation to a project. [27]

The Committee has been advised that any appeals will be limited to where an agreement is inconsistent with the approved Plan of Management,[28] which highlights that not only will the Plans act as a default in the event agreement cannot be reached, they will also constrain the parties' negotiation.

In the Committee's view it is unreasonable to expect that Plans of Management can be prepared in advance so that they satisfactorily deal with all contingencies that may arise in the assessment process, or that they can adequately anticipate all cultural heritage and set out a comprehensive code as to how it will be managed. There needs to be flexibility for Aboriginal people to thoroughly address the various stages of the assessment process without duress. In particular such Plans should have sufficient flexibility to enable Local ACHCs to leave certain decisions, including how cultural heritage will be managed, to a more detailed consideration once assessments have been completed.

The proposed reliance on Plans of Management is also problematic as Local ACHCs and the Aboriginal community ultimately have no control over its content. The Local ACHC can prepare a draft but the final form is determined by the Minister having regard to submissions of any person made from a public consultation process. There is no guarantee that the final form of the Plan of Management may not depart significantly from what the Local ACHC intended.

For this reason the Committee does not believe that Plans of Management should be approved by the Minister, but instead that they should be approved by an Independent Aboriginal Heritage Commission *and* the circumstances in which it can depart from what is proposed by the Local AHC should be limited and clearly stated in the heritage legislation.

3.4. Project Agreements

The Committee supports the concept of cultural heritage being negotiated at a local level. However, the scheme in the Government's Heritage Model is problematic for the following reasons:

(1) Agreements are stated to be the approval mechanism which replaces the AHIPs that are currently required.[29] As noted above there is capacity in relation to AHIPs for the Director-General to decline giving approval. No such capacity is proposed in relation to these Agreements.

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[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid, p.33 (48).
[28] Letter from Aboriginal Cultural Heritage Reform Secretariat to the Law Society of New South Wales received 19 December 2013.
[29] Discussion Paper, p.20.

(2) Given the importance of Project Agreements, the time frames are inadequate for the reasons set out above.

(3) The process assumes that there is complete contingency set out in the Plan of Management, such that if agreement is not reached then the matter will simply default to the Plan of Management.

(4) Although the table on page 30 of the Discussion Paper states that Project Agreements are required where there is "High ACH Value", other sections of the Paper indicate this is not the case. The Discussion Paper states that if agreement cannot be reached then a proponent "can proceed with caution" in relation to a Plan of Management.

(5) Fundamentally, if the outcome is already determined, it is difficult to see what will be negotiated (particularly in the proposed 20 day period). The Committee submits that in practice, the Plan of Management will become the high water mark and in most instances there will simply be a negotiation (albeit a short unsatisfactory one) as to whether it will be watered down. A Local ACHC will have no bargaining power to impose any additional conditions as a developer would simply need to wait 20 days and then "proceed with caution" in accordance with the Plan.

The Committee's view is that in this respect, the Government's Heritage Model is deficient compared to the model proposed by the Independent Working Party. The Independent Working Party's model had a similar timetable, but a failure to negotiate an outcome did not result in a predetermined outcome.[30] As stated above, the Committee is of the view that if agreement cannot be reached then Aboriginal cultural heritage should not be interfered with in the absence of a permit issued by an Independent Aboriginal Heritage Commission in accordance with clearly identified criteria; with the proposed legislation providing for an appeal mechanism to the Land and Environment Court.

3.5. Appeals

The Discussion Paper states that the new legislation will:

> provide independent dispute resolution support and appeal processes. These processes will include timeframes that enable fair, transparent and timely decisions. Appeals based on judicial review of process will be available through the Land and Environment Court (L&EC).[31]

The Paper does not however identify what decisions will be allowed to be appealed, although it notes that it will be a Local ACHC who will have standing to bring such appeals.[32]

The Law Society of NSW has subsequently been advised that:

> the Government model for reforming the ACH Legislation proposes a judicial review right regarding the administration of the processes under the Act. In addition the draft ACH model proposes merits appeals will be limited to Project Agreements where the appellant considers the agreement is inconsistent with the approved plan of management.[33]

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[30] Independent Working Party Report, p.32.
[31] Discussion Paper, p.7.
[32] Discussion Paper, p.16.
[33] Letter from Aboriginal Cultural Heritage Reform Secretariat to the Law Society of New South Wales received 19 December 2013.

The Committee submits that the Government's Heritage Model remains vague in relation to appeals, which does not assist any party or community member to make detailed comment on an issue which is central to the effective operation of the Government's Heritage Model.

On its face the appeal rights appear too narrow. The Committee notes that appeals limited to "process" do not allow for appeals in relation to the substance at issue in cultural heritage decisions. Appeals relating to the conformity of Agreements with Plans of Management do not provide protection for cultural heritage, particularly if the Plan of Management is silent or ambiguous on a particular issue. Furthermore, for the reasons above, the Committee is of the view that, where agreement cannot be reached in relation to the removal or destruction of cultural heritage, any act should only proceed through granting a permit issued by an Independent Aboriginal Heritage Commission, and with the option to appeal that decision to the Land and Environment Court.

4. Independent Aboriginal Heritage Commission

The Government's Heritage Model provides for the Office of Environment and Heritage ("OEH") to oversee the implementation of the new cultural heritage regime. This is in contrast to the Independent Working Party recommendation that an "independent statutory body, with a clear governance and accountability framework"[34] be established. The functions envisaged by the Independent Working Party for the Independent Commission are set out at pages 11-12 of the Independent Working Party Report. The Committee considers that the Independent Working Party's proposal is preferable to the Government's Heritage Model as it creates an office independent of Government with a specialised focus on Aboriginal cultural heritage. The Independent Working Party noted that through its workshops, roundtable sessions and submissions, there was general agreement that new heritage legislation should be "administered by a statutory Aboriginal Commission".[35]

The Committee also notes that in 2011 both NSWALC and NTSCorp made submissions that the Government should introduce an independent commission in relation to Aboriginal Cultural Heritage as follows:

> NSWALC and NTSCORP call on the Government to support the establishment of an independent Aboriginal Heritage Commission with Aboriginal commissioners who are appointed by the Aboriginal communities of NSW. In accordance with principles of self determination, the Commission must have responsibility for overseeing the protection and management of Aboriginal culture and heritage in NSW, with decentralised control of the day-to-day management responsibilities for Aboriginal culture and heritage vested in the local Aboriginal communities.[36]

The Committee supports the approach of NTSCorp and NSWALC. Furthermore, the Committee is of the view that an independent commission would act as a safety net for the protection of cultural heritage similar to that proposed by the Working Group.

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[34] Independent Working Party Report, pp.11-12.
[35] Ibid, p.4.
[36] Submission by the New South Wales Aboriginal Land Council and the NTSCorp Ltd in response to the Reform of Aboriginal Culture and Heritage in NSW *Our Culture in Our Hands*, December 2011; available online: http://www.environment.nsw.gov.au/resources/cultureheritage/29NSWALCNTSCOR.pdf (accessed 7 March 2014).

The Government has opposed this proposal on the basis that:

> The NSW Government has made a concerted effort to address unnecessary layers of bureaucracy. The additional red tape, with the financial and time burdens associated with this administrative layer, would be prohibitive.[37]

With respect, the Committee submits that the explanation is an unconvincing response in circumstances where the NSW Government appears to take no issue with an independent Heritage Council in relation to non-Aboriginal heritage under the *Heritage Act 1977* (NSW).[38]

5. Local Aboriginal Cultural Heritage Committees

The Committee supports the principle that Aboriginal people should make decisions about Aboriginal cultural heritage. This tenet is underpinned by international law and the accepted modern concept of Aboriginal self-determination. The Committee is of the view that the form and composition of Local ACHCs are ultimately a matter for Aboriginal people to determine. While it should not be expected that there will be complete consensus in the Aboriginal community in relation to this issue, unless there is broad agreement in relation to the Local ACHC model it will lack legitimacy as a policy to protect Aboriginal cultural heritage.

The Committee however makes a number of general observations in relation to the Local ACHCs proposed in the Government's Heritage Model.

5.1. General issues

While the Committee supports Local ACHCs as being the primary body for making decisions in relation to cultural heritage, even with the best intentions, it is doubtful that selecting 10 individuals from a community will be effective in providing broad representation of all Aboriginal people with an interest in cultural heritage or enable all cultural heritage to be taken into account through that process. It is even more doubtful if Local ACHCs are regional rather than local bodies.

Cultural knowledge can be specific to particular families. Some decisions in relation to cultural heritage may warrant broader community involvement and consensus. Furthermore, it will not always be the case that those with a high level of cultural knowledge will always be available to participate in these committees. There are already great demands placed on Elders to manage and participate in many programs affecting their communities. Others may have cultural knowledge but may not have the administrative skills to effectively participate or implement the cultural heritage decisions. In other instances, because of age or frailty, those with cultural knowledge may prefer others to participate in that role on their behalf.

For this reason if Local ACHCs are to be introduced, the scheme must provide flexibility in the timeframes to allow Aboriginal communities to consult with their communities as part of the process where appropriate.

5.2. Composition of Local ACHCs

The Committee believes that for the Government's Heritage Model to be effective, the mechanism by which the composition of Local ACHCs is determined needs to have broad support within the Aboriginal community. If it does not, it will not have any legitimacy and the model will fail in its purpose.

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[37] Discussion Paper, p.40.
[38] See ss 7-9, *Heritage Act 1977* (NSW).

While it is ultimately a matter for the Aboriginal community to determine, the Committee is concerned that the composition of Local ACHCs is too narrowly formulated by the Government's Heritage Model.

Once it is accepted by Government that Aboriginal cultural heritage can take a variety of forms, including aspects of both traditional and contemporary Aboriginal communities, it then follows that the Local ACHCs must also be representative of those interests.

For reasons set out below, the Committee is concerned that the Government's Heritage Model is deficient to the extent that it excludes, and identifies no role for Local Aboriginal Land Councils ("LALCs") established under the *Aboriginal Land Rights Act 1983* (NSW) ("ALRA"). That exclusion is likely to cause divisions within the Aboriginal community that are neither necessary nor appropriate.

The Committee makes the following additional observations in relation to the composition of Local ACHCs:

(1) The identification of the right people to speak in relation to Aboriginal cultural heritage can be an issue which requires considerable sensitivity. Support for LALCs is not universal.[39] Assertions of traditional ownership can be hotly disputed.[40] The mere fact that a person is a descendant from, or a member of, a particular group or organisation, does not mean they have any genuine knowledge of cultural heritage or any particular standing in the Aboriginal community.[41] Some of these issues are reflected in the criteria identified in the Discussion Paper.[42]

(2) In relation to the *Native Title Act 1993* (Cth) ("NTA") it can be noted that:

a. Even where native title rights and interests are recognised, there is the potential for considerable dispute as to which native title holders are the right people to speak for country. However, the NTA at least provides mechanisms for these disputes to be aired, and for people to be accountable to other native title holders. Organisational structures of prescribed bodies corporate can also assist in that regard.

b. Relying on registered native title claimants is also a potentially imprecise method. The registration of a native title claim does not prove the ultimate legitimacy of the claim itself. As in relation to native title holders, there may be a range of people within a claim group who may appropriately speak for country.

c. Even where native title claims are registered there may be other competing claims.

d. Even when a native title claim is registered it does not mean it will succeed. Similarly, where a claim fails, it does not mean the claimants are not the right people to speak for country.

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[39] See for example Foley, D., "What has native title done to the urban Koori in New South Wales who is also a traditional custodian?", in Morphy, H., (ed) *The Social Effects of Native Title: Recognition, Translation, Coexistence*, ANU E-Press, 2007.
[40] See for example Ingram, S., "*Sleight of Hand: Aboriginality in the Education Pathway*", paper delivered to the World Indigenous Peoples Conference on Education 2008.
[41] See for example, Yamanouchi, Y., "Kinship, Organisations and 'wannabes': Aboriginal Identity Negotiation in South-western Sydney", *Oceania*, Vol.80, 2010, pp.216-226.
[42] Discussion Paper, pp.15-16.

(3) Similarly, the Register of Aboriginal Owners established under Part 9 of the ALRA currently also has a number of limitations. At present it only has limited operation. To date it has been used primarily in relation to parks established under Part 4A of the *National Parks and Wildlife Act 1974* (NSW) ("NPWA"). Where a person is on the register, they are qualified to be a member of the LALC for the area.[43] It is limited to people who apply to be on the register.

(4) Beyond the operation of native title processes and the Register of Aboriginal Owners such contested assertions of traditional ownership are difficult to resolve. Ambiguity over traditional boundaries, contested genealogies and differences of opinion as to whether groups should be defined by language, cultural blocs or other criteria, all play a part in community dialogue. Furthermore, there can be scepticism in some Aboriginal communities where traditional ownership is asserted by people who have only recently identified as being Aboriginal through the identification of a remote genealogical ancestor.

The Discussion Paper does not identify how these issues will be resolved. The Government's Heritage Model proposes that nominations be made and the OEH will manage the process and make recommendations to the Minister who will appoint the Local ACHC. Having the Minister determine those matters is likely to undermine the legitimacy of the scheme in the eyes of Aboriginal people. The mechanism does not provide accountability to the Aboriginal community. Nor does it outline what mechanisms will be available if the Aboriginal community becomes dissatisfied with the way the Local ACHC is carrying out its functions and wants a change of membership. Because there is no ongoing accountability to the Aboriginal community, the model for establishing Local ACHCs as proposed by the Government's Heritage Model remains a membership centred on Government appointment rather than one of community representation.

As the Working Group recommended, despite some inherent limitations, the existing statutory processes of the NTA and the ALRA provide mechanisms by which Aboriginal representatives could be identified. While it is ultimately a matter for Aboriginal people to determine, consideration could be given to amending the Government's Heritage Model to provide that Local ACHCs be comprised of:

(1) representatives of native title holders who are nominated and authorised to carry out that function at a meeting of native title holders where notice has been given that one of the purposes of the meeting is to authorise representatives;[44]

(2) representatives or nominees of any registered native title claimants who have been authorised at a meeting of the native title claim group, where notice has been given that one of the purposes of the meeting is to authorise representatives;

(3) representatives or nominees of the relevant LALC who have been nominated at a meeting that gives notice that one of the purposes of the meeting is to nominate the representatives; and

(4) representatives or nominees of any registered Aboriginal owners will also be required to be nominated where appropriate, although it is noted that registered Aboriginal owners are qualified to be members of a LALC.

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[43] Section 54, ALRA.
[44] The legislation might also anticipate that native title holders may authorise a prescribed body corporate to nominate representatives.

There should be capacity for each of the native title holders, claimants and LALCs to nominate a pool of people (or at the very least alternatives), to cover the situation where there are multiple applications required to be considered, or where a nominee is sick or otherwise unable to participate.

The Committee submits that in respect of the process of appointing Local ACHC representatives, the only function the Minister should have is to be satisfied that the processes by which native title holders, registered native title claimants or LALCs have nominated representatives have been fairly and properly conducted.

5.3. "Representative of Indigenous Land Use Agreements"

The Discussion Paper states that membership of Local ACHCs may be drawn from "representatives of Indigenous Land Use Agreements". It is unclear to the Committee what this reference entails. Indigenous Land Use Agreements ("ILUAs") are specific agreements that have been registered under the NTA. They can take a variety of forms and deal with a variety of subject matters, which may or may not include issues relating to Aboriginal cultural heritage. There can also potentially be multiple ILUAs for any given area.

ILUAs involve "parties", not "representatives". Alternative procedure agreements need not include claimants or holders at all. It is sufficient if the relevant native title representative body is a party.

One area where an ILUA may be relevant is if it is an "Area Agreement" associated with the final settlement of a native title claim where there is an acknowledgement that native title exists in the area generally but there has been extinguishment, so there cannot be native title holders or claimants on the land concerned. In that circumstance, the ILUA may still recognise a particular group as the traditional people for the area, even if they do not meet the specific requirements of the NTA. However, for the purposes of the Local ACHC that scenario would be accommodated by allowing the Local ACHC to be comprised of representatives of the native title holders of adjoining land. It would be expected that in those circumstances the native title party to the ILUA will also be able to be placed on the Register of Aboriginal Owners.

5.4. Exclusion of Local Aboriginal Land Councils

It is the Committee's view that the Government's Heritage Model is deficient to the extent it excludes LALCs. It does not, as the Discussion Paper asserts, "align with and compliment section 82(2)(B) and (c) and section 170" of the ALRA.[45] The Discussion Paper justifies the exclusions as recognition "that changes to the ALR Act"[46] are underway. However, these changes are not identified in the Discussion Paper. As far as the Committee is aware, neither the Discussion Paper nor the recommendations in the current review of the ALRA have suggested alterations to the role of LALCs in relation to cultural heritage.

Given the broad definition of cultural heritage, the Committee can identify no proper reason to exclude LALCs from cultural heritage processes.

Membership of LALCs is not limited to traditional owners; however, there are many traditional owners who are members of many LALCs and even where members are from areas outside the LALC area, they can often bring their traditional values and knowledge

[45] *Discussion Paper*, p.14.
[46] Ibid.

with them.[47] The structure of LALCs under the ALRA was recommended by the Select Committee in 1980 by having regard to the particular circumstances of Aboriginal people in New South Wales.[48] In the Second Reading Speech for the Aboriginal Land Rights Bill, the Minister for Aboriginal Affairs noted:

> The representative procedures chosen here are those recommended by the Keane Select Committee. It is important to note that the proposal was contained in the written submission by the Aboriginal Legal Service and reflects the majority view of Aborigines in the State.[49]

The ALRA has always recognised a role for LALCs in relation to Aboriginal cultural heritage, where s 52(4) of the ALRA provides that the functions of LALCs include:

> to take action to protect the culture and heritage of Aboriginal persons in the Council's area, subject to any other law,

And:

> to promote awareness in the community of the culture and heritage of Aboriginal persons in the Council's area.

There are many instances of LALCs taking a proactive role in the protection of Aboriginal cultural heritage.[50] By involving themselves in cultural heritage issues LALCs have the capacity to draw upon the collective input of their members, including those who have traditional connections to country, as well as other members of the Aboriginal community whether they be members or not. LALCs are also accountable to their members.

It is noted that the Independent Working Party recommended a model for the protection of Aboriginal cultural heritage which recognised the role of LALCs in the management of cultural heritage:

> Clarifying who speaks for Country is one of the major issues for improving ACH conservation and management in NSW. The Working Party believes that the most effective way to achieve clarity is to build on the LALCs existing statutory responsibilities to consult with people with cultural association to Country.

The Independent Working Party recommended a model by which LALCs would have a central role and one which it believed "recognises that the LALCs know and understand the priorities for protecting and managing ACH in their local areas."[51]

5.5. Local ACHC Areas

The Committee notes that the Government's Heritage Model does not specify how Local ACHC areas will be identified, although it puts forward a number of options.[52] These areas are to be negotiated with the Aboriginal community. It should not be considered a matter determined by administrative convenience. The scheme will not have legitimacy in the

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[47] Furthermore, s 110, ALRA requires on going reporting on measures to increase the membership of LALCs.
[48] *Keane Report* (1980), pp.91-93
[49] Second Reading Speech, Aboriginal Land Rights Bill, Hansard, *Assembly*, 24 March 1983 at p 5094.
[50] See for example *Kirkness v Gosford City Council* [2012] NSWLEC 1060 at [9] and [41]; *Glendinning Minto Pty Ltd v Gosford City Council* [2010] NSWLEC 1151 per Tuor C at [17]; *Garrett v Williams, Craig Walter* [2007] NSWLEC 96; *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51 per Pepper J at [9]-[10] and [51]-[54] and *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal Torres Strait Islander Heritage Protection Act* (1989) 23 FCR 239.
[51] Independent Working Party Report, p.23.
[52] Discussion Paper, p.17.

Aboriginal community if any proposed "option" does not have the support of the Aboriginal community for the determination of such boundaries.

5.6. Remuneration

The Committee notes that the Discussion Paper is silent on how the members of Local ACHCs will be remunerated for their work. It is conceivable that some Local ACHCs will have a high volume of work and a range of complex issues to manage. All Local ACHCs will have a heavy work load in the initial stages of the introduction and operation of the legislation so as to ensure that maps and Plans of Management will be properly prepared.

6. Funding

The Government Model identifies the following functions for Local ACHCs:

(1) being "responsible for all decision making processes for ACH for the local area";[53]

(2) being "solely responsible for identifying the ACH values of the area" [54]

(3) mapping cultural values; [55]

(4) liaising with other cultural knowledge holders for the area; [56]

(5) identifying local priorities for conservation, management and innovations to ensure sustainable cultural connections are maintained;[57]

(6) providing updates to all other Aboriginal people who have a cultural association with that country within the relevant boundary represented by that Local ACHC; [58]

(7) preparing Plans of Management; [59]

(8) developing and coordinating ACH protection, priority projects; [60]

(9) negotiating with proponents to decide how ACH values are to be managed for individual projects; [61]

(10) deciding what conditions should be negotiated for each individual Project Agreement; [62]

(11) deciding what cultural values are required to continue practising culture locally; [63]

(12) deciding and negotiating how impacts will be managed for each individual project agreement.[64]

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[53] Discussion Paper, p.16.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Discussion Paper, p.16.
[64] Ibid, p.17.

The Committee submits that all of these functions are ongoing and require full and fair review. They are central to the scheme proposed for the protection of cultural heritage. The failure to properly carry out those functions will lead to cultural heritage being destroyed. The Committee notes the obvious point that it would be inappropriate for the Government to implement a scheme which places sole responsibility for protection of cultural heritage on Local ACHCs, yet neglect to fund those Local ACHCs to properly undertake these tasks.

Accordingly, the Committee submits that it is essential for Local ACHCs to be fully resourced to carry out these functions. Funding should be sufficient to provide for proper support and enable a Local ACHC to access independent advice where necessary. It should also be acknowledged that some Local ACHCs may have a higher volume of matters to deal with than others.

The Committee submits that if the funding provided for Local ACHCs is inadequate, Aboriginal people would be, in effect, subsidising the planning process for other people's developments. This is clearly an inequitable outcome.

The Committee submits that a general development levy where all proponents pay into the development approval process, much like an environmental levy collected by Local Government Councils would be an appropriate mechanism for the process to be funded. The levy could also fund an Independent Aboriginal Heritage Commission. The Committee submits again that this process should be administered and managed by the Independent Aboriginal Heritage Commission and not a Government Department.

Thank you for the opportunity to comment. If you have any questions please feel free to contact Vicky Kuek, policy lawyer for the Committee on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Ros Everett

Ros Everett
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/EPD:DHvk:1447483

20 April 2018

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

By email: ACH.reform@environment.nsw.gov.au

Dear Sir/Madam,

Draft Aboriginal Cultural Heritage Bill 2018

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

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

1. Background

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

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

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

Article 12(1) of the Declaration provides:

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

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

2. Objects of the ACH Bill

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

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

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

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

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

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

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[1] See for example, Aboriginal Cultural Heritage and Regional Studies, pp.19-21: http://www.environment.nsw.gov.au/resources/cultureheritage/RegionalStudiesfinalSect2comp2.pdf .
[2] Proposal Paper, p 10.
[3] Section 3, *Aboriginal Heritage Act* 2006 (Vic).
[4] Section 4, *Aboriginal Cultural Heritage Act* 2003 (Qld).
[5] Proposal Paper, p.10.

2.1. Aboriginal Cultural Heritage

The Proposal Paper asks, "[H]ow well does the following approach to defining Aboriginal cultural heritage match what you consider to be Aboriginal cultural heritage?"[6]

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

> For the purposes of this Act, Aboriginal cultural heritage is the living, traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with the associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity.[7]

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

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

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

2.2. Inadequate Protection of "Sites" and "Cultural Landscapes"

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

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

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

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[6] Proposal Paper, p 10.
[7] Section 4, ACH Bill.
[8] Section 39, ACH Bill.

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

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

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

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

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

> The definition of Aboriginal cultural heritage in the NPW Act does not include an overarching definition of Aboriginal cultural heritage that captures the full scope of cultural expression and practice. Instead, it restricts the definition of Aboriginal cultural heritage to tangible aspects, specifically, 'Aboriginal objects' and 'Aboriginal places.' In addition, the definition of 'Aboriginal objects' currently includes Aboriginal remains. This is recognised to be inappropriate and disrespectful.
>
> There are three main reasons for improving this approach:
>
> 1. The current definitions are outdated and no longer appropriate. They reflect an understanding of Aboriginal cultural heritage dating back to the 1960s, which assumed that Aboriginal cultural practices had ceased and that Aboriginal heritage consists largely of objects with archaeological and scientific value. We now know this is not the case.
>
> 2. The current definitions do not recognise Aboriginal people as the keepers of knowledge about their cultural heritage.
>
> 3. The way Aboriginal cultural heritage is defined in legislation determines how the law regulates and protects it. Consequently, the NPW Act only regulates and protects Aboriginal objects and Aboriginal places.[10]

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

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

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[9] See cl 80B(3), *National Parks and Wildlife Regulation 2009*.
[10] Proposal Paper p.11.

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

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

> The carving on the rock is not the site. The site is the carving and the surrounding area and cultural practice that took place at the site. (Exhibit A11 p 31)
>
> We look at an object on rock and we call it a woman site ... Why is it a woman on the rock? It's because of story attached to it and the journey that brings people to her and the journey that she keeps going on, and that's the cultural landscape which we haven't considered at all. We are just looking at an object, right there referring to that woman as an object when to us she is a living ancestral being who is still participating and is still doing things in country. (TS D7/394/26-33)[11]

(4) To the extent that the landscape or area of which the object or heritage forms part needs to be the subject of a Ministerial declaration before it is protected, it is unclear why the Minister should be a gate keeper for when this should occur. Furthermore, there are many "sites" which are significant which are not associated with objects which are equally worthy of protection. Story places or mythological sites, and increase sites[12] are examples. Having regard to the centrality of land to Aboriginal cultural beliefs, it is unsurprising that most other Aboriginal cultural heritage legislation protects "sites",[13] Aboriginal places,[14] or "significant Aboriginal areas"[15]. It is not clear why these cannot be protected in New South Wales as cultural heritage without the need for a declaration. This is a matter commented upon further below.

(5) The Proposal Paper states that a declaration in respect of Aboriginal cultural heritage "would be able to permanently protect both tangible and intangible cultural heritage values. It may also recognise associations between components of a landscape...Any activity that will harm the values associated with Declared ACH will need an approval from the ACH Authority." (p 30). However, the current draft of the ACH Bill does not enliven such higher level of protection.

2.3. Intangible Aboriginal Cultural Heritage

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

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[11] *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor* [2015] NSWLEC 1465 (17 November 2015) per Dixon C and Sullivan AC at [183].
[12] For more information on increase sites, see for example: http://austhrutime.com/ritual_increase.htm
[13] Section 5, *Aboriginal Heritage Act 1972* (WA), Section 3, *Northern Territory Sacred Sites Act* and s 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and s 3 of the *Aboriginal Heritage Act 1988* (SA).
[14] Section 5, *Aboriginal Heritage Act 2006* (Vic).
[15] Section 6, *Aboriginal Cultural Heritage Act 2006* (Qld).

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

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

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

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

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

3. Ministerial discretion

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

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

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

(1) The Minister appoints members of the ACH Authority Board (proposed s 8).

(2) The Minister may remove members of the ACH Authority Board, including the Chair and Deputy Chair (proposed Sch 1, cls 4(1), 5(1)(d), 5(2) and 7(2)).

(3) The Minister appoints a New South Wales Aboriginal Land Council representative as a member of the Board (proposed s 8).

(4) Draft ACH maps, as well as the mapping methodology, require approval from the Minister (proposed ss 12 and 20). The Minister may simply approve of amendments or replacements of Aboriginal cultural heritage maps (proposed s 20(6)).

(5) The Minister ultimately makes declarations of Aboriginal cultural heritage (proposed ss 12, 18(1)).

(6) The monitoring and reporting framework is developed by the ACH Authority, but requires approval by the Minister (proposed s 12).

(7) In respect of entry into Aboriginal Cultural Heritage Conservation Agreements ("ACH Conservation Agreements"), if Crown Lands are involved, approval is required from the Crown Lands Minister. If Crown-timber lands are involved, approval is required from the Minister administering the *Forestry Act 2012* (NSW) (proposed s 12). However, the Minister can direct the ACH Authority to terminate or vary ACH Conservation Agreements if a mining or petroleum authority has been granted (s 31). Further, the Minister can direct the ACH Authority to vary or terminate an ACH Conservation Agreement for the purpose of development by a public authority (proposed s 34).

(8) While the ACH Authority develops the funding allocation strategy, the Minister's approval is required (proposed s 12). The Minister may make such modifications as the Minster considers appropriate (proposed s 67(3)).

(9) While the ACH Authority prepares the Aboriginal Cultural Heritage assessment pathway ("ACHAP") Code of Practice, the Minister's approval is required. The Minister may make such modifications as the Minister considers appropriate (proposed s 54(3)).

(10) The ACH Authority may recommend that the Minister make an interim protection order, but it is the Minister who may make the order (proposed ss 78, 79). The Minister may revoke the order (proposed s 80(3)).

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

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

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

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

4. Interaction with the planning system

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

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

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

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

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

- Making planning proposals a trigger for the assessment pathway. Rezoning applications are often the initial step in the future redevelopment of planned precincts or for land release areas. After rezoning, the development potential of a site is fixed and the ability to minimise harm to Aboriginal cultural heritage is compromised;

- Any specific areas designated in ACH maps should be identified in a schedule to the relevant Local Environmental Plan. This will assist front-line council staff accepting development applications for lodgement to identify applications that require, at least, preliminary investigation under proposed s 56.

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

4.1. Exclusion of State Significant Development

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

4.2. Complying development

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

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

5. Appeals and enforcement

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

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

The Law Society also notes the following:

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

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

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

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[17] A planning certificate under s 10.7 of the *Environmental Planning and Assessment Act 1979* (formerly s 149).
[18] See for example ss 30(2A) and 33 of the *Land and Environment Court Act 1979* (NSW).
[19] Proposal Paper, p.13

(2) One of the reasons why the Local ACH Panel and the ACH Authority may have not approved a Cultural Heritage Plan may be a failure for the proponent to follow the appropriate procedures set out in the relevant guidelines. The ACH Bill should be amended to make clear that a proponent is not entitled to a merits appeal unless it has complied with the relevant guidelines and codes put in place for consultation by the ACH Authority.

(3) At present the ACH Bill is silent on who will be a party to an appeal. Presumably, the ACH Authority will be the contradictor. It is unclear how it will be resourced to participate. Furthermore, it is the Local ACH Panel which is tasked with negotiating Aboriginal cultural heritage Management Plans ("ACH Management Plans"), and it is not clear what role they will have in any appeal.

(4) It is in the nature of a merits appeal that a proponent could rely on new information, including technical reports in relation to the impacts of a project on Aboriginal cultural heritage. For example, the *Calga* proceedings[20] involved a merits appeal by an Aboriginal Land Council of a decision of the Planning Assessment Commission ("PAC") to allow a project which may impact on Aboriginal cultural heritage. In the hearing of that matter, the proponent did not rely only on material that had been provided as part of the development application or considered by the PAC. Instead it relied on new reports prepared by experts retained specifically for the proceedings. In the absence of having the Local ACH Panel involved in some capacity, the scheme may result in ACH Management Plans being approved on appeal on the basis of information which the Local ACH Panel has never been able to respond to.

(5) In other planning appeals there are procedures for objectors to bring forward information to the process. The Bill is silent on whether this will be able to occur.

(6) The potential for merits appeals also highlights the need for proper resourcing of Local ACH Panels. If there is significant heritage which may justify an appeal not proceeding, then it will be necessary for the position of the Local ACH Panel to be carefully documented to enable any decision not to approve a plan to be defended. It may need to be supplemented by expert advice. Depending on the nature of the project, there may need to be expertise other than in relation to cultural heritage to identify how a project may impact on the heritage. For example, in the *Calga* proceedings, issues were raised about the impact of dust and noise on areas of cultural significance.[21]

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

6. Regulations

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

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

[21] See the Calga decision at [35]

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

(1) Before recommending the declaration of Aboriginal cultural heritage, the ACH Authority must have regard to any relevant provisions of the regulations (proposed s 18(4)).

(2) Registration requirements for intangible Aboriginal cultural heritage will be set out in the regulations (proposed s 36(2)(b)).

(3) The regulations may provide for additional defences to a prosecution of a harm offence (proposed s 43(1)).

(4) The regulations may provide a defence for acts done in accordance with codes of conduct (except for the ACHAP code) (proposed s 43(2)).

(5) The regulations will provide for the negotiation and determination period for ACH Management Plans (proposed s 50).

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

7. Proposed guidelines and policies

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

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

8. Referencing of other legislation

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

9. Resourcing

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

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

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

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

10. Review

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

11. Conclusion

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

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

Yours sincerely,

Doug Humphreys OAM
President