

Ministerial powers in the draft Aboriginal Cultural Heritage Bill

The draft Aboriginal Cultural Heritage Bill (ACH Bill) provides for a new Aboriginal Cultural Heritage Authority (ACH Authority) to be established. The ACH Authority would be governed by a board of Aboriginal people and would be responsible for administering the new legislation. The draft Bill allows the ACH Authority to make decisions independently of the Minister but provides the Minister with a limited set of powers designed to ensure appropriate accountability to the Parliament and people of New South Wales.

Why does the Minister have certain powers in the draft Bill?

One of the key elements of our system of government is ministerial responsibility. This means that ministers are accountable to Parliament for the way NSW Government agencies administer laws, and for their decisions.

Ministerial accountability doesn't mean that ministers should be involved in the day-to-day administration and decision-making of government agencies.

The draft Bill proposes to establish the ACH Authority as a NSW government agency. This means that the principle of ministerial responsibility applies.

A major objective of the draft Bill is to give Aboriginal people responsibility for making decisions about their own cultural heritage. The draft Bill delivers Aboriginal decision-making and supports ministerial accountability by providing clear and distinct roles for the new ACH Authority, and for the Minister, as follows:

- The ACH Authority has the power to make certain decisions (including whether to authorise harm to ACH) and to undertake specific functions (such as making guidelines or recommendations). The Minister has no power to interfere in how the Authority makes these decisions or undertakes these functions. Clause 7 of the draft Bill states that the ACH Authority 'is not subject to the control or direction of the Minister'
- The Minister has the power to make a different set of decisions, usually on the recommendation of the Authority, and to approve certain procedures. For example, those that will affect the way other laws operate. These powers, which support the Minister's accountability to Parliament and the people of NSW, are explained in this fact sheet.

It is important to remember that decisions by the Minister and the ACH Authority may be subject to judicial review and open to challenge on various grounds, for example, that the decision was unreasonable or took account of irrelevant considerations.

Further information about our system of government and the role of ministers can be found on the [NSW Public Sector Commission Website](#).

Minister's powers under the draft ACH Bill

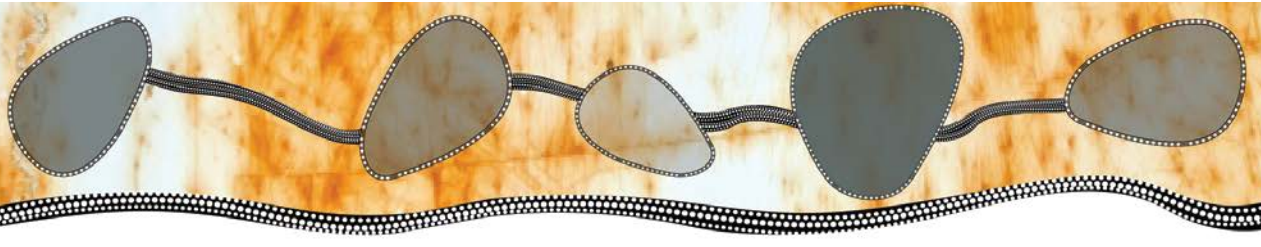
Cl 8(2) Board of ACH Authority: This clause requires the Minister to appoint the Board of the Authority.

It is proposed that the Minister be responsible for appointing the Authority's Board. This is because the Minister is accountable to Parliament and the public for the administration of the legislation. Examples of other ministerially appointed bodies include the Environment Protection Authority and the Heritage Council.

In appointing the Board, the Minister would have to comply with the process set out in the Bill, which is intended to be a community-driven process for putting nominations in front of the Minister.

The Minister would also have to comply with other requirements and principles that are designed to ensure the appointments are consistent with legal requirements and appropriate. For example, by applying the *Public Service Commissioner's Appointment Standards: Boards and Committees in the NSW Public Sector*, demonstrating compliance with the general principles of merit, fairness, diversity and integrity, and ensuring probity checks are conducted.

Cl 12(e) Functions of ACH Authority: this clause requires the Authority to make ACH maps for approval by the Minister,



and

CI 20(4) and CI 20(5) Preparation and approval of ACH maps: these clauses provide that the Minister is to approve the methodology for preparing ACH maps, and the mapping itself.

It is proposed that the Minister will approve ACH mapping for use in the new ACH assessment and approval system. This is because the new ACH assessment and approval system affect the operation of other laws. However:

- the ACH Authority has responsibility for preparing the mapping, and the Minister cannot direct the Authority in the exercise of that function
- the Minister won't approve other maps that may be prepared by local consultation panels for their own strategic planning purposes.

CI12(f) Functions of the ACH Authority: this clause requires the Authority to develop a monitoring and reporting framework for approval by the Minister

In keeping with the principle of responsible government, it is proposed that the Minister approve the monitoring and reporting framework. This will ensure it meets Parliamentary or whole-of-government legal and auditing requirements.

CI12(i) Functions of the ACH Authority: this clause requires the Authority to develop a funding allocation strategy for approval by the Minister,

and

CI 67(3) This clause provides that the Minister may approve the funding allocation strategy with such modifications (if any) as the Minister considers appropriate'

The ACH Authority will receive funding from the NSW Government. The Minister is accountable to Parliament and the public for the way that funding is expended, and there are certain rules and regulations that authorities must comply with when expending public funds.

For this reason, it is proposed that the Minister approve the funding allocation strategy, which will identify (at a very high level) how the ACH Authority intends to prioritise its expenditure

over a three-year period. The Minister may also need to modify the funding allocation strategy to make sure it complies with all requirements.

However, the Minister will not be involved in day-to-day decisions about the allocation of funding grants and the Authority's general expenditure. These decisions will rest with the ACH Authority.

CI 18 Declarations of Aboriginal cultural heritage: This clause gives the Minister responsibility for making ACH declarations, which provides certain protections under the legislation

It is proposed that the Minister be responsible for making ACH declarations, as declarations will have implications for other laws, government agencies and private landholders on whose land a declaration may be made.

CI 31(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:

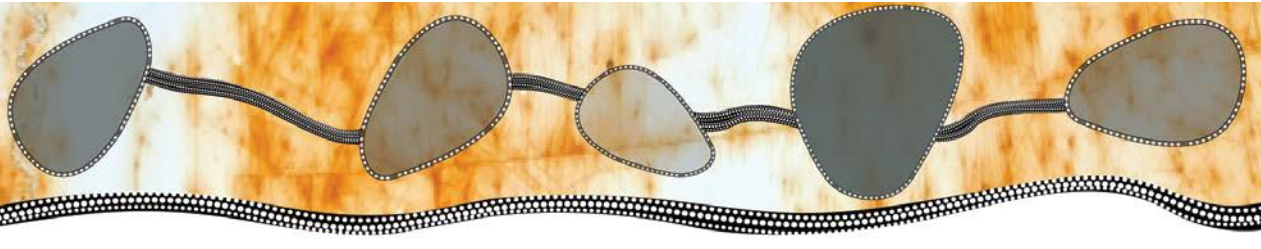
- a) will adversely affect any management actions that are required or authorised to be carried out on the land under the agreement, or*
- b) will adversely affect the Aboriginal cultural heritage protected by the agreement.*

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

This clause is proposed as a circuit breaker in the event there is a conflict between a mining authority that has been granted, and a conservation agreement.

CI 79 Making of interim protection orders: this clause gives the Minister responsibility for deciding whether to issue an interim protection order on the recommendation of the ACH Authority

The making of an interim protection order requires broad consideration and will have implications for other legislation, government agencies, and private landholder rights. For this reason, it is proposed that the Minister be responsible for making these decisions.



CI54(3) ACHAP Code of Practice: this clause gives the Minister responsibility for approving the ACHAP Code of Practice that will be developed by the ACH Authority

It is proposed that the Minister approve the ACHAP Code of Practice as it forms an integral part of the ACH assessment and approval system and will affect the operation of other laws.

Schedule 1 clauses (4), (5) and (7) Members of the Board of the ACH Authority: these clauses allow the Minister to appoint someone to be a deputy to a member of the Board, to remove a member of the Board, and remove the Chairperson or Deputy Chairperson from those positions

The Minister's proposed powers to appoint deputies, remove members of the board, or remove the Chairperson or Deputy Chairperson from their positions, are consistent with the Minister's proposed power to appoint the Board. It is proposed that the Minister have these powers because the Minister is accountable to Parliament and the public for the administration of the legislation.

These powers would also enable the Minister to act as a 'circuit breaker' in the event of a breakdown in communication between members.

In exercising these powers, the Minister would still need to apply the principles of procedural fairness.