Anthony Lean  
Chief Executive  
NSW Office of Environment and Heritage  
PO Box A290  
Sydney South, NSW 1232

Via email: ACH.reform@environment.nsw.gov.au

Dear Mr Lean,

RE: Submission in response to the reform of Aboriginal culture and heritage laws in NSW

Wanaruah Local Aboriginal Land Council (LALC) welcomes the opportunity to provide comment on Draft Aboriginal Culture and Heritage Bill 2018 (Draft Bill) and ‘A proposed new legal framework’ (Proposals paper).

We have broken our submission into two parts. The first is our community’s observations on the Draft Bill, the second are the recommendations developed by the LALC Network which we also support.

**Wanaruah LALC Observations**

**Part 1 section 3 Objects of Act,**

Nowhere in the objects of this draft Bill does it say it is to “protect” Culture and Heritage. Is this an oversight or is the intent not to protect? Our community believes without it being an object to protect C&H there will always be risk to protected sites.

**Recommendation: Include an object that specifically states protection of C&H is an Object of this legislation.**

**Part 1 section 3 Objects of Act, sub paragraph (e)**

It says: “to enable and support voluntary actions that conserve Aboriginal cultural heritage.” Our question is why is it “Voluntary” only? Should it not be to enable and support actions that conserve Aboriginal cultural heritage?

**Recommendation: Remove the word Voluntary.**
Part 1 section 5 Definitions Generally,

Throughout the consultations, the term “Council of Elders” and “Cultural Authority” were used a lot. Yet there is no definition to these terms and when you ask people they all have different ideas on who they refer to. Our community believes there needs to be a definition in the legislation defining the terms “Council of Elders” and “Cultural Authority”.

Recommendation: That a definition be included in Part 1, section 5, Definitions of the legislation defining the terms “Council of Elders” and “Cultural Authority”. We believe the definitions be something like the below examples:

"Council of Elders" means a group of Aboriginal elders with representatives for every family, clan, and language group in the area of authority of the council of elders.

"Cultural Authority" is the right to authorise or conduct non-destructive impacts (e.g. maintenance activities, restoration works) to a cultural site. Cultural Authority for a cultural site can only be assigned or revoked by the council of elders for that area. Where the cultural authority is unknown or lost it remains with the council of elders or where there is no council of elders, it remains with the Aboriginal Community. An individual may have sole Cultural Authority for a site but not for an area. Cultural Authority does not extend nor include the right to destroy a cultural site.

Another term often bandied about is “Speaking for Country”. Our community believes it also needs defining. Does it mean:

a. "who should be consulted"? In which case the answer is “everyone”! or,

b. does it mean “who has Authority for the destruction of cultural landscapes and sites”? In which case that falls back to the comment about needing a definition for the terms “Council of Elders” and “Cultural Authority”.

Recommendation: That a definition be included in Part 1, section 5, Definitions of the legislation defining the term "Speaking for Country".

Part 2, Division 1, section 9, Management of ACH Authority, sub paragraph (1) and Sub paragraph (2)

There is no “Separation of Powers” in the governance model. This could mean the board can interfere in the day to day management of the Authority outside board meetings. This is a very poor governance model. Our community believes the governance structure of the ACH Authority be like that of a Local Aboriginal Land Council or the NSW Aboriginal Land Council as defined in the ALRA 1983 as amended.

Recommendation: That the Legislation includes a governance model’s mimicking that in the ALRA 1983 as amended for the NSWALC or a LALC at each level of the ACH Authority.

Part 3, section 20, Preparation and Approval of ACH Maps, Sub paragraph (6)

It says that: “The Minister may, from time to time, approve of the amendment or replacement of ACH maps.”

Our community believes there needs to be clarification that this is the ACH Authority’s approved amendment or replacement of Maps and not the Minister amending or replacing a map that is not an accurate reflection of the cultural mapping for the area. We believe the recommendations from the LALC Network offer an excellent resolution here.
Part 4, Division 1, section 24, Ownership of certain Aboriginal Objects or Ancestral remains vested in ACH Authority on behalf of Aboriginal People.

Our community has concerns there is not enough rigor here to protect the rights of the Aboriginal community to their ancestral heritage from rape and pillage by vested interests in the ACH Authority authorising their display out of country against the will of the Council of Elders or Aboriginal community concerned. There needs to be clarification that Objects from an area can only be in care and control outside that area with the express consent of their community of origin.

Recommendation: That it is included in the legislation that Objects from an area can only be in care and control outside that area with the express consent of their community of origin.

Part 4, Division 2, section 34, Proposals by public authorities affecting land subject to ACH conservation sub paragraph (1) and Sub paragraph (2)

These two sub paragraphs effectively mean that there is NO PROTECTION of ACH under this Act. It is only able to minimise and mitigate impacts. The Minister can choose to destroy anything and everything.

Recommendation: That these sub paragraphs be removed from the legislation.

Part 5, Division 2, section 41, Offence to Harm ACH sub paragraph (1) Sub Sub paragraph (b)

Included in this there is a section that reads: “the person knows that the object is, or remains are, such an object or remains or that the heritage is so declared”. This section is the equivalent to a “Get out of jail free” clause. The defence should be they took all possible steps as part of due diligence to ensure no impacts would occur. Most proponents who are likely to impact are doing so because they have not conducted proper due diligence and they will hide behind the sub sub paragraph (b) defence as they often do now.

Recommendation: The section that reads: “the person knows that the object is, or remains are, such an object or remains or that the heritage is so declared”, is removed from Part 5, Division 2, section 41, Offence to Harm ACH sub paragraph (1) Sub Sub paragraph (b).

Part 5, Division 2, section 41, Offence to Harm ACH sub paragraph (2)

This paragraph states: “An offence under this subsection is an offence of strict liability and the defence of honest and reasonable mistake of fact applies”. This section is the equivalent to a “Get out of jail free” clause. The defence should be they took all possible steps as part of due diligence to ensure no impacts would occur. Most proponents who are likely to impact are doing so because they have not conducted proper due diligence and they will hide behind this defence as they often do now.

Recommendation: The section that reads: “An offence under this subsection is an offence of strict liability and the defence of honest and reasonable mistake of fact applies”, is removed from Part 5, Division 2, section 41, Offence to Harm ACH sub paragraph (2).
Part 5, Division 3, section 48, Negotiations of plans by proponents and Local Consultation Panel, sub paragraph (2) Sub Sub paragraph (d)

A section of the above clause reads: “the Aboriginal persons whose cultural heritage is to be impacted will benefit from the obligations of the proponent”. No “one person”, “Owns” any objects or places destroyable by this section. It is the property of the Aboriginal community where it is located.

**Recommendation** that the above clause be rewritten to reflect: No “one person”, “Owns” any objects or places destroyable by this section. It is the property of the Aboriginal community where it is located.

Part 5, Division 3, section 52, Appeal against refusal of or failure to approve proposed plan

Within this draft legislation there is no defined grounds for refusal. So all appeals of refusals will be won based the grounds they followed proper process. No protection for any site or place only the ability to minimise and mitigate impacts. When a proponent decides they want to destroy something there is NOTHING to prevent its destruction.

**Recommendation**: That grounds for refusal are included so Cultural places and Objects are able to be protected.

Part 6, section 65, Payments into ACH Fund, sub paragraph (b)

Included in this clause is a section that reads: “money payable into the Fund under an ACH management plan. These monies need to be separated from other funds. They are the property of the community whose culture has been impacted. We have in recent times seen the Dept of Planning raid the Upper Hunter Cultural Heritage trust fund and then grant funds outside the scope of the trust deed and policies surrounding it. If there is no financial gain by way of operational funds for the ACH Authority then there can be no allegations or opportunity for misuse of power for financial gain. It needs to be in the legislation not just the regulations.

**Recommendation**: The legislation to be amended to have a clear separation of ACH Authority Funds and the ACH Management plan funds.

Schedule 1 Part 2, section 7, Chairperson and Deputy Chairperson, Sub Paragraph (2)

The above clause states: “The Minister may at any time remove the Chairperson or Deputy Chairperson from office as Chairperson or Deputy Chairperson”. Our community questions why this is not the sole discretion of the ACH Authority Board?

**Recommendation**: That this Clause be modified to make it the sole discretion of the ACH Authority Board.

As one of the 120 LALCs across NSW, we represent a collective membership of over 23,000 Aboriginal persons in our State. LALCs are democratically elected Aboriginal organisations with objects to improve, protect and foster the best interests of its members and all Aboriginal persons within the LALC boundary area. LALCs have key functions under the Aboriginal Land Rights Act 1983 (NSW) (ALRA) to protect and promote Aboriginal culture and heritage, acquire and manage lands on behalf of members, in addition to providing community benefits.

The current laws, primarily outlined in the National Parks and Wildlife Act 1974 (NSW) (NPW Act) are failing to protect our cultural heritage. NSW is the last State in Australia without stand-alone legislation. Aboriginal peoples have long called for new laws to better protect Aboriginal cultural heritage (ACH) and
enshrine decision making for Aboriginal peoples. New laws also must enshrine roles for Aboriginal Land Councils.

While the Draft Bill has the capacity to be a significant improvement on the current laws, amendments are needed to ensure that new laws establish clear and enforceable mechanisms to protect ACH for future generations and enshrine self-determination for Aboriginal peoples.

In summary we support:

- Decision making, administration, compliance and enforcement by Aboriginal people
- Building on the Aboriginal Land Rights Network and providing increased roles for LALCs. This must be properly resourced by Government
- Requiring Aboriginal heritage approvals before planning decisions are made
- Broadening the definition of Aboriginal cultural heritage so all ACH can be protected
- Establishing clearer consultation requirements and steps
- New and stronger investigation powers and enforcement provisions

However, there are a number of areas where the intent of the reforms has not been adequately captured in the Draft Bill and where further clarity is needed. Key amendments needed include:

- Limiting the decision making roles of the Minister
- Requiring all developments to follow the ACH Assessment Pathway and ACH Management Plan (ACHMP) processes
- Limiting defences available for the harm offence to send a clear message that destroying Aboriginal heritage is unacceptable
- Removing merits appeals for proponent – as currently drafted proponents have more rights than Aboriginal people about our heritage
- Extending the harm offence to all ACH including undeclared Aboriginal cultural heritage
- Including safeguards and rigour in mapping, assessment pathway and Aboriginal cultural heritage management plan processes

**Recommendation:** We seek commitments that the NSW Government:

1. Will work with the Land Rights Network and Aboriginal communities to ensure the reforms meet the needs of Aboriginal communities, enshrine the principle of self-determination, meet NSWALC’s Principles for Reform, and reflect best practice standards and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples;

2. Prioritise this reform process. Further delays are unacceptable.

**Decision making and administrative roles for Aboriginal peoples**

Under the current laws the Minister and OEH have all decision making and administrative roles. Under the current NPW Act Aboriginal peoples and LALCs do not have any legislated roles in ACH. LALCs are merely referenced in current OEH consultation policy, despite being the key Aboriginal community organisation in their areas, and despite working to be the key protectors of ACH in their communities. The current OEH policy creates an open consultation process and has been a source of conflict and confusion. We oppose the current OEH consultation policy.

The draft Bill provides some decision making and most administrative roles to Aboriginal peoples, including compliance and enforcement via...
• **Aboriginal Cultural Heritage (ACH) Authority** made up of only Aboriginal people - section 8, Draft Bill. Will have key functions – section 12, Draft Bill.

• **Local Aboriginal Land Councils** may be delegated ‘local coordination and support roles’ - s.13, Draft Bill. This provides a key opportunity to recognise and build on the existing roles LALCs already undertake in relation to ACH and build on the investments in the Land Rights Network to date. LALCs have strong governance and are publicly accountable organisations. We seek commitments that the role of LALCs will genuinely be built on and supported, and not undermined.

• **Local ACH Consultation Panels** – to provide advice on local matters – sections 14-17, Draft Bill. The ACH Authority is proposed to develop policies and guidance around the operation, establishment and membership of the local panels – i.e. The Bill does not propose to outline who speaks for Country.

The ACH Authority will have significant roles and must have the confidence of the Aboriginal community and must be appointed based on the results of a community process. We recognise and respect that there will be many views on the establishment of the ACH Authority Board. We support a model that:

- Requires proven credentials for ACH Authority Board members – however credentials should be based on Aboriginal community inputs and belonging to recognised Aboriginal groups, not on university degrees,
- Builds on the existing legislated groups in NSW with authority and functions relating to Aboriginal cultural heritage – that is Aboriginal Land Councils and Aboriginal Owners under the *Aboriginal Land Rights Act 1983* and native title holders under the *Native Title Act*. This will provide a robust, coherent and complementary framework for new laws.
- Includes safeguards against cultural frauds being eligible to sit on the ACH Authority Board,
- Requires a community driven process to ensure that ACH Authority will not be ‘hand-picked’ by the Minister.

**Recommendation:** We support Aboriginal controlled decision making and administrative structures in the new laws.

**Recommendation:** A new legislative system for the protection of Aboriginal culture and heritage must:

- Enshrine recognition of the *Aboriginal Land Rights Act 1983 (NSW)*,
- Embed and build on existing structures of Aboriginal Land Councils to create a unified, accountable and workable system that complements existing roles and builds on the investment in the Aboriginal Land Rights system,
- Provide proper resourcing to LALCs to take on new roles, and
- Ensure that reforms meet the needs of Aboriginal communities and do not divide Aboriginal communities.

**Recommendation:** The ACH Authority Board should be composed of 13 members including one NSWALC representative plus four representatives from each of the following:
- Aboriginal Land Councils,
- Aboriginal Owners, registered under the *Aboriginal Land Rights Act 1983 (NSW)*
- Native Title holders / Prescribed Body Corporates

**Recommendation:** We support a community driven process where each of the above organisations/groups select their own representatives.

**Recommendation:** The NSW Government should resource the expansion and maintenance of the Aboriginal Owners Register under the *Aboriginal Land Rights Act 1983 (NSW)* to cover the whole of NSW. Further consultation is needed on appropriate amendments to the definition and processes related to the Aboriginal Owners register.
Recommendation: If the Minister is to appoint ACH Authority members, the Draft Bill must include safeguards to ensure that the Minister’s decision is bound by the results of an Aboriginal community controlled selection process, and that the Minister cannot unjustly remove Board members.

Recommendation: We support LALCs as the key local support and administrative body, unless the LALC chooses not to undertake this role. Any other body proposed to become accredited instead of a LALC should be as an interim measure (time limited) only until such time as the relevant LALC is able to take on those functions. Any accreditation process must genuinely promote capacity.

Recommendation: We support sufficient flexibility for local Aboriginal people to be able to determine the structure and composition of local decision making groups. The legislation should state that panel members must be Aboriginal persons.

Recommendation: While we note that the legislation does not propose boundaries, we support the use of LALC boundaries. Protocols and agreements can be developed to manage areas wherever cultural boundaries may cross over or where there are shared cultural interests.

Proposed roles for the Minister
While the ACH Authority will have some decision making the Draft Bill outlines that the Minister will retain some approval and decision making roles. The ACH Authority should have these roles not the Minister – particularly in relation to:
- declaring Aboriginal heritage (s.18, Draft Bill),
- approving maps and mapping methodology (s.20, Draft Bill),
- approving the Code of Practice (s.54, Draft Bill) and
- making interim protection orders (s.79, Draft Bill).

There can still be appropriate oversight without the Minister making key these decisions. At a minimum, any Ministerial decisions must be guided by clear parameters and criteria to safeguard against unfettered, discretionary decision making. Ministerial decisions should be based on the recommendations of Aboriginal people.

Recommendation: Proposed decision making roles for the Minister should be removed and provided to the ACH Authority.

Interactions with the planning system
The draft Bill outlines that proponents will generally have to obtain Aboriginal heritage approvals before applying for development consent – this is a significant change. However, we are concerned by the proposed exceptions (eg. for state significant development and complying development). More clarity and rigour is needed to ensure all developments and land use activities follow the ACH processes.

Recommendation: We support clearer interactions with the planning system, but further clarity and safeguards are needed.

Recommendation: The legislation should require all categories of development and land use activities to comply with Aboriginal heritage requirements.

Recommendation: Proponents should not be allowed to make development applications without an agreed ACH Management Plan.
Recommendation: The legislation should include safeguards to ensure any changes or modifications to developments require consultation with and concurrence of the ACH Authority and local panel.

New objects
The proposed new objects are more comprehensive than the current objects outlined in the NPW Act, and include recognition that Aboriginal heritage ‘belongs’ to Aboriginal peoples.

However, they could be further strengthened, for example, by including ‘protection’ of ACH as an object and through better alignment with the United Nations Declaration on the Rights of Indigenous Peoples.

Recommendation: The proposed objects should be updated to:
- Include protection of ACH, and

Broader recognition and definitions of Aboriginal cultural heritage
While the new proposed broader definition of ACH is supported, as noted further below, we seek to ensure that the harm offences capture the broader definitions and ‘undeclared’ ACH.

Recommendation: We support the proposed definitions with some amendments to better align with NSWALC’s Principles for Reform and ensure water is included. Harm offences must protect all ACH.

Harm offences (Part 5 of the Draft Bill)
As currently drafted we are concerned that the harm offences in Part 5 of the Draft Bill only relate to Aboriginal objects, ancestral remains and declared ACH. This means that significant but ‘undeclared’ heritage can only be protected from harm as an ‘object’ or ‘ancestral remains’, and not as a whole area or site.

All Aboriginal cultural heritage must be protected, regardless of significance.

Further, extra elements of ‘recklessly or intentionally’ have been added to the ‘knowing’ offence that will make them harder to prove. These elements should be removed.

Recommendation: The harm offence should apply to all ACH.

Recommendation: The harm offence should apply to all development and land use activities.

Recommendation: The elements added to the knowing harm offence should be removed.

Recommendation: The offence for breaching an ACHMP should be retained.

Recommendation: The strict liability offence for harming ACH should re-instate imprisonment and increase the penalty amount for declared ACH.

Desecration
The proposals paper (p.11) states that the new legislation will include a definition of desecration. However, this is not currently included in the Draft Bill.

We note that a definition of desecration is included in s.3 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) which could provide a useful starting point, particularly elements relating to activities or impacts that are inconsistent with Aboriginal tradition.
Recommendation: The new legislation should include a definition of desecration and associated offences that includes:

- Physical and non-physical/intangible elements of Aboriginal heritage
- Unauthorised entry into and inappropriate use of ACH sites
- Inappropriate use of or treating Aboriginal ancestral remains or Aboriginal objects contrary to Aboriginal beliefs and customs
- Inappropriate development on a song line/dreaming story
- Development too close to ACH
- Vandalising ACH including Aboriginal grave sites.

**ACH Management Plans**

Under the current NPW Act the NSW Government has the power to issue Aboriginal heritage impact permits (AHIPs) to harm, destroy or desecrate Aboriginal heritage (section 90, NPW Act).

The draft Bill will replace AHIPs with Aboriginal Cultural Heritage Management Plans (ACHMPs) that will be negotiated between a proponent and Local Consultation Panel, and approved by the ACH Authority. ACHMPs, if approved, will authorise harm to ACH, and may include measures minimise harm or conserve ACH.

The decision making criteria on ACHMPs is proposed to include objects of the Act, impacts on Aboriginal community, impact on proponents and public interest. ‘Impact on proponents’ and ‘public interest’ are not in line with the intent of the reforms. These elements should be removed.

Section 49(3) of the Draft Bill allows the proponent to submit an ACHMP to the ACH Authority for approval if the negotiation period has expired and the local ACH panel has not agreed. This section should be removed.

**Recommendation:** Decision making criteria should be based on recommendations by Aboriginal peoples and the objects of the Act.

**Recommendation:** We support that Aboriginal people (the ACH Authority), not OEH, make decisions about ACHMPs.

**Recommendation:** Section 49(3) of the Draft Bill should be removed.

**Recommendation:** The Draft Bill should include the following principles:
- Harm avoidance and minimisation
- ‘Intergenerational equity of access to heritage’ which would reflect the proposed definition of ACH significance in s.4.
- The principle of free, prior and informed consent, which reflect the reform aim of decision making by Aboriginal people.

**Timeframes for negotiation and determination**

The Draft Bill outlines that key timeframes will be outlined in regulations (not yet developed).

The proposed timeframes for negotiation and determination outlined in the proposals paper (p.43) are far too short eg. a negotiation period of only 10 days for a basic ACH Management Plan (ACHMP).

**Recommendation:** Any mandatory timeframes must allow for meaningful consultation and genuine input by Aboriginal people; timeframes must be culturally appropriate.
allowances for cultural priorities (eg. Sorry business). Certain times of the year should also be excluded eg. Christmas and New Year, NAIDOC week.

Assessment Pathway
The proposed ACH Assessment Pathway still relies on the proponent to check maps of ‘known and likely’ Aboriginal heritage to trigger further assessment and consultation.

Detailed steps proponents will need to undertake are to be set out in a Code of Practice developed by ACH Authority and approved by Minister. We are concerned that the process is still proponent driven and still allows proponents to buy the advice they want which could down play the presence or significance of ACH. The level of oversight by the ACH Authority in the Assessment Pathway needs to be improved.

**Recommendation:** Further safeguards are needed in the ACH Assessment Pathway to ensure that proponents cannot bypass assessment and consultation with Aboriginal peoples.

**Recommendation:** Aboriginal people must have visibility of and meaningful input into all ACH processes, including in the preparation of assessment reports.

**Recommendation:** The legislation should specify that the ACH Assessment pathway applies to all development and land use activities including state significant projects and complying development.

**Recommendation:** We do not support checking a map as a sufficient step by itself to confirm that no sites are likely to exist, and effectively make important decisions about Aboriginal culture and heritage management and protection, at the expense of consultation with Aboriginal people.

Intangible ACH
Under the current NPW Act there are no protections for intangible ACH.

The Draft Bill proposes that intangible heritage can be registered and agreements can be made about the use of intangible ACH. A new offence for knowingly using registered intangible cultural heritage for commercial purposes without agreement is included in the draft Bill. However, further clarifications and safeguards are needed to better align with Aboriginal community’s rights to control Aboriginal cultural heritage.

We acknowledge that the protection of knowledge and intangible ACH can be complex and present challenges. ACH can be a shared heritage held by one or more Aboriginal groups, can involve sensitive information and elements may already be in the public domain.

As such, we understand that the proposals outlined in the draft Bill are intended to fill a gap. However we encourage the NSW Government to work with the Federal Government to develop a coherent national framework to support Aboriginal people’s intangible heritage and cultural and intellectual property rights. Australia needs a legislative scheme which protects ACH and fulfils obligations under Article 31 of the Declaration of the Rights of Indigenous Peoples.

We draw the Government’s attention the work of the World Intellectual Property Organisation (WIPO), UNDRIP, and Convention on Biological Diversity, that provide useful guidance in this regard.

We also note that IP Australia has recently released a discussion paper ‘Indigenous Knowledge: Issues for protection and management.’ The NSW Government should implement the proposed solutions in this report within the NSW Government’s remit.
Recommendation: We support the inclusion of provisions relating to intangible ACH. However, safeguards are needed to better align with Aboriginal community’s rights.

Recommendation: We recommend that the NSW Government adopt recommendations in the IP Australia discussion paper within the NSW Government’s remit.

Information and mapping
Under the current NPW Act information and mapping is managed by OEH.

The Draft Bill proposes that this will now be managed by the ACH Authority.

Recommendation: We support information and mapping systems to be managed and owned by Aboriginal people, including a restricted access database for Aboriginal people only.

Recommendation: Further safeguards are needed to protect Aboriginal people’s knowledge and information from misuse and unauthorised access.

Recommendation: The legislation should include offences and penalties for unauthorised access and use of information.

New investigation powers, compliance and enforcement provisions
The Draft Bill outlines that the ACH Authority will be responsible for investigating breaches of the laws and harm to ACH and will be able to issue stop work orders and remediation orders.

The Minister is proposed to issue interim protection orders.

The Draft Bill also outlines that new Court orders can be made including to “prevent, control, abate or mitigate” harm, “make good any resulting harm to ACH” and for compensation (restorative justice). Binding agreements can be made that the defendant will do or not do certain things (enforceable undertakings).

These will be important enforcement and compliance tools, as well as to deter harm occurring.

Recommendation: We support the new compliance, enforcement, remediation and investigation powers.

Recommendation: We support that the ACH Authority will be able to issue stop work orders, including that orders may be issued verbally.

Recommendation: Stop work orders should be able to be made for all development and land use activities.

Recommendation: The ACH Authority should have the power to make interim protection orders, not the Minister.

Appeals
The Draft Bill entrenches the existing imbalance of proponent and land owner rights over the rights of Aboriginal peoples. We reject this as it is contrary to the intent of the reforms and the objects proposed in the Draft Bill.

Providing proponents with additional rights to appeal on the merits of the decision is unnecessary. It is also contrary to decision making by Aboriginal peoples as the Courts will be asked to make decisions, taking this out of Aboriginal people’s hands. Proponents will have judicial review rights in relation to decision making processes. Creating further barriers to Aboriginal people’s access to justice is not supported.
Recommendation: We do not support merits appeals for proponents.

Recommendation: Aboriginal people should have merits appeals.

Defences
The draft Bill proposes to retain broad defences that will be available to proponents if ACH is harmed. We do not support the range of broad defences under the current laws which are replicated in the draft Bill.

**Recommendation:** Defences should be limited and be required to meet minimum standards developed by the ACH Authority.

**Recommendation:** Defences for ‘low environmental impact activities’ should be removed.

**Recommendation:** Additional defences made by the Minister or in Regulations should be removed.

**Recommendation:** We oppose any new defence for large scale assessments and approvals.

Penalties
The Draft Bill proposes to increase maximum penalty amounts for most serious offences to $1,650,000 for a corporation and $330,000 for an individual (and up to one year imprisonment).

Penalties should be higher. Aboriginal people should also have roles in determining penalties.

**Recommendation:** We recommend penalty amounts are increased to align with the Protection of the Environment Operations Act 1997 (NSW pollution law) i.e. $5 million for corporations and $2 million for individuals. Imprisonment must be retained.

Monitoring and reporting
The Draft Bill includes requirements for monitoring and reporting that can help measure and build the evidence base to support protection of ACH.

**Recommendation:** We support improved monitoring and reporting about the state of ACH.

Civil proceeding and open standing
The Draft Bill provides that any person may bring proceedings in the Land and Environment Court to remedy or restrain a breach of the Act of regulations. Open standing provisions will allow any person to seek civil enforcement. However, these provisions come with the risk of having to pay other the costs of other parties when unsuccessful. This can be a significant barrier in accessing justice.

**Recommendation:** We support the open standing provisions, but costs should not be borne by Aboriginal people.

Repatriation
The current NPW Act has some provisions for ‘disposing’ of Aboriginal objects which may include returning to Aboriginal owners.

The draft Bill includes some improved processes for Aboriginal cultural heritage to be returned to Aboriginal communities, including requiring consultation with the local ACH Panel.

**Recommendation:** The ACH Authority must be properly resourced to carry out repatriation functions in consultation with local Aboriginal communities.
Recommendation: The NSW Government must increase and provide active support for inter-state and overseas repatriation.

Conservation mechanisms
Sections 28 – 35 of the Draft Bill provide for voluntary agreements to be made between land owners and the ACH Authority.

Recommendation: This section needs to be re-drafted to reflect the unique and irreplaceable nature of ACH and better align with the intent of the reforms. Increased roles of Local ACH Panels and LALCs should be included.

Recommendation: We support providing incentives to land holders to protect ACH.

Recommendation: The legislation needs to include additional mechanisms to protect ACH, including allowing the ACH Authority to acquire or purchase property to protect ACH.

Legislation should be clearer and in plain English
There are several areas where the Draft Bill needs to be clarified to avoid confusion and ambiguity. Minimising the use of jargon will benefit those administering and using the system.

Recommendation: The legislation should be clear and in plain English.

Broader reform package
The Draft Bill is one element of a broader reform package. As acknowledged in the Government’s ‘A proposed new legal framework’ (Proposals paper), the success of reforms will rely on a range of other factors.

• Resourcing: The new system and administrative structures must not be set up to fail.

Recommendation: The reforms must be properly resourced in order for the new system to be successful.

• Transition and implementation: Implementation of the new framework (if passed by NSW Parliament) is expected to take a number of years. The need for capacity building and resourcing will be ongoing. We are also concerned about the ongoing operation of the current ACH regime within the NPW Act in the meantime.

Recommendation: NSWALC and the Land Rights Network must be central to transitional and implementation arrangements, including resourcing and capacity building.

Recommendation: Safeguards and commitments are needed to ensure the transition period provides for genuine establishment and capacity building needs and is done within a suitable time period.

Recommendation: We recommend that the Government consider:
   a. Requiring that the ACH Authority gives concurrence on AHIPs during the transition period,
   b. Commencing relevant sections of the legislation early if communities are ready,
   c. Commencing the development of policies and key elements of the new system as soon as the ACH Authority is established.

• Education and awareness: While central to transition and implementation plans, NSWALC strongly recommends that education and awareness strategies are developed and implemented urgently to address misconceptions and misinformation about the reform proposals.
Recommendation: We recommend that education and awareness strategies are implemented urgently.

- **Development of appropriate regulations, policies, guidelines and Codes**: The Draft ACH Bill provides for numerous important issues to be dealt with via Regulation, policies, guidelines and Codes. These documents will have significant implications for operation and effectiveness of the new laws, the Aboriginal Land Rights Network and Aboriginal peoples.

Recommendation: Genuine consultation with NSWALC, LALCs and Aboriginal peoples is needed on all proposed regulations, policies, guidelines and codes.

Recommendation: Consultation with the NSW Aboriginal Land Council, LALCs and Aboriginal peoples is needed on all proposed.

Recommendation: The NSW Aboriginal Land Council supports Aboriginal control and self-determination. As such, policies, guidelines and codes should not be approved by the Minister and should instead be approved by the ACH Authority.

- **Reform to planning laws and reforms to support cultural practice**

  While it is hoped that the reform process will improve protections for our cultural heritage, the Government must do more to support cultural practice, Aboriginal peoples access to Aboriginal sites, and better integrate the ACH regime with NSW planning and land use laws.

Recommendation: We seek a commitment that the NSW Government reform NSW planning, land use laws and other laws to improve requirements to protect ACH, and provide for Aboriginal peoples cultural rights.

- **Reform and consultation process**

  Unfortunately there have been a number of inadequacies with the Government’s reform and consultation process to date. Concerns include:
  - Ongoing delays to reform process including the release of the draft Bill
  - Only one week’s notice in some instances about Government workshops – short notice severely limits participation and creates fears that Government is not genuine,
  - Insufficient materials provided to communities about the Government’s proposals – for example only one copy of the Draft Bill was made available per table at some OEH workshops,
  - Only small sections of the proposals were presented to participants – this created a sense of distrust, that Government was not providing the full picture or comprehensively explaining the proposed new laws and that participants at workshops were not able to comprehensively discuss all elements of the proposed new laws,
  - Less than two months consultation on the draft Bill – There should be a minimum three month consultation period with Aboriginal communities on a Draft Bill.

Recommendation: Improvements to Government consultation processes are needed.

Recommendation: The next stage of the reform process must provide clear and accessible information to Aboriginal communities including timelines for proposed changes to the Draft Bill and details about further consultations and transitional arrangements.
We are committed to working with Government and key stakeholders to finally deliver reforms that will better protect our cultural heritage.

We trust that the issues raised in this letter will be addressed and look forward to contributing to future consultation processes.

Should you require further information regarding the content of this letter please contact Noel Downs 0429773900.

Sincerely,

Noel Downs
CEO
Wanaruah LALC

Date: 20 Apr 2018