Reforming the Aboriginal cultural heritage legislation

Consultation topics guide

These questions are to help you consider your response to the Government model. You do not have to answer all of them. You may wish to just focus on those aspects of the model that relate to your views.

How to have your say

The current phase of public consultation seeks the views and solutions of all stakeholders. There are several ways for you to have your say.

🔗 Online  📞 Attend a workshop  📧 By mail
📞 By phone  📧 By fax  📧 By email

For more information, see www.environment.nsw.gov.au/achreform

The closing date for consultation is 14 February 2014.

Removing ACH from the NPW Act

Stand-alone legislation

For both pragmatic and symbolic reasons, the Government has proposed a new Aboriginal Cultural Heritage (ACH) Act to replace the provisions for ACH currently included in the National Parks and Wildlife Act 1974. The objectives of the new ACH Act would reflect the intent to celebrate, promote, protect and better manage Aboriginal cultural values in NSW.

Q.1 Should a new stand-alone Aboriginal cultural heritage Act be created?

If not, what alternative would you suggest?

Preamble

The legislation seeks to protect the ACH values identified as important to the Aboriginal people of NSW:

• Aboriginal spiritual and cultural heritage values exist in the land, waters and natural resources of NSW
• Aboriginal people are the critical determinants of ACH values
• the wellbeing of Aboriginal people is intimately tied to the wellbeing of their Country
• the social fabric of NSW and Australia is enriched by providing opportunities to share, understand and celebrate ACH values.

Q.2 Does the proposed preamble respectfully reflect contemporary views and understanding of the value of Aboriginal culture and heritage?

If not, what suggestions would you make to improve the preamble?
Definition

Aboriginal cultural heritage (ACH) means the practices, representations, expressions, knowledge and skills – along with the associated objects and artefacts – that Aboriginal people recognise as part of their cultural heritage, insofar as these values are reflected in the landscape.

Q.3 Does the proposed definition for Aboriginal cultural heritage appropriately recognise tangible and intangible ACH values?
If not, what alternative wording would you suggest to improve the definition of ACH?
Local people, local decisions

Who is to make local decisions

In feedback received, Aboriginal people highlighted the need to identify those people with cultural authority and knowledge of cultural practices to make decisions about Country.

It would be inefficient, costly and time consuming to require proponents to consult with all the people identified with a cultural connection for every proposed land-use activity. To address this, each Local ACH Committee, when established, will comprise 10 nominated identified people. These are people who have connection to Country and knowledge and understanding of the cultural heritage practices and priorities for their Country.

The Local ACH Committee will have a balance of males and females. Different local groups with cultural association will also be represented. This ensures the broader interests of the local Aboriginal community are represented. Positions on the Local ACH Committee will be held for five years.

Q.4 Should the composition of the Local ACH Committees include people with the following statutory recognition:

- parties to a Native Title determination (NSW Native Title Act 1994)?
- registered Native Title claimants (NSW Native Title Act 1994)?
- people identified as Aboriginal Owners (Aboriginal Land Rights Act 1983)?
- parties to an Indigenous Land-use Agreement (NSW Native Title Act 1994)?

List any other statutory processes Government should consider for identifying Aboriginal people with the cultural authority to speak for Country.

Q.5 Should the Local ACH Committees also include Aboriginal Elders who are Traditional Owners and Knowledge Holders?

If so, what guidance would you suggest is used to identify Aboriginal Elders who are Traditional Owners and Knowledge Holders that should be recognised for membership of a Local ACH Committee?

Q.6 Which of these four proposed options for creating boundaries for the Local ACH Committees do you prefer?

- Use the Local Aboriginal Land Council boundaries
- Use the regional Aboriginal Land Council boundaries
- Use the local Government and Shire boundaries
- Use the local land services boundaries to be established

List any other boundaries Government should consider for the Local ACH Committees.
Significance criteria for ACH values

Consideration was given to whether the new legislation should define ‘significance’ or use ‘significance criteria’ to decide the best management approach. The Government determined that establishing significance criteria would remove a local communities' authority to define its own heritage and values. It recommends control over identifying, defining and assessing the values of heritage objects, places and landscapes should become the role of the Local ACH Committee within a framework that allows consistency with Government support and oversight.

Q.7 Do you agree with the proposal to establish the following three categories for classifying ACH values:
- no or low ACH value?
- high ACH value?
- incomplete ACH information?

List any other criteria Government should consider for Local Aboriginal Committees and people to map and categorise local ACH values.

ACH Maps and Plans of Management

The ACH Maps will visually show areas of high ACH value, areas of low or no ACH value and areas where knowledge of the ACH value is incomplete. Each Local ACH Committee will map, according to criteria set within the regulations, where known and incomplete ACH values are located within the map’s boundary.

For every ACH Map created, a Plan of Management will be developed according to the criteria set in the regulations. The purpose of this plan is to outline specific strategies for managing each type of ACH value identified in the map.

Q.8 Should the Local ACH Committees work with other local Aboriginal people identified with cultural authority to:
- identify local ACH values?
- categorise local ACH values?
- map local ACH values?
- develop local ACH Plans of Management to outline strategies for managing each type of ACH value identified in the map?

List any other ways each Local ACH Committee should work with the local Aboriginal people, with community or legislatively recognised cultural knowledge, to manage their local ACH values.

Negotiating Project Agreements

The current Aboriginal heritage impact permits will be replaced by new Project Agreements that are negotiated between the proponents and the Local ACH Committee. Project Agreements will be required for certain activities in areas that are mapped as having incomplete or high ACH values. Proponents and the Local ACH Committee will work through the regulatory process together to develop a Project Agreement.

Q.9 Should Project Agreements be negotiated between the Local ACH Committee and proponents?

What process would you suggest the Local ACH Committee undertake to negotiate a Project Agreement?
Tools and support for conservation and strategic planning

ACH Register

The ACH Register is a database which will hold all known and relevant ACH information in NSW. It will be able to produce ACH reports and maps of any scale for land in NSW. The ACH Register would need to be linked with the ePlanning system proposed under the planning reform process to ensure that Regional Growth Plans, Subregional Delivery Plans, Local Plans and all other relevant statutory planning instruments consider ACH values early.

Q.10 Will the creation of a public ACH Register, which will be publicly accessible and contains all ACH information for NSW, help:
- raise awareness of ACH values?
- with strategic planning and development processes?
- lead to better opportunities to protect ACH?
- inform land-use decisions?
- create ACH conservation outcomes at both local and state levels?

List any other suggestions for improving the use of the ACH Register.

State of Aboriginal Cultural Heritage Report

This report will be published every three years, providing status reports of ACH in NSW. It will contain information drawn from Plans of Management, Project Agreements and data from the ACH Register, and will examine ACH trends and potential implications for the ongoing practice and protection of Aboriginal culture and heritage. It will make state, regional and local recommendations for future policy, program and legislative action required to ensure appropriate ACH protection and management.

Q.11 Will the State of ACH Report will be an effective tool for:
- monitoring cumulative impacts and conservation outcomes?
- informing local, regional and state-wide government policy and programs?
- evidence-based decision making at the local and state-wide levels?
- informing community and government conservation priorities?

Describe what you believe the State of ACH report should include, and the benefits it would provide to stakeholders.

Local prioritisation and strategic planning

Local prioritisation and strategic planning for activities that are required for conservation, access and cultural practice will be outlined in each Plan of Management, as will local aspirations and priorities related to managing Country and the care and ownership of ACH. The existing legislative provisions for care and ownership of ACH and access to and management of Country will be maintained in the new model.

Q.12 Will the following proposed statutory ACH conservation tools help Local ACH Committees work with other parties to develop funding applications, to conserve, protect and manage ACH values:
- Local ACH Plan of Management?
- Local ACH Maps?
- ACH Register?
- Project Agreements?
- State of Aboriginal Cultural Heritage Report?
List any other ACH conservation tools Government should consider to help conserve, protect and manage ACH values.

Q.13 Would tools, such as minimum standards, templates and criteria, support and assist the Local ACH Committees to develop effective Plans of Management, ACH Maps and Project Agreements?

List any other assistance Government should consider to assist Local ACH Committees to develop Local ACH Maps, Plans of Management and Project Agreements.

Q.14 Should the following existing mechanisms be strengthened in order to protect, conserve and manage ACH values:
- declaring Aboriginal Places (currently within the *National Parks and Wildlife Act 1974*)?
- voluntary conservation agreements (currently within the NPW Act)?
- listing places and items on State Heritage Register (currently within the *Heritage Act 1977*)?

List any other processes the Government should consider to protect, conserve and manage ACH values.

Q.15 Will the following serve as incentives for people to better protect, conserve and manage ACH values:
- maintaining the existing penalties for harm to ACH values?
- maintaining the existing offences of harm to ACH values?
- maintaining the existing defences of harm to ACH values?
- maintaining the existing powers to investigate harm to ACH values?
- introducing a penalty for failing to comply with a Project Agreement?
- introducing a penalty for failing to comply with consultation requirements?

List any other incentives the Government should consider to protect, conserve and manage ACH values.

Q.16 Would the following processes provide for transparency and accountability in the proposed ACH model:
- criteria for ACH values within ACH Maps?
- placing ACH maps and Plan of Management on public exhibition before decisions are made?
- placing all relevant ACH information on the public ACH Register (with restrictions for culturally sensitive information)?
- review of Project Agreements by the Heritage Division before listing them on the public ACH Register?
- reporting via the State of the Aboriginal Cultural Heritage Report?

List any other suggestions for increasing the transparency and accountability in the proposed system.

Links to the planning process

**Early, upfront and ready access to ACH information**

The draft Government model for ACH reform must be consistent with the reforms approved for the planning process, including considering ACH early, providing upfront and easy access for all to ACH information to inform land use planning and decisions. Providing this material early will mean Project Agreements can be negotiated earlier in the planning process than is currently possible.

The best option for early, consistent and comprehensive integration of ACH values in the planning system is to link ACH values into the proposed state-wide strategic mapping process and ePlanning system under the new planning reforms.
Q.17 Would linking the ACH Maps and Plans of Management with the proposed ePlanning process:

- be useful for considering ACH values early in the planning process?
- incorporate ACH values into the strategic planning process?
- provide clarity for proponents, planning authorities of the ACH values developments should avoid impacting?
- link effectively with the proposed planning reform?
- provide better opportunities for Local ACH Committees and Local Councils to work together to plan, protect and manage ACH values via the Local Land Use Plans?

List any other processes the Government should consider to integrate ACH values at the strategic level.

Q.18 If a Project Agreement has not been developed before planning approval is issued, should the approving authority be required to include a standard clause as a condition of consent?

For example: ‘an ACH Project Agreement must be gained to manage the high and/or incomplete ACH values mapped on Lot xx DP xx, prior to commencing any ground disturbance works’.

Q.19 Would developing Project Agreements at the earliest stages of the planning process, rather than after a development approval is issued, be a more effective way to consider and manage ACH values?

List any other mechanisms to encourage Project Agreements to be created early in the planning process.

Q.20 What process would you suggest planning authorities undertake to ensure ACH values have been considered when development consent is sought?

List any suggestions for improving the links between the ACH and planning reform processes.

Flexible Project Agreements

**ACH outcomes managed via Project Agreements**

With the strategic planning and approvals occurring earlier via the ACH Maps and Plans of Management, Project Agreements will not require additional planning approval. They will be required to meet the minimum standards set in the regulation and conditions within the Project Agreements will need to be consistent with the ministerially approved Plan of Management.

Q.21 Should Project Agreements be flexible to allow the Local ACH Committee and proponent to form conditions relating to:

- ownership of ACH values within the relevant land?
- access to ACH values within the relevant land?
- methodologies for managing ACH values to be impacted or investigated within the relevant land?
- conservation of ACH values within the relevant land?
- the needs of the project?

List any other factors a Project Agreement should include.

Q.22 Will a Code of Conduct and Negotiation Framework assist Local ACH Committees and proponents to conduct fair, equitable and good faith negotiations when developing Project Agreements?

List any other suggestions you have to support both Local ACH Committees and proponents to conduct fair, equitable and good faith negotiations.
Funding ACH outcomes

It is acknowledged that, while the Government provides financial grants for a range of cultural initiatives, these grants will not be enough to sustain new ACH conservation areas. Innovative ways to fund Local ACH Committees to maintain, enhance and protect ACH values will need to be considered. The Government recognises a new funding system may be required. There are a range of options for funding and the Government welcomes your views.

Q.23 Which of the following funding options do you believe would provide the best outcomes for both the ACH values and development?

- **Voluntary funding support:** A proponent could voluntarily offer funding to support ACH enhancement projects identified in the Plan of Management. For example, Project Agreements could include a condition that the proponent will fund a project to maintain or improve local ACH values outside the impact area, instead of spending the equivalent amount of funding within the development area, which would not deliver quality or sustainable ACH outcomes for the broader Aboriginal community.

- **Levy:** This option requires proponents to pay a levy based on a percentage of the capital investment value of the development. The levy payment would be limited to those projects requiring Project Agreements to be negotiated. These levy funds could be placed in a separate ACH fund managed by OEH’s Heritage Division. The funds would be distributed to support funding the ACH initiatives outlined in ACH Plans of Management.

- **Offsets:** Within the Plans of Management, Local ACH Committees could identify land containing high ACH value which they desire to purchase with the express intent to conserve, maintain or enhance the high ACH value identified with that land. It may be possible for the Local ACH Committee to purchase these areas with funds from proponents seeking to offset their impacts on another site within the local or regional boundary. Lists of areas which could not be impacted or involve negotiating any offsets would need to accord with the ministerially approved and publicly available Plan of Management.

- **Cost recovery plus conservation:** This option would set the fees paid by the proponent for negotiating a Project Agreement at a level that would cover the Local ACH Committee negotiation costs and a set amount for conservation works within the local or regional boundary. These amounts would be established via the regulation and be dependent on the ACH values in the local area and the level of development.

Note: All these options require annual reporting (to be set within the regulation) to show how the funds have been utilised to meet the Plan of Management conservation priorities. Annual reports would be uploaded into the ACH Register.

List any other funding suggestions you have that would result in supporting sustainable ACH outcomes and meet the needs of the development project.

Dispute resolution and appeal processes

Resolution processes

The ACH model will include dispute-resolution processes and proposes standard judicial review appeal rights regarding the administration of the processes under the Act. There are a range of options for dispute resolution. The Government welcomes your views.
Q.24 Which dispute resolution process do you think would be the most effective for assisting the Local ACH Committee and proponent?

- **Mediation** is a process where the disputants, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its mediation.

- **Arbitration** is a process where the parties present arguments and evidence to a dispute resolution practitioner who makes a determination which is binding on the parties. Arbitration is particularly useful where the subject matter is highly technical, or where the parties seek greater confidentiality than in open court.

- **Neutral evaluation** is a process where the disputants present arguments and evidence to a dispute resolution practitioner. The practitioner makes a determination on the key issues in dispute and the most effective means of resolving the dispute, without determining the facts of the dispute. The determination is not binding.

- **Conciliation** is a process in which the disputants, with the assistance of a conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process.

List any other suggestions for dispute resolution processes for Government to consider.

### Appeals and reviews

As with the current system for issuing Aboriginal heritage impact permits under the NPW Act, there is no proposal to create third-party merit appeal rights. The purpose of the public exhibition process for ACH Plans of Management is to bring forward engagement in project planning and consequently address any issues raised from parties with a right or interest.

Q.25 Will the need for dispute resolution and the likelihood of appeals be reduced by:

- requiring compliance with minimum standards and guidelines for the development and approval of ACH Maps and Plans of Management?
- placing Plans of Management and ACH Maps on public exhibition submissions before decisions are made?
- setting mandatory timeframes, minimum standards and guidelines for consultation?
- compliance with a mandatory Code of Conduct and Negotiation Framework for Project Agreements?
- mandatory criteria and minimum standards for development of Project Agreements?

Q.26 When Plans of Management are made by the Local ACH committees:

- should any member of the public have the right to appeal the making of those plans, on the basis that that person does not think that the plan is appropriate, fair, equitable, and have the Court decide the plan (i.e. merits appeal)?
- should any member of the public have the right to appeal the making of those plans, on the basis that the process contravened legal principles (i.e. judicial review)?

Q.27 When Project Agreements are made by the Local ACH committees:

- should any member of the public have the right to appeal the making of those Agreements, on the basis that that person does not think that the Agreement is appropriate, fair, equitable, and have the Court decide the Agreement (i.e. merits appeal)?
- should any member of the public have the right to appeal the making of those agreements, on the basis that the process leading to the Agreement contravened legal principles (i.e. judicial review)?