16 April 2018

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

RE: Comments on the proposed Aboriginal Cultural Heritage Bill 2018

Dear Sir/Madam,

Thank you for the opportunity to provide comments on the Aboriginal Cultural Heritage Bill 2018 proposed to replace the existing management of Aboriginal cultural heritage in New South Wales (NSW). Please find below some general comments on the overall direction of the system, as well as more detailed comments in relation to the Bill itself.

The Australian Archaeological Association (AAA) represents over 600 heritage professionals across Australia, a significant portion of whom reside and work in NSW. Our members work on a daily basis applying the current Aboriginal heritage legislation as both consultants and regulators. We are therefore among the best informed people able to contribute experience and advice on the development of a system that works; for the government applying the legislation, for the Aboriginal community, for development proponents and for the wider public who are all stakeholders in the management of the heritage of NSW and Australia.

As we have indicated in previous correspondence, we are strongly supportive of new legislation, with the existing *National Parks and Wildlife Act 1974* now over 40 years old, and deficient in many areas. We are further pleased to see that many of the comments from previous rounds of consultation over the last six years have, at least in part, been integrated into the currently proposed system; and that the new proposal now addresses several of the limitations of the current Act, as well as providing a much stronger voice for Aboriginal people in the process. The latter is an issue currently being grappled with around the world, as outlined in current literature (e.g. Connaughton & Herbert, 2018). It is, however, disappointing to note that the role of heritage professionals is rarely considered in this Bill, despite the industry having worked closely with Aboriginal communities and advocating for the conservation and investigation of Aboriginal cultural heritage since at least the 1960s; and being the people having to work with this system. A strong heritage industry, provided with Statutory and regulatory support, has a valuable role to play in providing the expertise and independent advice required for cultural heritage conservation. We also highlight that the lack
of regulations or guidelines associated with the Bill makes several aspects of its functions uncertain at this stage.

Further, there remains a number of potential risks in the proposed system, which may result in detrimental impacts to Aboriginal cultural heritage and significant issues in the future development process of NSW unless addressed. These include:

1. the community-driven and undefined scope, nature, funding and composition of the Local Aboriginal Cultural Heritage (ACH) panels, which are so critical to the process;

2. increasing de-regulation and reliance on individuals with cultural knowledge but limited training, rather than specialists, in the interpretation of as-yet-uncreated, online resources to determine whether Aboriginal heritage is an issue or not. More broadly, increasing de-regulation in this Bill provides opportunity for manipulation of the system and further checks and balances are required;

3. the lack of an agreed basis for the assessment and management of the intangible cultural values components of Aboriginal heritage in Australia. This is particularly problematic in the absence of Australia’s ratification of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003, as unlike other types of heritage, there is only limited understanding of these issues in the country, and no broad agreement within NSW and across other Australian governments. Particularly, there is the lack of a common and widely accepted methodological approach to the definition and management of intangible cultural heritage in Australia;

4. the shift away from the management and protection of the scientific values associated with Aboriginal heritage, denying the value of the previous system which has operated in Australia for more than 40 years and limits opportunity to continue future legitimate investigations in that direction;

and

5. a lack of consideration for the shared nature and significance of much of the Aboriginal cultural heritage of NSW.

In addition, we have previously identified that for the proposed system to work successfully a substantial and ongoing investment would be required by Government to establish the bodies and develop the cultural heritage mapping identified as critical components. Given the current limited investment in Aboriginal cultural heritage management in NSW we have concerns that the tools required to make the system function will not be available in a comprehensive and timely manner. Significant funds would need to be contributed to starting and running this system if it is to function effectively and as intended, or risk significant delays in the NSW assessment process due to Aboriginal heritage management.

We believe that any new Aboriginal heritage legislation needs to recognise the multiple values that heritage has. Certainly for many years the primary focus has been on the archaeological, scientific values of that heritage, and the balance needs to be redressed to recognise and protect ongoing cultural values. That said, a new Act should not completely discount scientific value, as that will ultimately be detrimental to the Australian community and our understanding of the development of human society as a whole. Rather a new Act should facilitate, perhaps even mandate, collaboration between such parties, to recognise and celebrate the many values of Aboriginal cultural heritage to the entire community.
The AAA would be happy to speak with you in more detail over any aspect of these comments if you wish. If you wish to discuss this matter further, please contact Dr. Alan Williams FSA MAACAI on 0428 810 150 or awilliams@extent.com.au. Dr. Williams is our local NSW State Representative, and he is closely monitoring the proposed legislative changes on behalf of AAA. Alternatively, if you wish to table this matter with the AAA national executive, you can email me directly at president@australian.archaeology.com.

Kind regards,

Dr. Michael Slack
President, Australian Archaeological Association

Dr. Alan Williams
NSW State Representative, Australian Archaeological Association
General Comments

- **Definition of Significance**: During discussions with the OEH ACH Reform team, lengthy debate was undertaken on who should define the significance of Aboriginal cultural heritage and how this was to be done in the new Act. While there was no dispute that Aboriginal people have primacy over significance, a strong argument was made that non-Indigenous people's perspectives needed to also be considered. The key example of this was the Aboriginal human remains recovered from Lake Mungo, western NSW, which are clearly of significance to the local Aboriginal community (e.g. ABC News, 2017), but are also of State, national and international significance to non-Indigenous people in understanding the history of the human species (e.g. Malaspinas et al., 2016; Tobler et al., 2017).

  While the definition of Aboriginal significance used in the Bill includes a range of values that non-Indigenous people commonly use to assess cultural heritage (notably social, spiritual, historic, aesthetic and scientific), the current wording of the clause (Section 4(2b)) is poor, and suggests that only Aboriginal people can apply values to these criteria. We recommend that this definition is restructured to more accurately reflect that these criteria can be applied to cultural heritage by a non-Indigenous person, as well as an Aboriginal person. We would direct the Reform team to other heritage related Acts that incorporate both perspectives and would be more suitable, such as the Victorian Aboriginal Heritage Act 2006:

  “cultural heritage significance” includes—

  (a) archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance; and

  (b) significance in accordance with Aboriginal tradition;

- **Local ACH panels**: The Local ACH panels will be critical in the success of this process as the first point of contact for a proponent, and in determining the nature and level of assessment in a given area, yet they remain poorly defined in the existing documentation and proposed Bill. The documentation and feedback from workshops indicates that the development of these panels is to be community driven, and to be developed in the form of guidelines and/or regulations after the Act has been established. Given the history of the state, and the non-traditional nature of statutory heritage protection, it is unreasonable to expect the diverse Aboriginal community to produce a coherent and legitimate heritage management bureaucracy without substantial support, training and funding. A similar community driven approach was proposed in the Office of Environment and Heritage (OEH) 2010 guidelines for Aboriginal consultation, and this has been found to result in increased fracturing of the Aboriginal community, and manipulation and dysfunction of the cultural heritage assessment process, rather than collegiality or agreement (e.g. Sutton et al., 2013). It seems likely a similar situation would result here, but with far greater impact to the assessment process.

  Given the importance of these panels in the new system, and the potential for their dysfunction and/or external influence (see below), we would recommend that far more detail is incorporated into the Act – similar to some of the details presented in relation to the ACH Authority Board in Schedule 1. This would address their composition, structure, axiom, criteria for membership, timeframes for personnel serving upon them, etc. While inclusion of some specific information is probably not possible (such as nomination of specific individuals and/or definition of the geographic area covered by a panel), incorporating this more generic functional information could be developed to ensure a more robust and accountable system than would be possible through regulations or guidelines. At the very least, such regulations or guidelines should be developed and distributed for comment prior to
the Bill being considered to ensure a comprehensive understanding of the process can be understood prior to it becoming law.

- **Local ACH Panel Funding:** Given the involvement of these panels is key to the success or failure of the Bill, they must be suitably funded. While funding is discussed in Part 6 of the Bill, it makes no reference to how the Local ACH panels will be funded. With the lack of information on the Local ACH panels in the Bill to date, it increases the risk that they would not be suitably funded through the ACH Fund, and therefore would be unable to adequately fulfil their role, and would be prone to dysfunction/ influence from external sources (i.e. they would be forced to fund themselves through their role in the assessment and development process). To avoid this potential situation, it is recommended that additional sections are incorporated into Part 6 that make it clear the ACH Fund would provide remuneration for Local ACH panel members and suitable resources to ensure their functioning without the need, or perhaps more accurately a requirement, for direct external revenue.

- **Local ACH Panel Reliability and Ongoing Management:** Following on from the point above, it is not clear in the Bill how the process will be managed in the event that the Local ACH Panel is not functioning correctly – e.g. absent committee members, a quorum not being reached, lack of relevant expertise, etc. There seems no incentive nor penalties outlined in the Bill, in the event that the panel does not function correctly. As with the points above, it is recommended that more information on the Local ACH panels are outlined in the Bill, and includes direction in the event that a panel becomes dysfunctional and/or absent, what steps can be taken by both the ACH Authority and/or the proponent.

- **Local ACH Panel Ethical Framework/Pecuniary Interests:** Unlike the ACH Authority that has clear definitions in the Bill (Schedule 1), the Local ACH panels are poorly defined, and/or minimally bound by the Bill’s contents. In tandem with the potential funding issues above, and the likely source of representatives of the panel from existing private organisations involved in the cultural resource management industry, there is increased risk of conflicts of interest and pecuniary interest through their function. It is therefore recommended that even if specific aspects of the Local ACH panels cannot be defined at this stage, basic conditions similar to Schedule 1 are incorporated in the Bill for them, most notably in the areas of pecuniary interest and identifying funding areas and gifts (e.g. Section 69; Schedule 1 Section 8), and identifying conflicts of interest of people assigned to the panel.

- **ACH Assessment Pathway:** Stages 1 and 2 of the ACH Assessment Pathway both make significant assumptions that Aboriginal heritage of a given area is well understood both in the ACH Maps (which have yet to be developed) and/or by the Local ACH panel in question. If the Bill is passed, further detail is critical as to how the sensitivity mapping will be developed, what the methodology will be and what party will be undertaking the mapping. Will it be the local panel, a state agency or some other body? What process will be put in place for the review and ratification of the mapping to ensure confidence in the data, and what will be the process for future updating of the information? If we view these maps as the equivalent of the heritage maps within Local Environmental Plans, the process for changing, update or even correcting errors in those maps is slow and laborious, and Councils are reticent.

As heritage professionals, we can advise that frequently both the tangible and intangible Aboriginal cultural heritage of an area is not identified nor well understood. A good example of this is the recent cultural heritage uncovered as part of the light rail development in Moore Park, NSW, and still under scrutiny two years later (Sydney Morning Herald, 2016). Hence, this assumption has the risk of either unnecessarily increasing the level of assessment required for an area, or leading to a lack of
assessment and detrimental consequences to any cultural heritage if present. It is recommended that in both of these stages, additional conditions are included that where uncertainty to the nature, composition or spatial extent of Aboriginal heritage is evident that progression to next Stage is automatically undertaken.

- **Ex Post Facto Concerns**: The Bill allows the easy modification and/or termination of ACH conservation agreements and management plans (Section 31(3); Section 53). While this allows flexibility in the system and is welcome, it does increase the risk for Ex Post Facto issues. Specifically, it increases the risk for proponents and heritage professionals to undertake works under an approved agreement/plan, which if subsequently modified or terminated could result in them being considered to have committed an offence under Section 41 of the Bill. This would be an unacceptable risk to proponents, heritage professionals and Aboriginal people who would likely be undertaking the investigation and/or recovery of Aboriginal cultural heritage as part of a development, and under an agreement/plan would be *knowingly* undertaking the works (thereby automatically being within the Tier 1 penalties). To avoid such issues, we strongly recommend that additional conditions are included that indicate where works are carried out under, and in accordance with, an approved agreement/plan, they cannot be considered an offence even in the event the agreement/plan is subsequently modified or terminated.

- **Undefined Fees**: There are a range of undefined fees within the Bill that should have limits imposed. These fees are all essential to the assessment process, and proponents and heritage professionals should be provided some certainty as to their quantity – rather than an undefined fee that can be changed regularly and/or by location (i.e. different fees developed by different Local ACH panels). These include accessing the ACH information system (Section 19(7)), payments received from the ACH management plans into the ACH Fund (Section 65(b)) – and thereby suggesting each management plan will have a fee to be paid to the ACH Authority – and inspecting the pecuniary interests of the Board (Schedule 1 Section 8(3)). Assuming, our recommendations above are considered, a further fee to review the pecuniary interests of the Local ACH panel may also be listed. We recommend that some indication of the fees associated with these tasks are outlined in Section 154, as is the case for some penalties.

- **Heritage Act Excavation Director Requirements**: We strongly support the efforts in this Bill to increase the interaction of Aboriginal cultural heritage management with the *Heritage Act 1977*. This is most evident in Schedule 2 [1], which by removing part of the relic definition, would allow *all* Aboriginal cultural heritage to be listed and managed under the *Heritage Act 1977*, as well as the proposed Aboriginal Cultural Heritage Act. However, this increased interaction will likely result in a larger number of Aboriginal cultural heritage sites and places being listed on the State Heritage Register, and the relics provisions applying to pre-Contact Aboriginal archaeological sites. To undertake any works on relics, the Heritage Division presently requires a heritage professional to meet a series of requirements (known as ‘Excavation Director requirements’). Currently, these are focussed on European (historical) archaeology expertise. Application of these requirements in the new system would result in inexperienced Excavation Directors managing pre-Contact sites, and would leave heritage professionals with Aboriginal cultural heritage expertise – who would be most suitable to work on such sites – at a disadvantage. It is recommended that if these changes are made to the *Heritage Act 1977*, then the Excavation Director requirements are reviewed and based in a sound process to ensure that the expertise required is tailored to the site type.
Education and Conservation. In our experience, education and conservation are key issues for the Aboriginal stakeholders presently involved in Aboriginal cultural heritage management in NSW. A research arm was previously an important feature of the National Parks and Wildlife Service, but has been gradually diminished over time, to the detriment of the heritage conservation function of OEH. We recommend that the new Bill incorporate establishment of a similar research body, either within the ACH Authority, or across the Local ACH panels. This would improve our understanding of the nature and significance of the Aboriginal cultural heritage of the state, with consequent benefits for conservation. It would also have the potential to allow sharing of skills among the Aboriginal community, heritage professionals and the bureaucracy. We also note the recent research by Connaughton & Herbert (2018) into the relationship between compliance-driven archaeological work and Indigenous stakeholders, which indicates there is a need to draw the parties together for a shared understanding of the past, rather than to separate and privilege one view.

Specific Comments on Bill

- **Section 41(c):** The lack of definition on ‘trivial’ or ‘negligible’ in terms of harm provides uncertainty that can be exploited. It is recommended that further consideration on the nature and type of harm that can be prosecuted is considered and/or defined in this part of the Bill.

- **Section 43 (note):** While as heritage professionals, we are highly supportive of strategies studies that provide a holistic and comprehensive understanding of the cultural landscape, we do not support the adoption of such studies that allow blanket approval for currently undefined activities to be automatically implemented without the need to undertake the assessment process. Such an approach could be open to dysfunction/external influence as has been seen in the operation of the (now superceded) Part 3A of the *Environmental Planning and Assessment Act 1979* (e.g. NSW EDO, 2017), and this has the potential to be detrimental to Aboriginal cultural heritage. Given this, we recommend that this is further explored in regulations and guidelines in the future once the Act is established, and appropriate consultation and feedback can be undertaken on this issue.

- **Section 49(3)(a):** It is recommended that this clause includes liaison with the Local ACH panel, since it would ensure that the negotiation between a proponent and Local ACH panel is undertaken in good faith. As it is currently written, there is a suggestion that the proponent could bypass the Local ACH panel by simply not reaching agreement in the negotiation phase, and go straight to the ACH Authority for consideration. While an option must be provided to progress an issue where a Local ACH panel/proponent cannot reach agreement, it must ensure that manipulating the system is not possible – or beneficial – to either party through appropriate timeframes, penalties and/or other mechanisms.

- **Section 50:** The negotiation and discrimination periods should be defined in the Bill, since ensuring adequate time for these tasks is essential to the success of the Act. There are examples in the Queensland process where it is more beneficial for a proponent to wait out the negotiation period and implement later steps, rather than acting in good faith. By defining these timeframes and ensuring that the Local ACH panel remains involved in the process (albeit as an advisor to the ACH Authority, rather than consent authority – see point above) would reduce the risk of supplanting the process.

- **Section 59(b):** The timeframe for the ACH Authority to review and respond to an assessment report in 10 days is considered too short. Using current examples from the Office of Environment and Heritage, timeframes of permit processing are in the order of several months. Using this example, the proposed 10 day timeframe in the Bill would virtually guarantee that no assessment report would ever be
reviewed in time, and would automatically be considered adequate. While a short timeframe is welcomed, 10 days is unrealistic, and would likely lead to sub-standard and/or non-heritage professional developed assessment documents supplanting the system to the detriment of Aboriginal heritage (with proponents knowing they are unlikely to ever be rejected). It is recommended that at least 20 business days is provided for this review.

• **Section 122**: We believe that the two year statute of limitations on investigation and prosecution outlined in this section is too short. A typical development can take this length of time, if not longer. We have several examples where more than this time has passed before impacts to Aboriginal heritage have been identified. We would recommend that this period is changed to 10 years.

**References**

ABC News (2017) Mungo Man welcomed back to country in dance and song.  


