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NEW SOUTH WALES
DRAFT GOVERNMENT BILL

Aboriginal Cultural Heritage Bill 2018

No. , 2018

A Bill for

An Act relating to Aboriginal cultural heritage.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Aboriginal Cultural Heritage Act 2018*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Objects of Act

The objects of this Act are as follows:

- (a) in support of Parliament's recognition of Aboriginal people under section 2 of the *Constitution Act 1902*:
 - (i) to recognise that Aboriginal cultural heritage belongs to Aboriginal people and accordingly establish a legislative framework that reflects Aboriginal people's responsibility for and authority over Aboriginal cultural heritage, and
 - (ii) to recognise Aboriginal cultural heritage as a living culture that is intrinsic to the well-being of Aboriginal people,

Note. By section 2 of the *Constitution Act 1902*, Parliament (on behalf of the people of NSW) acknowledged and honoured the Aboriginal people as the State's first people and nations and recognised that Aboriginal people, as the traditional custodians and occupants of the land in NSW, have a spiritual, social, cultural and economic relationship with their traditional lands and waters and have made and continue to make a unique and lasting contribution to the identity of the State.

- (b) to establish effective processes for conserving and managing Aboriginal cultural heritage and for regulating activities that may cause harm to that heritage so as to achieve better outcomes for Aboriginal people and the wider NSW community,
- (c) to provide for the collection and use of information about Aboriginal cultural heritage in a culturally sensitive manner to support effective planning, conservation and regulatory actions and to enable the monitoring and evaluation of the outcomes of those actions,
- (d) to promote understanding of and respect for Aboriginal cultural heritage among all NSW people,
- (e) to enable and support voluntary actions that conserve Aboriginal cultural heritage.

4 Meaning of "Aboriginal cultural heritage" and related key terms

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

- (2) In this Act:

Aboriginal ancestral remains means any bodily remains of deceased Aboriginal persons, but does not include:

- (a) bodily remains buried in a cemetery in which non-Aboriginal persons are also buried, or

- (b) bodily remains dealt with or to be dealt with in accordance with a law of the State relating to the treatment or examination for forensic or other purposes of the bodies of deceased persons.

Aboriginal ancestral remains include (but are not limited to) any bodily remains that are declared under Part 3 to be Aboriginal ancestral remains for the purposes of this Act.

Aboriginal cultural heritage significance means of significance to Aboriginal people or communities for conservation for present and future generations and in respect for past generations, and includes any such spiritual, social, historic, scientific or aesthetic significance.

Aboriginal object means any object, article or material evidence that relates to the habitation of land in New South Wales by Aboriginal people (whether or not connected with particular land), being habitation before or concurrent with the occupation of the land by other people. An Aboriginal object includes (but is not limited to) any object, article or material evidence that is declared under Part 3 to be an Aboriginal object for the purposes of this Act.

intangible Aboriginal cultural heritage means any practices, representations, expressions, beliefs, knowledge or skills comprising Aboriginal cultural heritage (including intellectual creation or innovation of Aboriginal people based on or derived from Aboriginal cultural heritage), but does not include Aboriginal objects, Aboriginal ancestral remains or any other tangible materials comprising Aboriginal cultural heritage.

Note. Under section 18, a landscape or other place having Aboriginal cultural heritage significance, and tangible material relating to Aboriginal life or historical events (in addition to Aboriginal objects and ancestral remains) may be declared to comprise Aboriginal cultural heritage.

5 Definitions generally

- (1) In this Act:

Aboriginal person means a person who:

- (a) is a member of the Aboriginal race of Australia, and
- (b) identifies as an Aboriginal person, and
- (c) is accepted by the Aboriginal community as an Aboriginal person,

and **Aboriginal people** has a corresponding meaning.

ACH Authority means the Aboriginal Cultural Heritage Authority constituted under Part 2.

ACH conservation agreement means an agreement under Part 4 for the purpose of conserving Aboriginal cultural heritage between the ACH Authority and the owners of land.

ACH Fund means the Aboriginal Cultural Heritage Fund established under Part 6.

ACH information system means the ACH information system established and managed by the ACH Authority under Part 3.

ACH management plan means an ACH management plan approved by the ACH Authority under Part 5.

ACH map means an ACH map prepared by the ACH Authority and approved by the Minister under Part 3.

ACHAP Code of Practice means the ACH assessment pathway code of practice developed by the ACH Authority and approved by the Minister under Division 4 of Part 5.

connected, in relation to an Aboriginal object or Aboriginal ancestral remains and particular land, means the cultural relationship between the object or remains and the particular land.

function includes a power, authority or duty, and **exercise** a function includes perform a duty.

harm—see Part 5.

LALC means a Local Aboriginal Land Council constituted under the *Aboriginal Land Rights Act 1983*.

land includes any place.

Local ACH Consultation Panel means a local Aboriginal cultural heritage consultation panel established by the ACH Authority under Part 2.

Tier 1, Tier 2, Tier 3 or Tier 4 monetary penalty, in relation to an offence, indicates the maximum monetary penalty that a court may impose for the offence—see section 120 for the relevant maximum amounts.

Note. The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) Notes included in this Act do not form part of this Act.

Part 2 Aboriginal Cultural Heritage Authority and Local Consultation Panels

Division 1 Establishment and management of ACH Authority

6 Establishment of ACH Authority

There is established by this Act a body corporate with the name of the Aboriginal Cultural Heritage Authority (the *ACH Authority*).

7 Status of ACH Authority

- (1) The ACH Authority is not subject to the control or direction of the Minister.
- (2) The ACH Authority is a NSW Government agency.

Note. See section 13A of the *Interpretation Act 1987* in relation to the status, privileges and immunities of bodies declared to be NSW Government agencies.

8 Board of ACH Authority

- (1) There is to be a Board of the ACH Authority.
- (2) The Board is to consist of 13 members (being Aboriginal persons) appointed by the Minister.

Consultation note. The number of members has not yet been confirmed and is subject to discussion.

- (3)

Consultation note. The process for the nomination of Aboriginal persons as members of the Board, and their required collective skills and expertise, has not yet been determined and included in the draft Bill, but is intended to be a community-driven process to ensure the Board has cultural legitimacy and the requisite skills and expertise.

- (4) The Minister is to appoint a representative of the New South Wales Aboriginal Land Council as a member of the Board.
- (5) The Minister is to consult the Minister administering the *Aboriginal Land Rights Act 1983* on the appointment of members of the Board if a different Minister administers that Act.
- (6) Schedule 1 contains provisions relating to the members and procedure of the Board.

9 Management of ACH Authority

- (1) The affairs of the ACH Authority are to be managed by the Board of the ACH Authority.
- (2) Any act, matter or thing done in the name of, or on behalf of, the ACH Authority by the Board is taken to have been done by the ACH Authority.

10 Committees of Board of ACH Authority

- (1) The Board of the ACH Authority may appoint committees to assist it to exercise its functions.
- (2) A committee is to consist of the members appointed by the Board of the ACH Authority (whether or not they are members of the Board).

11 Staff of ACH Authority

- (1) Persons may be employed in the Public Service under the *Government Sector Employment Act 2013* to enable the ACH Authority to exercise its functions.

Note. Section 59 of the *Government Sector Employment Act 2013* provides that the persons so employed (or whose services the ACH Authority makes use of) may be referred to as

officers or employees, or members of staff, of the ACH Authority. Section 47A of the *Constitution Act 1902* precludes the ACH Authority from employing staff.

- (2) The ACH Authority may engage consultants for the purpose of obtaining expert advice.

Division 2 Functions of ACH Authority

12 Functions of ACH Authority

- (1) The ACH Authority has the functions conferred on the ACH Authority by or under this Act or any other Act.
- (2) In particular, the ACH Authority has the following functions:
 - (a) the establishment of Local ACH Consultation Panels and support for their operation,
 - (b) the making of recommendations to the Minister on the declaration of Aboriginal cultural heritage,
 - (c) the registration of intangible Aboriginal cultural heritage,
 - (d) the establishment and management of the ACH information system,
 - (e) the preparation for approval by the Minister of ACH maps,
 - (f) the development for approval by the Minister of a monitoring and reporting framework:
 - (i) to improve the evidence base for decisions by government or others relating to Aboriginal cultural heritage, and
 - (ii) to improve the quality of information provided to the public about actions to conserve Aboriginal cultural heritage,
 - (g) the entry into ACH conservation agreements,
 - (h) the approval of ACH management plans,
 - (i) the management of the ACH Fund in accordance with the funding allocation strategy approved by the Minister,
 - (j) the care of Aboriginal objects or Aboriginal ancestral remains vested in the ACH Authority and determination of requests for their repatriation,
 - (k) the development and publication of guidance on the practical operation of this Act,
 - (l) the development for the approval of the Minister of the funding allocation strategy, the mapping methodology for ACH maps, the monitoring and reporting framework and the ACHAP code of practice,
 - (m) advising the Minister on other matters relating to the administration of this Act.

Note. Under the *Heritage Act 1977*, the ACH Authority acts in the place of the Heritage Council in connection with making recommendations to the Minister on the listing of items on the State Heritage Register that relate to Aboriginal cultural heritage and determining applications for approval of actions that would affect any such listed items.

13 Delegation of certain functions of ACH Authority

- (1) In this section:

relevant delegate means:

 - (a) a member of the Board of the ACH Authority, or
 - (b) a committee of the Board of the ACH Authority, or
 - (c) a member of staff of the ACH Authority, or

- (d) a Local ACH Consultation Panel, or
 - (e) a LALC, or
 - (f) a NSW Government agency or the head of a Public Service agency, or
 - (g) a local council, or
 - (h) any person, or a person of a class, prescribed by the regulations.
- (2) The ACH Authority may delegate to a relevant delegate any of its functions (other than this power of delegation) that the regulations authorise to be delegated to the relevant delegate. However, the regulations cannot authorise the delegation of the following functions:
- (a) establishing Local ACH Consultation Panels,
 - (b) recommending the declaration of Aboriginal cultural heritage or making other recommendations to the Minister under this Act or under the *Heritage Act 1977*,
 - (c) entry into ACH conservation agreements,
 - (d) approval of ACH management plans.
- (3) The regulations may only authorise the delegation of the function of co-ordinating the establishment and supporting the operation of Local ACH Consultation Panels to a committee of the Board of the ACH Authority, a LALC or other Aboriginal organisation.
- (4) The regulations may make provision with respect to reports on the exercise of delegated functions.

Consultation note. It is proposed that (in line with the existing functions of LALCs under section 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. 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.

Division 3 Local ACH Consultation Panels

14 Establishment of Local ACH Consultation Panels

- (1) The ACH Authority is to establish local Aboriginal cultural heritage consultation panels (*Local ACH Consultation Panels*).
- (2) Local ACH Consultation Panels may be established for a particular area of the State or for particular aspects of Aboriginal cultural heritage, or both.

15 Membership of Local ACH Consultation Panels

The members of a Local ACH Consultation Panel are to be appointed by the ACH Authority in accordance with procedures publicly notified by the ACH Authority.

16 Functions of Local ACH Consultation Panels

- (1) Local ACH Consultation Panels:
 - (a) represent Aboriginal cultural heritage authority in relation to the area or aspect for which they are established, and
 - (b) have a role under this Act in decisions that affect Aboriginal cultural heritage in relation to that area or aspect, and
 - (c) provide advice to the ACH Authority in relation to that area or aspect.

- (2) In particular, Local ACH Consultation Panels have the following functions:
- (a) advising, and negotiating ACH management plans with, proponents of relevant activities,
 - (b) preparing local draft ACH maps and developing ACH strategic plans for approval under this Act,
 - (c) advising the ACH Authority on the following:
 - (i) recommendations for the declaration of Aboriginal cultural heritage (and any activities to be authorised by a declaration),
 - (ii) nominations by the ACH Authority for listings on the State Heritage Register,
 - (iii) proposed ACH conservation agreements,
 - (iv) the outcomes of the negotiation of ACH management plans and proposed changes to approved plans,
 - (v) information included in the ACH Information System,
 - (vi) the repatriation of Aboriginal objects or Aboriginal ancestral remains.
- (3) Local ACH Consultation Panels are required to operate in accordance with policies and guidelines issued by the ACH Authority.

17 Consultation with Aboriginal community

Procedures, policies and guidelines with respect to the establishment, membership and operation of Local ACH Consultation Panels are to be developed by the ACH Authority through a process of consultation with the Aboriginal community in New South Wales.

Part 3 Aboriginal cultural heritage declarations and information

18 Declarations of Aboriginal cultural heritage

- (1) The Minister may, on the recommendation of the ACH Authority, declare that for the purposes of this Act:
 - (a) land that is part of a landscape or other place having Aboriginal cultural heritage significance comprises Aboriginal cultural heritage (including land containing or otherwise connected with an Aboriginal object or Aboriginal ancestral remains whose removal from the land would reduce the Aboriginal cultural heritage significance of the object or remains or of the land), or
 - (b) any specified object, article or material evidence is an Aboriginal object, or
 - (c) any bodily remains are Aboriginal ancestral remains, or
 - (d) any other tangible material relating to Aboriginal life or historical events comprises Aboriginal cultural heritage.

Note. See section 4. In this Act, “Aboriginal object” and “Aboriginal ancestral remains” include (but are not limited to) declared objects or remains under this Part.

- (2) A declaration under this section may include a description of activities that may be carried out despite the declaration.

Note. Section 45 exempts any such activities from constituting harm to Aboriginal cultural heritage.

- (3) A declaration under this section is to be made by an order in writing of the Minister and has effect when it is recorded on the public online portal of the ACH information system.

Note. The *Interpretation Act 1987* provides that an order under an Act may be amended or revoked by further order.

- (4) Before making a recommendation to the Minister for a declaration under this section, the ACH Authority is to consult:
 - (a) any relevant Local ACH Consultation Panel, and
 - (b) the landholders of any land concerned, and
 - (c) any public or local authority that manages or controls any land concerned, and
 - (d) the owners of any object or other material concerned.

The ACH Authority is to have regard to any relevant provisions of the regulations or an ACH strategic plan when making any such recommendation to the Minister.

- (5) Public or private land, objects or materials may be declared under this section.

Consultation note. Declared Aboriginal cultural heritage will be a new mechanism to replace Aboriginal places under the National Parks and Wildlife Act 1974 and to extend to all aspects of Aboriginal cultural heritage, so as to identify that heritage and provide the protections conferred by this proposed Act.

19 Establishment and management of ACH Information System

- (1) The ACH Authority is to establish an information system containing information in relation to Aboriginal cultural heritage.
- (2) The ACH information system is to be managed by the ACH Authority for the purposes of supporting culturally appropriate and effective decision-making in relation to Aboriginal cultural heritage.
- (3) The ACH information system is to comprise the following:
 - (a) a restricted access database—for information on the system that is not appropriate for general access by the public and that may be accessed only by

- Local ACH Consultation Panels, the Board of the ACH Authority, persons engaged in the administration of this Act authorised by the Board and other persons authorised by the regulations,
- (b) a public online portal on a government website—for the public sharing of information on the system that is not part of the restricted access database.
- (4) The information on the ACH information system may include (but is not limited to) the following:
- (a) information on Aboriginal cultural heritage significance known to Local ACH Consultation Panels or the ACH Authority,
 - (b) reports on the assessment of particular Aboriginal cultural heritage that are prepared for the purposes of this Act,
 - (c) ACH management plans,
 - (d) declarations under this Part of land, Aboriginal objects, Aboriginal ancestral remains and other tangible material that comprises Aboriginal cultural heritage,
 - (e) registered intangible Aboriginal cultural heritage under Division 3 of Part 4 and agreements entered into under that Division,
 - (f) ACH maps approved by the Minister under this Part,
 - (g) relevant items listed on the State Heritage Register,
 - (h) ACH conservation agreements,
 - (i) ACH strategic plans,
 - (j) information of a kind prescribed by the regulations.
- (5) The ACH Authority is to develop protocols for the appropriate collection, updating and management of information on the ACH information system.
- (6) The ACH Authority is to use its best endeavours to ensure that the information on the ACH information system is accurate and as comprehensive as practicable. However, the ACH Authority is not subject to a statutory duty with respect to the information on the system that would give rise to any civil liability with respect to its accuracy or comprehensiveness.
- (7) The regulations may make provision for or with respect to the persons who may access information on the restricted access database, any fees payable for accessing any such information and any other matter relating to accessing or using any such information.

20 Preparation and approval of ACH maps

- (1) The ACH Authority is to prepare maps containing spatial data about Aboriginal cultural heritage (*ACH maps*).
- (2) The purpose of ACH maps is to assist those engaged in land-use planning, development assessment and land management or development activities to identify likely areas of Aboriginal cultural heritage. The ACH information system provides detailed information about Aboriginal objects and other Aboriginal cultural heritage in those areas.
- (3) Local ACH Consultation Panels (with the assistance of their support bodies) are to prepare draft ACH maps in relation to their local area and provide those draft maps and related information to the ACH Authority.
- (4) ACH maps (including local draft maps) are to be prepared in accordance with a mapping methodology developed by the ACH Authority and approved by the Minister.

- (5) ACH maps are required to be approved by the Minister and published on the public online portal of the ACH information system.
- (6) The Minister may, from time to time, approve of the amendment or replacement of ACH maps.

21 ACH strategic plans

- (1) ACH Authority may approve ACH strategic plans developed by relevant Local ACH Consultation Panels with the assistance of their support bodies.
- (2) ACH strategic plans are to identify priorities in their respective areas on the following to inform decision-making on Aboriginal cultural heritage planning and resourcing:
 - (a) Aboriginal cultural heritage conservation and management,
 - (b) access to Aboriginal cultural heritage,
 - (c) public awareness of Aboriginal cultural heritage,
 - (d) intergenerational knowledge transfer.
- (3) Public authorities are to take into consideration relevant ACH strategic plans when exercising their statutory or other functions. However, this subsection does not operate to exclude a statutory discretion of a public authority or to authorise any action by a public authority that is inconsistent with any statutory or other legal obligation of the public authority.

22 State of Aboriginal cultural heritage reports

- (1) The ACH Authority is required to prepare a report on the state of Aboriginal cultural heritage in the State:
 - (a) within 5 years after the commencement of this Act, and
 - (b) every 3 years thereafter.
- (2) The report is to be given to the Minister and tabled in both Houses of Parliament.
- (3) The report is to include the following matters:
 - (a) an assessment of the status of Aboriginal cultural heritage in the State (including the matters impacting on that heritage, the cumulative impacts and conservation outcomes that have been achieved),
 - (b) an analysis of the costs and benefits of conserving Aboriginal cultural heritage (including with respect to Aboriginal persons and Aboriginal communities),
 - (c) a review of the programs and activities of public authorities, non-government organisations and the private sector relating to the conservation of Aboriginal cultural heritage,
 - (d) an examination of the outlook for Aboriginal cultural heritage (including an examination of trends),
 - (e) an assessment of the effectiveness of the regulatory framework under this Act,
 - (f) any general recommendations for future policies, programs and legislative action to improve the effectiveness of this Act.

23 Annual reports of ACH Authority

- (1) An annual report of the ACH Authority under the *Annual Reports (Statutory Bodies) Act 1984* is to include such information as is prescribed by the regulations under this Act in relation to Aboriginal cultural heritage and the operation of this Act.

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Aboriginal Cultural Heritage Bill 2018 [NSW]
Part 3 Aboriginal cultural heritage declarations and information

- (2) Any such annual report of the ACH Authority (including its financial statements) may be included in the annual report of the Public Service agency in which the staff of the ACH Authority are employed.

Part 4 Conservation of Aboriginal cultural heritage

Division 1 Ownership and care arrangements

24 Ownership of certain Aboriginal objects or ancestral remains vested in ACH Authority on behalf of Aboriginal people

- (1) On and from the commencement of this section:
 - (a) an Aboriginal object that, immediately before the repeal of section 83 of the *National Parks and Wildlife Act 1974* by this Act, was taken to be the property of the Crown by the operation of that section, and
 - (b) an Aboriginal object or Aboriginal ancestral remains abandoned after the commencement of this section by any person,is the property of the ACH Authority.
- (2) The ACH Authority is to hold that property on behalf of Aboriginal people and is responsible for its proper care and protection.
- (3) The ACH Authority may exercise in relation to that property the powers it has in relation to other property of the ACH Authority.
- (4) This section does not operate to restrict the lawful use of land or to authorise the disturbance or excavation of any land.
- (5) Compensation is not payable in respect of the vesting of property in the ACH Authority by this section.
- (6) A reference in this section to an Aboriginal object that, immediately before the repeal of section 83 of the *National Parks and Wildlife Act 1974*, was the property of the Crown by the operation of that section includes a reference to Aboriginal ancestral remains that were the property of the Crown by the operation of that section.

25 Repatriation etc of Aboriginal objects, ancestral remains or other material that are property or under control of ACH Authority

- (1) The ACH Authority may deal with Aboriginal objects, Aboriginal ancestral remains or other tangible materials comprising Aboriginal cultural heritage that are the property or under the control of the ACH Authority:
 - (a) by returning the objects, remains or materials to any appropriate Aboriginal person or Aboriginal persons willing to accept possession, custody or control of them in accordance with Aboriginal tradition, or
 - (b) by otherwise dealing with the objects, remains or materials in accordance with any reasonable directions of any appropriate Aboriginal person or Aboriginal persons, or
 - (c) by making suitable arrangements for their safekeeping.
- (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.
- (3) Nothing in this section is taken to limit the right of an Aboriginal person or Aboriginal persons accepting possession, custody or control of any object, ancestral remains or materials pursuant to this section to deal with the object, remains or materials in accordance with Aboriginal tradition.

26 Acquisition, preservation etc of Aboriginal objects, ancestral remains or other materials that are not property or under control of ACH Authority

The ACH Authority may, by agreement with a person having the ownership or possession of:

- (a) an Aboriginal object that is, or Aboriginal ancestral remains that are, not the property or under the control of the ACH Authority, or
- (b) any other tangible materials comprising Aboriginal cultural heritage that are not the property or under the control of the ACH Authority,

acquire the object, remains or materials or take such other action as the ACH Authority thinks is practicable for their preservation or exhibition.

27 Notification of Aboriginal objects, ancestral remains or other materials

- (1) This section applies to Aboriginal objects, Aboriginal ancestral remains or other tangible materials comprising Aboriginal cultural heritage that are the property or under the control of the ACH Authority.
- (2) A person who is aware of the location of any such Aboriginal objects, remains or materials is required to notify the ACH Authority of their location as soon as practicable unless the person has reason to believe that the ACH Authority is already aware of their location.

Maximum penalty: Tier 3 monetary penalty.

Division 2 Aboriginal cultural heritage conservation agreements

28 ACH Authority may enter into ACH conservation agreements

- (1) The ACH Authority may enter into an agreement with the owner of land for the purpose of conserving Aboriginal cultural heritage in connection with the land (an *ACH conservation agreement*).
- (2) Land may be subject to a single ACH conservation agreement even if the land consists of separate parcels of land and whether or not the parcels are adjacent.
- (3) Land that comprises only part of one or more parcels of land may be subject to an ACH conservation agreement.

29 General provisions relating to ACH conservation agreements

- (1) The ACH Authority is not to enter into an ACH conservation agreement relating to land unless:
 - (a) all the owners of the land are parties to the agreement or have consented in writing to the agreement, and
 - (b) where the land (not being Crown land) is subject to a residential tenancy agreement or other lease, the tenant or the lessee has consented in writing to the conservation agreement, and
 - (c) where the land is subject to a mortgage or charge, the mortgagee or chargee has consented in writing to the agreement, and
 - (d) where the land is subject to a covenant, the ACH Authority has consulted with the person entitled to the benefit of the covenant about the terms of the agreement, and
 - (e) where the land is owned by a Local Aboriginal Land Council, the New South Wales Aboriginal Land Council has consented in writing to the agreement.
- (2) The ACH Authority is to consult any relevant Local ACH Consultation Panel on a proposed ACH conservation agreement.

- (3) The ACH Authority may enter into an ACH conservation agreement relating to land that is Crown land or lands of the Crown:
 - (a) with a public authority (not being a Public Service agency) that owns or has the control and management of the land, or
 - (b) if the land is under the control and management of a Public Service agency, with the responsible Minister.
- (4) If an ACH conservation agreement is entered into under subsection (2) by a public authority that is not the owner of the land concerned:
 - (a) the agreement is taken to have been entered into on behalf of the owner of the land, and
 - (b) a reference in this Division to the owner of the land (however expressed) includes, while a public authority has the control and management of the land, a reference to the public authority that has that control and management and, if the public authority is a Public Service agency, the responsible Minister.
- (5) The ACH Authority is not to enter into an ACH conservation agreement relating to Crown-timber land within the meaning of the *Forestry Act 2012* except with the consent of the Minister administering that Act.
- (6) The ACH Authority is not to enter into an ACH conservation agreement for Crown land except with the consent of the Minister administering the *Crown Lands Act 1989*.

30 Content of ACH conservation agreements

- (1) An ACH conservation agreement may contain any of the following terms, binding on the owner from time to time of the land to which it applies:
 - (a) restricting development on the land,
 - (b) requiring the owner to refrain from or not to permit specified activities on the land,
 - (c) requiring the owner to carry out specified activities or do specified things,
 - (d) requiring the owner to permit access to the land by specified persons for specified purposes,

Consultation note. ACH conservation agreements will be able to be used to provide access to private land by Aboriginal persons for purposes associated with Aboriginal cultural heritage. The ACH Authority will be able to register an agreement with the Registrar General so as to bind future owners of the land.
 - (e) requiring the owner to contribute towards costs incurred which relate to the land or the agreement,
 - (f) specifying the manner in which any money provided to the owner under the agreement is to be applied by the owner,
 - (g) requiring the owner to repay money paid to the owner under the agreement if a specified breach of the agreement occurs,
 - (h) providing for any other matter relating to the conservation of Aboriginal cultural heritage in connection with the land.
- (2) An ACH conservation agreement may contain terms, binding on the ACH Authority:
 - (a) requiring the ACH Authority to provide financial assistance, technical advice or other assistance, or
 - (b) requiring the ACH Authority to carry out specified activities or do specified things, or
 - (c) providing for any other matter relating to the conservation of Aboriginal cultural heritage in connection with the land.

31 Duration and variation of ACH conservation agreements

- (1) An ACH conservation agreement has effect from a day, or on the happening of an event, specified in the agreement.
- (2) An ACH conservation agreement may be varied by a subsequent agreement between the ACH Authority and all the owners of the land at the time of the variation. The area to which the ACH conservation agreement applies may be increased or reduced by any such variation of the agreement.
- (3) An ACH conservation agreement has effect in perpetuity or for the period set out in the agreement unless it is terminated:
 - (a) by a subsequent agreement between the ACH Authority and all the owners of the land at the time of the termination, or
 - (b) in any such other manner or in such circumstances as may be set out in the agreement.
- (4) An ACH conservation agreement may be varied or terminated by the ACH Authority by notification published in the Gazette, without the consent of the owners of the land, if the ACH Authority is of the opinion that the land is no longer needed for, or is no longer capable of being used to achieve, the conservation of Aboriginal cultural heritage for which the agreement was entered into.
- (5) The ACH Authority is not to vary or terminate an ACH conservation agreement under subsection (4) without the consent of the owners of the land unless:
 - (a) written notice of the intention of the ACH Authority to vary or terminate the agreement has been given to the owners of the land stating that the owners may make submissions to the ACH Authority within the period specified in the notice (being a period of not less than 28 days), and
 - (b) the ACH Authority has considered any submissions made by the owners of the land within that specified period.
- (6) If an ACH conservation agreement is varied by the ACH Authority under subsection (4) without the consent of the owners of the land at the time of the variation, the owners may, by written notice given to the ACH Authority, terminate the agreement.
- (7) The Minister may direct the ACH Authority to vary or terminate an ACH conservation agreement if a mining or petroleum authority is or has been granted in respect of the land and the Minister is of the opinion that the activity authorised by the mining or petroleum authority:
 - (a) will adversely affect any management actions that are required or authorised to be carried out on the land under the agreement, or
 - (b) will adversely affect the Aboriginal cultural heritage protected by the agreement.

The ACH Authority is required to comply with the Minister's direction.

- (8) Before giving any such direction, the Minister is to give the owners of the relevant land and the ACH Authority an opportunity to make submissions on the proposed direction and is to take any submission made into account.
- (9) The owner of land subject to an ACH conservation agreement is not entitled to any compensation from the Minister or the ACH Authority as a result of any variation or termination of the agreement by the ACH Authority without the consent of the owner.
- (10) The regulations may make provision for or with respect to the reimbursement of the owner of the land or the ACH Authority by the holder of the mining or petroleum authority for the costs incurred by the owner or ACH Authority in establishing the

agreement (including the making of payments to the Minister for the purposes of any such reimbursement). The regulations may also make provision for the reimbursement of the ACH Authority by the owner of the land for money paid to the owner under the agreement.

- (11) Subsection (9) does not affect any right to compensation the owner may have under the *Mining Act 1992*, the *Petroleum (Onshore) Act 1991* or any other legislation in respect of the grant of the mining or petroleum authority or to activities carried out under the authority.
- (12) 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.

32 Registration of ACH conservation agreements

- (1) On being notified by the ACH Authority that an ACH conservation agreement has been entered into, or that any such agreement has been re-issued, varied or terminated, the Registrar-General must:
 - (a) in the case of an ACH conservation agreement relating to land under the *Real Property Act 1900*—register the agreement, variation or termination by making an entry concerning the agreement, variation or termination in any folio of the Register kept under that Act that relates to that land, or
 - (b) in the case of an ACH conservation agreement relating to land not under the *Real Property Act 1900*:
 - (i) register the agreement, variation or termination in the General Register of Deeds kept under Division 1 of Part 23 of the *Conveyancing Act 1919*, and
 - (ii) if appropriate, make an entry concerning the agreement, variation or termination in any official record relating to Crown land that relates to that land.
- (2) An ACH conservation agreement relating to land under the *Real Property Act 1900* about which an entry is made in a folio and that is in force is an interest recorded in the folio for the purposes of section 42 of that Act.

33 ACH conservation agreements to run with land and re-issue etc of agreements in certain cases

- (1) An ACH conservation agreement that has been registered by the Registrar-General and that is in force is binding on, and enforceable by and against, the successors in title to the owners who entered into the agreement and those successors in title are taken to have notice of the agreement.
- (2) This section extends to successors in title of part only of the land to which an ACH conservation agreement applies.
- (3) If there are different successors in title to different parts of the land, the regulations may make provision with respect to obligations and entitlement under this Act of the successors in title in relation to the ACH conservation agreement.
- (4) In this section:

part of land includes a different interest in the land.

successors in title includes a lessee, mortgagee, chargee, covenant chargee or other person, in possession of the site of an ACH conservation agreement pursuant to a lease, mortgage, charge, positive covenant or other encumbrance entered into before or after the registration of the ACH conservation agreement.

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

- (1) A public authority must not carry out development on land subject to an ACH conservation agreement unless:
 - (a) it has given written notice of the proposed development to the Minister and the owner of the land, and
 - (b) it has received written notice from the Minister consenting to the development.
- (2) The Minister may consent to the development only if:
 - (a) the Minister is of the opinion (having regard to the advice of the ACH Authority) that the development will neither adversely affect any management actions that may be carried out on the land under the ACH conservation agreement nor adversely affect Aboriginal cultural heritage protected by the agreement, or
 - (b) there is no practical alternative to the carrying out of the development, or
 - (c) the development is required for an essential public purpose or for a purpose of special significance to the State.
- (3) The ACH Authority, if directed to do so by the Minister, is to vary or terminate the ACH conservation agreement, by notification in the Gazette, without the consent of the owners of the land if consent to development is granted under this section and the Minister considers that the variation or termination is necessary to enable the public authority to carry out the development.
- (4) If an ACH conservation agreement is varied under this section without the approval of the owner of the land subject to the agreement, the owner may terminate the agreement by notice in writing to the ACH Authority.
- (5) The owner of land subject to an ACH conservation agreement is not entitled to any compensation as a result of the variation or termination of the agreement under this section.
- (6) Subsection (5) does not affect any right to compensation the owner may have under the *Land Acquisition (Just Terms Compensation) Act 1991* or any other Act in respect of the development.
- (7) The consent of the Minister under this section is not an approval for the purposes of Part 5 of the *Environmental Planning and Assessment Act 1979*.
- (8) Section 50 (Resolution of disputes) applies to disputes under this section in the same way as it applies to disputes referred to in that section.
- (9) This section does not apply:
 - (a) to any part of land that is a wilderness area within the meaning of the *Wilderness Act 1987*, or
 - (b) in respect of development proposed to be carried out by a public authority on land if the public authority is the owner of the land and the proposed development is not inconsistent with the terms of the ACH conservation agreement, or
 - (c) in respect of development that comprises emergency or routine work by a public authority of a kind that the authority and the Minister have agreed to exclude from the application of this section.
- (10) In this section, **development** has the same meaning it has in the *Environmental Planning and Assessment Act 1979*.

35 Activities authorised by mining or petroleum authorities not affected by ACH conservation agreement

Nothing in this Division:

- (a) prevents the grant of a mining or petroleum authority in respect of land subject to an ACH conservation agreement in accordance with the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991*, or
- (b) prevents the carrying out, on or in respect of land subject to an ACH conservation agreement, of any activity authorised by a mining or petroleum authority in accordance with the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991*.

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

36 Registration of intangible Aboriginal cultural heritage

- (1) The ACH Authority may, on application under this Division, register any intangible Aboriginal cultural heritage and the holders of the heritage.
- (2) The ACH Authority may only register intangible Aboriginal cultural heritage if:
 - (a) it is satisfied that the heritage is not widely known to the public and should be protected from unauthorised commercial use, and
 - (b) it complies with the registration requirements of the regulations.
- (3) The registration of intangible Aboriginal cultural heritage under this Division is to be made by an order in writing of the ACH Authority and has effect when it is recorded on the public online portal of the ACH information system.

Note. The *Interpretation Act 1987* provides that an order under an Act may be amended or revoked by further order.
- (4) Before registering intangible Aboriginal cultural heritage, the ACH Authority is to consult any relevant Local ACH Consultation Panel and have regard to any relevant provisions of an ACH strategic plan.

37 Registered holders of intangible cultural heritage

The following may apply to the ACH Authority for the registration of intangible Aboriginal cultural heritage and may be declared to be the registered holders of that heritage:

- (a) a Local ACH Consultation Panel,
- (b) a LALC,
- (c) a board of management under Division 6 of Part 4A of the *National Parks and Wildlife Act 1974*,
- (d) a registered native title body corporate under the *Native Title Act 1993* of the Commonwealth or a person registered under that Act as holding native title rights and interests,
- (e) an Aboriginal and Torres Strait Islander corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* of the Commonwealth,
- (f) any other Aboriginal person or body prescribed by the regulations.

38 Offence to use registered intangible cultural heritage for commercial purposes without agreement

- (1) A person is guilty of an offence if:

- (a) the person knowingly uses for commercial purposes intangible Aboriginal cultural heritage that is registered under this Division, and
- (b) the person is not authorised to do so by an agreement with the registered holders of that intangible Aboriginal cultural heritage.

Maximum penalty: Tier 1 monetary penalty.

- (2) A person may enter into an agreement with the registered holders for the authorisation of a class of persons to use the intangible Aboriginal cultural heritage for commercial purposes.
- (3) The parties to an agreement under this section are required to provide a copy of the agreement to the ACH Authority for inclusion on the ACH Information System.
- (4) This section does not apply to the use of intangible Aboriginal cultural heritage by the registered holders of that heritage.

Part 5 Aboriginal cultural heritage regulatory system

Division 1 Preliminary

39 Aboriginal cultural heritage to which Part applies

This Part applies to the following Aboriginal cultural heritage:

- (a) Aboriginal objects,
- (b) Aboriginal ancestral remains,
- (c) any other Aboriginal cultural heritage declared under Part 3.

40 Definitions: Part 5

In this Part:

harm an Aboriginal object, Aboriginal ancestral remains or other declared Aboriginal cultural heritage, means:

- (a) destroy or damage the object, remains or other declared heritage, or
- (b) move the object or remains from the land with which the object is, or remains are, connected, or
- (c) lose the object or remains when assigned to the custody or care of a person or body, or
- (d) otherwise harm the Aboriginal cultural heritage significance of the object, remains or other declared heritage.

Harm to Aboriginal cultural heritage significance includes any act in relation to the object, remains or other declared heritage (other than the expression of an opinion or belief) that demonstrates disrespect for the significance to Aboriginal people of the object, remains or other declared heritage.

proponent means a person (including an Aboriginal person) who proposes to carry out activities that may harm Aboriginal cultural heritage to which this Part applies.

relevant Local ACH Consultation Panel, in relation to any proposed activities, means the Local ACH Consultation Panel established for the area in which the activities are to be carried out or in respect of the aspect of Aboriginal cultural heritage that will be affected by the activities. A reference to the relevant Local ACH Consultation Panel is to be construed as:

- (a) if there are a number of panels for a particular proposed activity—a reference to each of those panels, and
- (b) if there is no panel for a particular proposed activity—a reference to the ACH Authority.

Division 2 Harming Aboriginal cultural heritage—offences

41 Offence to harm Aboriginal cultural heritage

- (1) A person is guilty of an offence if:
 - (a) the person intentionally or recklessly harms an Aboriginal object, Aboriginal ancestral remains or any other Aboriginal cultural heritage declared under Part 3, and
 - (b) the person knows that the object is, or remains are, such an object or remains or that the heritage is so declared, and
 - (c) the harm is not trivial or negligible.

Maximum penalty: Tier 1 monetary penalty or imprisonment for 1 year, or both.

- (2) A person is guilty of an offence if:
- (a) the person harms an Aboriginal object, Aboriginal ancestral remains or any other Aboriginal cultural heritage declared under Part 3, and
 - (b) the harm is not trivial or negligible.

An offence under this subsection is an offence of strict liability and the defence of honest and reasonable mistake of fact applies.

Maximum penalty: Tier 2 monetary penalty.

- (3) If, in proceedings for an offence under subsection (1), the court is not satisfied that the accused is guilty of an offence under that subsection, but is satisfied that the accused is guilty of an offence under subsection (2), the court may find the accused not guilty of the offence charged but guilty of an offence under subsection (2).

Note. An offence under this section committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation—see section 125.

42 Defence—act authorised by ACH management plan

It is a defence to a prosecution for an offence under this Division if the person charged establishes that the act that constitutes the offence was authorised by, and done in accordance with, an ACH management plan approved by the ACH Authority.

Note. Sections 89J and 115ZG of the *Environmental Planning and Assessment Act 1979* provide that State significant development and State significant infrastructure may be carried out without the need for authorisation by an ACH management plan of any harm to Aboriginal cultural heritage. Any impacts on that heritage are required to be assessed and taken into account under the provisions of that Act relating to the approval of State significant development and State significant infrastructure.

43 Defence—acts authorised by the regulations

- (1) The regulations may make provision for additional defences to a prosecution of an offence under section 41 (2), including provision for the exclusion of acts that have a low environmental impact.
- (2) The regulations under this section may provide for additional defences by reference to acts done in accordance with codes of practice made by the Minister or adopted by the regulations.

Consultation note. Consideration is being given to whether it would be appropriate to enable large-scale strategic ACH assessments and approvals for certain types of activities within an area that may harm ACH (rather than assessments and authorisation by management plans on a site by site basis). The regulations made under this clause after the passage of the Bill could provide for this strategic approach (including by reference to acts done in accordance with codes of practice made by the Minister or adopted by the regulations). There will be an opportunity for further community consultation on the proposal when any such regulations are prepared.

44 Defence—taking reasonable steps to avoid harm

It is a defence to a prosecution for an offence under section 41 (2) if the person charged establishes the person took all reasonable steps to determine, in accordance with the ACHAP Code of Practice, whether the act that constitutes the offence would harm Aboriginal cultural heritage and reasonably determined that no Aboriginal cultural heritage would be harmed.

45 Activities exempt from application of this Division

This Division does not apply in relation to the following:

- (a) in the case of Aboriginal cultural heritage declared under Part 3—any activities that are described in the declaration as activities that may be carried out despite the declaration,
- (b) work for the conservation of Aboriginal cultural heritage carried out by or with the authority of the ACH Authority,
- (c) work for the conservation of Aboriginal cultural heritage carried out on land reserved under the *National Parks and Wildlife Act 1974* in accordance with that Act,
- (d) acts done by Aboriginal persons (and their dependants) for the purposes of carrying out traditional cultural activities (except commercial activities),
- (e) any emergency fire fighting act or bush fire hazard reduction work (including emergency bush fire hazard reduction work) that is done or carried out by a fire fighting authority under the *Rural Fires Act 1997* (including by the staff of a fire fighting authority and volunteer fire fighters acting in that capacity),
- (f) any act that is authorised by or under the *State Emergency and Rescue Management Act 1989* or the *State Emergency Service Act 1989* and that was reasonably necessary to avoid an actual or imminent threat to life or property,
- (g) any act specifically required or permitted under an ACH conservation agreement,
- (h) any act authorised by or under Division 1 of Part 4,
- (i) any act done by a person engaged in the administration of this Act for the purpose only of determining whether the provisions of this Act or the regulations have been contravened or of exercising any other official function of the person.

Division 3 ACH management plans

46 Nature and purpose of ACH management plan

- (1) An ACH management plan is a plan approved by the ACH Authority following assessment and negotiation between the proponent and the relevant Local ACH Consultation Panel that authorises harm to Aboriginal cultural heritage to which this Part applies as a result of the carrying out of activities by the proponent.
- (2) An ACH management plan is to specify the proponent or class of proponents authorised to harm Aboriginal cultural heritage in accordance with the plan.
- (3) An ACH management plan may include measures to conserve or minimise harm to Aboriginal cultural heritage.

47 Assessment of activities that may require plan

The stages of assessment required by Division 4 in relation to proposed activities are to be completed in accordance with the ACHAP Code of Practice before a proposed ACH management plan is submitted to the ACH Authority for approval.

48 Negotiation of plans by proponents and Local ACH Consultation Panel

- (1) The terms of a proposed ACH management plan are to be negotiated by the proponent of the proposed activity and the relevant Local ACH Consultation Panel.
- (2) Negotiations are to be conducted in accordance with the ACH Code of Practice so as to ensure that:
 - (a) the negotiations are conducted fairly and in good faith, and
 - (b) the outcomes of the negotiations are directly related to Aboriginal cultural heritage and promote the objects of this Act, and

- (c) a balance is achieved between the obligations of the proponent and the authorised harm to Aboriginal cultural heritage, and
- (d) the Aboriginal persons whose cultural heritage is to be impacted will benefit from the obligations of the proponent.

49 Approval of plans by ACH Authority

- (1) Following assessment and negotiations, a draft ACH management plan agreed between the proponent and the relevant Local ACH Consultation Panel may be submitted to the ACH Authority for approval.
- (2) The ACH Authority may:
 - (a) approve the draft plan, or
 - (b) refuse to approve the draft plan, or
 - (c) refer the draft plan back to the proponent and Local ACH Consultation Panel for re-consideration having regard to particular matters raised by the ACH Authority.
- (3) If the proponent and the relevant Local ACH Consultation Panel fail to agree on a draft ACH management plan by the expiration of the applicable negotiation period for the preparation of the draft plan:
 - (a) the proponent may request the ACH Authority to approve an ACH management plan for the proposed activities concerned, and
 - (b) the proponent and the relevant Local ACH Consultation Panel may provide advice to the ACH Authority on the proposed activities and the Aboriginal cultural heritage significance that will be impacted by those activities, and
 - (c) the ACH Authority may determine the matter and approve an ACH management plan in such terms as the Authority considers appropriate or refuse to approve a plan.
- (4) In making a determination under this section, the ACH Authority is to have regard to the objects of this Act, the impact on the Aboriginal community and the proponent of approving or not approving a plan and the public interest.

50 Negotiation and determination periods for plans

For the purposes of this Division:

- (a) the *negotiation period* for the preparation of a draft ACH management period is the period prescribed by the regulations for the class of the proposed plan concerned commencing with the date on which the proponent requests the Local ACH Consultation Panel to negotiate a plan, and
- (b) the *determination period* for the approval or refusal of approval of an agreed draft plan submitted for the approval of the ACH Authority, or for the determination of a request by the proponent for the approval of a plan where a draft plan has not been agreed, is the period prescribed by the regulations for the class of the proposed plan concerned commencing with the date on which the draft plan is submitted or the request is made.

51 Resolution of disputes

- (1) If during the negotiations for a proposed ACH management plan, a dispute arises between the proponent and the Local ACH Consultation Panel, either party may request the ACH Authority to appoint an independent mediator to assist in resolving the dispute.
- (2) The ACH Authority may appoint a suitably qualified person as the independent mediator.

- (3) The independent mediator is to facilitate further discussion between the parties with a view to the resolution of the dispute.
- (4) The regulations may make provision with respect to a mediation under this section.

52 Appeal against refusal of or failure to approve proposed plan

- (1) If the ACH Authority refuses to approve an agreed draft ACH management plan submitted to the Authority or refuses a request by the proponent for the approval of an ACH management plan where a draft plan has not been agreed, the proponent may appeal to the Land and Environment Court against the refusal.
- (2) An appeal is to be made within the time prescribed by the regulations and in the manner prescribed by the rules of the Court.
- (3) If an ACH management plan has not been approved or refused by the ACH Authority by the expiration of the applicable determination period, the ACH Authority is taken, for the purposes of this section, to have refused to approve the agreed draft plan submitted to the Authority or refused the request by the proponent for approval of a plan. This subsection does not prevent an ACH management plan being approved or refused by the ACH Authority after the expiration of the determination period.
- (4) After hearing an appeal, the Court may:
 - (a) confirm the refusal to approve the proposed ACH management plan, or
 - (b) allow the appeal and approve the proposed ACH management plan, with or without modifications.
- (5) A plan approved by the Court on appeal is taken to be an ACH management plan approved by the ACH Authority.

53 Amendment or termination of plans

- (1) The ACH Authority may amend or terminate an ACH management plan:
 - (a) by a further plan approved by the ACH Authority under this Division, or
 - (b) by written notice in any circumstances authorised by the regulations.
- (2) An amendment of an ACH management plan may change the proponent or class of proponents authorised by the plan to harm Aboriginal cultural heritage. If the proponent of an activity changes because of a change in the ownership of the land concerned, the new proponent is entitled to an amendment of the plan to authorise the new proponent to harm that heritage in accordance with the existing terms of the plan.
- (3) The regulations may make provision for or with respect to the amendment or termination of ACH management plans (including provision with respect to consultation with the relevant Local ACH Consultation Panel on any proposed amendment or termination).

Division 4 ACH assessment pathway

54 ACHAP Code of Practice

- (1) The ACH Authority is to prepare and submit to the Minister a draft code of practice for the purposes of the assessment of whether proposed activities will harm Aboriginal cultural heritage to which this Part applies (the *ACHAP Code of Practice*).
- (2) The draft ACHAP Code of Practice is to make provision for the following:
 - (a) the 4 stages of assessment for the purposes of this Part that are referred to in this Division, and

- (b) a negotiation framework to guide the negotiation process between the proponent and the relevant Local ACH Consultation Panel.
- (3) The Minister may approve a draft ACHAP Code of Practice submitted by the ACH Authority, with such modifications (if any) as the Minister considers appropriate.
- (4) As soon as the Minister has approved the ACHAP Code of Practice, the ACH Authority is to publish it on the NSW planning portal and on any other publicly accessible website it considers appropriate.
- (5) The Minister may, from time to time, approve of the amendment or replacement of the ACHAP Code of Practice.

55 Stage 1 of assessment (map review)

- (1) The first stage of assessment under this Division requires the proponent to review ACH maps to determine whether the site of the proposed activities is in an area shown on an ACH map as an area containing known Aboriginal cultural heritage or likely to contain Aboriginal cultural heritage.
- (2) If the site of the proposed activities is in such an area, the proponent is to undertake the second stage of assessment.

56 Stage 2 of assessment (preliminary investigation)

- (1) The second stage of assessment under this Division requires the proponent to:
 - (a) notify the ACH Authority of the nature and site of the proposed activities, and
 - (b) consult the relevant Local ACH Consultation Panel to provide the Panel with information about the proposed activities and to obtain information about any Aboriginal cultural heritage that the site actually contains.
- (2) If an ACH management plan is still required, the proponent is to undertake the third stage of assessment.

57 Stage 3 of assessment (scoping assessment)

- (1) The third stage of assessment under this Division requires the proponent and the relevant Local ACH Consultation Panel to assess generally:
 - (a) the likely harm to Aboriginal cultural heritage that would be caused by the proposed activities, and
 - (b) the options for avoiding or minimising that harm.
- (2) If an ACH management plan is still required, the proponent is to undertake the fourth stage of assessment.

58 Stage 4 of assessment (detailed assessment and final assessment report)

- (1) The fourth stage of assessment under this Division requires the proponent to assess in detail:
 - (a) the Aboriginal cultural heritage contained on the site of the proposed activities, and
 - (b) the harm to that heritage that will be caused by the proposed activities, and
 - (c) the options for avoiding or minimising that harm.
- (2) After the completion of that detailed assessment, the fourth stage of assessment requires the proponent to prepare, and provide to the ACH Authority for review, a report on the assessment process and the findings of the assessment.

59 Review of assessment report by ACH Authority

- (1) The ACH Authority is to review any assessment report submitted to it under this Division to determine whether the assessment has been completed in accordance with this Division and the ACHAP Code of Practice.
- (2) A review of a report by the ACH Authority is taken to have been completed:
 - (a) if the ACH Authority advises the proponent that the stages of assessment required by this Division have been completed in accordance with this Division and the ACHAP Code of Practice, or
 - (b) if the ACH Authority does not, within 10 business days after the report is submitted for review (or other period agreed by the proponent), provide that advice to the proponent or require the proponent to undertake further assessment in order to comply with this Division and the ACHAP Code of Practice, or
 - (c) if the proponent undertakes any such further assessment and submits a revised report to the ACH Authority.
- (3) The ACH Authority may require only one further assessment to be undertaken in relation to the review of a report.

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

60 Development applications to which Division applies

- (1) This Division applies to an application for development consent under Part 4 of the *Environmental Planning and Assessment Act 1979*, but does not apply to:
 - (a) an application for development consent for State significant development, or
 - (b) an application for a complying development certificate.
- (2) An application for development consent to which this Division applies is referred to in this Division as a **relevant development application**.

Note. The limitation of this Division to relevant development applications does not prevent the negotiation and approval of ACH management plans under Division 3 in connection with assessment requirements under the *Environmental Planning and Assessment Act 1979* for development applications for State significant development, for applications for approval for State significant infrastructure or for the carrying out of activities under Part 5 of that Act.

61 Assessment and requirements for relevant development applications

- (1) A relevant development application cannot be lodged with the consent authority unless:
 - (a) the stages of assessment required by Division 4 have been completed in accordance with the ACHAP Code of Practice, and
 - (b) any required report of the assessment has been reviewed by the ACH Authority (including the submission of a revised report after any further assessment required by the ACH Authority).
- (2) If the assessment establishes that the proposed development will harm Aboriginal cultural heritage to which this Part applies and an ACH management plan will be required to provide a defence for the offence under Division 2 of harming that heritage, the relevant development application is to be accompanied by:
 - (a) an ACH management plan approved by the ACH Authority that relates to the proposed development, or
 - (b) a draft ACH management plan (whether or not agreed to by the Local ACH Consultation Panel) if:

- (i) the proponent has negotiated with the Local ACH Consultation Panel but a draft plan has not been agreed between the proponent and the Panel by the end of the negotiation period referred to in Division 3, or
- (ii) a draft has been so agreed to but has not been approved by the ACH Authority by the end of the determination period referred to in Division 3.

62 Changes to proposed development during or after determination of relevant development application by consent authority

The regulations may make provision for or with respect to the application of this Division to:

- (a) any change in the proposed development under a relevant development application that is made after an assessment of the proposed development under Division 4, or
- (b) an application under the *Environmental Planning and Assessment Act 1979* to modify a development consent granted on the determination of a relevant development application.

Consultation note. An approval to harm Aboriginal cultural heritage under an ACH management plan is among the approvals that constitute proposed development as integrated development to which special procedures apply under the *Environmental Planning and Assessment Act 1979*. Under those special procedures, the consent authority may refer proposed development to the ACH Authority and the ACH Authority may grant general terms of approval for a future ACH management plan in relation to the proposed development. A future plan that is consistent with those general terms of approval is generally required to be approved by the ACH Authority if the consent authority has granted consent to the proposed development. Any necessary modifications to the standard integrated development planning provisions are to be considered following public consultation.

Part 6 Financial provisions

Note. The ACH Authority is specified as a statutory body under the *Public Finance and Audit Act 1983* and accordingly is required to keep appropriate financial records that are audited by the Auditor-General and to make annual reports to Parliament on its activities (including its audited accounts).

63 ACH Fund

There is to be established by this Act in the Special Deposits Account the Aboriginal Cultural Heritage Fund (the *ACH Fund*).

64 Management of Fund by ACH Authority

The ACH Authority is to manage the ACH Fund in accordance with this Act and the funding allocation strategy approved by the Minister under this Part.

65 Payments into ACH Fund

The following amounts are to be paid into the ACH Fund, subject to any requirements specified in the regulations:

- (a) amounts received by the ACH Authority (including any gifts),
- (b) money payable into the Fund under an ACH management plan,
- (c) the proceeds of investment of money in the Fund,
- (d) any other money appropriated by Parliament for the purposes of the Fund or required by this or any other Act or law to be paid into the Fund.

66 Payments from ACH Fund

The following may be paid out of the Fund, subject to any requirements specified in the regulations:

- (a) such amounts as are required to meet the expenditure incurred by the ACH Authority in the exercise of its functions,
- (b) such amounts as are authorised to be paid out of the Fund by the regulations,
- (c) such other amounts as are authorised to be paid out of the Fund by this or any other Act or law.

67 Funding allocation strategy

- (1) The ACH Authority is, as soon as practicable after the commencement of this Act and at least every 3 years thereafter, to prepare and submit to the Minister a draft funding allocation strategy.
- (2) The draft funding allocation strategy is to identify funding priorities for the purpose of conserving Aboriginal cultural heritage.
- (3) The Minister may approve a draft funding allocation strategy submitted by the ACH Authority, with such modifications (if any) as the Minister considers appropriate.
- (4) As soon as the Minister has approved the funding allocation strategy, the ACH Authority is to publish the strategy on a publicly accessible website.

68 Separate accounts within ACH Fund

The ACH Authority is to keep separate accounts within the ACH Fund for the matters that the regulations require separate accounts or (subject to the regulations) for the matters that the approved funding allocation strategy requires separate accounts.

69 Acquisition of property by gift

- (1) The ACH Authority may acquire property by gift (whether on trust or otherwise) for the purposes of the conservation of Aboriginal cultural heritage and may agree to, and carry out, the conditions of any such gift, but only if the carrying out of any such condition is not inconsistent with the functions of the ACH Authority.
- (2) The rule of law against remoteness of vesting does not apply to any condition of a gift to which the ACH Authority has agreed under this section.
- (3) The *Duties Act 1997* does not apply to or in respect of any gift made or to be made to the ACH Authority.
- (4) In this section, *gift* includes a devise or bequest.

70 Annual report

An annual report of the activities and financial statements of the ACH Authority under the *Annual Reports (Statutory Bodies) Act 1984* may be included in the annual report of any Public Service agency in which the staff of the ACH Authority are employed.

Part 7 Regulatory compliance mechanisms

Division 1 Preliminary

71 Definitions

In this Part:

interim protection order means an order under Division 3.

remediation order means an order under Division 4.

stop work order means an order under Division 2.

72 Purposes for which powers may be exercised under this Part

- (1) The powers under this Part may be exercised for the purposes of this Act.
- (2) This Part does not affect the exercise of powers under the *Environmental Planning and Assessment Act 1979* or any other Act in relation to purposes for which powers may be exercised under this Part.

Division 2 Stop work orders

73 ACH Authority may make stop work order

- (1) If the ACH Authority is of the opinion that any action is being, or is about to be, carried out (or that any action that should be carried out is not being carried out) in any area of land that is likely to result in a contravention of this Act, the ACH Authority may order:
 - (a) that the action cease and not be carried out within the period of 40 days (or a lesser specified period) after the order is made, or
 - (b) in the case of action that is not being carried out—that the action be carried out within the period specified in the order.
- (2) For the purposes of this section, an act is likely to result in such a contravention if the ACH Authority has reasonable cause to suspect that it is likely to do so. The ACH Authority is not required to establish that any defence to a prosecution for the contravention is not available.
- (3) The ACH Authority is not required, before making a stop work order, to notify any person who may be affected by the order.

74 Taking effect and extension of stop work order

- (1) A stop work order takes effect on and from the date on which:
 - (a) a copy of the order is affixed in a conspicuous place in the area in which the action is or is about to be carried out, or
 - (b) the person carrying out or about to carry out the action (or not carrying out the action) is notified, either in writing or verbally, that the order has been made, whichever is the sooner. An order notified to a person verbally ceases to have effect unless it is confirmed in writing to the person within 72 hours.
- (2) The ACH Authority may extend the operation of a stop work order by making a further order or orders under this Division.

75 Offence—contravention of stop work order

A person must not contravene a stop work order.

Maximum penalty (includes additional daily penalty): Tier 1 monetary penalty.

76 Appeal against stop work order

- (1) A person against whom a stop work order is made may appeal to the Land and Environment Court against the making of the order.
- (2) The lodging of an appeal does not, except to the extent that the Court otherwise directs in relation to the appeal, operate to stay action on the stop work order appealed against.
- (3) After hearing an appeal, the Court may:
 - (a) confirm the order, or
 - (b) modify or rescind the order.
- (4) In making a decision on an appeal, the Court is to have regard to the objects of this Act and the public interest.

77 Consultation about modification or licensing of proposed detrimental action

- (1) After making a stop work order, the ACH Authority must immediately consult with the person taking or proposing to take the relevant action to determine whether any modification of the action may be sufficient to prevent the contravention of this Act.
- (2) The ACH Authority may, for that purpose, request the person to provide information to determine whether any modification of the action would be sufficient or whether an ACH management plan or other authority should be made or issued.

Division 3 Interim protection orders

78 Recommendation for making of interim protection order

- (1) The ACH Authority may recommend to the Minister the making of an interim protection order in respect of an area of land:
 - (a) that has, in the opinion of the ACH Authority, Aboriginal cultural heritage significance, or
 - (b) on which the ACH Authority intends to exercise any of its functions under this Act in relation to Aboriginal cultural heritage.
- (2) This subsection applies where the ACH Authority has made a stop work order in relation to a contravention of this Act. The ACH Authority is to recommend to the Minister the making of an interim protection order if, after consulting the person taking or proposing to take the relevant action, the ACH Authority is of the opinion that satisfactory arrangements cannot be made to prevent the contravention concerned and that it is appropriate to make an interim protection order in the circumstances.

79 Making of interim protection orders

- (1) The Minister may, after considering a recommendation of the ACH Authority, make an interim protection order in respect of the area of land the subject of the recommendation.
- (2) An interim protection order may contain terms of a kind set out in the regulations, being terms relating to the conservation of Aboriginal cultural heritage.
- (3) The Minister is not required, before making an interim protection order, to notify any person who will be affected by the order of the intention to make the order.

80 Taking effect and duration of interim protection order

- (1) An interim protection order takes effect on the date of its publication in the Gazette or on a later date specified in the order.

- (2) An interim protection order has effect for such period (not exceeding 2 years) specified in the order.
- (3) An interim protection order ceases to have effect if the order is revoked by the Minister by notice published in the Gazette.
- (4) An interim protection order also ceases to have effect if the land subject to the order is reserved under the *National Parks and Wildlife Act 1974*.

81 Notice of making of interim protection order

The Minister is to cause notice of an interim protection order and its terms (or of the revocation of the order) to be given to:

- (a) any person who appears to the Minister to be a landholder of the area of land subject to the order, and
- (b) the local council in whose area the land subject to the order is situated, and
- (c) any other person the Minister thinks fit.

82 Offence—contravention of interim protection order

A person who is given notice of an interim protection order must not contravene the order.

Maximum penalty (includes additional daily penalty): Tier 1 monetary penalty.

83 Appeal against interim protection order

- (1) A landholder of the whole or any part of an area of land subject to an interim protection order may appeal to the Land and Environment Court against the making of the order or any of its terms.
- (2) An appeal is to be made within the time prescribed by the regulations and in the manner prescribed by the rules of the Court.
- (3) The lodging of an appeal does not, except to the extent that the Court otherwise directs in relation to the appeal, operate to stay action on the interim protection order appealed against.
- (4) In deciding an appeal, the Court is to have regard to:
 - (a) any hardship caused to the landholder by the making of the order or any of its terms, and
 - (b) the purposes of the order, and
 - (c) the public interest.

Division 4 Remediation orders

84 Definition of “harm”

In this Division:

harm to Aboriginal cultural heritage, means harm (within the meaning of Part 5) to Aboriginal cultural heritage to which that Part applies.

85 Orders for remediation work relating to harm to Aboriginal cultural heritage

- (1) The ACH Authority may order a person to carry out specified remediation work, in a specified manner and within a specified time, if the ACH Authority is satisfied that Aboriginal cultural heritage has been harmed in or as a result of the commission of an offence against this Act or the regulations (whether or not any person has been proceeded against or convicted for the offence).

- (2) A remediation order may, as an alternative to requiring a person to carry out specified remediation work in a specified manner, require the person to carry out work that will achieve a specified remediation outcome.
- (3) A remediation order is to be served in writing on the person to whom it is given.
- (4) A remediation order may be varied or revoked in the same manner in which a remediation order may be given.

86 Remediation work required by order

- (1) The specified remediation work to be carried out by a person to whom a remediation order is given may include one or more of the following types of work:
 - (a) work to control, abate or mitigate the harm to the Aboriginal cultural heritage concerned,
 - (b) work to maintain, remediate or restore any Aboriginal cultural heritage harmed.
- (2) A remediation order may also require the person to carry out the following actions (and any such action that is required to be carried out is to be regarded for the purposes of this Division as part of the remediation work required by the order):
 - (a) ascertaining the nature and extent of the harm concerned and furnishing the information or records obtained to other persons (including to the ACH Authority),
 - (b) preparing, furnishing and carrying out a plan of action,
 - (c) engaging a suitably qualified person to plan, design or carry out the work required by the order,
 - (d) furnishing progress reports,
 - (e) monitoring, sampling and analysing anything to ascertain the nature and extent of the harm concerned or the progress in remediating the harm,
 - (f) vacating the land concerned (or part of it) or ceasing to carry on, modifying or not commencing an activity on, or use of, the land (or part of it),
 - (g) carrying on an activity (or an aspect of it) only during particular times or in a particular manner,
 - (h) construction, installation or removal of anything,
 - (i) erecting or displaying on the land concerned any sign or notice containing directions to persons not to enter the land or not to use the land in a specified manner or for a specified purpose or containing other directions of that kind or any other kind,
 - (j) refraining from disturbance or further disturbance of the land concerned in a specified manner or below a specified depth,
 - (k) informing the ACH Authority of any change in the ownership or occupancy of the land concerned, to the extent that the person subject to the requirement is aware of the change.

87 Persons to whom remediation orders may be given

A remediation order may be given to any or all of the following persons:

- (a) the current or former landholder of any land on which the harm concerned occurred,
- (b) any other person the ACH Authority reasonably believes is responsible for the harm concerned.

88 Other person may carry out remediation work if failure to comply with order

- (1) If a person fails to comply with a remediation order, the ACH Authority may authorise any other person to enter the land concerned and carry out all or part of the specified remediation work.
- (2) The ACH Authority may recover the cost of that remediation work from the person given the remediation order in any court of competent jurisdiction as a debt due by that person to the ACH Authority.

89 Development consent not required to carry out remediation work

A person is not required to obtain development consent under the *Environmental Planning and Assessment Act 1979* to carry out remediation work that the person is required or authorised to carry out under this Division.

90 Entry to land to carry out remediation work

- (1) A person required or authorised to carry out remediation work under a remediation order may enter the land concerned to carry out the work.
- (2) Nothing in this Division authorises a person to enter any part of premises used only for residential purposes except with the consent of the occupier of the premises.

91 Recovery by person given remediation order

If the person given a remediation order complies with the order but was not the person who caused the harm concerned, the cost of complying with the order may be recovered by the person who complied with the order as a debt in a court of competent jurisdiction from the person who caused the harm.

92 Offence of contravening remediation order or obstructing remediation work

- (1) A person must not, without reasonable excuse, contravene a remediation order to which the person is subject.
Maximum penalty (includes additional daily penalty): Tier 2 monetary penalty.
- (2) An example of a reasonable excuse is that the person was unable to enter the land because of the refusal of access to the land by its occupier, but entry to that land was essential for the person to avoid committing the offence.
- (3) A person must not intentionally obstruct anyone who is carrying out remediation work under a remediation order.
Maximum penalty (includes additional daily penalty): Tier 2 monetary penalty.

93 Appeals under this Division

- (1) A person given a remediation order may appeal against the giving of the order (or any terms of the order) to the Land and Environment Court within 30 days of the service of the order.
- (2) The lodging of an appeal does not, except to the extent that the Court otherwise directs in relation to the appeal, operate to stay action on the remediation order appealed against.

Part 8 Investigation powers

Division 1 Preliminary

94 Definitions

In this Part:

authorised officer means a person appointed under Division 2.

motor vehicle has the same meaning as in the *Road Transport Act 2013*.

occupier of premises means the person who has the management or control of the premises.

premises includes:

- (a) a building or structure, or
- (b) land or a place (whether enclosed or built on or not), or
- (c) a mobile plant, vehicle, vessel or aircraft.

records includes plans, specifications, maps, reports, books and other documents (whether in writing, in electronic form or otherwise).

specify an act, matter or thing, includes:

- (a) describe the act, matter or thing, and
- (b) specify a class of acts, matters or things.

vessel means any kind of vessel used in navigation.

95 Purposes for which powers under this Part may be exercised

Powers may be exercised under this Part for the following purposes:

- (a) for determining whether there has been compliance with or a contravention of this Act, the regulations, ACH management plans, ACH conservation agreements or other instruments or requirements issued or made under this Act,
- (b) for obtaining information or records for purposes connected with the administration of this Act,
- (c) generally for administering this Act.

96 Effect on other functions

Nothing in this Part affects any function under any other Part of this Act or under any other Act.

Division 2 Authorised officers

97 Appointment of authorised officers

The ACH Authority may appoint any person (including a class of persons) as an authorised officer for the purposes of this Part.

98 Scope of authority

- (1) An authorisation of a person as an authorised officer can be given generally, or subject to conditions, limitations or restrictions or only for limited purposes.
- (2) If such authorisation is given subject to conditions, limitations or restrictions or only for limited purposes, nothing in this Act authorises or requires the authorised officer to act in contravention of the conditions, limitations or restrictions or for other purposes.

99 Identification

- (1) Every authorised officer who is not a police officer is to be provided with an identification card as an authorised officer by the ACH Authority.
- (2) In the course of exercising the functions of an authorised officer under this Act, the officer must, if requested to do so by any person affected by the exercise of any such function, produce to the person the officer's identification card, issued in accordance with this section or, in the case of a police officer, the officer's police identification.

Division 3 Powers to require information and records

100 Application of Part

This Part applies whether or not a power of entry under Division 4 is being or has been exercised.

101 Requirement to provide information and records

- (1) The ACH Authority may, by notice in writing given to a person, require the person to furnish to it such information or records (or both) as it requires by the notice.
- (2) An authorised officer may, by notice in writing given to a person, require the person to furnish to the officer such information or records (or both) as the officer requires by the notice.

102 Manner, time etc for compliance

A notice under this Part must specify the manner in which information or records are required to be furnished and a reasonable time by which the information or records are required to be furnished.

103 Provisions relating to records

- (1) A notice under this Part may only require a person to furnish existing records that are in the person's possession or that are within the person's power to obtain lawfully.
- (2) The body or person to whom any record is furnished under this Part may take copies of it.
- (3) If any record required to be furnished under this Part is in electronic, mechanical or other form, the notice requires the record to be furnished in written form, unless the notice otherwise provides.

Division 4 Powers of entry and search of premises

104 Powers of authorised officers to enter premises

- (1) An authorised officer may enter any premises at any reasonable time.
- (2) A power to enter premises conferred by this Part authorises entry by foot or by means of a motor vehicle or other vehicle, or by an aircraft, or in any other manner.
- (3) Entry may be effected under this Part by an authorised officer with the aid of such authorised officers or police officers as the authorised officer considers necessary and with the use of reasonable force.
- (4) Entry may be effected to any premises with the authority of a search warrant under section 107.

105 Entry into residential premises only with permission or warrant

This Part does not empower an authorised officer to enter any part of premises used only for residential purposes without the permission of the occupier or the authority of a search warrant under this Part.

106 Powers of authorised officers to do things at premises

- (1) An authorised officer may, at any premises lawfully entered, do anything that in the opinion of the authorised officer is necessary to be done for the purposes of this Part, including (but not limited to) the things specified in subsection (2).
- (2) An authorised officer may do any or all of the following:
 - (a) examine and inspect any works, objects, articles or materials,
 - (b) take and remove samples,
 - (c) make such examinations, inquiries and tests as the authorised officer considers necessary,
 - (d) take such photographs, films, audio, video and other recordings as the authorised officer considers necessary,
 - (e) require records to be produced for inspection,
 - (f) examine and inspect any records,
 - (g) copy any records,
 - (h) seize anything that the authorised officer has reasonable grounds for believing is connected with an offence against this Act or the regulations,
 - (i) for the purposes of any such seizure—direct a person who has the power to deliver up the thing to deliver up the thing,
 - (j) for the purposes of any such seizure—direct the occupier of the premises where the thing is seized to retain it at those premises or at another place under the control of the occupier,
 - (k) do any other thing the authorised officer is empowered to do under this Part.
- (3) The power to seize anything connected with an offence includes a power to seize:
 - (a) a thing with respect to which the offence has been committed, and
 - (b) a thing that will afford evidence of the commission of the offence, and
 - (c) a thing that was used for the purpose of committing the offence.

A reference to any such offence includes a reference to an offence that there are reasonable grounds for believing has been committed.

107 Search warrants

(1) Application for search warrant

An authorised officer under this Part may apply to an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* for the issue of a search warrant if the authorised officer under this Part believes on reasonable grounds that:

- (a) a provision of this Act or the regulations is being or has been contravened at any premises, or
- (b) there is in or on any premises matter or a thing that is connected with an offence under this Act or the regulations.

(2) **Issue of search warrant**

An authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer under this Part named in the warrant:

- (a) to enter the premises, and
- (b) to exercise any function of an authorised officer under this Part.

(3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.

(4) **Definitions**

In this section:

matter or a thing connected with an offence means:

- (a) matter or a thing with respect to which the offence has been committed, or
- (b) matter or a thing that will afford evidence of the commission of an offence, or
- (c) matter or a thing that was used, or is intended to be used, for the purpose of committing the offence.

offence includes an offence that there are reasonable grounds for believing has been, or is to be, committed.

108 Authorised officers may request assistance

A person may accompany an authorised officer and take all reasonable steps to assist an 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.

109 Assistance to be given to authorised officers

- (1) This section applies for the purpose of enabling an authorised officer to exercise any of the powers of an authorised officer under this Part in connection with any premises.
- (2) The ACH Authority may, by notice in writing given to the owner or occupier of the premises, require the owner or occupier to provide such reasonable assistance and facilities as are specified in the notice within a specified time and in a specified manner.
- (3) Assistance and facilities can be required under this section, whether they are of the same kind as, or a different kind from, any prescribed by the regulations.

110 Care to be taken and compensation

- (1) In the exercise of a power of entering or searching premises under this Part, the authorised officer must do as little damage as possible.
- (2) The ACH Authority must compensate all interested parties for any damage caused by an authorised officer in exercising a power of entering premises (but not any damage caused by the exercise of any other power), unless the occupier obstructed or hindered the authorised officer in the exercise of the power of entry.

111 Disposal of things seized

The regulations may make provision with respect to the disposal or return of things seized under this Part.

Division 5 Powers to question and to identify persons

112 Power of authorised officers to require answers

- (1) An authorised officer may require a person whom the authorised officer suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for the purposes of this Act to answer questions in relation to those matters.
- (2) The ACH Authority may, by notice in writing, require a corporation to nominate, in writing within the time specified in the notice, a director or officer of the corporation to be the corporation's representative for the purpose of answering questions under this section.
- (3) Answers given by a person so nominated bind the corporation.
- (4) An authorised officer may, by notice in writing, require a person to attend at a specified place and time to answer questions under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered.
- (5) The place and time at which a person may be required to so attend is to be:
 - (a) a place or time nominated by the person, or
 - (b) if the place and time nominated is not reasonable in the circumstances or a place and time is not nominated by the person—a place and time nominated by the authorised officer that is reasonable in the circumstances.

113 Recording of evidence

- (1) An authorised officer may cause any questions and answers to questions given under this Part to be recorded if the officer has informed the person who is to be questioned that the record is to be made.
- (2) A record may be made using sound recording apparatus or audio visual apparatus, or any other method determined by the authorised officer.
- (3) A copy of any such record must be provided by the authorised officer to the person who is questioned as soon as practicable after it is made.
- (4) A record may be made under this section despite the provisions of any other law.

114 Power of authorised officers to demand name and address

- (1) **Name and address to be given if offence suspected**

An authorised officer may require a person whom the authorised officer suspects on reasonable grounds to have committed an offence against this Act or the regulations to state his or her full name and residential address.
- (2) **Proof of name and address**

An authorised officer may request a person who is required under this section to state his or her full name and residential address to provide proof of the name and address. It is not an offence to fail to comply with any such request.
- (3) **Power of arrest**

A person who, being required to do so under this section:

 - (a) refuses to state his or her name or residential address, or
 - (b) states a name or residential address that in the opinion of the authorised officer is false,

may without any other warrant than this Act be apprehended by the authorised officer and taken before a Magistrate or court officer to be dealt with according to law.

(4) **Bail**

A Magistrate or court officer before whom a person is so taken may make a bail decision under the *Bail Act 2013* in respect of the person.

(5) If the person has not been charged with an offence, the *Bail Act 2013* applies as if the person were accused of an offence.

(6) For the purpose of applying the *Bail Act 2013*, a court officer has the same functions as an authorised justice under that Act.

(7) In this section:

court officer means an authorised officer under the *Criminal Procedure Act 1986*.

Division 6 General

115 Offences

(1) A person who, without lawful excuse, neglects or fails to comply with a requirement made of the person under this Part, except under section 115 (Power of authorised officers to demand name and address), is guilty of an offence.

Maximum penalty (includes additional daily penalty): Tier 2 monetary penalty.

(2) A person who, without lawful excuse, neglects or fails to comply with a requirement made of the person under section 113 is guilty of an offence.

Maximum penalty: Tier 4 monetary penalty.

(3) A person who furnishes any information or does any other thing in purported compliance with a requirement made under this Part, knowing that it is false or misleading in a material respect, is guilty of an offence.

Maximum penalty: Tier 2 monetary penalty.

(4) A person who intentionally delays or obstructs an authorised officer in the exercise of the authorised officer's powers under this Part is guilty of an offence.

Maximum penalty: Tier 2 monetary penalty.

(5) A person who assaults, threatens or abuses an authorised officer in the exercise of the authorised officer's powers under this Part is guilty of an offence.

Maximum penalty: Tier 2 monetary penalty.

(6) A person who impersonates an authorised officer is guilty of an offence.

Maximum penalty: Tier 2 monetary penalty.

116 Provisions relating to requirements to furnish records or information or answer questions

(1) **Warning to be given on each occasion**

A person is not guilty of an offence of failing to comply with a requirement under this Part to furnish records or information or to answer a question unless the person was warned on that occasion that a failure to comply is an offence.

(2) **Self-incrimination not an excuse**

A person is not excused from a requirement under this Part to furnish records or information or to answer a question on the ground that the record, information or answer might incriminate the person or make the person liable to a penalty.

(3) Information or answer not admissible if objection made

However, any information furnished or answer given by a natural person in compliance with a requirement under this Part is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under this Part) if:

- (a) the person objected at the time to doing so on the ground that it might incriminate the person, or
- (b) the person was not warned on that occasion that the person may object to furnishing the information or giving the answer on the ground that it might incriminate the person.

(4) Records admissible

Any record furnished by a person in compliance with a requirement under this Part is not inadmissible in evidence against the person in criminal proceedings on the ground that the record might incriminate the person.

(5) Further information

Further information obtained as a result of a record or information furnished or of an answer given in compliance with a requirement under this Part is not inadmissible on the ground:

- (a) that the record or information had to be furnished or the answer had to be given, or
- (b) that the record or information furnished or answer given might incriminate the person.

(6) Requirement to state name and address

This section extends to a requirement under this Part to state a person's name and address.

117 Revocation or variation

- (1) A notice given under this Part may be revoked or varied by a subsequent notice or notices.
- (2) A notice may be varied by modification of, or addition to, its terms and specifications.
- (3) Without limiting the above, a notice may be varied by extending the time for complying with the notice.
- (4) A notice may only be revoked or varied by:
 - (a) the ACH Authority, or
 - (b) the authorised officer who gave the notice, or
 - (c) another authorised officer.

118 Extraterritorial application

A notice may be given under this Part to a person in respect of a matter even though the person is outside the State or the matter occurs or is located outside the State, so long as the matter affects Aboriginal cultural heritage in this State.

Part 9 Criminal and civil proceedings

Division 1 Criminal proceedings

119 Maximum monetary penalty—Tier 1, Tier 2, Tier 3 or Tier 4

- (1) If *Tier 1*, *Tier 2*, *Tier 3* or *Tier 4* is specified as the maximum monetary penalty at the end of a provision (or a number of provisions) of this Act, a person who contravenes or fails to comply with that provision (or those provisions) is guilty of an offence and liable to a monetary penalty not exceeding the relevant penalty specified in this section. If a period of imprisonment is also specified, the person is also liable to imprisonment not exceeding the period so specified.

Note. Section 155 provides that the regulations may create offences and impose a monetary penalty for an offence against the regulations not exceeding \$5,500.

- (2) The maximum monetary penalty for *Tier 1* is:
- (a) in the case of a corporation:
 - (i) \$1,650,000, and
 - (ii) if this Act provides that an additional daily penalty applies to the offence—a further \$165,000 for each day the offence continues, or
 - (b) in the case of an individual:
 - (i) \$330,000, and
 - (ii) if this Act provides that an additional daily penalty applies to the offence—a further \$33,000 for each day the offence continues.
- (3) The maximum monetary penalty for *Tier 2* is:
- (a) in the case of a corporation:
 - (i) \$660,000, and
 - (ii) if this Act provides that an additional daily penalty applies to the offence—a further \$66,000 for each day the offence continues, or
 - (b) in the case of an individual:
 - (i) \$132,000, and
 - (ii) if this Act provides that an additional daily penalty applies to the offence—a further \$13,200 for each day the offence continues.
- (4) The maximum monetary penalty for *Tier 3* is:
- (a) in the case of a corporation:
 - (i) \$440,000, and
 - (ii) if this Act provides that an additional daily penalty applies to the offence—a further \$44,000 for each day the offence continues, or
 - (b) in the case of an individual:
 - (i) \$88,000, and
 - (ii) if this Act provides that an additional daily penalty applies to the offence—a further \$8,800 for each day the offence continues.
- (5) The maximum monetary penalty for *Tier 4* is:
- (a) in the case of a corporation:
 - (i) \$110,000, and
 - (ii) if this Act provides that an additional daily penalty applies to the offence—a further \$11,000 for each day the offence continues, or
 - (b) in the case of an individual:

- (i) \$22,000, and
- (ii) if this Act provides that an additional daily penalty applies to the offence—a further \$2,200 for each day the offence continues.

120 Proceedings for offences

- (1) Proceedings for an offence against this Act or the regulations may be dealt with summarily before the Local Court or before the Land and Environment Court in its summary jurisdiction.
- (2) If proceedings for an offence are brought in the Local Court, the maximum monetary penalty that the Local Court may impose for the offence is, despite any other provision of this Act, \$110,000 (including within that maximum amount any additional daily penalty) or the maximum monetary penalty provided for the offence, whichever is the lesser.

121 Authority to take proceedings

- (1) Any legal proceedings for an offence against this Act or the regulations may only be taken by a police officer, by the ACH Authority or by a person duly authorised by the ACH Authority in that behalf, either generally or in any particular case.
- (2) In any proceedings referred to in this section the production of an authority purporting to be issued by a prescribed person acting for the ACH Authority is evidence of the authority without proof of the signature of the person.

122 Time within which proceedings may be commenced

- (1) Proceedings for an offence against this Act or the regulations may be commenced not later than 2 years after the date on which the offence is alleged to have been committed.
- (2) Proceedings for an offence against this Act or the regulations may also be commenced within, but not later than, 2 years after the date on which evidence of the alleged offence first came to the attention of any relevant investigation officer.
- (3) If subsection (2) is relied on for the purpose of commencing proceedings for an offence, the court attendance notice or application must contain particulars of the date on which evidence of the offence first came to the attention of any relevant investigation officer and need not contain particulars of the date on which the offence was committed. The date on which evidence first came to the attention of any relevant investigation officer is the date specified in the court attendance notice or application, unless the contrary is established.
- (4) This section applies despite anything in the *Criminal Procedure Act 1986* or any other Act.
- (5) In this section:
 - evidence** of an offence means evidence of any act or omission constituting the offence.
 - investigation officer** means an authorised officer within the meaning of Part 8, whether or not the person has the functions of an investigation officer in connection with the offence concerned.
 - relevant investigation officer** means:
 - (a) in relation to proceedings for an offence instituted by or with the authority of the ACH Authority—any investigation officer who is an employee or agent of the ACH Authority, or
 - (b) in relation to proceedings for an offence instituted by any other person—any investigation officer.

123 Penalty notices for certain offences

- (1) An authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence.
- (2) A penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence.
- (3) The *Fines Act 1996* applies to a penalty notice issued under this section.
Note. The *Fines Act 1996* provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.
- (4) The amount payable under a penalty notice issued under this section is the amount prescribed for the alleged offence by the regulations (not exceeding the maximum amount of penalty that could be imposed for the offence by a court).
- (5) A penalty notice issued under this section may be withdrawn by any authorised officer within 28 days after the penalty notice was issued. If the penalty notice is withdrawn:
 - (a) any amount that has been paid under the penalty notice is to be repaid to the person who paid it, and
 - (b) proceedings may be taken in respect of the alleged offence as if the penalty notice had not been issued.
- (6) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (7) In this section, **authorised officer** means a person who is declared by the regulations to be an authorised officer for the purposes of this section or who belongs to a class of persons so declared.

124 Liability of directors etc for offences by corporation—offences attracting executive liability

- (1) For the purposes of this section, an **executive liability offence** is an offence against any of the following provisions that is committed by a corporation:
 - (a) section 41 (Offence to harm Aboriginal cultural heritage),
 - (b) section 75, 82 or 92 (Contravening stop work order, interim protection order or remediation order),
 - (c) section 143 (Offence of failing to comply with court order), being an order in relation to an offence involving harm to Aboriginal cultural heritage, but not being an order in relation to costs and expenses incurred by a public authority or agency.
- (2) A person commits an offence against this section if:
 - (a) a corporation commits an executive liability offence, and
 - (b) the person is:
 - (i) a director of the corporation, or
 - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the executive liability offence, and
 - (c) the person:
 - (i) knows or ought reasonably to know that the executive liability offence (or an offence of the same type) would be or is being committed, and
 - (ii) fails to take all reasonable steps to prevent or stop the commission of that offence.

Maximum penalty: The maximum penalty for the executive liability offence if committed by an individual.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the executive liability offence.
- (5) This section does not affect the liability of the corporation for the executive liability offence, and applies whether or not the corporation is prosecuted for, or convicted of, the executive liability offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are accessories to the commission of the executive liability offence or are otherwise concerned in, or party to, the commission of the executive liability offence.

- (7) In this section:

director has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

reasonable steps, in relation to the commission of an executive liability offence, includes, but is not limited to, such action (if any) of the following kinds as is reasonable in all the circumstances:

- (a) action towards:
 - (i) assessing the corporation's compliance with the provision creating the executive liability offence, and
 - (ii) ensuring that the corporation arranged regular professional assessments of its compliance with the provision,
- (b) action towards ensuring that the corporation's employees, agents and contractors are provided with information, training, instruction and supervision appropriate to them to enable them to comply with the provision creating the executive liability offence so far as the provision is relevant to them,
- (c) action towards ensuring that:
 - (i) the plant, equipment and other resources, and
 - (ii) the structures, work systems and other processes,relevant to compliance with the provision creating the executive liability offence are appropriate in all the circumstances,
- (d) action towards creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance with the provision creating the executive liability offence.

125 Liability of directors etc for offences by corporation—accessory to the commission of the offences

- (1) For the purposes of this section, a *corporate offence* is an offence against this Act or the regulations that is capable of being committed by a corporation, whether or not it is an executive liability offence referred to in section 125.
- (2) A person commits an offence against this section if:
 - (a) a corporation commits a corporate offence, and
 - (b) the person is:
 - (i) a director of the corporation, or

- (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the corporate offence, and
- (c) the person:
 - (i) aids, abets, counsels or procures the commission of the corporate offence, or
 - (ii) induces, whether by threats or promises or otherwise, the commission of the corporate offence, or
 - (iii) conspires with others to effect the commission of the corporate offence, or
 - (iv) is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.

Maximum penalty: The maximum penalty for the corporate offence if committed by an individual.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the corporate offence.
- (5) This section does not affect the liability of the corporation for the corporate offence, and applies whether or not the corporation is prosecuted for, or convicted of, the corporate offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are concerned in, or party to, the commission of the corporate offence.

126 Evidence as to state of mind of corporation

- (1) Without limiting any other law or practice regarding the admissibility of evidence, evidence that an officer, employee or agent of a corporation (while acting in his or her capacity as such) had, at any particular time, a particular state of mind, is evidence that the corporation had that state of mind.
- (2) In this section, the *state of mind* of a person includes:
 - (a) the knowledge, intention, opinion, belief or purpose of the person, and
 - (b) the person's reasons for the intention, opinion, belief or purpose.

127 Ancillary offences

- (1) A person who:
 - (a) causes or permits another person to commit, or
 - (b) aids, abets, counsels or procures another person to commit, or
 - (c) conspires to commit,an offence under a provision of this Act or the regulations is guilty of an offence against that provision and is liable, on conviction, to the same penalty applicable to an offence against that provision.
- (2) A person does not commit an offence because of this section for any act or omission that is an offence under section 125 (Liability of directors etc for offences by corporations—accessory to the commission of the offences).

128 Offence—false or misleading information

- (1) A person must not provide information in connection with a matter under this Act that the person knows, or ought reasonably to know, is false or misleading in a material particular.
Maximum penalty: Tier 2 monetary penalty.
- (2) For the purposes of this section, a person provides information in connection with any such matter if:
 - (a) the person is requesting an ACH management plan, or a variation of any such plan, and the information is provided by the person in or in connection with the request, or
 - (b) the person is engaged by any such person and the information is provided by that person for the purposes of the request, or
 - (c) the person provides information in connection with any other matter or thing under this Act that the regulations declare to be the provision of information in connection with a matter under this Act.

Note. The *Crimes Act 1900* contains other offences relating to false and misleading information: section 192G (Intention to defraud by false or misleading statement—maximum penalty: imprisonment for 5 years), sections 307A, 307B and 307C (False or misleading applications/information/documents—maximum penalty: imprisonment for 2 years or \$22,000, or both).

129 Continuing offences

- (1) A person who is guilty of an offence because the person contravenes a requirement made by or under this Act or the regulations (whether the requirement is imposed by a notice or otherwise) to do or cease to do something (whether or not within a specified period or before a particular time):
 - (a) continues, until the requirement is complied with and despite the fact that any specified period has expired or time has passed, to be liable to comply with the requirement, and
 - (b) is guilty of a continuing offence for each day the contravention continues.
- (2) This section does not apply to an offence if the relevant provision of this Act or the regulations does not provide for a penalty for a continuing offence.
- (3) This section does not apply to the extent that a requirement of a notice is revoked.

130 Sentencing for offence—matters to be considered

- (1) In imposing a penalty for an offence against this Act or the regulations, the court is to take into consideration the following (so far as they are relevant):
 - (a) the extent of the harm caused or likely to be caused by the commission of the offence,
 - (b) the practical measures that may be taken to prevent, control, abate or mitigate that harm,
 - (c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused by the commission of the offence,
 - (d) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,
 - (e) whether, in committing the offence, the person was complying with orders from an employer or supervising employee,
 - (f) whether the offence was committed for commercial gain.

- (2) The court may take into consideration other matters that it considers relevant.

Division 2 Civil proceedings

131 Definition of “breach”

In this Division:

breach includes a threatened or apprehended breach.

132 Civil proceedings to remedy or restrain breaches of this Act or regulations

- (1) Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.
- (2) Any such proceedings may be brought whether or not proceedings have been instituted for an offence against this Act or the regulations.
- (3) If the Court is satisfied that a breach has been committed or that a breach will, unless restrained by order of the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach.
- (4) Without limiting the powers of the Court under this section, an order under this section may suspend any ACH management plan.

133 Civil proceedings for enforcement of ACH conservation agreements and other conservation obligations

- (1) The ACH Authority, or a person acting with the written consent of the ACH Authority, may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of:
 - (a) any ACH conservation agreement, or
 - (b) a provision of an ACH management plan relating to measures to conserve or minimise harm to Aboriginal cultural heritage, but only if the proponent to whom the plan applies has relied on the authority conferred by the plan to harm Aboriginal cultural heritage.
- (2) If the Court is satisfied that a breach has been committed or that a breach will, unless restrained by order of the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach.
- (3) Without limiting the powers of the Court under this section, the Court may award damages against the owner of the land subject to the ACH conservation agreement or the ACH management plan for a breach of the agreement or plan that arose from an intentional, reckless or negligent act or omission by or on behalf of the owner or a previous owner of the land (being an act or omission of which the owner had notice) including a failure by the owner or previous owner to prevent another person from causing a breach of the agreement or plan.
- (4) Section 89 of the *Conveyancing Act 1919* does not authorise any court to modify or wholly or partially extinguish any restriction or obligation created by an ACH conservation agreement except with the consent of the ACH Authority.

134 Provisions relating to proceedings under this Division

- (1) Proceedings may be brought by a person under this Division whether or not any right of the person has been or may be infringed by or as a consequence of the breach concerned.
- (2) Proceedings may be brought by a person under this Division on the person’s own behalf or on behalf of another person (with their consent), or of a body corporate or

unincorporate (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

- (3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings.

Division 3 Ancillary court orders

135 Operation of Division

(1) **Application to proved offences**

This Division applies where a court finds an offence against this Act or the regulations proved.

(2) **Meaning of proved offences**

Without limiting the generality of subsection (1), a court finds an offence proved if:

- (a) the court convicts the offender of the offence, or
(b) the court makes an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* against the offender in relation to the offence (in which case the order is not a punishment for the purposes of that section).

(3) **Definitions**

In this Division:

damage to Aboriginal cultural heritage, means harm to:

- (a) an Aboriginal object, or
(b) Aboriginal ancestral remains.

the court means the court that finds the offence proved.

the offender means the person who is found to have committed the offence.

136 Orders generally

(1) **Orders may be made**

One or more orders may be made under this Division against the offender.

(2) **Orders are additional**

Orders may be made under this Division in addition to any penalty that may be imposed or any other action that may be taken in relation to the offence.

(3) **Other action not required**

Orders may be made under this Division regardless of whether any penalty is imposed, or other action taken, in relation to the offence.

137 Orders for restoration and prevention

- (1) The court may order the offender to take such steps as are specified in the order, within such time as is so specified (or such further time as the court on application may allow):

- (a) to prevent, control, abate or mitigate any harm to Aboriginal cultural heritage caused by the commission of the offence, or
(b) to make good any resulting harm to Aboriginal cultural heritage, or
(c) to prevent the continuance or recurrence of the offence.

- (2) The court may order the offender to provide security to the court or to the ACH Authority for the performance of any obligation imposed under this section.
- (3) An order under subsection (2) must specify:
 - (a) the amount of the security required to be provided, and
 - (b) the kind of security required to be provided, and
 - (c) the manner and form in which the security is to be provided.

138 Orders for costs, expenses and compensation at time offence proved

- (1) The court may, if it appears to the court that:
 - (a) a public authority has incurred costs and expenses in connection with:
 - (i) the prevention, control, abatement or mitigation of any harm to Aboriginal cultural heritage caused by the commission of the offence, or
 - (ii) making good any resulting harm to Aboriginal cultural heritage, or
 - (b) a person (including a public authority) has, by reason of the commission of the offence, suffered loss of or harm to property or has incurred costs and expenses in preventing or mitigating, or in attempting to prevent or mitigate, any such loss or damage,

order the offender to pay to the public authority or person the costs and expenses so incurred, or compensation for the loss or harm so suffered, as the case may be, in such amount as is fixed by the order.
- (2) An order made by the Land and Environment Court under subsection (1) is enforceable as if it were an order made by the Court in Class 4 proceedings under the *Land and Environment Court Act 1979*.
- (3) The Local Court may not make an order under subsection (1) for the payment of an amount that exceeds the amount for which an order may be made by the court when exercising jurisdiction under the *Civil Procedure Act 2005*. An order made by the court is enforceable as if it were an order made by the court when exercising jurisdiction under that Act.

139 Recovery of costs, expenses and compensation after offence proved

- (1) If, after the court finds the offence proved:
 - (a) a public authority has incurred costs and expenses in connection with:
 - (i) the prevention, control, abatement or mitigation of harm to Aboriginal cultural heritage caused by the commission of the offence, or
 - (ii) making good any resulting harm to Aboriginal cultural heritage, or
 - (b) a person (including a public authority) has, by reason of the commission of the offence, suffered loss of or harm to property or has incurred costs and expenses in preventing or mitigating, or in attempting to prevent or mitigate, any such loss or harm,

the person or public authority may recover from the offender the costs and expenses incurred or the amount of the loss or harm in the Land and Environment Court.
- (2) The amount of any such costs and expenses (but not the amount of any such loss or harm) may be recovered as a debt.

140 Orders regarding costs and expenses of investigation

- (1) The court may, if it appears to the court that the ACH Authority has reasonably incurred costs and expenses during the investigation of the offence, order the

offender to pay to the ACH Authority the costs and expenses so incurred in such amount as is fixed by the order.

- (2) An order made by the Land and Environment Court under subsection (1) is enforceable as if it were an order made by the Court in Class 4 proceedings under the *Land and Environment Court Act 1979*. An order made by the Local Court under subsection (1) is enforceable as if it were an order made by the court when exercising jurisdiction under the *Civil Procedure Act 2005*.
- (3) In this section:
costs and expenses, in relation to the investigation of an offence, means the costs and expenses:
 - (a) in conducting any inspection, test, measurement or analysis, or
 - (b) of transporting, storing or disposing of evidence, during the investigation of the offence.

141 Orders regarding monetary benefits

- (1) The court may order the offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.
- (2) The amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act.
- (3) The regulations may prescribe a protocol to be used in determining the amount that represents the monetary benefit acquired by the offender or accrued or accruing to the offender.
- (4) In this section:
monetary benefits means monetary, financial or economic benefits.
the court does not include the Local Court.

142 Additional orders

(1) Orders

The court may do any one or more of the following:

- (a) order the offender to take specified action to publicise the offence (including the circumstances of the offence) and its consequences and any other orders made against the person,
- (b) order the offender to take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender's conduct),
- (c) order the offender to carry out a specified project for the restoration or enhancement of Aboriginal cultural heritage,
- (d) order the offender to carry out or commission a specified audit of activities carried on by the offender,
- (e) order the offender to pay a specified amount to a specified organisation (including into the ACH Fund), for the purposes of a specified project for the restoration or enhancement of Aboriginal cultural heritage,

- (f) if the ACH Authority is a party to the proceedings, order the offender to provide a financial assurance, of a form and amount specified by the court, to the ACH Authority, if the court orders the offender to carry out a specified work or program for the restoration or enhancement of Aboriginal cultural heritage.

The Local Court is not authorised to make an order referred to in paragraph (c), (d), (e) or (f).

- (2) Without limiting subsection (1) (c), the court may order the offender to carry out any social or community activity for the benefit of the Aboriginal community adversely affected by the offence (a *restorative justice activity*) that the offender has agreed to carry out. However, the Local Court is not authorised to make an order under this subsection.

(3) **Machinery**

The court may, in an order under this section, fix a period for compliance and impose any other requirements the court considers necessary or expedient for enforcement of the order.

(4) **Failure to publicise or notify**

If the offender fails to comply with an order under subsection (1) (a) or (b), the prosecutor or a person authorised by the prosecutor may take action to carry out the order as far as may be practicable, including action to publicise or notify:

- (a) the original contravention, its consequences, and any other penalties imposed on the offender, and
(b) the failure to comply with the order.

(5) **Cost of publicising or notifying**

The reasonable cost of taking action referred to in subsection (4) is recoverable by the prosecutor or person taking the action, in a court of competent jurisdiction, as a debt from the offender.

(6) **Financial assurances**

Sections 302–307 of the *Protection of the Environment Operations Act 1997* apply (subject to the regulations) to a financial assurance provided by an offender under an order made under this section in the same way as they apply to a financial assurance given by a holder of a licence under a condition of a licence under Part 9.4 of that Act.

143 Offence of failing to comply with court order

A person who fails to comply with an order under this Division (except an order for the payment of money) is guilty of an offence.

Maximum penalty (includes additional daily penalty): Tier 4 monetary penalty.

Division 4 Enforceable undertakings

144 Enforcement of undertakings

- (1) The ACH Authority may accept a written undertaking given by a person for the purposes of this Division in connection with a matter in relation to which the ACH Authority has a function under this Act.
- (2) Without limiting subsection (1), an undertaking that the ACH Authority may accept includes an undertaking to carry out a restorative justice activity.
- (3) The person may withdraw or vary the undertaking at any time, but only with the consent in writing of the ACH Authority. The consent of the ACH Authority is

required even if the undertaking purports to authorise withdrawal or variation of the undertaking without that consent.

- (4) The ACH Authority may apply to the Land and Environment Court for an order under subsection (5) if the ACH Authority considers that the person who gave the undertaking has breached any of its terms.
- (5) The Court may make all or any of the following orders if it is satisfied that the person has breached a term of the undertaking:
 - (a) an order directing the person to comply with that term of the undertaking,
 - (b) an order directing the person to pay to the ACH Authority an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach,
 - (c) any order that the Court thinks appropriate directing the person to compensate any other person who has suffered loss or harm as a result of the breach,
 - (d) an order suspending or revoking an ACH management plan,
 - (e) an order requiring the person to prevent, control, abate or mitigate any actual or likely harm to Aboriginal cultural heritage caused by the breach,
 - (f) an order requiring the person to make good any actual or likely harm to Aboriginal cultural heritage caused by the breach,
 - (g) any other order the Court considers appropriate.

Division 5 Evidentiary provisions

145 Onus of proof of reasonable excuse

The onus of proof of reasonable excuse in any proceedings for an offence under this Act or the regulations lies on the person charged with the offence.

146 Responsibility of landholder for activities carried out on the land

- (1) In any criminal or civil proceedings under this Act, the landholder of any land on which an offence or contravention is alleged to have occurred is taken to have carried out the activity constituting the alleged offence or contravention unless it is established that:
 - (a) the activity was carried out by another person, and
 - (b) the landholder did not cause or permit the other person to carry out the activity.
- (2) This section does not prevent proceedings being taken against the person who actually carried out the activity.
- (3) This section does not apply to an offence excluded by the regulations.

147 Documentary evidence generally

Any document purporting:

- (a) to be a document issued, made or given for the purposes of this Act, and
 - (b) to have been signed by the person authorised to issue, make or give the document, or by another person acting as delegate or on behalf of the person, and
 - (c) to have been issued, made or given on a specified day,
- is admissible in any criminal or civil proceedings under this Act and (in the absence of evidence to the contrary) is to be taken to be such a document, to have been so signed and to have been issued, made or given on that day.

148 Certificate evidence of certain matters

- (1) A document signed by an officer prescribed by the regulations and certifying any one or more of the relevant matters specified in subsection (2) is admissible in criminal or civil proceedings under this Act and (in the absence of evidence to the contrary) is evidence of the matters so certified.
- (2) The relevant matters are as follows:
 - (a) that a specified person was, at a specified time or during a specified period, a landholder of specified land,
 - (b) that a specified person was served with a specified document under this Act,
 - (c) that a specified function of the Minister or ACH Authority was delegated to a specified person under this Act during a specified period,
 - (d) that a specified person was or was not, at a specified time or during a specified period, an authorised officer under Part 8 or an employee of a specified public authority,
 - (e) any other matter prescribed by the regulations.

