# Dharriwaa Elders Group submission in response to the Aboriginal Cultural Heritage Bill 2018 (NSW)

**18 April 2018**

Walgett's Dharriwaa Elders Group (DEG) asks that the architects of the proposed ACH legislation consider their task very carefully.

We hope this submission shows that a better way for the NSW Government to support Aboriginal communities' ACH to flourish is achievable.

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**Dharriwaa Elders Group rejects the Aboriginal Cultural Heritage Bill 2018 (NSW).**

Dharriwaa Elders Group ("DEG") cannot reconcile the need for empowered, self-determining Aboriginal communities to manage their Country and associated Aboriginal Cultural Values, with the proposed legislation. It has been rushed, has not been effectively discussed with communities in the short timeframe, and does not yet provide an instrument to support Aboriginal communities to manage their cultural heritage. The big picture remains unclear, with no mention of how this Act is proposed to interact with other Acts. This Bill appears to us to be rushed so that developers will have less processes and "Black Tape" or "Green Tape" to address when planning further destruction of Aboriginal Cultural Heritage ("ACH").

We have witnessed the effects of successive NSW Governments management of ACH under the NSW NPW Act. Neglect caused by poor resourcing and interpretation by the responsible department (now downgraded to an Office), have meant death by a thousand cuts of ACH, whereby many little decisions have been determined in isolation and have cumulatively resulted in the mass destruction of ACH throughout NSW.

While we applaud the gesture to create a new regime for managing ACH, we solemnly urge the NSW Government not to proceed with the Bill as it stands. Legislation regarding ACH has to be done properly or outrage and dissent will follow. Where were the genuine attempts through widespread media channels to persuade and inform Aboriginal people and other stakeholders of the reform process in order that full awareness and acceptance is assured?

This submission was prepared in workshops undertaken by DEG on 28 March 2018, 12, 17 & 18 April 2018, based on our work and learnings over more than 18 years of operation. The Dharriwaa Elders Group is a good example of a poorly-resourced "co-ordinating and support organisation" referred to briefly in Part 2 of the Bill.

Our submission provides advice and comments on each Part of the Bill, but does not pretend to be exhaustive. When advice is given about a concept that is overarching to the Bill, this concept is taken as applying throughout the Bill. We have renamed some of the key Bill concepts.

- "Local ACH Consultation Panels" are referred to as "Local Panels" or "Local ACH Panels";
- "ACH Authority" is referred to as the "ACH Agency".
- "ACH Management Plans" are renamed "ACH Harm Authorisation and Mitigation Plans" (HAMPs).
- We have created a term "ACH Management Plan" for the plan that would be prepared by the Local Panels for the management of objects, ancestral remains, intangible ACH and declared areas or places of ACH.

We are also very concerned about the Regulations that will be developed to accompany the Act and request an opportunity to comment further on these before they are made.

## 1. Introduction to Walgett's Dharriwaa Elders Group

The Dharriwaa Elders Group[1] (DEG) takes a leading interest in the protection of ACH and maintaining Aboriginal Cultural Values ("ACVs") in Walgett landscapes. DEG was born 20 November 2000 after Elders had worked together on projects since 1998. The Group took its name from one of its sacred sites - Narran Lakes - Dharriwaa (common meeting place) and its full members are Aboriginal people over 60 who live in Walgett. With the aid of governments, sponsors and volunteers, the organisation has worked to support Aboriginal Elders to resume leadership roles in the community, keep active and healthy; promote local Aboriginal cultural knowledge and identity; and develop the Walgett Aboriginal community.

An important activity has been to protect and manage the ACVs of the Walgett area. This activity has involved supporting the people who hold the knowledge that provides Aboriginal Cultural Values, understanding and documenting Elders' knowledge and mapping significance in the landscape. It has involved conducting education activities including exhibitions, magazine production, schools programs, community induction for government and community education programs. It has also involved advocacy and negotiation with landholders and government agencies which has sometimes produced outcomes that have protected culturally significant places from destruction. It has involved maintaining knowledge and other productivity infrastructure and continually training and mentoring local Aboriginal staff at levels determined by scarce resources.

## 2. Part 1 - Preliminary

> *"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"*[2]

<u>Some reflections on the given definition of Aboriginal Cultural Heritage.</u>

Aboriginal peoples of NSW are not one homogenous group. The use of the term here should be amended to read "Aboriginal families and custodians" so that the ties to cultural heritage and identity are localised to particular Aboriginal families, and Aboriginal individuals in communities who today, have taken on custodianship responsibilities if family groups have moved, or been removed from Country.

It is not acceptable for Aboriginal people from any community, to take collective responsibility for the property of Aboriginal families and communities that they do not belong to, and cannot speak for. This is why the power in the Act will need to work "From the Ground Up"[3]. The Act will need to be improved so that the Local ACH Panels have the power to declare and manage

[1] a charitable incorporated Association with deductible gift recipient status.
[2] 4 (1) Part 1, page 2, Aboriginal Cultural Heritage Bill 2018
[3] A term we regularly use at DEG for a process of community working with government

ACH on behalf of local families, and the ACH Authority or Agency, is created with the powers necessary to support the Local Panels in this process, investigate and enforce compliance.

The definition of "Aboriginal cultural heritage" in the Bill importantly includes environment, landscapes and materials that Aboriginal people recognise as part of their cultural heritage & identity. We have discovered that throughout the Bill, this definition has not been consistently applied. For this definition to be fulfilled by the Act, offences to ACH must include harms to areas and places, landscapes, story tracks and waterholes as well as objects and ancestral remains. Currently in the Bill, if places or areas with high Aboriginal Cultural Heritage Values are not Declared, they have no protection. DEG has been waiting for its highest priority areas nominated under the current Act, for AP gazettal, since 2002. If the Declaration process in the proposed Act will also depend on the Minister, as is proposed in the Bill, this unacceptable delay will cause much of our ACH to be destroyed or harmed. Much ACH will not benefit from the protective measures of the Bill. We propose specific changes are needed in the Act to rectify this.

The Act will also need better provisions to identify and protect environmental values and landscapes. The declaration of ACH is not enough on its own. The Act would also need to provide appropriate standing for Aboriginal communities in the management of landscapes, biodiversity & water, so that they can influence decision-making in regards to culturally significant environments, materials and landscapes.

The definition of ACH recognises that ACH also includes *living* practices "that Aboriginal people recognise as part of their heritage and identity". For living practices to be sustained, Aboriginal individuals and families must have access to Country. This is vital in order to maintain and revive ACVs connected to Country. Provisions must be made in the *Crown Land Management Act 2016*, the *Local Land Services Act 2013, the Water Management Act 2000*, the *Biodiversity and Conservation Act 2016* and other Acts to provide unrestricted access for Aboriginal individuals and families to Country and the standing to challenge decisions about their Country being made by landholders of freehold and western lands titles, and decisions made by government agencies regarding Travelling Stock Routes and other crown lands and waterways important to Aboriginal people.

For living practices to be sustained, Aboriginal organisations like DEG must be supported to maintain living ACVs thru education activities in their communities. Aboriginal communities will need resourcing to improve their wellbeing and other capacities in order to be fairly matched with the development proponents they face in order to manage ACVs.

It will have to be recognised that the management of ACVs and ACH will only properly occur once the proposed Act facilitates a change in thinking – i.e. that the Act is an instrument that will describe how Aboriginal families and local Aboriginal communities in NSW will be resourced and supported by law and NSW agencies to maintain living ACH.

The role of the NSW Government as deputy for the Commonwealth in the practical enforcement of Commonwealth environmental and ACH laws must also be considered by the Act. Many Commonwealth laws govern activities that this proposed Act will regulate. The *Water Act 2007*, *Environment Protection and Biodiversity Conservation Act 1999*, The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* , the *Protection of Moveable Cultural Heritage Act 1986* etc. Will an important role of the proposed ACH Agency be to enforce these Acts? What is the NSW Government's plan for how these Acts will work together? We are vitally interested to know as we have experienced difficulty in the past invoking the *Environment Protection and Biodiversity Conservation Act* when we have advised the Minister that the nationally-significant Narran Lakes wetland and associated biodiversity are threatened by opal mining activities in the Lightning Ridge and Surrounding Areas Opal Mining Reserve. Environmental custodians in NSW Government agencies were not heeded when NSW Industry proceeded to licence opal mining activities. In that case, the NSW Government's responsibilities to the Commonwealth were ignored we believe.

For years DEG has considered the need for cultural water flows in our rivers and waterways, which should intersect with and add to environmental flows. The objects of the *Water Act 2007* acknowledge the need for cultural flows, yet nobody has co-ordinated them with the NSW Government. Even the Murray Darling Basin Authority has not included cultural flows in its Plan, despite its Indigenous Unit, MLDRN and NBAN advising the need for them to be included in water planning. This co-ordinating role between Commonwealth and NSW Government should be an important role for the ACH Agency.

**3. Part 2 - Aboriginal Cultural Heritage Authority and Local Consultation Panels**

**Local Consultation Panels renamed Local ACH Panels**

The proposed Local Consultation Panels will need to be rethought because they need to be truly local (i.e. not regional) according to boundaries defined and negotiated between Aboriginal communities. And they need to be the decision-making authority regarding that Country, not merely "consulted". Therefore we propose the term "Local Consultation Panel" be changed to **"Local ACH Panel" ("LP").** This submission uses this term.

Membership of the Local ACH Panels needs to be regulated with great care. Aboriginal society is very complex today and is made more difficult to navigate as governments continue to weaken and divide us.

- The members of the LPs would need to be a careful mix of genders, custodians and traditional owners. No one or two family groups should be enabled to dominate the Panels.
- LP members must be selected for their maturity and representation of different family groups who speak for different areas of Country within the defined Local ACH Panel area.

- The election process should probably be managed by the Electoral Commission, and "wards" or areas of Country within the Local ACH Panel Area, should be considered.
- Local Aboriginal Community-Controlled resourcing and support organisations, experienced in implementing ACH management, would themselves be managed by Aboriginal custodian directors and would provide the secretariat and implementation functions of the Local Panels.
- There must be a requirement for Local ACH Panel members to declare any pecuniary or other conflicts of interests in matters discussed.
- There must be requirements for LPs to appoint and instruct representatives to speak on behalf of Local Panels in courts and other arenas. These representatives will only be authorised by provisions of the Act to act according to Local ACH Panel decisions[4].

Furthermore, healing and mediations are needed in order to determine who speaks for Country in places where this may no longer be straightforward due to colonisation. Aboriginal custodians who have been present in communities for generations need to be valued alongside descendants of Apical Ancestors. Elders, and possibly younger people who are considered worthy of taking cultural responsibility by Elders, will need to be inducted through a locally supported and determined process to be ready for candidature and to therefore take up the burdens and responsibilities of serving on the LPs. The roles of different family groups on Country will have to be actively researched, taught and agreed/negotiated locally before the boundaries, wards and Local ACH Panel electoral procedures are designed.

**ACH Authority to be renamed ACH Agency**

The proposed Aboriginal Cultural Heritage Authority should be rethought to reflect that it should be a resourcing body whose main purpose is to support and strengthen the Local ACH Panels to act and make decisions, ie an "agency" of the Local Panels. ACH Agency Board members should not be able to make decisions for communities on ACH matters. Instead, the ACH Agency should exist to resource and support local Aboriginal communities in their decision-making. The ACH Agency would support the decision-making of Local ACH Panels by providing advice, guidance, expertise, funding, training and mediation services where disputes arise.

As much power as possible needs to be devolved to the Local Panels. The powers of investigation and powers to make orders vested in the ACH Agency should be delegated to the Local Panels unless there is an overriding public interest for why that shouldn't occur, or unless the Local Panel requests temporarily to not have those powers conferred on it.

More consideration needs to be given to the governance of the ACH Agency. The ACH Agency will need to be a statutory body or government department because it will need powers of

[4] We have learnt that the Local Decision Making model of representation through the Murdi Paaki Regional Assembly is not serving the needs of our Aboriginal community, because delegates are not appointed for their capabilities to act on instructions from the local Community Working Parties, nor are they resourced to be able to do so.

investigation and enforcement and to be resourced with stable budget allocations and specialist lawyers funded by Crown Solicitors, however it is problematic if it is subject to the control and direction of the Minister.

If the Board of the ACH Agency can be sacked at any time, how can the Board be independent? The Independent Planning Commission is an agency of NSW set up under an Act and its commissioners are appointed by the Minister but not subject to control of the Minister and there are specific situations outlined in the Act that apply for their sacking. Would the IPC provide a suitable model? We ask that the authors of the Act find a way to ensure that the ACH Agency is independent of, and not beholden to Ministers. As the arbiter of important decisions about ACH, the members of the ACH Agency should be free to operate without fear or favour. Likewise, the government should not be linked to its decisions. If the independence of the ACH Agency is strengthened, then its actions will be more just.

The Board members of the ACH Agency should not be Ministerial appointees. They should be a mix of delegates sent from the Local ACH Panels to complement a statewide knowledge pool, and Aboriginal individuals chosen by the Local ACH Panels for their financial, governance, advocacy, ACH management and management experience. Once an Aboriginal person has authority it is a lifetime thing. We would prefer the long-term bi-partisan appointment of the Agency Board Members to be similar to how Judges are appointed. There are a number of factors which entrench Judges' independence, these include the independence of funding and tenure. We cannot have the Agency changing and losing its corporate knowledge with government changes and so we look to the example of judicial appointments as a way of determining the Agency Board members.

The Board and the ACH Agency it governs, is not where the power should lie in the new Act. The ACH Agency Board's function will be to keep the bureaucrats honest and on track, and to support and represent local communities to monitor and protect their ACH. The Board should be adequately resourced to have the capacity to interact with communities and be instructed by them. The Board meetings should occur in rotating locations around NSW, and representatives from the Local ACH Panels participate remotely from their home community Local Panel, facilitated by telecommunications. For example, the Royal Flying Doctor Service, regularly conducts meetings using digital telecommunications, remotely and effectively.

A large part of the ACH Agency role will be to help LPs determine complex matters, and then prosecute/negotiate with relevant Local, Commonwealth and NSW Governments and support and represent Local ACH Panels to act in many jurisdictions; depending on whether environmental, planning, mining, repatriation and IP and commercial exploitation matters are being considered. Sometimes international jurisdictions will apply in activities the Local Panels will need to pursue in order to grow and protect their ACVs. The ACH Agency will need to harmonize decision-making with other Commonwealth and NSW laws and responsibilities and engage in higher order advocacy and law reform work that leads from LP instructions.

We have explained now, that the Local ACH Panels are where the power in the Act must reside. **The success of the Act will rest on the quality of the operations, and capacity of the Local ACH Panels.**

**The local coordination and support role**.

Section 12(2)(a)[5] identifies that the LP ACH Agency has a function to establish the Local ACH Panels and support their operation. The part in the clause about "supporting their operation" relates to what the Policy Proposal paper refers to as **the local coordination and support role**.

Section 13(3)[6] proposes who the LP ACH Agency can delegate the local coordination and support role to:

> *"the Regulations may only authorise the delegation of the function of co-ordinating the establishment and supporting the operation of the Local ACH Panels to a committee of the Board of the ACH Authority, a LALC or other Aboriginal organisation".*

The accompanying Consultation note is the only other place in the Bill where the very important "local coordination and support role" is described:

> *"It is proposed that (in line with the existing functions of LALCs under s 52(4) of the Aboriginal Land Rights Act 1983 in relation to Aboriginal cultural heritage) the regulations will authorise the delegation of the function of co-ordinating the establishment and supporting the operation of Local ACH Consultation Panels to a LALC unless the LALC chooses not to exercise that function or does not have the capacity to exercise that function[7]"*

The Local ACH Panels must be supported by local Aboriginal organisations experienced in managing ACH in their communities and resourced well to undertake this new role to be relinquished by NSW Office of Environment and Heritage. In many NSW Aboriginal communities there are ACH custodians and respected Aboriginal organisations that have grown organically to further their work, despite a lack of government support. Despite the poverty of their communities, these organisations have grown from the efforts of their communities' Aboriginal Elders and their supporters, to meet a long-identified need to protect and maintain locally-valued ACH <u>in the absence of the NSW Government</u> resourcing its agencies adequately to undertake this role. DEG understands this role, and the resources that will be required to service it responsibly[8]. Walgett's DEG is not just an "other Aboriginal organisation"! Neither are DEG's sister organisations around NSW – members of the Aboriginal Cultural Heritage and Arts Association ("ACHAA"). DEG would like some recognition for its achievements in this domain.

[5] Part 2, Page 6, Aboriginal Cultural Heritage Bill 2018
[6] Part 2, page 7, Aboriginal Cultural Heritage Bill 2018
[7] Consultation note (under Cl 13(4)), Part 2, page 7, Aboriginal Cultural Heritage Bill 2018
[8] And described the functions required in our earlier submission to the ACH Reform process: <http://www.dharriwaaeldersgroup.org.au/images/downloads/NSWACHreformsMarch14.pdf>

The NSW LALC network has shown that the majority of its members are not the custodians who have been committed to taking on this role. The NSW LALCs were not established for the purpose of managing ACH, and so many of them have not developed this interest or expertise. The governance of LALCs determines that they can be stacked by dominant family groups. LALCs are not systemically designed to distribute voting (and therefore decision-making) fairly and equally to all family groups. They are also severely under-resourced. LALCs could contribute to the operations of the Local ACH panels and their support organisations, by offering affordable land and other resources to support their operations. It will be important that the new ACH Act does not offer the local coordination and support role to the NSW LALC Network automatically. This will be the death knell of existing fragile ACH organisations – and at the very least, retraumatise Aboriginal people who have been working for years in the field.

The Dharriwaa Elders Group urges caution regarding the proposed delegation of functions to local councils or government agencies:

> *"The regulations will also authorise appropriate enforcement and compliance functions to be delegated to a government agency or local council and the administration of the ACH Fund to a government agency"*[9].

It has been our experience that local councils and government agencies cannot be trusted with ACH matters, so this approach is not recommended or supported unless the ACH Panels have the authority to instruct and direct the activities of the Council or agency. In western and north-western NSW, council and agency staff are usually either captured by the industries keen to ignore ACVs, or racism, or both. We do support the right of Local ACH Panels to authorise a delegation to an agency they trust locally, but this should be done on a local basis and the regulations should reflect this.

**Part 3 Aboriginal cultural heritage declarations and information**

Gazetted Aboriginal Places ("APs") under the NPW Act 1974 must be protected from destruction including from mining activities, under the new law. The Bill does not appear to provide the same protections as the NPW Act 1974, for already gazetted Aboriginal Places, or the ACH it proposes under the Bill, to be newly declared. This is totally unacceptable.

Currently the DEG is awaiting gazettal of 2 out of 3 AP nominations it made in 2002. We are concerned there will be similar delays with the declaration of ACH under the new regime. There must be resourcing for this declaration activity, so that it happens in a timely manner and addresses the backlog of nominations currently awaiting determination. In addition, landholders must not be enabled to hold up the process, as has occurred with our AP nominations. Even though there is no provision in the current NPW Act 1974 that requires landholder approval for an AP gazettal, the NSW Government agencies implementing the Act have interpreted it this way and have therefore allowed landholders to delay AP gazettals indefinitely. Because DEG has no

[9] Consultation note (under Cl 13(4)), Part 2, page 7, Aboriginal Cultural Heritage Bill 2018

funds it can devote to legal proceedings, these actions by NSW OEH have not been challenged in courts yet.

We support the continued gazettal, ie declaration of ACH, as an important provision of the proposed Act. The Act must first enable and resource the Local ACH Panels to undertake surveys, identification and collecting activities so that they can nominate its areas and places of ACH value for declaration. Local Panels must be given the power to declare their ACH, but if the ACH Agency and Minister must confirm those declarations in order for them to be protected, the Act must provide an urgent timeframe and Ministerial decision-making guidelines for this to occur, and for a moratorium to be placed on any new development proposals, until the Local Panels have been supported to declare their ACH, and the Minister gazetted them.

Before these areas and places are gazetted, the wider definition of ACH in the beginning of the Bill must be applied through all Parts of the Act so that not only objects and ancestral remains are protected from harms if they are not declared or gazetted. We were concerned to note that the Bill has not applied protections to all elements of ACH it describes in the definition of ACH. If the Bill is allowed to proceed without this proposed improvement, it will be even more important for the Local Panels to survey their Country before they consider any new development proposals.

A legally enforceable right to enter properties for the purpose of Local Panels and their agents to survey and identify ACH must be included in the Act. This will aid the clarity of ACH knowledge as after surveys and mapping has been undertaken by Local Panels, it will be clearer to all who is responsible for ACH harms. The Act needs to provide a legal pathway for ACH to be identified on lands where Aboriginal people have been denied access since colonisation, so that NSW will not be further entrenching the wrong of ACH destruction that has occurred since access has been denied. If access to Country continues to be denied and memories fade, Aboriginal people and families will never have the opportunity to reconnect with their ACH. Communities will already be starting from a greatly reduced knowledge of the ACH values of lands and waters of NSW due to cultural genocidal practices that must not continue.

Objects and ancestral remains, and places and areas and intangible things of ACH must have Management Plans prepared for them once they are described and declared by the Local Panels and gazetted by the ACH Agency and the Minister. The Act must include guidelines for Management Plans that outline how these places and things will be conserved, access provisions ensured in order to continue cultural practices and connections etc. These Management Plans will be determined by the Local Panels, and also gazetted by the ACH Agency and Minister. They might be similar to Management Plans prepared today for crown reserves. When they refer to lands subject to freehold or privately-leased titles, a process should be offered by the Act that invites a voluntary Conservation Agreement from the landholder. Conservation Agreements will be registered to attach to the land title in perpetuity. The Act will describe a process for mediation and negotiation to occur, so that the Conservation Agreements and Management

Agreements conform. The Act and the ACH Agency must be flexible to make this provision work in different parts of NSW – on western and freehold and crown lands.

The DEG will never agree to a NSW Government body owning or managing Community Intellectual Property. Up until now, communities have relied in an adhoc way (i.e. without being able to rely on strong policy & succession procedures of the government agency) upon the goodwill of individuals working in NPWS and now NSW OEH who we have built relationships of trust with.

Recently DEG has raised concerns[10] regarding the poor resourcing of archiving and digitising IP assets of communities collected in the past by NSW National Parks & Wildlife Service (and its successors) sites officers and archaeologists. We believe paper records are in danger of being skipped or lost due to the individual gatekeepers of Aboriginal communities' ACH IP leaving the workforce and IP management policies not being resourced adequately for communities to be assured their knowledge is safe.

This will always be a risk when knowledge is separated from those who manage and value it.

We require caretakers of our community's knowledge to safeguard and manage information so that it is digitised, stored safely and made accessible to our community. How the knowledge is shared should be determined by the relevant community. It is no longer acceptable to make communities rely on Aboriginal employees of government agencies for this role. They are still government employees, not representatives of communities. They are usually under-supported and quickly churned to greener industry pastures[11]. DEG and its sister organisations around NSW have been undertaking a knowledge-maintenance role up until now, and should be supported to continue and enhance our practice, locate and safeguard our communities' IP before it ends up in the skips.

In the past DEG has also been concerned about the risks of knowledge being revealed or shared. The NSW Government published maps of known / mapped Aboriginal sites on an opal mining website which we believed put those sites at risk from destruction by miners who would gain financially by those sites not existing. Because very little resourcing has been devoted to monitoring compliance with ACH laws, those sites were definitely risked. And they were not given appropriate context when published either. We know that those sites represented only a small subsection of places of ACH. However those sites were published as if they were the only Aboriginal sites present on those lands. The inference by the poor context given was that that if miners' activities did not jeopardise the sites mapped, then they would have a legal defence if other sites and places were destroyed. DEG requested NSW DPI take down the map from its website.

[10] Emails to NSW State Library 15/8/2017 and subsequent phone meeting and emails with NSW State Records
[11] sometimes ACH-destroying industries

The Act must resource Local Panels and their support organisations with the skills and resources to access live satellite imagery to monitor change in order to alert its officers to live investigations needed. This custodian/monitoring ability must rest at the local community level, where timely on-the-ground responses will need to occur in order for the Local Panels to stay on top of realistic preventative and compliance needs. Currently live imagery is inaccessible. It would be helpful if this imagery is made available to Local Panels as a proprietary layer to the NSW Govt SixMaps[12] service[13]. In addition, Local Panels need access to data layers that identify the type of title of Lots and DPs eg whether a Lot and DP is a crown land, or other land title. Local Panels and their support bodies will also need access to private contact information for landholders tied to location.

Legal protections for the IP of local Aboriginal communities against national and international predators should be considered by the Act, but is not considered by the Bill. The Act may be sufficient to protect cultural knowledge from unauthorised commercial use, but how will it prevent its use in jurisdictions outside of Australia? What mechanisms will be put in place to ensure this knowledge is secure and safe from such unauthorised use? The Act must provide solutions to these questions.

We note that the Bill provides for the Minister to approve and publish ACH maps, and approve amendment and replacement of ACH maps.[14] Again, only the LPs should have the authority to prepare, approve, publish or amend its own maps. The NSW Government must resource and support LPs so that all stakeholders can have confidence in the advice given by LPs, who shall refer to their own knowledge resources, including their maps, when considering matters.

IT and governance capacity must reside in local Aboriginal communities so that they can prepare and manage their own IP and maps. It is no longer acceptable that employees within NSW OEH (even if they are Aboriginal) are delegated this task. It will require a concerted effort to provide this capability to communities but this capability must be delivered. Some communities like Walgett, are very close to being able to meet this capability. It is not hard to envisage a process whereby formal advice would be sought by the ACH Agency from the Local Panels and their support organisations, who would consult their locally-held maps and databases, as information is required. Full use should be made of IT capabilities by the Local Panels, including surveillance of assets and the logging of authorised and unauthorised access to the databases. Landholders and other developers would need to be held at arms-length from the Local Panels, by intermediary processes provided by the staff of the ACH Agency.

It will be an important role for the ACH Agency to ensure that LPs and their supporting organisations are resourced to have this capacity, including to be able to undertake overnight off-site data backups to secure, Australian data centres. The NBN or similar, high capacity communications infrastructure will be required in each local Aboriginal community for this to be

[12] https://maps.six.nsw.gov.au/
[13] Or similar fee-free service
[14] 20 (5), (6), part 3, page 11, Aboriginal Cultural Heritage Bill 2018

possible. At DEG, we are unable to make off-site overnight backups due to the large size of data to be backed-up, as the NBN is not yet available in Walgett. We don't know if we will be able to access it for this purpose when the NBN becomes available due to cost and secure data storage considerations. The ACH Agency should use the LPs' group purchasing power to negotiate and obtain benefits for its member LPs with telecommunications and Australian sovereign data centre providers.

Surveying and documentation skills must also reside in Aboriginal communities so that the LPs preside over an accumulating, organised dataset, collected from on-ground surveys, previous surveys, cultural knowledge recordings and other resources it values to inform its decisions. There will be an important role for the ACH Agency to ensure that LPs and their supporting organisations have access to knowledgeable ecologists, botanists, zoologists, hydrologists, archaeologists, anthropologists and other professionals, who will assist them to prepare the knowledge resources they will require in order to provide informed, independent advice to government and developers in regards to all Country in their domains. While government agencies and their contractors have often allowed themselves to be captured by powerful interests, Aboriginal communities are motivated to commission independent scientific advice. The Act must ensure that the scientific advice provided to decision makers is not solely advice that has been commissioned by the development proponent (as is the current situation provided by the Bill).

In our area, there are large areas of lands unsurveyed for habitats and native vegetation communities, archaeology and Aboriginal history values. This is because until now, most surveys have been undertaken by landholders before making development proposals, by companies engaged by developers, or by under-resourced NPWS and NSW OEH employees who have usually only surveyed lands subject to development applications or planning proposals. And we are lucky in that the big push for land clearing for broadacre farming, mining activities etc. is only recently upon us. A large surveying, mapping and documentation effort is required.

All Country within a Local ACH Panel's area of concern, must be surveyed for areas, objects and intangible ACH values. Local ACH Panels must be resourced to undertake this activity with their agents and supporting organisations. Local ACH Panels must be resourced to use all locational technologies available in order to accurately locate and revisit, and assess the Aboriginal Cultural Values of Country within their purview. LPs must be resourced to access ACH intangible assets located both in their communities and outside it, in collecting institutions, government and scientific agencies. They must be resourced to create and safely store and manage data, and develop policies regarding these practices.

This activity will require NSW Government to provide LPs with expedited access to NSW State Archives and other collecting institutions, in order to locate relevant information from local Aboriginal communities residing in the archives of those institutions. A significant effort will be required from those institutions to digitise and catalogue afresh their assets in order for these assets to be discovered by communities.

DEG and the Indigenous Unit of NSW State Library have been considering this need for some years. Witness the resources supplied to NSW State Library from Rio Tinto[15] so that the Aboriginal language resources on the library's shelves could be discovered for the first time. The library had realised that aged catalogue descriptions often ignored assets of interest to Aboriginal communities.

Forget "Green Tape" and "Black Tape" delaying developers' desires. Aboriginal organisations need to recover their cultural assets (or at least the information about them in digital form) from collecting institutions in order to support healing and informed ACH decision-making in communities. When will this activity be prioritised? When will the wellbeing of NSW Aboriginal communities be prioritised?

We can guarantee now that Walgett's IP assets will not be handed over to the NSW Government, nor any other entity which has not established trust with DEG Directors. We are acutely aware however, of the need to develop further our own internal IP and information management policies and practices, and acknowledge our urgent need for more capacity in this field. Due to DEG's capability in this area, we could offer upskilling to sister Aboriginal community organisations in the future.

More thinking will need to be undertaken regarding the statutory role of ACH strategic plans and their interaction with LEPs and other planning instruments, including the following Acts and regulations: *Biodiversity Conservation Act 2017, Water Management Act 2000, Local Government Act 1993, Mining Act 1992, Petroleum (Onshore Act 1991, Environmental Planning and Assessment Act 1979, National Parks and Wildlife Act 1974, Forestry Act 1912 and Local land Services Act 2013.*

We applaud the requirement for a "State of Aboriginal Cultural Heritage Reports"[16] and in particular, the requirement for tabling in both houses of Parliament. We support the inclusion of matters impacting ACH such as cumulative impacts, and analyses of costs and benefits of conserving ACH, including with respect to Aboriginal people and communities[17]. This requirement, if undertaken correctly, will provide much evidence to governments to justify the considerable investments that will be required for the improved management of ACH. It will also provide a picture for the first time to decision makers of the extent of the destruction of ACH to date (and likely ongoing). It should include estimates of destruction in the past as well, so impacts can be measured against a realistic baseline. This will require considerable input from academics who must work in partnership with local Aboriginal communities to undertake this important research.

[15] https://www.sl.nsw.gov.au/support-foundation-success-stories/partnership-rio-tinto-australia-rediscovering-indigenous
[16] 22. Part 3, page 11, Aboriginal Cultural Heritage Bill 2018
[17] 22 (3). Part 3, page 11, Aboriginal Cultural Heritage Bill 2018

Again – the reporting and research must be undertaken and owned by the LPs with their own resourcing bodies, and co-ordinated state-wide through collaborative practice of these academics being locally-directed. The LPs will need the data in these reports for their own planning and evaluation purposes. DEG would be happy to provide advice on the model it uses in its partnership with UNSW[18] which we think is unique in Australia for its community-led approach.

**Part 4. Conservation of Aboriginal cultural heritage.**

**Division 1 – Ownership and care arrangements**

The ACH Agency[19] must only hold property on behalf of the LPs, (ie not "Aboriginal people"). This is because LPs will be the responsible body, accountable to Aboriginal communities. Therefore, the provisions of Division 1 should be turned around so that it is clear that the Local ACH Panels are responsible for the objects' care and protection, and may delegate that role to their ACH Agency from time to time.

For example

> *(2) The ACH Authority is to hold that property on behalf of Aboriginal people and is responsible for its proper care and protection.* [20]

should read as:

> *(2) The ACH Agency is to hold that property according to the instructions of the relevant Local ACH Panel*

We do know that there are many objects of ACH significance that have been removed from their context and original locations, without proper provenance being recorded, and so now have lost much of their educational and site-related values, and have accumulated in Aboriginal Keeping Places and cultural centres and other locations. There are many items also, that are in private hands, under the control of property owners who are reluctant to relinquish them to their local Aboriginal Keeping Place or cultural centre.

DEG is a member of the NSW Aboriginal Cultural Heritage and Arts Association (ACHAA) and the issue of managing responsibly items of ACH value that have lost their provenance has been acknowledged as an issue requiring much further consideration by NSW Aboriginal cultural custodians. The proposed ACH Agency might usefully conduct an amnesty and good faith ACH handback project from time to time, and make repatriation or other arrangements under instruction of its LPs.

[18] Yuwaya Ngarra-li < http://www.dharriwaaeldersgroup.org.au/index.php/yuwayangarrali>
[19] Named the ACH Authority by the Aboriginal Cultural Heritage Bill 2018
[20] Part 4, Division 1, 24, page 13, Aboriginal Cultural Heritage Bill 2018

The ACH Agency should always be instructed by the communities of origin of the ACH items, or if that is not possible, regional groupings of LPs. Ancestral remains, especially, are highly significant. They must be treated with the greatest respect and reburied on Country in accordance with the wishes of the local Aboriginal community of provenance. Therefore the Bill should be amended appropriately, particularly:

> *(2) The ACH Authority may deal with Aboriginal objects, Aboriginal ancestral remains or other tangible materials comprising Aboriginal cultural heritage under this section only if:*
> *(a) the ACH Authority has first consulted any relevant Local ACH Consultation Panel about the proposed dealing, and*
> *(b) the ACH Authority considers it is reasonable to do so in the circumstances.* [21]

should be amended to read:

> *(2) The ACH Agency may deal with Aboriginal objects, Aboriginal ancestral remains or other tangible materials comprising Aboriginal cultural heritage under this section only:*
> *(a) according to the instructions of the relevant Local ACH Panel about the proposed dealing, and*
> *(b) the relevant Local ACH Panel considers it is reasonable to do so in the circumstances.*

In **24. Ownership of certain Aboriginal objects or ancestral remains vested in ACH Agency on behalf of Aboriginal people**[22]

A statement should be made about the true nature of custodianship of Aboriginal objects and ancestral remains so that the euphemism for NSW Government ownership is not avoided by saying coyly that everything that was taken to be the property of the Crown in the previous versions of the NPW Acts "is the property of the ACH Authority".[23] The Act must clearly state that Aboriginal objects and ancestral remains are the property of particular Aboriginal families and current day custodians and custodian groups, LPs, that are acting on their behalf.

Therefore, the ACH Local Panels should be the body notified when Aboriginal objects, ancestral remains or other materials are discovered and the Local Panel will be charged with responding to the notification.

**Division 2 Aboriginal cultural heritage conservation agreements**

Conservation Agreements in our proposed new regime, would be proposed by Local Panels to landholders who control leased or freehold titles lands within areas identified within declared or nominated ACH Management Plans. They may also be proposed to Local Panels by landholders who wish to conserve places they are already aware of with ACH values.

This is the only mechanism Local Panels and thereby Aboriginal communities will have available to protect areas of ACH value that are controlled by private landholders.

[21] Part 4, Division1, 25 (2), page 13, Aboriginal Cultural Heritage Bill 2018
[22] Part 4, Division 1, 24, page 13, Aboriginal Cultural Heritage Bill 2018
[23] Part 4, Division 1, 24 (1), page 13, Aboriginal Cultural Heritage Bill 2018

Section 28 should be amended to include a provision that ACH Conservation Agreements will be attached in perpetuity to land titles, as explained in s 32 "Registration of ACH Conservation Agreements" and therefore remain in place despite any change in custodianship of lands. Currently this important point only appears in a Consultation note on page 15, 30 (1) (d).

It must be made clear that the ACH Agency will be making Conservation Agreements as the agency of the Local ACH Panels, and according to their instructions, so this requires an amendment to the words at s29 (2). Really, the Conservation Agreements are being made by the Local Panels, facilitated by the ACH Agency. It would be better if the Act reflected this position. The Local Panels may choose to deputise the ACH Agency to the task from time to time.

It is not acceptable that the ACH Agency could be blocked from making an ACH Conservation Agreement by the Ministers administering the *Forestry Act 2012*, and the *Crown Lands Act 1989* or their successors[24]. ACH Conservation Agreements should take precedence.

Further consideration will need to be made re the Section **30 Content of ACH conservation agreements[25].**

1. Financial dealings would preferably benefit LPs directly and their work to maintain ACH, and indirectly enhance the values of the lands and therefore the landholders.
2. It will be important to change 3 30 (1) (d) to ensure that local Aboriginal people will not be excluded by landholders from areas that are subject to an ACH Conservation Agreement.

Further consideration is needed regarding Section **31 Duration and variation of ACH conservation agreements[26].**

1. ACH Conservation Agreements should be made in perpetuity, or for a shorter time by the Local Panels, or according to instructions of Local ACH Panels.
2. Only the ACH Agency, acting under instruction of an LP should be able to terminate or amend an ACH Conservation Agreement.
3. Landholders must not have the power to terminate the agreement unilaterally! So s 31 (6) must be deleted!
4. ACH Conservation Agreements must not be able to be terminated by the Minister if an activity granted by a mining or petroleum authority will adversely affect ACH within the area bound by an ACH Conservation Agreement. This represents a significant degradation of protection than that currently provided by AP gazettal. It is a disincentive working against the whole idea of conservation of ACH, not to mention a waste of the precious resources spent in conserving the ACH in the first place, if this is allowed to occur and all the good work preparing a Conservation Agreement can be undone so unfairly.

[24] Part 4, Division 2, 29 (5), (6), page 14, Aboriginal Cultural Heritage Bill 2018
[25] Page 15, Aboriginal Cultural Heritage Bill 2018
[26] Page 16, Aboriginal Cultural Heritage Bill 2018

5. We must be able to comment on the accompanying Regulations, for s 31 (12) refers to how the Regulations will define variations to the ACH Conservation Agreements - *"The regulations may authorise the ACH Authority and the owners of the land concerned to make minor variations to an ACH conservation agreement without any consent or consultation required by this section".* The Local Panels should always agree to any proposed changes to a Conservation Agreement, for they are the party that makes the Conservation Agreement, unless that role is deputised by them to their ACH Agency.

Further consideration is needed of Section **34 Proposals by public authorities affecting land subject to ACH conservation agreements[27].**

1. Government infrastructure projects must not be exempted from this ACH Conservation Agreements process. Ministers should not be allowed to come in over the top of these important agreements and destroy ACH at the stroke of their pen. As referred to above, only the ACH Agency, acting under instruction of an LP should be able to terminate or amend an ACH Conservation Agreement in agreement with the landholder.

Delete Section **35 Activities authorised by mining or petroleum authorities not be affected by ACH conservation agreement.[28]**

Activities authorised by mining or petroleum authorities **should** be affected by ACH Conservation Agreements, therefore 35 should be deleted. As with all other development, only Local ACH Panels and their Agency should have authority to amend or delete ACH Conservation Agreements, in agreement with the landholder.

**Division 3 Agreements for use of registered intangible Aboriginal cultural heritage for commercial purposes[29]**

It is not appropriate for intangible ACH to be "registered" by any other body other than Local ACH Panels, and only then, if they find a benefit from doing so. Therefore Division 3 should be deleted. This measure in the Bill is another way of separating local Aboriginal families and communities from the exercise of their living cultural practices and knowledge.

There should rather be provisions in the proposed Act for intangible Aboriginal cultural heritage, when held by National Parks and Wildlife or NSW Office of Environment and Heritage, or any body supported by those agencies such as Boards of management or Co-management, to be returned to the safekeeping of Local ACH panels.

In addition, the Act should prescribe the Offence of using for commercial purposes intangible ACH without agreement from Local ACH Panels, and the process of agreement-making for the

[27] Page 18, Aboriginal Cultural Heritage Bill 2018
[28] Page 19, Aboriginal Cultural Heritage Bill 2018
[29] Page 19, Aboriginal Cultural Heritage Bill 2018

exploitation of intangible ACH, by Local ACH Panels. Therefore Division 3 must go back to the drawing board and is unacceptable in its current form.

Individuals may hold intangible ACH, as might Aboriginal Keeping Places and other ACCOs currently. DEG would propose that they should not exploit intangible ACH for commercial purposes unless LPs and therefore the families attached to that IP agree and benefit. The Act could usefully resource a process that assists this to be worked through. In addition, the Act could resource a process that will assist Aboriginal people to consider and make provision for cultural IP in their wills and succession planning. Community cultural succession planning is also an important activity that must be resourced to occur so that Aboriginal Cultural Values are maintained for future years.

**Part 5 Aboriginal Cultural Heritage Regulatory system.**

**Division 2 harming Aboriginal Cultural Heritage - offences[30].** In this Division, the Bill's concept of the ACH Management Plan[31] first appears. DEG asks that the readers of this submission pause a moment and consider the destruction of Aboriginal Cultural Heritage that successive governments have presided over under previous Acts, and the poor resourcing of compliance activities to date. Consider also the impact on the wellbeing of the Aboriginal families and communities of NSW that this negligence has caused. Also consider the human impacts and costs of this negligence on the health, policing, justice, child protection and other vital services.

We propose that the term ACH Management Plan referred to in this Part, be renamed **"ACH Harm Authorisation and Mitigation Plan" (HAMP)**. This is to clarify the purpose of the Plan, and to minimise confusion, because we are proposing that ACH Management Plans must be prepared by Local Panels in order to manage ACH of objects, ancestral remains, intangible ACH and Declared areas or places of ACH. We shall continue to use our term in our submission.

The Bill proposes that HAMPs will be approved by the ACH Agency, and that these HAMPs will authorise any destruction of ACH, except destruction authorised by approvals for major projects under the *Environmental Planning and Assessment Act 1979*.

In the negotiation of HAMPs, mitigation and destruction would be negotiated between ACH Agency supporting the Local Panels, and the developer. Mitigations for all impacts on ACH including environmental, pollution etc and the cumulative impacts on ACH of proposed actions must be included in the HAMPs.

1. HAMPs must only be entered into by LPs unless they delegate their power to the ACH Agency.
2. All destruction of ACH must be negotiated by this process, including State Significant Development and infrastructure. Otherwise, the developments most likely to cause harm

[30] Page 21, Aboriginal Cultural Heritage Bill 2018
[31] Part 5, Division 2, 42. Defence – act authorized by ACH management plan, page 22, Aboriginal Cultural Heritage Bill 2018

to ACH are exempt from the requirement to enter HAMPs and custodians of ACH will continue to have no control over their ACH when it comes to these developments.

3. It must no longer be a defence to "take reasonable steps to avoid harm"[32] including if the person took steps as described in the ACHAP Code of Practice which we all have experienced does not require the involvement of local Aboriginal communities. If a person has caused harm to ACH they should be prosecuted.
4. The exemptions contained in s 45. "Activities exempt from application of this Division[33]" are acceptable.

**Division 3 ACH management plans[34]** needs to be totally rewritten.

All ACH Conservation Agreements and ACH declarations will trigger the need for the ACH LPs to produce an ACH Management Plan for the area specified. ACH Management Plans should not be driven by the desire of a development proponent to destroy ACH. An ACH Management Plan must be developed and approved by a Local ACH Panel, for managing and causing ACH to flourish. The ACH Agency's role is to support the ACH Local ACH Panel to undertake this process. As explained before, the Bill's ACH management plans must be renamed Harm and Mitigation Plans (HAMPs).

It is fair to include in the law that the "Aboriginal persons whose cultural heritage is to be impacted will benefit from the obligations of the proponent"[35] however it is not acceptable that the proposed ACH Agency approve the HAMP – only the Local ACH Panel affected could rightly do that, with this approval enforced by the proposed Act and supported under the Act by the ACH Agency. In some cases a Local Panel may choose to deputise this task to their ACH Agency.

If a proponent desires to negotiate the destruction of ACH, the ACH Agency must provide a culturally safe, level playing field for negotiation to occur between development proponents and Local ACH Panels. It is unfair to release proponents directly on Local ACH Panels, as it will subject ACH management activities to corruption, discrimination and bullying risks. Many landholders who are often millionaires, often raised in private boarding schools and university private colleges have been socialised in a dangerous culture of entitlement and cannot by any stretch of the imagination, fairly deal with Local ACH Panels. The ACH Agency must be given legislative authority to provide safe and fair environments for negotiation of ACH destruction.

It is not acceptable that an impossible timeframe is proposed by the Bill for the ACH Management Plan approval.

The timeframe for this process to occur would depend on how frequently the Local ACH Panels are resourced to meet and make decisions. It may also depend on the time it takes for the Local

[32] 44 Defence—taking reasonable steps to avoid harm, Part 5, Division 2, page 22, Aboriginal Cultural Heritage Bill 2018

[33] Pages 22,23, Aboriginal Cultural Heritage Bill 2018

[34] Page 23, Aboriginal Cultural Heritage Bill 2018

[35] Part 5, Division 3, 48 (d), page 24, Aboriginal Cultural Heritage Bill 2018

ACH Panel to engage a scientist or other specialist advice in order to determine impacts on ACH of the developer's proposal. This would depend on the availability of the scientists and their ability to travel to the affected area in order to provide considered advice, maps, buffer zones etc., for the consideration of the Local ACH Panel. For communities in remote areas these timeframes would need to be extended compared to areas where scientists are mostly residing. The ACH Agency would need to consider the resourcing of regional institutes established for the servicing of the Local ACH Panels. The better resourced the Local ACH Panels are, the faster the timeframes could be.

If a Local ACH Panel does not agree to enter an ACH HAMP for the area the proponent wishes to impact, currently the Bill provides for a process for the development proponent to go direct to the ACH Agency to request a HAMP. If the ACH Agency refuses the proponent, then the proponent can appeal to the Land and Environment Court. If the ACH Agency agrees with the proponent, then it has gone against the Local ACH Panel, and this should not be permitted to occur within the proposed law! Already, the development proponent has had an unfair advantage of first appealing to the ACH Agency once it has been refused by the Local ACH Panel. Local ACH Panels must have equitable appeal rights. Otherwise there is a risk that the LP or ACH Agency will enter a HAMP simply because it does not have the resources or inclination to defend a developer appeal. If both sides can appeal, this perverse incentive is neutralised.

We firmly submit that only Local ACH Panels should have the authority to enter HAMPs unless they delegate this power to the ACH Agency.

If the proponent challenges the decision of the Local ACH Panel, and takes the decision to the Land and Environment Court, the Local ACH Panel must have access to pro bono legal resources to equitably defend its refusal decision, and its ACH. For this to occur, Local ACH Panels and their supporting agents will have to be regularly supported with legal information, and pro bono community ACH legal services resourced to be available as the matters arise. If specialty Crown Solicitors and community legal services are not provided for this purpose, the proposed law will be realised to be the instrument for accelerated destruction of ACH values that the Dharriwaa Elders Group fears it is.

Aboriginal people, family groups, and communities must be given standing to join merit appeals. The proposed Bill is not fair in that it provides that only proponents of ACH harms are able to appeal against HAMPs on their merits, whereas the only mechanism Aboriginal people have is judicial review arguing on the basis that there is an error of law (by the decision maker). At the moment this Bill doesn't give Aboriginal people a right to join merit appeal proceedings. Aboriginal people need to join these proceedings to put evidence before the Court as to why the decision to refuse the HAMP should be upheld.

The actual custodian/s should be able to join the Local Panel in Court so that their voice can be heard and the Court has the benefit of their evidence. They can then give their unique perspective and arguments that may not be available to the actual parties.

It is indicated in this division that the accompanying regulations will authorise circumstances under which HAMPs can be terminated or amended. We must see and comment on these regulations.

Therefore now, we state that Section **53 Amendment or termination of plans**[36] should be amended to include a statement confirming that only Local ACH Panels can amend or terminate ACH HAMPs, until fair and equitable measures are included which give us confidence in any Land and Environment Court proceedings.

**Division 4 ACH assessment pathway** must be changed completely.

The ACH Agency must under instruction of Local ACH Panels, develop a process to clearly explain the processes proponents will be required to undertake to apply to destroy or impact ACH. This pathway could be called an ACH Harm Authorisation and Mitigation Plan pathway. (To replace the "ACHAP Code of Practice" proposed by the Bill). This application process should be clearly explained in all communications.

For one, it should not be the role of development proponents to assess or describe ACH when they want to modify or destroy it. Local ACH Panels must be resourced to assess, locate and describe their own ACH values, based on happy, prideful realisation of the extent of their ACH knowledge and values.

Development proponents, who plan to undertake development of any land, should be required to lodge a HAMP with the Local ACH Panel Agency, which clearly outlines their proposal and justifies its benefits for the local community and people of NSW. The LP ACH Agency would then notify the Local ACH Panel, and support them to consult their maps and scientific advisors, and negotiate on a level playing field, an outcome with the proponent, that they are satisfied with. This outcome would include the Local ACH Panel providing advice to the proponent for how ACH impacts could be minimised, assessments of likely harms and any compensations deemed appropriate.

The impacts of cumulative effects of ACH destruction and impacts must be considered by the Local ACH Panels during this process (and this should be a legislative requirement). This might require receiving advice from neighbouring Local ACH Panels, advice re regional impacts of proposals, and especially should take into account the need to repair landscapes, river and groundwater systems and biodiversity to offset the amounts that have already been lost across the state.

Once advice in response to the Application for an HAMP has been provided to the proponent, the agreed terms of any negotiated agreement would need to be implemented. In our experience, these are often measures such as: the promotion of the terms of the approval to all who need to know them, education of individual opal miners for example in what they are and

[36] Part 5, Division 3, 53, page 25, Aboriginal Cultural Heritage Bill 2018

are not permitted to do, the erection of buffer zone fencing, distribution of buffer zone maps, designation of approved roads, puddling dams, transport corridors, dust and pollution mitigation measures etc. These should be enforceable terms in any HAMP.

Resourcing will be needed by the Local ACH Panels to engage its teams of compliance officers. Police should also receive training in this type of enforcement and a member of the Local Panel or an ACH Agency compliance officer must accompany police when undertaking these types of ACH enforcement activities.[37]

**Part 6 Financial provisions**

The financing of ACH management through the ACH Fund relies on income from compensation for the destruction and impacts on ACH, income from prosecutions, gifts, interest earned from investments, and Budget allocations. DEG is concerned that this form of resourcing relies on sound financial investment advice, and risks much from another financial crisis. Most importantly, it provides a conflict of interest for the ACH Agency, for it appears the system will rely to some extent on income received from developers who have paid into the Fund compensations for loss or destruction of ACH. This is not acceptable as it could provide an incentive for the ACH Agency to enter ACH HAMPs simply to receive funding to keep the Agency solvent. The parliamentary budget allocation will need to be substantial in order to reduce reliance on compensation income for the destruction of ACH.

Furthermore, consideration will have to be given to determining relative compensation values of destruction. For example, ACH in areas of high land values brought about by the values of non-Aboriginal populations and industries is just as valued by Aboriginal communities as ACH in remote areas like Walgett where land values are not as high. How will the legislation assist Local ACH Panels to determine compensation values across the state? How will compensation for activities that destroy huge areas of land and biodiversity (like broad acre cotton farming) be measured against loss of individual scarred trees in an individual's backyard, or when measured against a mining proposal that might produce enormous wealth for overseas shareholders?

A principle that income generated from local loss should be quarantined for the relevant local community, must be established in the Act. But ACH provides so much more than the prideful activity of managing it for Aboriginal people. How will the loss of it be appropriately compensated for?

We request modelling to be undertaken to assess the financial values of ACH and its loss, on Aboriginal communities and the NSW economy, and common sense guidelines to be offered in the Act for the consideration of Local ACH Panels when determining compensation.

[37] Dharriwaa Elders Group has been proposing to NSW Police that to assist its repair of community relations in Walgett, an environmental policing unit and training institute should be located in Walgett Police Station that would work closely with a DEG-proposed Aboriginal ranger program engaged in surveying and compliance monitoring activities.

Furthermore, there is no provision or thought in the Bill currently for the resourcing of the proposed regime, and particularly the resourcing that will be required for the smooth and informed operation of the Local ACH Panels and their supporting organisations. The funding allocation appears entirely directed at the ACH Agency, with no mention of how the Local Panels will be financed, if at all. Given our proposal to give ACH Local Panels a bigger role in the management and conservation of ACH, it is vital that they are appropriately funded to undertake their important work. But even if the ACH Agency retains the roles currently proposed, Local Panels will still have much to do and will need resourcing to allow this to happen.

During the consultations we have heard much about local co-ordinating support organisations who, it is recognised, will be required at community level to support the work of the Local ACH Panels. These resourcing bodies should not be the LALC network. For one – the LALC network can barely operate to support its legislative obligations now, and needs its Land Fund re-opened. For another, if the LALC network is offered the role to accept or decline – this immediately sets up increased conflict in local communities – much more than already exists due to other government actions that cause division and disharmony – the last thing we need in already traumatised under-resourced communities living in poverty.

The ACH Fund will need to invest its funds wisely. These investments must be ethical and vetted closely, and be transparently and regularly reported, to ensure that they are investments in activities that do not destroy ACH.

**Part 7 Regulatory compliance mechanisms**

**Division 2 Stop Work Orders**

It will be useful for the ACH Agency to have the power to make stop work orders for Local Panels.

We question how the stop work orders will be communicated to the party needing to be stopped. It will need to be explained properly on Country. How will this process be resourced and undertaken?

We question how stop work orders will be monitored for compliance and how this compliance monitoring will be resourced. Stop work orders are important – but how will compliance on the ground be resourced to occur?

**76 Appeal against stop work order.**

The ACH Agency will need to be instructed by the relevant Local ACH Panel in order to defend appeals made against stop work orders. This means that the Local ACH Panel will need to have access to legal advice. Section 76 (4) instructs the Court to "have regard to the objects of this Act and the public interest". We would also add that the Court should have regard to the advice of the Local ACH Panel whose ACH is under threat. The relevant Local ACH Panel, and its members or community associates who speak for that Country, are the party that is defending the stop work order. In addition, third parties should have standing in appeals, so that the Court can

benefit from all available information in order to make wise decisions. Third parties might be Aboriginal ACH knowledge-holders.

**Division 3 Interim protection orders**

It will be useful for the Act to give the ACH Agency the power to make interim protection orders as the Minister may be less inclined to make them, and the ACH Agency will be instructed, and would not otherwise have an opinion, by the aggrieved Local Panel. If an individual has discovered that ACH is threatened, they could notify the ACH Agency or Local Panel, however the Local Panel must be formally notified eventually. The process would be that the Local Panel would advise the ACH Agency to then act on its behalf to invoke an IPO.

We question how the orders will be communicated to the offending party. It will need to be explained properly on Country. How will this process be resourced?

We question how the interim protection orders will be monitored for compliance and how this compliance monitoring will be resourced.

The appeal process described in Part 7, s 83[38] will require the ACH Agency and the Local ACH Panel to be advised. In s 83 (4), the Court should have regard to the objects of the Act, and the advice of the ACH Local ACH Panel involved, which must be recognised as a party to the appeal.

The hardship of the offender landholder is irrelevant. Why would an illegal act of ACH harm be allowed to proceed because the landholder or developer might go bankrupt and / or it might affect their business if they are restrained by an IPO? We don't understand why this option is given in the Bill. It must be deleted from the Act.

**Division 4 Remediation orders**

Much of Section **86 Remediation work required by order**[39] will need to be changed. The person against whom the remediation order is made, should not propose the nature and extent of harm, prepare a plan of action, engage their own consultant to propose and prepare a plan of action, or undertake any of the monitoring required to measure the progress of remediation. Rather the Local ACH Panel should determine the harm and remediation required, and instruct the ACH Agency in relation to this. The ACH Agency should provide the Local ACH Panel with access to suitably qualified people to provide advice to the ACH Local Panel, and support the ACH Local ACH Panel throughout the remediation process. Between them they should both be satisfied that the remediation work undertaken is satisfactory and completed according to terms they determine in the remediation work order. The Local ACH Panel must approve and engage any contractors to undertake the Remediation Work, and the person subject to the remediation work order should be required to cover all costs. This will eliminate the need for another remediation

[38] Page 33, Aboriginal Cultural Heritage Bill 2018
[39] Page 34, Aboriginal Cultural Heritage Bill 2018

work supplier if the offender fails to comply with the work order, as is offered in s 88.[40] If the Local ACH Panel's contractor undertakes the remediation work, then the Local ACH Panel will be directly involved in monitoring the work to its satisfaction, within a timeframe under its control. Unnecessary court and legal advisers' time would be eliminated.

The appeal process described in Part 7, s 93[41] will require the Local ACH Panel to be able to join the process, and receive legal advice.

Aboriginal people, family groups, communities and Local ACH Panels must be able to join merit appeals. The proposed Bill is not fair in that it provides that only proponents of ACH harms are able to appeal against orders on their merits, whereas the only mechanism Aboriginal people have is judicial review arguing on the basis that there is an error of law (by the decision maker).

**Part 8 Investigation powers**

The ACH Agency, under instructions from Local ACH Panels, would employ and train "authorised officers" to investigate compliance with the ACH Act and suspected breaches of the ACH Act. Local ACH Panels could be deputised by the ACH Agency for this task.

We would be interested to explore if NSW Police officers could undertake this additional training and be employed for this purpose from each police command. DEG proposes that a training academy for these authorised officers is established in Walgett. Once trained, authorised officers would need to be stationed on the ground throughout NSW. Currently investigations officers with NSW OEH are based regionally and find it difficult to travel in a timely manner to respond to reports DEG registers with Enviroline. Therefore we estimate the staff would need to at least be triple the numbers of existing ACH investigations staff of NSW OEH. And investigations will also have to be expanded to include environmental and water matters. The investigations officer must be accompanied by a person authorised (and trained) by the Local ACH Panel, to travel with them and provide assistance to them.

> ***108 Authorised officers may request assistance***
>
> *A person may accompany an authorised officer and take all reasonable steps to assistance authorised officer in the exercise of the authorised officer's functions under this Part if the authorised officer is of the opinion that the person is capable of providing assistance to the authorised officer in the exercise of those functions.* [42]

The presence of police will be necessary for safety, acknowledging the risks evidenced by the recent killing of an NSW OEH Officer by a farmer near Moree. The locally authorised person would be present to provide locally relevant ACH knowledge to the investigations team. This investigations team would need to be equipped with video, GPS, emergency beacons and satellite phones, and monitored at all times by their base, in order to minimise the proven risk to

[40] "Other person may carry out remediation work if failure to comply with order"
[41] Page 35, Aboriginal Cultural Heritage Bill 2018
[42] Part 8, Division 4, 108, page 39, Aboriginal Cultural Heritage Bill 2018

their lives. As offered above, landholders/irrigators and other developers are often missing important socialisation and other psychological skills, and their pathologies are often allowed to magnify and fester in isolation – far away from health services and regular community interactions and socialisation opportunities. This is one of the reasons why ACH is harmed in the first place, but it also a reason why compliance teams' lives are at risk.

**Section 118. Extraterritorial application**

It will be important that investigations into breaches of the Act extend outside NSW and possibly outside Australia if necessary.

**Part 9 Criminal and civil proceedings**

Whether the two year limit on proceedings against offences is appropriate will only be known by DEG when we know how well the ACH Agency and Local Panels are resourced to respond in a timely manner to reports, and that the Agency has a legal team that can put together prosecutions in a timely way. There should be no time limits imposed on ACH Agency and Local Panels, only on appeals made against Local Panel and ACH Agency decisions.

ACH crimes should be able to be prosecuted under the Act retrospectively.

The only other option for Aboriginal people to defend its ACH is by being able to bring civil proceedings in the Land and Environment Court. They would need to prove the breach on the balance of probabilities. Those provisions would only be used by Aboriginal people if the ACH Agency is not doing its job. We ask the NSW Government - will it be left up to Aboriginal people to enforce the Act, in order to protect their ACH, like it is now? Civil enforcement provisions for Aboriginal people are important and should remain however it shouldn't be left to Aboriginal people to enforce the Act. Monitoring for compliance will be very important to build the faith of Aboriginal people in NSW civic society and the law.

A definition in this Part

*(3)* ***Definitions***

*In this Division:* ***damage*** *to Aboriginal cultural heritage, means harm to:*
*(a) an Aboriginal object, or*
*(b) Aboriginal ancestral remains.* [43]

This definition excludes the harming of a place (for example a bora ground or occupation site, quarry site, story site) or landscape or element of a landscape (eg a significant area of habitat or waterhole, a clump of significant medicine plants etc). Harm to intangible ACH is also excluded in this part of the Bill. We need to ensure that the Act will protect more than just objects or ancestral remains, and harms are extended to being understood to occur to ACH as it is described in the definition.

[43] Part 9, Division 3 Ancillary court orders, page 50, Aboriginal Cultural Heritage Bill 2018

It appears that the Bill's harm offences apply to objects, remains and declared ACH. Declared ACH can include landscapes and natural features and materials, but they will only be protected if they are declared. And in the Bill it is the Minister, not the ACH Agency that decides what to declare. This must change. The Agency should make declarations as we cannot rely on the Minister as this risks delay. Currently no timeframes and decision-making criteria are given and the decision risks becoming a political one.

The ACH Agency (but realistically the Local Panels and their supporting organisations) will need staff on the ground to ensure court order compliance. The ACH Agency will have to sue the offender for contempt of court if court orders are disobeyed. Resourcing again must be considered here. It is all very well to have an Act but we know from bitter experience that this means nothing when resources are not applied to enforce the laws. And governments wonder why Aboriginal people do not vote!

The terms of a restorative justice order would need to be proposed and agreed to by the Local ACH Panels. The Local ACH Panel would need capacity to supervise the restorative justice work to be undertaken – unless NSW Justice will do this in which case they will need special training by the Local ACH panels and the Local ACH Panels will need to determine and inspect the work undertaken.[44] It is unclear in the Bill who will supervise the restorative justice process.

The work to repair harms must be paid for by the offender, and commissioned by the Local Panel to the quality they require. The order should define what outcomes are required and what steps need to be taken by the offender. If the offender doesn't comply with the order, then that is an offence, and they must be prosecuted. They need to pay the fine or make good the harm by funding a repair process. The LP would advise the ACH Agency to take the offender to court if they have breached their order.

The Act should provide a process in which the offender is brought together with those offended against, in a safe place by an independent arbitrator to help mediate between offender and victims, if the Local Panel believes this may assist. It may provide a wonderful opportunity to educate the offenders of the harms that they are causing. In many cases the offender may require a health referral and offered intensive therapy and resocialisation support. The person who the order is made against needs to be educated or retrained and also must "face the music" for their offence. DEG members are sceptical whether landholders, miners and other developers would ever willingly listen to blackfellas, and would only use an option for restorative justice as a cheap and dishonest way of eluding a fine or jail term. So DEG proposes that the Act must fund a widespread attitudinal-change media campaign in order to bring about widespread community understanding and appreciation of ACH and the importance of Aboriginal communities' ACH management roles. ACH is a valuable unrealised asset for NSW. Money spent on a well-crafted advertising campaign will save many dollars for NSW in the long run, and make everyone's job easier in the ACH management field. We remember the dollars spent to combat the first wave of

[44] As mentioned in part 9, Division 3 142 (2), page 53, Aboriginal Cultural Heritage Bill 2018

the HIV/AIDs epidemic and how that has been proven to be a very effective health promotion initiative, and saved lives. The same dollars need to be spent to promote ACH, and ACHAA members (like DEG) are well-placed to lead this task.

It is usually impossible to repair ACH that has been harmed. This is why there needs to be really strong fines imposed, and why most resources need to be devoted to prevention of ACH harms.

A proportion of fines revenue should be devoted to ACH conservation activities. If the fines revenue only goes into general revenue then nothing has been repaired. The sentence has only punished someone, but not been used to conserve ACH. Fines revenue should be used to support the work of Local Panels and for more community education re ACH.

The DEG asks that the architects of the proposed ACH legislation consider their task very carefully. We hope that this submission has shown that a better way for the NSW Government to support Aboriginal communities' ACH to flourish is achievable.