



NGALAYA

Ngalaya Aboriginal Corporation
PO Box 46, Kingsford NSW 2032
directors@ngalaya.org.au

**Submission to the NSW Office of Environment and Heritage
regarding the Aboriginal Cultural Heritage Bill 2018**

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Ngalaya Aboriginal Corporation thanks the Office of Environment and Heritage for the opportunity to share these views on the draft Aboriginal Cultural Heritage Bill 2018.

Founded in 1997, Ngalaya is the peak body for First Nations lawyers and law students in New South Wales. Ngalaya is operated by a volunteer board of directors.

Summary

Maintaining cultural heritage is imperative for maintaining the bonds to First Peoples' continuing culture and identity, dating back to the dreaming. Without these continuing practices, there remains only the trauma of colonisation and assimilation.

The international community recognises cultural heritage as a cornerstone for human rights. Article 27 of the Convention on Civil and Political Rights provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This is reflected within Article 11(2) of the Declaration on the Rights of Indigenous Peoples (**Declaration**), where to protect the rights of Indigenous peoples:

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

The Declaration sets the standard for the rights for Indigenous peoples that member nations should work to achieve. The Australian government accepted the Declaration in April 2008 and the Australian Human Rights Commission has promoted the Declaration within Australia.

Currently, New South Wales protects cultural heritage primarily through the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**). A number of Aboriginal and environmental bodies have criticised this law for being archaic and emphasising the importance of development over preservation. Very few prosecutions have succeeded under the NPW Act and many Aboriginal Heritage Impact Permit applications have been approved without adequate consultation with traditional custodians. Consequently, many Aboriginal communities have lost faith in the NPW Act as a means to protect their heritage.

The Aboriginal Cultural Heritage Bill 2018 (**Bill**) is a noteworthy improvement on the NPW Act, as it captures important recommendations from environmental and Aboriginal stakeholders.

Nonetheless, the Bill remains to address the following ongoing issues:

- a) The Minister has a wide discretion which merely requires consultation with the Aboriginal Cultural Heritage Authority's (**ACH Authority**);
- b) There is a lack of information and regulation on how the local Aboriginal Cultural Heritage consultation panels (**Local Panels**) are formed, operated and funded;

- c) The ownership structure for Aboriginal objects, remains and associated intellectual property creates a number of legal issues, including the right for traditional custodians to protect their heritage, that have not been properly addressed;
- d) The offences under Part 5 remain the same as they did under the NPW Act and there are no corresponding civil law provisions;
- e) The Bill does not address state significant development, or mining and petroleum activities, nor does it adequately explain how the corresponding laws of the aforementioned groups will protect Aboriginal cultural heritage;
- f) The ACH Authority members can be replaced by the Minister at their discretion; and
- g) Any decision impacted by a member's conflict of interest will not be affected.

At this stage, the Bill will not create public confidence within the Aboriginal communities, despite making improvements on the NPW Act. This submission analyses the Bill and provides recommendations as needed.

Clause by clause analysis

1 Preliminary

3 – Objects of Act

We do not oppose the existing objects of the Bill. However, the objects require the facilitation of Ecologically Sustainable Development (**ESD**). ESD is an objective under the *Environmental Planning and Assessment Act 1979* (NSW) and is considered by each development authority in their decision making (section 1.3 (b)) as defined by section 6(2) of the *Protection of the Environment (Operations) Act 1991* (NSW).

ESD is practically important for protecting Aboriginal cultural heritage. For example, the precautionary principle provides that when there is no scientific certainty from the lack of surveying and generations of lost culture. This is very important when many cultural landscapes remain unsurveyed.

Recommendation 1

To align the operation of the Bill with the *Environmental Planning and Assessment Act* and for the most effective protection of Aboriginal cultural heritage, the following must be inserted after 3(e):

(f) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about Aboriginal cultural heritage conservation and management

And added to clause 5(1):

ecologically sustainable development has the same meaning it has in section 6 (2) of the *Protection of the Environment Administration Act 1991*.

4 - Meaning of “Aboriginal cultural heritage” and related key terms

The expanded definition of Aboriginal cultural heritage to include environment, landscapes and places provides a better scope of protection.

The definition of ‘Aboriginal object’ is very similar to its definition under the NPW Act (section 5), which caused Aboriginal objects to be separated from their cultural landscapes.

As it is likely that the definition of ‘Aboriginal object’ will be interpreted independently from ‘Aboriginal cultural heritage’, management and enforcement mechanisms under Parts 4 and 5 of the Bill will be watered down.

Recommendation 2

Either or both the following options:

1. Amend definition of ‘Aboriginal Object’ to include any associated environment, landscapes, places, objects, ancestral remains and materials.
2. Amend definition of ‘harm’ under clause 5 and 40 to include harm to declared and interim Aboriginal cultural heritage areas.

Amend definition of 'Aboriginal cultural heritage' to include waters.

2 Aboriginal Cultural Heritage Authority and Local Consultation Panels

7 – Status of ACH Authority

The ACH Authority's independence is recommended and must be answerable to all stakeholders, especially the Aboriginal community.

Calls for nominations must be open to the public and each member must have special expertise in understanding Aboriginal cultural heritage. There are no selection criteria for the Minister to consider under this Bill, except that members must be Aboriginal.

Recommendation 3

The nomination process must strike a fair balance between archaeological experts and traditional knowledge holders.

14 – Establishment of Local ACH Consultation Panels and 15 – Membership of Local ACH Panels

The establishment of Local Panels is acceptable in managing Aboriginal heritage at a local level. However, difficulties arise when comparing this system to the local Aboriginal heritage bodies in Victoria, as the Bill does not address the following issues:

- uncertainty over traditional boundaries between different traditional custodians;
- potential delays in registering Local Panels when cultural heritage is at risk of harm;
- varying levels of development in different areas, i.e. Local Panels with more or less funding and differing levels of self-sustainability; and
- no provisions or principles under the Bill for appointing Local Panels.

Recommendation 4

Include provisions under clause 15 or Schedule 1 for the selection process and criteria for Local ACH consultation panel members. Member preference should be based on understanding of ACH and engagement with traditional custodians.

ACH Authority should ensure all Local Panels are adequately budgeted and funded to survey their area and engage with developers

16 – Functions of Local ACH consultation panels

The language in clause 16(1)(a) is ambiguous. There is no clarification over the make-up of the Panel and whether they represent the ACH Authority. With no guiding membership criteria under this Bill, it is possible that traditional custodians could be left out of having a say over their heritage.

There are no provisions under clause 16 requiring the Local Panel to consult with the community and traditional custodians over the existence and management of ACH. Although local panels may have the skills and expertise to exercise their functions without

consultation, there will be a loss in public confidence if there are no legislated and legally enforceable functions to consult with the Aboriginal community.

Recommendation 5

Amend 16(1)(a) “Aboriginal cultural heritage authority” to “ACH Authority”.

Insert subclause under (2) to give local panels the function to consult with their local Aboriginal community

3 Aboriginal cultural heritage declarations and information

18 – Declarations of Aboriginal cultural heritage

This clause is a more comprehensive version of the equivalent section under the NPW Act.

Clause 18(2) allows the ACH Authority and Minister to dilute the significance of the Aboriginal area and allow harmful activities. Conversely, clause 18(2) may help negotiate Aboriginal places on private lands more expeditiously. The ACH Authority must continue to prioritise the protection of ACH over the importance of development activity.

The declaration of an Aboriginal place also requires the ACH Authority to fully consider the cultural significance of the area. However, many of these Aboriginal places are known and can only be known by certain genders. Therefore, it would be culturally inappropriate for some ACH Authority members to assess these areas without cultural permission.

Recommendation 6

Allowances should be introduced to excuse certain members of the ACH Authority from considering proposed Aboriginal places on cultural grounds. Not only is this respectful of culture, it will also encourage more applications and evidence supporting them.

There is a practice of informing traditional custodians of the Minister’s gender and retrieving informed consent to provide their evidence, as the Minister has final approval over the area.

19 – Establishment and management of ACH information system

There are no factors under clause 19 which differentiate between what is restricted and what is available publicly. The ACH Authority can publish protocols on what would be considered sensitive under clause 19(5), but this would not be legally enforceable and discourages traditional custodians from sharing knowledge.

Similarly, there is no cultural restriction on the ACH restricted database under clause 19(3)(a).

When putting this provision into practice, the ACH Authority will be dependent on the Local Panel. This is because the Local Panel will need to consult with the community, arrange or conduct area surveys and collate the data into ACH information and knowledge. This can be resource and time intensive and each local panel will need adequate funding from the ACH Authority.

Recommendation 7

The restriction of culturally sensitive information is highly recommended. There are different layers of sensitivity within each cultural landscape that cannot be privy to the public, or even some of its traditional custodians.

Eligible members under clause 19(3)(a) should be restricted from parts of the database, if it is culturally appropriate.

Include a list of factors for determining which information will require permission to access, such as information pertaining to cultural practices, ceremonial areas and gendered areas.

20 – Preparation and approval of ACH maps

Clause 20 echoes the same concerns under clause 19(3), where there are no limits on the maps and materials ACH may publish to protect ACH. Many stakeholders will fear that publishing the precise location of their heritage on private lands will motivate land holders to develop over the area and remove or destroy the heritage.

Recommendation 8

ACH public mapping should encompass broad areas of cultural significance to encourage developers to make enquiries and engage with the ACH Authority and Local Panel.

21 – ACH strategic plans

Clause 21(2) will rely on the Local Panels to be adequately funded to survey and assess the area.

4 Conservation of Aboriginal cultural heritage

24 – Ownership of certain Aboriginal objects or ancestral remains vested in ACH Authority on behalf of Aboriginal people and 25 – Repatriation etc of Aboriginal objects, ancestral remains or other material that are property or under control of ACH Authority.

This provision gives the ACH Authority property rights to the Aboriginal object. The traditional custodians for the Aboriginal object will have no right to claim it, unless the ACH Authority allows it within their own discretion.

Recommendation 9

Clause 24 is opposed.

Recommendation 10

Amend clause 25(1) at the beginning to read:
“The ACH Authority shall take all reasonable steps to deal with Aboriginal objects...”

27 – Notification of Aboriginal objects, ancestral remains or other materials

We support this with proposed amendments.

Recommendation 11

As the Local Panels are required to survey and record heritage for the ACH Authority, the person who is aware should be required to inform either the ACH Authority or the Local Panel to fulfil their requirement.

30 – Content of ACH conservation agreements

There is a reasonable likelihood that negotiations for a ACH conservation agreement may divulge culturally sensitive information to private parties. It is necessary to protect against this with a confidentiality provision for each party to the ACH conservation agreement.

Recommendation 12

Amend clause 30(1) by inserting (i):

“requiring the owner to refrain from disclosing any detail known to them concerning the Aboriginal cultural heritage on the land”.

31 – Duration and variation of ACH conservation agreements

This clause allows the ACH Authority to be flexible with their declarations. In one way, it allows the ACH Authority to make any changes to better protect Aboriginal cultural heritage in the event new heritage areas are discovered. On the other hand, it reduces any protections. In the latter case, there is no involvement with the traditional custodians, local Aboriginal community or even the Local Panel. If the ACH Authority is empowered to vary the ACH agreement, they must also consult with the traditional custodians, much the same way as they do with the land owners.

Clause 31(7) also greatly reduces the right to protect Aboriginal cultural heritage when a mining or petroleum activity is authorised in the area. See further commentary on this issue under the analysis of clause 35.

Recommendation 13

Insert in clause 31(4):

An ACH conservation agreement may be varied or terminated by the ACH Authority by notification published in the Gazette, without the consent of the owner of the land, if the ACH Authority provides 28 days written notice to the Local ACH Consultation Panel and is of the opinion that the land is no longer needed for, or is no longer capable of being used to achieve, the conservation of Aboriginal cultural heritage for which the agreement was entered into; OR

Amend clause 31(5)(a) and (b) to read as follows:

- a. Written notice of the intention of the ACH Authority to vary or terminate the agreement has been given to the owners of the land and the Local ACH consultation panel stating that the owners may make submissions to the ACH Authority within the period specified in the notice (being a period not less than 28 days); and
- b. The ACH Authority has considered any submissions made by the owners and the local ACH consultation panel within that specified period.

Recommendation 14

Delete clause 31(7).

32 – Registration of ACH conservation agreements

We support this, but care must be taken to maintain privacy over the cultural sensitivity of the area, if it could be accessed by any public member at the Lands Title Office.

Recommendation 15

A version of the ACH agreement registered under clause 32 must only include the outline of the area and approved/restricted activities. The full ACH agreement details should be kept with the ACH Authority and subject to confidentiality provisions under clause 19.

34 – Proposals by public authorities affecting land subject to ACH conservation agreements

Clause 34 contains no requirement to consult with traditional custodians within the area affected. It could be implied that the ACH Authority will do this as part of their functions. However, it will create confidence with the traditional custodians for a legal requirement for the Minister to consult with, at least, the local ACH consultation panel before making their decision.

Recommendation 16

Insert in 34(2)(a):

(having regard to the advice of the ACH Authority *and Local ACH consultation panel*)

35 – Activities authorised by mining or petroleum authorities not affect by ACH Conservation agreement

We strongly oppose this clause. It will generate great resistance and uncertainty. The *Mining Act 1992* and the *Petroleum (Onshore) Act 1982* contain no provisions to require the protection of Aboriginal cultural heritage. The OEH's Bill discussion plan provides no guidance on how this new system will be implemented for mining or petroleum operation approvals.

Recommendation 17

Delete or suspend clause 35, until detailed proposals for managing Aboriginal heritage are implemented by the NSW Department of Resources for the *Mining Act 1992* and the *Petroleum (Onshore) Act 1982*.

Division 3 – Agreements for use of registered intangible Aboriginal cultural heritage for commercial purposes

Division 3 is a very ambitious provision to protect the intellectual property within Aboriginal cultural heritage. Nonetheless, several issues in Division 3 need to be addressed.

Overall, the Division must be able to protect against overseas exploitation. This Division and the Office of Environment and Heritage provides no protection mechanisms against overseas exploitation.

Clause 36(2) should expand the protection of intangible Aboriginal cultural heritage, if it can be defined accurately and traced back to its original traditional custodians. History has already seen too many exploitations of Aboriginal intellectual property for commercial gain. Therefore, the introduction of protections against such exploitation is long overdue. For example, spinifex manufacturing, which is widely known in academic journals and media, would not be afforded the same protection under this Division.

We have concerns with clause 36(3) regarding how much information can be accessed by the public. Even minimal information could allow any public member to further investigate and exploit this heritage.

The scope of who may hold tangible heritage under clause 37 is too narrow, which may wrongly exclude traditional custodians who do not fit within any of the holder categories. The ACH Authority must have a duty under the proposed regulations to investigate each proposed holder to trace the intangible heritage them. Otherwise, traditional custodians and the local Aboriginal community will have no faith in the Division.

Clause 37 also presents an equitable issue for intangible cultural heritage holders. In the matter of *John Bulun Bulun & Anor v R & T Textiles Pty Ltd (includes corrigendum)* [1998] FCA 1082, an artist Mr Bulun Bulun held copyright over an artwork which he gained from stories and lore from Ganabingu country. The Artwork was exploited by a third party for a textiles design and Mr Bulun Bulun sued under the Copyright Act. However, another artist Mr Milpururru brought proceedings against the third party on behalf of the Ganabingu country on the grounds that they are the equitable owners of the artistic works. The Court found that if the customary laws relating to ownership of artistic works survived colonisation, then the Copyright owner has a fiduciary obligation towards the traditional owners. The obligation in this case was satisfied when Mr Bulun Bulun took legal action to protect his copyright.

For the purpose of Division 3, with the re-emergence of customary knowledge and laws, a legal question will arise concerning the property holders' equitable duties.

Clause 38 lacks specificity and will not operate as an adequate deterrent for breaching the provision.

Recommendation 18

Further review of Division 3 is required.

Although the penalty under clause 38 can include the base penalty, it should rather reflect and be multiplied by the amount of profit gained from breaching the provision. An example is section 45F of the *Competition and Consumer Act 2010*, which makes it an offence to enter into a cartel contract. Section 45F(3) provides:

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:

(a) \$10,000,000;

(b) if the court can determine the total value of the benefits that:

- (i) have been obtained by one or more persons; and
 - (ii) are reasonably attributable to the commission of the offence;
- 3 times that total value;

A provision such as this would be a greater deterrent to exploiting intangible Aboriginal cultural heritage.

5 Aboriginal cultural heritage regulatory system

39 – Aboriginal cultural heritage to which this part applies

This clause effectively emulates the scope of protection for Aboriginal heritage under the NPW Act. This narrow definition is plainly inadequate. It undermines any progress achieved by amending Aboriginal cultural heritage to include surrounding landscapes.

Recommendation 19

Insert after clause 39(3)(c):

(d) Aboriginal cultural heritage areas submitted to the ACH Authority for declaration

46 – Nature and purpose of ACH management plan

This is a replacement to the Aboriginal Heritage Impact Permit provisions under part 6, Division 2 of the NPW Act. AHIPs have been regarded by traditional custodians and other Aboriginal stakeholders as marginalising their culture. This is especially the case when the Aboriginal object's significance is divorced from the entirety of the cultural landscape where it lays. Even worse has been the woefully low amount of Aboriginal Heritage Impact Permit applications that have been rejected. From 2010 to 2014, of the 273 AHIP applications lodged, 251 were determined and only two were refused.

48 – Negotiation of plans by proponents and local ACH consultation panel

In theory, this section will give the traditional custodians an opportunity to negotiate an outcome for their own heritage. However, due to the uncertainty over the composition of the Local Panel, the negotiation's practical outcome is too vague to determine.

Recommendation 20

Finalise protocols for selecting Local Panels for consultation.

49 – Approval of plans by ACH Authority

The consideration of the proponent's project and the public interest under sub clause (4) appears useful. In practice, however, sub clause (4) reflects section 90K(1)(i) of the NPW Act, which requires the decision maker to consider the social and economic consequences of making the decision. By taking these consequences into account, the ACH Authority would be more likely to approve the management plan to benefit the mainstream community, rather than the minority. This may undermine the value placed on Aboriginal cultural heritage.

Recommendation 21

Remove “the proponent of approving or not approving a plan and the public interest” and replace with considerations regarding:

- practical measures that protect and conserve the Aboriginal cultural heritage;
- the views of any persons holding knowledge over the cultural significance of the area; and
- whether the development is crucial for the community.

52 – Appeal against refusal of or failure to approve proposed plan

The *Land and Environment Court Act 1979* (NSW) does not indicate which class jurisdiction clause 52 falls under. Therefore, it is impossible to determine whether a claimant has standing for judicial review or merits review if their application is refused.

There is no right allowing the Local Panel to appeal the ACH Authority’s decision to approve a proposed plan. The Land and Environment Court should have the power to review these decisions on behalf of traditional custodians.

Recommendation 22

Amend the *Land and Environment Court Act* to account for clause 52 to identify the class of proceedings appeals under clause 52 fall under.

Provide Local Panels, or traditional custodians who engaged in consultations, the right to appeal ACH Authority decisions.

Division 5 – Special procedures relating to certain development applications under planning legislation

It is beneficial to have the ACH assessment and management process settled before submitting the development application to avoid competing deadlines.

However, the exclusion of State Significant Development is opposed because it has the greatest impact on Aboriginal cultural heritage and, therefore, requires stricter regulation. The OEH’s discussion plan refers to the Department of Planning and Environment’s proposed revisions to their policies and procedures, but this lacks clarity and, most importantly, is not enforceable.

Recommendation 23

Suspend exclusion of State Significant Development until the Department of Planning and Environment’s new policies and procedures for ACH assessment and management are released for public consultation.

6 Financial provisions

We are concerned that this Bill will allow the ACH Authority to delegate or contract out its functions to other bodies and be delegated or sub-contracted under other bodies.

Clause 70, which alludes to the possibility of ACH Authority staff working for other public bodies, is particularly concerning because it creates further uncertainty. It is unclear how the

ACH Authority will operate and how it will interact with other departments or even private bodies. The OEH needs to clarify on this issue.

7 Regulatory compliance mechanisms and 8 Investigative powers

The provisions in Part 7 and 8 are more comprehensive than the similar provisions under the NPW Act. However, these parts relate to any harm as defined under Part 5 of this Bill, which is only limited to objects and declared places. These remediation and investigation provisions currently lack utility.

Recommendation 24

Sufficiently surveying and mapping within each local ACH panel area.

Amend the scope of Part 5 to include harm to 'Aboriginal cultural heritage' as defined in the definitions section.

9 Division 2 – Civil proceedings

Although we support allowing anyone to act to enforce the Bill, the effect is too limited. There are no civil provisions forbidding any person harming Aboriginal cultural heritage, which could be remedied by injunctive relief or compensation. Instead, the applicant can only seek for the respondent to conduct an ACH assessment and/or management plan which would then be decided by the ACH Authority.

Recommendation 25

Include civil and criminal provisions that forbid harm to Aboriginal cultural heritage.

Schedule 1 – members of the board of the ACH Authority

Preventing a conflict of interest with the ACH Authority is essential. Therefore, we support this clause, except for sub clause 8(5), which prevents the decision from being invalidated. This subclause essentially nullifies clause 8, even where a compromised member's vote tips the balance of the decision. This subclause will result in the loss of public faith in the ACH Authority or even prompt future investigations into its conduct.

Recommendation 26

Remove clause 8(5).