Reforming the Aboriginal Cultural Heritage System in NSW

Draft recommendations to the NSW Government

A discussion paper

Developed by the independent Aboriginal Culture and Heritage Reform Working Party
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## Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td><strong>Aboriginal Place</strong></td>
<td>A place declared under section 84 of the NPW Act that, in the opinion of the Minister, is or was of special significance to Aboriginal culture</td>
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<tr>
<td><strong>ACH</strong></td>
<td>Aboriginal cultural heritage</td>
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<tr>
<td><strong>ACH Approval</strong></td>
<td>Aboriginal Cultural Heritage Approval, a legally binding licence negotiated between the proponent and LALC to manage ACH values in a local area</td>
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<tr>
<td><strong>ACH maps</strong></td>
<td>Maps containing the cultural heritage values within the LALC boundary. The ACH maps inform the CLBP</td>
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<tr>
<td><strong>ACH Office</strong></td>
<td>NSW Aboriginal Cultural Heritage Office within government</td>
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<td><strong>ACH Officer</strong></td>
<td>(Regional) Aboriginal Cultural Heritage Officer</td>
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<tr>
<td><strong>ACH Register</strong></td>
<td>Aboriginal Cultural Heritage Register</td>
</tr>
<tr>
<td><strong>ACH value</strong></td>
<td>A category in the ACH maps that distinguishes areas of high to moderate cultural value</td>
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<tr>
<td><strong>Advisory Panel</strong></td>
<td>Recognised experts in disciplines associated with conserving Aboriginal cultural heritage to advise the Commission in their deliberations</td>
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<tr>
<td><strong>AHIP</strong></td>
<td>Aboriginal Heritage Impact Permit</td>
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<td><strong>AHIMS</strong></td>
<td>Aboriginal Heritage Information Management System</td>
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<td><strong>ALR Act</strong></td>
<td><em>Aboriginal Land Rights Act 1983 (NSW)</em></td>
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<tr>
<td><strong>ATSIHP</strong></td>
<td><em>Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)</em></td>
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<tr>
<td><strong>CLBP</strong></td>
<td>Community Land and Business Plan</td>
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<tr>
<td><strong>Code of Practice for Archaeological Investigation (CoPAI)</strong></td>
<td>A Code of Practice which outlines the methodologies for conducting archaeological investigations, as identified in the NPW Regulation 2009</td>
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<tr>
<td><strong>Commission</strong></td>
<td>NSW Aboriginal Cultural Heritage Commission</td>
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<tr>
<td><strong>cultural heritage values</strong></td>
<td>The collective values identified by a LALC within its boundaries containing ‘ACH values’, ‘incomplete ACH information’ and ‘low ACH values’</td>
</tr>
<tr>
<td><strong>due diligence</strong></td>
<td>Taking reasonable and practical steps to determine whether a person’s actions will harm an Aboriginal object and, if so, what measures can be taken to avoid that harm</td>
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<tr>
<td><strong>ESD</strong></td>
<td>Ecological sustainable development as defined in the <em>NSW Protection of the Environment Administration Act 1991</em></td>
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<tr>
<td><strong>EP&amp;A Act</strong></td>
<td><em>Environmental Planning and Assessment Act 1979 (NSW)</em></td>
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<tr>
<td><strong>GTA</strong></td>
<td>General terms of approval for use by planning authorities</td>
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<tr>
<td><strong>heritage advisor</strong></td>
<td>A suitably qualified person with a discipline directly relevant to managing Aboriginal cultural heritage</td>
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<tr>
<td>Term</td>
<td>Description</td>
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<td>---------------------------</td>
<td>-----------------------------------------------------------------------------</td>
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<tr>
<td>incomplete ACH information</td>
<td>A category in the ACH maps that identifies areas where there is insufficient information to determine the heritage value and further assessments may be needed</td>
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<tr>
<td>LALC</td>
<td>Local Aboriginal Land Council as defined in the ALR Act</td>
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<tr>
<td>low ACH value</td>
<td>A category in the ACH maps that identifies areas with low or nil cultural value</td>
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<tr>
<td>L&amp;EC</td>
<td>Land and Environment Court of NSW</td>
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<tr>
<td>NPW Act</td>
<td><em>National Parks and Wildlife Act 1974</em></td>
</tr>
<tr>
<td>NPW Regulation</td>
<td><em>National Parks and Wildlife Regulation 2009</em></td>
</tr>
<tr>
<td>NRM</td>
<td>Natural resource management</td>
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<tr>
<td>NSWALC</td>
<td>New South Wales Aboriginal Land Council as defined in the ALR Act</td>
</tr>
<tr>
<td>OEH</td>
<td>Office of the Environment and Heritage, NSW Government</td>
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<tr>
<td>one-stop-shop</td>
<td>The single entry point into Aboriginal communities for negotiating ACH Approval conditions prior to referral of the ACH Approval to the Commission</td>
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<tr>
<td>POEO Act</td>
<td><em>Protection of the Environment Operation Act 1997</em></td>
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<tr>
<td>PoM</td>
<td>Plan of management; developed by a LALC outlining strategies for managing the cultural heritage values identified within a LALC boundary</td>
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<tr>
<td>parties</td>
<td>May include Aboriginal people, industries, government, miners, farmers, proponents, heritage specialists, academics and non-profit organisations</td>
</tr>
<tr>
<td>proponent</td>
<td>A person undertaking an activity, such as a development or exploration</td>
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<tr>
<td>Voluntary ACH Access Agreements (VACHAA)</td>
<td>A non-regulatory access agreement negotiated between landholders and LALCs where no development is occurring to allow access to land for cultural purposes</td>
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</table>
Chair’s foreword

The NSW Government has announced its commitment to reforming the way Aboriginal cultural heritage is protected and managed.

For nearly 40 years the National Parks and Wildlife Act 1974 has been the primary NSW legislation for the protection of Aboriginal cultural heritage. Many Aboriginal people, community groups, industry, developers and heritage professionals have called for change.

In 2011 the NSW Government established an Aboriginal Culture and Heritage Reform Working Party (the Working Party) to oversee a process to bring together ideas from the Aboriginal communities of NSW and other interested parties to reform the Aboriginal cultural heritage system in NSW.

As the Chair of the Working Party, I am honoured to be a part of the NSW Government initiative to explore genuine opportunities to improve the way in which Aboriginal cultural heritage is considered and administered within NSW.

Members of the Working Party are drawn from various backgrounds. We are working together to provide advice to the government on options to manage and protect Aboriginal cultural heritage in NSW and to provide greater certainty to industry and developers. In developing this draft set of recommendations, the Working Party has reviewed approaches in other jurisdictions, considered the comments received through the two engagement processes and assessed the existing regulatory framework.

In the model outlined in this discussion paper, the Working Party has aimed to:

- recognise the role of Aboriginal people in the management of their cultural heritage
- establish processes that conserve and protect cultural heritage values
- streamline the regulatory system
- allow for the consideration of Aboriginal cultural heritage protection early in the planning processes
- provide greater certainty to industry and developers and
- establish the roles and responsibilities of all parties in the process.

This is a unique opportunity to contribute to how Aboriginal cultural heritage is managed in NSW.

Thank you to all who have helped develop the Working Party’s recommendations to this point. The investment of your time, effort and interest in the process is appreciated and the Working Party now welcomes your views on the draft recommendations.

Danny Gilbert AM
Chair, Aboriginal Culture and Heritage Reform Working Party
Executive summary

The NSW Government has made a commitment to review Aboriginal cultural heritage (ACH) legislation in NSW. The review includes consultation sessions across NSW and recommendations from an independent expert advisory group, the Aboriginal Culture and Heritage Reform Working Party (the Working Party).

To date the review has included multiple opportunities for engaging with Aboriginal people, industry, government agencies, heritage consultants and other people with an interest in Aboriginal heritage matters. Using the results from the engagement sessions, research and an assessment of the approaches and resources within NSW and other jurisdictions, the Working Party has made draft recommendations for significant reform. Feedback on this discussion paper will be considered in the finalisation of the Working Party recommendations to government.

ACH is primarily managed under the National Parks and Wildlife Act 1974. This Act has been amended several times in the past 40 years, and there is popular support for the Act to be reformed.

The Working Party's recommendations (Table 1) reflect their objectives to deliver:

A new standalone Act for ACH management and conservation  Respect for Aboriginal cultural heritage in NSW would be demonstrated in delivering a stand-alone ACH Act that extended the focus of heritage beyond ‘objects’ and ‘places’ with greater protection for intangible cultural heritage values. Further details are in Chapter 4.

A new administrative system for ACH management  The Working Party was mindful of using and improving existing resources where feasible. It is recommended the Local Aboriginal Land Council network be built on to deliver the proposed system. Further details are in Chapter 5.

ACH matters considered early in planning processes  The LALCs currently have a statutory responsibility to prepare and implement Community Land and Business Plans (CLBPs), which will be informed by ACH maps and plans of management (ACH maps and PoM) produced by the LALC. Further details are in Chapter 6.

Local people plan and negotiate ACH outcomes  Each LALC would develop ACH maps with highly significant areas identified and protected as Aboriginal Places or listing on the NSW State Heritage Register. ACH maps would be accompanied by plans of management (PoM) that consider local ACH values and suggest ways to support continued cultural practices and protection of ACH values. The ACH maps and PoM would be reviewed by the Commission against minimum standards and approved by the Minister. The current Aboriginal Heritage Impact Permit (AHIP) system would be replaced with ACH Approvals. Further details are in Chapter 5.

Streamlined processes  The recommended model would provide all parties with clarity in relation to respective roles and responsibilities and certainty of delivery of outcomes through fair and transparent processes and mandated timeframes. Further details are in Chapters 5, 6, 7, 8 and 9.

Adequate funding provided  The Working Party has outlined where government funding is required for the recommended system. It is acknowledged that sustainable and strategic conservation outcomes also require funding. Therefore an additional voluntary funding option has been recommended. Further details are in Chapter 9.

Table 1 on the following page itemises these recommendations.

Have your say on the recommendations and legislative model  This review of the ACH legislation is a unique opportunity for your voice to be heard by the Working Party, government and other parties involved in cultural heritage matters. You are encouraged to consider this discussion paper and respond to either the questions posed at the end of each chapter or develop your own response. Details of how to respond to this paper are in Chapter 3.
Table 1  Working Party’s draft recommendations

| Standalone ACH legislation | 1. Remove all Aboriginal cultural heritage provisions from the *National Parks and Wildlife Act 1974* and develop a separate Aboriginal Cultural Heritage Act for NSW. |
| | 2. Include a preamble or objectives in the new Act to reflect contemporary and positive views of ACH. |
| | 3. Include definitions in the new Act of objects and landscapes in-line with international standards to provide protection for significant tangible and intangible cultural heritage values. |
| Administrative structure | 4. Establish a ministerially-appointed NSW Aboriginal Cultural Heritage Commission. |
| | 5. Establish a NSW Aboriginal Cultural Heritage Office within government to support the Commission. |
| | 6. Empower the Commission to create minimum standards, policies, templates and guidelines. |
| | 7. Establish Regional Aboriginal Cultural Heritage Officers (ACH Officers) across NSW. |
| Early planning processes | 8. Establish a statutory NSW ACH Register to which government agencies would contribute relevant data before the new legislation commences. |
| | 9. Require Local Aboriginal Land Councils (LALCs) to develop staged ACH values maps (to guide the Community Land and Business Plans (CLBPs)). |
| | 10. Require consideration of the maps in all statutory planning instruments and processes. |
| | 11. Enable early engagement of Aboriginal people by using strategic mapping and planning. |
| Local decisions by local people | 12. Use the existing LALC framework for local decision making on ACH matters, including the negotiation of conditions in ACH Approvals, thus recognising the rights of local Aboriginal people with the cultural authority to plan and negotiate outcomes for their heritage. |
| | 13. Require the LALCs to enhance the ACH objectives and strategies within Community Land and Business Plans and to use maps of ACH values to develop plans of management (PoM) to inform the CLBP. |
| | 14. Enable the LALC to negotiate directly with private property owners and public land managers to develop voluntary access agreements and access conditions within ACH Approvals. |
| | 15. Retain and enhance provisions to transfer ownership of objects from the Crown to people with cultural authority. |
| Streamlined process | 16. Approve amendments to the *Environment Planning & Assessment Act 1979* and the *Aboriginal Land Rights Act 1983* to ensure the seamless and consistent delivery of ACH matters. |
| | 17. Ensure consistency and clarity in consultation processes by requiring all government processes to follow the LALC model for consultation on ACH matters with Aboriginal communities. |
| | 18. Include revised appeal/resolution processes and mandatory timeframes in the legislation. |
| | 19. Replace Aboriginal Heritage Impact Permits (AHIPs) with ACH Approvals to be negotiated at a local level and approved by the Commission. |
| | 20. Apply effective and flexible processes appropriate for the different ACH values identified. |
| Funding ACH outcomes | 21. Provide adequate funding for the operation of the Commission, the ACH Office and the ACH Act. |
| | 22. Allow flexibility in ACH Approvals to provide for a range of approaches to meet ACH priorities as articulated in the PoM. |
| | 23. Ensure sufficient resources and training is provided to enable the LALCs to effectively engage in the process. |
Chapter 1  Introduction

This paper reflects the Working Party deliberations guided by the government-endorsed terms of reference\(^1\) for the reform process.

**The Working Party**

The Minister for the Environment, the Minister for Heritage and the Minister for Aboriginal Affairs appointed members to the Aboriginal Culture and Heritage Reform Working Party (Working Party) based on their individual skills, expertise and experiences in managing and protecting Aboriginal cultural heritage. The Working Party members were not chosen as representatives of their respective organisations. The Working Party was established to provide independent recommendations to government.

The members of the Working Party and their expertise:

- **Mr Daniel Gilbert AM** Gilbert + Tobin Lawyers, Chair. Community engagement and cultural and social issues affecting Aboriginal people in NSW.
- **Ms Brianna Casey** NSW Farmers. Aboriginal culture and heritage and how it relates to industry and business.
- **Ms Constance Chatfield** Local Government and Shires Association (LGSA). Land management and the issues affecting Aboriginal cultural heritage.
- **Mr Stephen Ryan** NSW Aboriginal Land Council (NSWALC). Land management and the issues affecting Aboriginal culture and heritage.
- **Dr Sandra Wallace** Australian Association of Consulting Archaeologists (AACA). Aboriginal culture and heritage conservation.
- **Mr Brad Welsh** Rio Tinto. Aboriginal culture and heritage and how it relates to industry and business.
- **Mr Robert Wilcher** Herbert Greer, Property Council of Australia (NSW). Aboriginal culture and heritage and how it relates to industry and business.
- **Mr Jason Ardler** Aboriginal Affairs NSW, *ex officio* member.
- **Mr Norman Laing** Office of Environment and Heritage, *ex officio* member.

The Working Party is seeking your feedback on the draft recommendations via a number of community and stakeholder workshops to be held at various locations across NSW. Submissions are also welcome via email, mail, telephone or online. **Chapter 3** has details on how you can have your say. Obtain further information about the reform process and background information at: [www.environment.nsw.gov.au/achreform](http://www.environment.nsw.gov.au/achreform).

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\(^2\) A member up to August 2012
Implications for other NSW legislation and policy

The NSW Government has committed to a number of reviews relating to government services and programs. Currently there are several reviews of legislation that are relevant to, and have potential implications for, the recommended Aboriginal cultural heritage reform. A list of the most relevant legislative reviews and policy initiatives underway include:

- a review of the Environment Planning and Assessment Act 1979 by the Department of Planning and Infrastructure
- the planning and development of the Strategic Regional Land Use Plans by the Department of Planning and Infrastructure
- a review of the Aboriginal Land Rights Act 1983 by the Minister for Aboriginal Affairs
- development of a NSW Aboriginal Affairs Strategy by the Ministerial Taskforce for Aboriginal Affairs
- the establishment of the Land and Water Advisory Panel by the Parliamentary Secretary for Natural Resources and
- the establishment of Local Land Service Reference Panels to coordinate natural resource management, agricultural and emergency response services.

The Working Party has, where possible, considered these reviews and, where relevant, sought clarification from respective agencies regarding how the recommended reforms can be integrated across government to ensure continuity and consistency in approach.
Chapter 2: Rationale for Aboriginal cultural heritage reform

The decision to give legal protection to Aboriginal heritage via amendments to the National Parks and Wildlife Act (NPW Act) in the late 1960s reflects an early ‘natural history’ view – that Aboriginal heritage is part of the natural environment of NSW rather than a part of the state’s rich cultural heritage.

This reflected the views at the time the NPW Act was created. Those views have since changed significantly to acknowledge the right of Aboriginal people to have a significant voice in managing their own cultural heritage.


The NPW Act concentrates on collections of heritage objects and archaeology, with limited roles for Aboriginal people specifically relating to Aboriginal heritage. Protection of Aboriginal heritage under the NPW Act is limited to ‘places’ and ‘objects’, with the latter primarily based on archaeological perspectives of heritage. These do not necessarily reflect Aboriginal peoples’ understanding of cultural heritage.

Consultation for the review of the ACH legislation has demonstrated that Aboriginal people and the majority of parties with an interest in ACH are critical of the current NSW regime. They have argued that the roles and responsibilities for all parties need to be clearly identified, the processes streamlined and clarity established as to who should be consulted. The system must also remove unnecessary red tape.

There is clearly a need to delineate roles and responsibilities for Aboriginal people, heritage professionals, government and industry, as well as improve cultural heritage outcomes.

A review of the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act) is currently underway. Central to the proposed Commonwealth heritage reform is implementing an ‘accreditation’ system for all jurisdictions. Under this proposed system, jurisdictions may be exempt from the Commonwealth model when they meet certain minimum standards. In light of the Commonwealth discussion paper released on 3 August 2009, it is noted that the current NSW legislative framework and regime for protecting Aboriginal heritage may not meet the proposed prescribed standards for accreditation.

The Commonwealth's discussion paper includes 20 proposed accreditation standards which provide a baseline for any new legislation. The proposed standards for accreditation have been incorporated into the recommended new ACH legislation outlined in this discussion paper. Further information on these standards is available at www.environment.gov.au/heritage/laws/indigenous/lawreform/index.html.

In 1969, the NSW Government became the second Australian government to legislate to protect elements of Aboriginal heritage by amending the National Parks and Wildlife Act 1967. Since the ATSIHP Act was introduced in 1984, most jurisdictions have reformed the ways in which they protect Aboriginal cultural heritage.

New South Wales remains the only jurisdiction in Australia without separate Aboriginal heritage legislation. The reform also provides an opportunity to provide a simplified, transparent and flexible system for all parties. The recommended legislation must also seamlessly integrate with the review of the planning system currently underway.
Chapter 3   Engaging stakeholders

The first stage of the reform process sought input from Aboriginal people and other key parties, including industry, heritage specialists and academics. Consultation focussed on a number of key issues, including:

- defining Aboriginal cultural heritage
- management of Aboriginal cultural heritage
- ownership of Aboriginal cultural heritage
- who speaks for Country
- land use planning and development processes
- public natural resource management processes.

The consultation included 26 regional Aboriginal community workshops and interviews with Aboriginal people and five roundtable meetings with the industry sectors, environmental groups, heritage practitioners, local government, government agencies and catchment management authorities. Over 460 people contributed to these meetings.

A total of 88 written submissions were received during the first round of consultation. These submissions were from NSW Government staff, Aboriginal corporations, representatives from local government, heritage advisors and employment consultants. The submissions received represent a wide range of regional and metropolitan areas from Walgett to Nambucca and Newcastle to Blacktown.

Of the online respondents, 60% chose not to identify any particular group to which they might belong; however, 8.8% of respondents identified as being of Aboriginal descent and 9.6% stated an affiliation with an industry or professional group.

The written submissions, summaries of the workshop and roundtable sessions and a summary of all submissions received to date can be found at:


There was general agreement on a range of issues. These included that:

- a new modernised standalone legislation to protect Aboriginal cultural heritage is required
- the legislation be administered by a statutory Aboriginal Commission
- appropriate resourcing for the system to operate effectively is needed
- protecting Aboriginal cultural heritage should be built into the planning legislation, including the need for upfront regional assessments, mapping and information
- the system requires certainty and clarity for all parties
- the significance of Aboriginal cultural heritage should be determined by Aboriginal people
- ownership of Aboriginal objects should be vested in Aboriginal people, not the NSW Government
- Aboriginal people should be given control over the use of their cultural knowledge
- clarifying who speaks for Country is essential
  and
- the ACH reform process should not be rushed and Aboriginal people should be provided with enough information to enable effective engagement in the process.

The reform process was amended following the feedback received during the first phase of consultation. The second phase of the reform process was expanded to include publishing information for Aboriginal people about the current regime and other jurisdictional approaches. Aboriginal people requested this information at the workshop sessions to enable them to contribute to the reform process in a more informed and engaged way.
These three publications are available via the OEH website:

1. Phase 1 consultation – summary of feedback

2. How the Aboriginal heritage system works in NSW

3. Comparing the NSW Aboriginal heritage system with other Australian systems

These documents were discussed with Aboriginal people via an additional 11 regional education/information meetings held between June and July 2012. The documents were also distributed to approximately 1,000 people and published on the OEH website for public access.
Chapter 4  Objectives, preamble and definitions

Key aims of the reform are to:

- improve Aboriginal cultural heritage (ACH) conservation outcomes
- provide certainty and fairness for all involved in the NSW regime
- improve and streamline decision-making processes and timeframes.

The draft recommended system must provide opportunities for Aboriginal people to contribute early in the planning process. It must empower the most appropriate people to make informed decisions about cultural heritage protection and identify the approaches required when heritage impacts are unavoidable. The system must provide equal opportunities for Aboriginal people, industries, government, miners, farmers, proponents, heritage advisors, academics and non-profit organisations to negotiate and consider local heritage issues, balanced with the emerging developmental needs of the respective local area and NSW generally.

Overall objectives of the reform

There are several objectives for this reform.

1. Empower Aboriginal people to manage their cultural heritage

- Recognise and clarify the central role of Aboriginal people in the management and custodianship of their cultural heritage as understood and determined by them.
- Assist Aboriginal people with their decision making by improving the quality of information available.
- Require engagement early in proposed projects and strategic planning processes to make informed decisions and provide better opportunities to protect cultural heritage values.
- Provide clarity on who in the Aboriginal community has the cultural authority to make decisions about ACH management and who must be engaged.

2. Streamline processes

- Provide a local one-stop-shop for negotiating and consulting on ACH matters to effectively support the protection of Aboriginal cultural heritage.
- Create an effective and flexible regulatory system which balances the protection of ACH with economic development and growth.
- Establish clear roles and responsibilities for all parties associated with ACH matters in NSW.
- Include appeal and dispute resolution processes within the system.
- Include mandatory timeframes to ensure effective and timely delivery of outcomes.
- Link ACH protection with other strategic processes such as natural resource management and strategic planning.

3. Develop strategic plans to support early and upfront consideration of ACH

- Create a mechanism which delivers information early to people making long-term land-use decisions.
- Ensure early consideration of ACH matters and integrate or align those with the directions of other NSW legislative reviews.
- Encourage positive outcomes that find a balance between competing demands.
- Provide consistent information to planning professionals and agencies to afford the best opportunities to effectively consider the implications for achieving sustainable ACH outcomes.
4. Improve ACH outcomes

- Clearly define ACH and how it should be protected and managed.
- Provide mechanisms to allow all parties to make informed and strategic decisions on ACH management.
- Ensure all recommended systems in the new ACH legislation are adequately resourced.
- Develop effective mechanisms for protecting ACH, which clearly define roles and responsibilities for the Aboriginal community, government, industry, and heritage professionals.

Preamble or objectives in the recommended legislation

A preamble serves as an introductory statement of an Act. The preamble to the recommended Act would have no interpretive effect. The information included in the preamble would convey the overall intention of the Parliament when the Bill was passed. Importantly the preamble would promote awareness, respect and compliance with the law.

It is recommended the preamble in any new ACH legislation would provide recognition that:

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

The recommended preamble would also include a statement about the aims of the legislation. For example:

This legislation seeks to protect both the tangible and intangible aspects of Aboriginal cultural heritage that are identified as important to Aboriginal people of NSW.

Definition of Aboriginal cultural heritage in the recommended legislation

A major element of the reform process is to consider how intangible cultural heritage values in the landscape are to be afforded protection. Under the NPW Act, there is no definition of Aboriginal cultural heritage and definitions are limited to ‘Aboriginal objects’ and ‘Aboriginal Places’ ³. Currently, under the NPW Act, Aboriginal objects and Places are the only components of Aboriginal cultural heritage protected.

The following recommended wording of the Act’s definition of cultural heritage is based on comments received through the consultation process and on the United Nations’ Declaration on the Rights of Indigenous Peoples⁴.

‘Aboriginal cultural heritage means the practices, representations, expressions, knowledge and skills – as well as associated objects and artefacts that Aboriginal, peoples recognise as part of their cultural heritage, insofar as these relate to land.’

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Within the spirit of this definition, various provisions in the legislation would recognise and protect intangible cultural heritage. These provisions could include:

- Continuation and/or enhancement of the current:
  - declared Aboriginal Places mechanism
  - voluntary conservation agreements\(^5\)
  and
  - negotiation of lease agreements and acquisition of land with high ACH values for the national parks estate\(^6\).

- New mechanisms to negotiate ACH Approval conditions associated with:
  - conservation strategies and actions to protect ACH values
  - programs to support, enhance and promote ACH values
  - research to improve knowledge of the nature, distribution and value of ACH
  - impacts to ACH; for example, any ACH value (tangible or intangible) which is identified and mapped by the LALC will be managed under the legislation. The legislation will define ‘harm’, for the purpose of creating offences
  - negotiated sociocultural outcomes
  and
  - facilitating access to Country to support continuing practising culture and mapping of cultural heritage landscapes.

- New mechanisms to negotiate and support access to private land:
  - Voluntary ACH Access Agreements for private land (where no development process applies).

### POINTS TO CONSIDER AND RESPOND TO

**Question 1**
Do you agree with this chapter?

**Question 2**
Do you agree with the recommended outline for the preamble? If not, what changes would you make to the preamble?

**Question 3**
Do you agree with the recommended definition for Aboriginal cultural heritage? If not, what changes would you make to the definition?

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A core consideration has been to ensure sufficient support will be provided through systems, structures and resources to deliver the intended reform outcomes. The Working Party was mindful of the need to use and build on the existing resources, systems community governance and decision making structures in NSW and to identify where new systems and structures and resources would be required. To avoid creating additional red-tape and governance arrangements, it is recommended that existing statutory frameworks contained in the *Aboriginal Land Rights Act 1983* and *Native Title Act 1993* be utilised and built upon.

The recommended legislation would include a new organisational structure with the proposed roles and responsibilities as illustrated in Figure 1, and an administrative structure as illustrated in Figure 3.
Administrative structure and decision making – roles and responsibilities

The relevant Minister

The Minister would have the overarching obligation to ensure that, with respect to the exercise of the powers vested in the Minister, proper consideration is at all times given to the advancement and protection of ACH values as determined from time to time by the Commission and LALCs. The specific responsibilities of the relevant Minister would be to:

- consider referrals made by the Commission and decide whether items, features or places of significance should be protected as an Aboriginal Place, listed on the State Heritage Register or by any other appropriate conservation mechanism
- review, amend and approve initial ACH maps and PoMs that meet the requirements for inclusion in strategic planning (noting that until such approval, ACH maps and PoMs would have no legal status)
- review and approve ACH maps where there are changes from incomplete ACH information areas to ACH value areas and have these maps statutorily reviewed every four years
- delegate roles and responsibilities, such as reviewing and issuing ACH Approvals, ACH maps and PoMs, as permitted under the Act and regulations
- and
- consider all advice from the Commission for Governments’ consideration of ACH matters.

The Planning Minister

The Minister for Planning and Infrastructure has responsibilities under the EP&A Act 1979. It is contemplated that the Minister for Planning and Infrastructure would consider, among other matters, advice from the Commission when making land use decisions.

NSW Aboriginal Cultural Heritage Commission

The NSW Aboriginal Cultural Heritage Commission (the Commission) would be an independent statutory body, with a clear governance and accountability framework. It would have responsibility for providing advice to government on all matters relating to ACH in NSW. The roles of the Commission would include:

- developing minimum standards and guidance for processes and timeframes with secretariat support from the NSW Aboriginal Cultural Heritage Office (ACH Office)
- reviewing and issuing ACH Approvals against minimum standards within the mandatory timeframes (further details under Engagement process, page 23)
- reviewing the ACH maps and PoMs before referring to the Minister for approval
- providing ACH advice on strategic planning matters to relevant agencies and organisations to ensure ACH is considered early and effectively
- ensuring ACH Approvals and conditions are reasonable and consistent with the ACH maps and PoM
- providing mediation where there is disagreement between the LALC and the proponent on assessment processes and ACH Approvals
- providing the Minister with nominations for Aboriginal Places and items for consideration for listing on the State Heritage Register as ACH items of State Significance
- supporting LALC initiatives to maintain, enhance and improve local ACH priority values
- appointing, supporting and managing the ACHOs
- delegating responsibilities to the ACH Office according to provisions in the ACH Act or regulations
- requesting the ACH Office to undertake investigations, prosecutions and secretariat duties identified in regulation and policies
- and
- raising and promoting community awareness about the importance of ACH values and programs.
The Minister would appoint 10 individuals based on skills and experience, plus a permanent, independent full-time chair. The Commission would include one nominee from NSWALC. Appointments to the Commission will be via a state-wide nomination process. All members of the Commission would need to demonstrate they are an Aboriginal person as defined in section 4(1) of the *Aboriginal Land Rights Act 1983*.

Skills and experience required by the Commission members would include a knowledge and understanding of the ACH legislation, understanding of traditional and contemporary Aboriginal cultural heritage, experience in a range of relevant heritage disciplines (e.g. archaeology, anthropology, biodiversity), an understanding of the planning process and dispute-resolution skills. When making appointments to the Commission, the Minister would aim to have a gender balance and to reflect a geographic spread of members across NSW. It is intended that members appointed by the Minister would be drawn from people born within NSW or those with long-standing ties to Country in NSW.

The Commission would have the discretion to liaise with a multi-disciplinary Advisory Panel to seek technical support and advice on a range of matters as needed. The Commission could confer with the Advisory Panel or specific individuals from the list. The experts would be appointed by the Commission.

**Local Aboriginal Land Councils (LALC)**

Clarifying who speaks for Country is one of the major issues for improving ACH conservation and management in NSW. The Working Party believes that the most effective way to achieve clarity is to build on the LALCs existing statutory responsibilities to consult with people with cultural association to Country. The proposed model will ensure that the LALCs consult with people with cultural association (including non LALC members) in local, upfront decision making for ACH values and ACH Approvals. Refer to Figure 2.

It is recommended that each LALC would be supported and empowered to fulfil its existing statutory functions pursuant to section 52(4) of the *Aboriginal Land Rights Act 1983* (ALR Act). That is:

(a) To take action to protect the cultural heritage of Aboriginal persons in the council’s area, subject to any other law and

(b) To promote awareness in the community of the cultural heritage of Aboriginal persons in the council’s area.

This will be achieved by building on and supporting the role of the community land and business plans (CLBP), which are required under section 82 of the ALR Act. The purpose of the CLBP is to describe the aims of the LALC and identify the strategies and actions to achieve the aims.

Currently, according to section 82(2) of the ALR Act, when a LALC is preparing a CLBP, they must consult with the following persons:

(a) Members of the LALC

(b) Persons who have a cultural association with the land within the LALCs area

(c) Any other persons required to be consulted by the regulations or a policy of the New South Wales Aboriginal Land Council.

In preparing ACH maps, PoMs and ACH Approvals, a LALC will be required to consider section 82(s) of the ALR Act and consult with Aboriginal persons who may not be members of a LALC or may not ordinarily be persons engaged with a LALC but have ACH knowledge.
Pursuant to section 83(1)(d) the CLBP must contain the objectives and strategies of the LALC in relation to ACH (a cultural heritage strategy). The ACH maps and plans of management (PoM) will inform this strategy.

LALCs may choose to discharge their ACH responsibilities with the assistance of a subcommittee which could be comprised of members of the LALC Board and Aboriginal persons identified under section 82(2) (b) and (c) of the ALR Act. In these cases, the ACH subcommittee would make recommendations to the LALC Board for decisions or the Board could delegate that authority, in which event subcommittee decisions will be binding on the LALC.

Each LALC would be empowered to:

- be the local one-stop-shop for Aboriginal community consultation and negotiation on ACH matters within its boundary
- develop and negotiate ACH Approvals according to the ACH map and PoM. ACH Approvals could include negotiating access to land, care and ownership of ACH, conservation or offset areas and associated management strategies, or ACH investigations relevant to the project
- identify and map places and landscapes of cultural value
- develop a PoM with clear strategies to support the management of ACH values
- implement the PoM conservation and protection strategies
- implement and execute conditions within ACH Approvals as required and
- develop and negotiate Voluntary ACH Access Agreements (VACHAA) with landholders to access private and public land to support natural resource management (via green teams and links to NRM work) cultural wellbeing and/or enhance local ACH values.
Members of the LALC Board or subcommittees would not be able to tender for, or participate in, any paid fieldwork associated with projects where the LALC has been involved and negotiated ACH Approvals with a proponent; with the exception that they may need to attend onsite meetings during assessments to make informed decisions. Any ‘fieldworkers’ required for survey, salvage/mitigation or other activities arising from an ACH Approval would be organised by the LALC but must not include Board or subcommittee members.

**NSW Aboriginal Land Council (NSWALC)**

It is recommended that the Commission would work with NSWALC to develop a policy regarding what is meant by ‘any other person required to be consulted’ in section 82(2)(c). In addition to Registered Aboriginal owners who are required by section 82(2)(b) to be consulted on CLBP matters, the policy could include Native Title holders, claimants who successfully passed the native title registration test, people with rights pursuant to approved ILUAs and other people with status and knowledge. The aim is to ensure that LALCs consult with those Aboriginal people in the LALC area with the relevant knowledge and status in relation to cultural heritage, giving such people the opportunity to participate in, and contribute to, decisions affecting ACH in the relevant LALC area.

**Registrar Aboriginal Land Rights Act 1983**

Where there is a dispute regarding individuals who meet cultural association requirements identified under section 82(2)(b) and (c) of the ALR Act, but who feel they have not been appropriately consulted or recognised by the LALC, those individuals may make a request for a review to the Registrar ALR Act. Inclusion in the list provides the ability to consult on ACH Approvals from that point on, but would not be retrospectively applied to ACH Approvals already issued.

**Regional Aboriginal Cultural Heritage Officer (ACHO)**

Regional Aboriginal Cultural Heritage Officers (ACHO) would be appointed by the Commission based on skills and experience. As an employee of the Commission, the ACHO would be responsible for supporting the Commission and working with LALCs as required by the Commission. An ACHO would be appointed for each of the nine NSWALC statutory regional boundaries. The regulations would allow additional regional ACHOs to be appointed for areas which experience high levels of development demands to ensure the requirements can be met.

The Regional ACHO would be responsible for:

- assisting the LALC to consider information in their ACH maps and plans (assist in gathering/recording oral histories and stories, collating relevant cultural information to inform the mapping projects)
- assisting in the identification of local ACH priority values targeted for conservation/protection to ensure the local community can continue to practise cultural heritage
- assisting the Commission to maintain the state-wide ACH Register (local maps and plans)
- assisting proponents who cannot access the web-based Register by providing the LALC contact details and a copy of the ACH map for the relevant area
- providing advice to the LALCs regarding process requirements for negotiating and mediating with the proponents
- assisting in promotion and training of ACH awareness wherever feasible
- and
- providing advice to the Commission and/or ACH Office and LALC as required.
The NSW Aboriginal Cultural Heritage Office (ACH Office)
The NSW Government would establish an ACH Office within a NSW Government agency to provide assistance to the Commission. The ACH Office’s work would include:

- providing secretariat services for the Commission as required by regulations and policies developed by the Commission and the relevant Minister
- issuing ACH Approvals when delegated or directed by the Commission\(^7\)
- maintaining and updating the ACH Register
- supporting the Commission in developing minimum standards and guidance for processes and timeframes
- guiding the regional ACHOs and the LALCs to develop ACH maps and PoMs supporting LALCs to protect and promote ACH
- undertaking investigations and enforcing compliance as requested by the Commission and required by regulations and policies.

Figure 3 Administrative structure required to support the recommended new legislation

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\(^7\) The ACH Office may issue ACH Approvals when stipulated under the regulations or as requested by the Commission.
The NSW Aboriginal Cultural Heritage Register (ACH Register)

The ACH Register would be an important tool to successfully protect and manage ACH. It would be a web-based portal to all relevant ACH information to aid decision making on ACH matters. The ACH Register would include:

- the Aboriginal Heritage Information Management System (AHIMS) – Aboriginal objects, places, values ancestral remains, ACH assessment reports
- LALC boundaries and LALC contact details
- ACH maps
- ACH plans of management
- ACH Approvals
- Voluntary ACH Access Agreements
- Aboriginal Places and items listed on the State Heritage Register and
- all other relevant ACH data.

The quality of the information entered into the ACH Register would be controlled by setting minimum standards for data recording.

An important factor to consider in the recommended system is the dual consideration of Aboriginal people’s management of ACH information and appropriate public access to ACH information for decision making purposes. To cater for both needs, it is recommended that the Commission and LALC work together to release local ACH information, and develop strategies for managing sensitive information at the local level.

Public access to desensitised portions of the ACH Register would be available via an interactive webpage, for quick and early access to ACH data for projects. The ACH Office would maintain the ACH Register on behalf of the Commission. The ACH Register would incorporate and replace the current Aboriginal Heritage Information Management System (AHIMS).

Under statutory reporting requirements, the Commission would use the ACH Register to provide annual reports of ACH activities. These reports would include performance measures, such as details and the number of ACH areas conserved, the number of ACH Approvals issued or refused, programs funded to enhance ACH values, number of appeals and compliance audits and their outcomes.

Heritage advisors

Heritage advisors with appropriate qualifications, skills and experience would:

- conduct archaeological assessments and investigations for developments as required
- assist LALCs and project sponsors prepare ACH Approvals
- assist LALCs to undertake assessments, mapping and develop PoMs
- assist with protection and rehabilitation works
- assist with audits of ACH elements of the CLBP as required by the Commission.

Engagement processes

It is recommended that engagement with the LALCs would be triggered at several different stages. The due diligence processes would remain as per the current legislative provisions within the NPW Act. As is the case now, the need to follow a due diligence process, and the associated engagement requirements, would be removed if undertaking any activity that is:

- exempt from the offence of harm (e.g. emergencies, fire-fighting or bushfire hazard reduction, and some conservation or traditional cultural activities)
- defined in the regulation as a low-impact activity (e.g. undertaking specified farming, complying or exempt development, land management, maintenance, surveying or environmental rehabilitation works).
Further information on the due diligence process can be found at:

The ACH map would be developed according to the criteria that identify areas within the LALC boundary as having:

- medium to high ACH value
- low ACH value
- or
- incomplete ACH information.

Mandatory triggers for engagement would be:

- Where a project is in a mapped ‘ACH value area’ or an area where there is ‘incomplete ACH information’ the proponent and the relevant LALC would refer to the PoM and discuss the processes for managing the values of that area.
- Where low ACH values were identified in the ACH map no mandatory trigger for consultation would exist and the proponent could commence works with caution. Part of the due diligence process in these areas would be to check the ACH PoM on the ACH Register to inform project planning. The proponent may also elect to voluntarily liaise with LALCs for additional information at this stage.
- Where an unexpected find is identified in low-ACH value areas after works had commenced, the proponent would be required to refer to the ACH PoM to establish how to proceed, and liaise with the relevant LALC, where necessary. Mandatory timeframes would apply for notification of unexpected finds, consultation processes, mediation processes and site management.

► Appendix A details the engagement process.

ACH Approvals

The legislation would provide for ACH Approvals to be negotiated between the LALC and the relevant parties. ACH Approvals could be applied to conservation, maintenance, mitigation, investigation, access and ownership matters. Heritage advisors would have an integral role in supporting the LALC and discussing conditions in an ACH Approval to ensure that the archaeological integrity is addressed.

The ACH Approval would replace the current Aboriginal Heritage Impact Permit (AHIP) process. The ACH Approval would be developed against minimum standards set within regulations, and approved by the Commission. The Chair may delegate responsibilities to the ACH Office from time to time, as determined by the Commission.

An ACH Approval could include standard or specific conditions for managing cultural heritage values. This approach provides:

- local determinations for managing local cultural heritage needs
- certainty by meeting minimum standards
- mandatory timeframes for delivery
- and
- transparency with approvals reviewed and issued by the Commission.

If agreement cannot be reached between the parties when drafting an ACH Approval, the Commission would provide mediation processes within mandatory timeframes. Where resolution is not reached within the mandatory timeframes, the proponent would proceed with caution. Further details are included in Chapter 8 and Figure 6.

Draft conditions in the ACH Approvals negotiated by the LALC and proponent that do not meet the minimum standards will be amended by the Commission (or ACH Office). Both parties would be notified of the changes before the ACH Approval is issued. While minimum standards for ACH Approvals would be developed once the Commission and the ACH Office are established, it is intended ACH Approvals would include:

- project parameters and timeframes
- protection and conservation outcomes and management
- ACH studies and methodologies
• access agreements
• care and custodianship conditions for any ACH objects
• cultural sensitivity management
and
• programs or initiatives to enhance identified ACH values in the PoM.

All applications for ACH Approvals would be sent to the Chair of the Commission. The Chair would seek advice from the ACH Office and then process applications that were uncomplicated or involved low-ACH impact. Applications for projects that are complex or include impacts to higher ACH values would be considered and determined by all the members of the Commission with advice from the ACH Office and the multi-disciplinary Advisory Panel as needed.

All ACH Approvals would be legally binding licences that provide certainty to all parties. Agreed ACH conservation actions and other conditions must be able to be monitored and enforced. Issued ACH Approvals would only be amended if a variation was sought or if directed by a court. It is proposed that any ACH Approval issued could be the subject of an appeal by the proponent or the LALC in the Land and Environment Court.

Access to Country

The recommended ACH Approval would allow the LALC to negotiate as a specific condition(s), opportunities for access to Country with public or private landholders. The recommended legislation would also introduce an informal Voluntary Aboriginal Cultural Heritage Access Agreement (VACHAA) for private landholders where an ACH Approval may not be suitable; that is, where there is no development process taking place. Both processes could provide better access to Country and outcomes for cultural heritage, natural resource management and cultural wellbeing.

▶ Appendix B provides further details about processes to access Country.

Care and ownership of objects

The recommended legislation would allow for the transfer of ownership of salvaged Aboriginal objects and those on crown land to the relevant registered Aboriginal owners identified under the ALR Act or to the relevant LALC on behalf of the members identified under section 82(2)(c) of the ALR Act. Care and ownership responsibilities would be managed through specific conditions within the ACH Approval. Care and ownership of ACH can also be negotiated as specific conditions in an ACH Approval even when there is no development process taking place.

▶ Appendix B provides further details about care and ownership of ACH.

Funding the new ACH administrative structure

The draft recommended model would require the NSW Government to allocate funding for several key elements of the recommended legislative system.

The elements of the Working Party’s recommendations that would require government funding include:

• the establishment and ongoing costs for the Commission, ACHOs and the ACH Office
• support for LALCs to deliver their ACH responsibilities
• strategic ACH mapping
and
• establishment and ongoing maintenance of the ACH Register.
<table>
<thead>
<tr>
<th>Question</th>
<th>Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Question 4</td>
<td>Do you agree with this chapter?</td>
</tr>
<tr>
<td>Question 5</td>
<td>Do you agree with the establishment and roles and responsibilities of the NSW Aboriginal Cultural Heritage Commission? If not, what would you like to see changed?</td>
</tr>
<tr>
<td>Question 6</td>
<td>Do you agree with the recommendation to build on the existing LALC structure and statutory functions? If not, what would you like to see changed?</td>
</tr>
<tr>
<td>Question 7</td>
<td>Do you agree with the recommended Regional Aboriginal Cultural Heritage Officer to support the LALCs? If not, what would you like to see changed?</td>
</tr>
<tr>
<td>Question 8</td>
<td>Do you agree with the recommended Aboriginal Cultural Heritage Office roles? If not, what would you like to see changed?</td>
</tr>
<tr>
<td>Question 9</td>
<td>Do you agree with the elements included in the recommended ACH Register? If not, what would you like to see changed?</td>
</tr>
<tr>
<td>Question 10</td>
<td>Do you agree with the recommended engagement process? If not, what would you like to see changed?</td>
</tr>
<tr>
<td>Question 11</td>
<td>Do you agree with the flexibility of the recommended ACH Approval to enable most ACH matters to be negotiated when appropriate? If not, what would you like to see changed?</td>
</tr>
<tr>
<td>Question 12</td>
<td>Do you agree that appeals should be possible on issued ACH Approvals?</td>
</tr>
</tbody>
</table>
Chapter 6 Mapping for strategic planning

Early and strategic planning requires access to reliable information to make informed and consistent decisions. Effective strategic planning also requires the relevant parties to be involved at the outset of the planning process (refer to Figure 4).

Upfront mapping

Mapping of all cultural heritage values across NSW would be compiled as part of the Community Land and Business Planning (CLBP) process and included on a NSW Aboriginal Cultural Heritage Register (ACH Register). The ACH maps would be completed following criteria set within regulations and would inform the CLBP. As outlined in the previous chapter, the ACH maps would show areas marked with three levels of value:

1. ACH value areas
2. low ACH value areas
   or
3. areas with incomplete ACH information.

Mapping the cultural heritage values across the state would be achieved in a staged process. The creation of ACH maps would commence using existing ACH data as the baseline. LALCs would have 12 months from the commencement of the Act to conduct a gap analysis to establish where additional information is required and finalise the mapping of the three value areas. In the second year the LALCs would complete the plans of management (PoM) and provide them to the Commission for review against minimum standards. The Commission would also ensure the PoM strategies for managing each of the values are appropriate and not onerous. The ACH maps and PoMs would be approved by the Minister before being included on the ACH Register. This process would provide better quality data control and replace outdated or inaccurate data.

The ACH maps would be used for strategic planning by government bodies and also at the beginning of projects (at the due diligence stage) by proponents, heritage specialists, government agencies or any parties considering activities that would involve conservation or non-exempt ground disturbance works. Planners and proponents would be able to search the ACH Register and identify the location of Aboriginal Places, ACH values, biodiversity values and cultural resources.

ACH mapping would provide the best opportunities for protecting high value areas identified by the Aboriginal community. Equally the mapping would be essential for making informed decisions when there are requests to undertake activities that may impact ACH objects, places and landscapes. The LALC would be supported by the ACHO, and the ACH Office to identify areas of specific significance, which could lead to an Aboriginal Place declaration, a voluntary conservation agreement, or listing on the State Heritage Register.

The ACH maps and PoM would be continually updated and listed on the ACH Register when each strategic plan or individual project is completed. The updated information would be required to monitor ecological sustainable development (ESD) considerations such as cumulative impacts and intergenerational equity issues. The Minister would approve the ACH Maps and PoMs at the following points:

- when the ACH Maps and PoMs are initially complied
- when they are reviewed by statute every four years
  and
- when further assessments result in a change of mapping from incomplete information areas to ACH value areas.
Local issues, local decisions

It is recommended that the cultural heritage values included in maps would be identified at a local level by Aboriginal people via the LALC. To successfully map the cultural heritage values, the LALC would be required to involve people with the cultural authority who hold cultural information and understand the values and details of these areas. The LALC would work through criteria to assist in mapping the cultural heritage values. The criteria would be devised by the Commission but would likely include some of the following:

- traditional stories, songs associated with areas
- sites or areas with established links to the traditional stories and songs
- areas with established traditional, historical and contemporary cultural connections
- areas with natural resources of medicinal or other cultural value
- areas of known ceremonial practices
- areas with long chronological or intense occupational periods
- sites or areas with rare cultural heritage values
- areas with values required for the continued practising of culture
- burials and/or burial grounds.
Cultural value is defined at local levels

As outlined in Chapter 4, the ACH definition includes tangible and intangible values. The cultural heritage value would be determined by the relevant people in the LALC area. The LALC would identify cultural heritage values and develop a PoM. The LALCs would determine and map local ACH objects, places and landscapes that should be considered for conservation or protection. These would be guided by the definition within the Act, regulations, guidelines and templates. The Commission would check the ACH maps and PoMs against the minimum standards before referring the ACH maps and PoMs to the Minister for approval.

The mapping process would identify three different areas. Areas identified with high ACH values would trigger consultation with the LALC. Low ACH value areas would not require consultation; however, if unexpected finds are identified the proponent would need to check the requirements of the PoM for the site type. Projects within the incomplete information areas would need to refer to the relevant PoM to check if consultation is required for that specific area. Refer to Table 2.

Any ACH Approvals required for areas with ACH value or incomplete ACH information would need to be negotiated according to the ACH maps and PoMs. This process allows for local Aboriginal decision making but with government oversight on land use and heritage conservation decisions.

The Department of Planning and Infrastructure or local councils reviewing applications could request additional assessments be conducted for project areas where information is either incomplete or contrary to the ACH map. This is to help make informed decisions about the appropriate course of action. In these instances the Commission would work with these organisations.

The LALC would devise appropriate management strategies for each heritage place, feature and site type within their PoM. In addition to assessments undertaken by proponents, the LALC may undertake its own additional assessment and mapping of cultural and scientific significant values over time to enhance the ACH Map. The ACH maps and PoMs would be available via the ACH Register. The CLBPs would not be included in the ACH Register.

The ACH maps and PoM would be developed and updated by the LALC, with the support of Heritage Advisors and the regional ACHO after assessments had been completed. The ACH maps and PoMs would have no legal status until approved by the relevant Minister and made available on the ACH Register by the Commission.

Planning for conservation outcomes

The PoMs would inform the ACH strategy within the CLBP and:

- document how and why an object, area or place is significant and how the significance can be conserved
- describe what cultural activities can be undertaken in association with mapped objects, values and places
- describe the level of access to land that is required in order to maintain and manage cultural heritage objects, values, places and practices
- develop and record cultural heritage conservation and management strategies
- identify areas that require future assessment and mapping in order to identify, record and determine the significance of ACH objects, values or places
- identify areas that do not require further assessment or mapping or have limited cultural heritage values.
Table 2 Information and actions required for the three mapped ACH value areas

<table>
<thead>
<tr>
<th>ACH Type</th>
<th>ACH Value</th>
<th>Low ACH Value</th>
<th>Incomplete ACH Information</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Areas identified as having moderate to high value</td>
<td>Areas identified as having low value</td>
<td>Value yet to be determined or an area that has yet to be assessed</td>
</tr>
<tr>
<td>Information required in PoM</td>
<td>• Identification of values that must be protected</td>
<td>• A list of site types that require consultation with the LALC after an unexpected find (not all site types will require consultation)</td>
<td>• A list of identified areas within the LALC that require consultation and/or assessment</td>
</tr>
<tr>
<td></td>
<td>• Evidence to support the values</td>
<td></td>
<td>• A list of site types that require consultation with the LALC after an unexpected find (not all areas and site types will require consultation)</td>
</tr>
<tr>
<td></td>
<td>• Protocols for accessing sites</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Actions required by proponents before activities can proceed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Role of PoM</td>
<td>• To guide activities to avoid and minimise harm</td>
<td>• To provide guidance for unexpected finds</td>
<td>• To provide guidance for requirements for unassessed areas</td>
</tr>
<tr>
<td></td>
<td>• To guide conservation activities</td>
<td></td>
<td>• To provide guidance for unexpected finds</td>
</tr>
<tr>
<td></td>
<td>• To guide negotiations for an ACH Approval</td>
<td></td>
<td>• To provide guidance to proponents about assessment requirements</td>
</tr>
<tr>
<td>Actions required by Proponent</td>
<td>• Undertake due diligence</td>
<td>• Undertake due diligence</td>
<td>• Undertake due diligence</td>
</tr>
<tr>
<td></td>
<td>• Engage with LALC</td>
<td>• Proceed with caution</td>
<td>• Check PoM for guidance on how to proceed</td>
</tr>
<tr>
<td></td>
<td>• Assess and plan for areas proposed for impact</td>
<td>• Refer to PoM for guidance for unexpected finds</td>
<td>• Consult with LALC if required by PoM</td>
</tr>
<tr>
<td></td>
<td>• Conserve areas and places of high value</td>
<td>• Consult with LALC where required by PoM</td>
<td>• Conduct partial or full assessment to inform ACH approval decisions where necessary</td>
</tr>
<tr>
<td></td>
<td>• Obtain ACH Approval</td>
<td></td>
<td>• Where disputes arise for assessments or approvals, the Commission mediates within mandatory timeframes. When mandatory timeframes are not met, proponents would proceed with caution (Refer to Figure 6)</td>
</tr>
</tbody>
</table>

All people who access the ACH Register will be able to establish upfront the appropriate actions for their proposed work based on the location of the relevant project on the ACH map and the PoM. Areas identified as having ACH values will require consultation. Within areas of incomplete ACH information, the proponent will need to check the PoM to determine if consultation is required for that area. ACH Approvals issued are to be consistent with the ACH map and PoM for that area.

For areas of low ACH value, proponents could proceed with caution without consultation or further upfront assessments. In the event that an unexpected find was located during works, the proponent would check the ACH PoM (stored on the ACH Register) for the site type and contact the LALC if required by the ACH PoM. Mandatory timeframes and mediation processes would ensure timely resolutions were achieved. Box 1 outlines how the recommended administrative structure supports local decisions and priorities in comparison with the current system. Refer to Chapter 5 for details of each of the administrative roles.
Box 1: Local decisions, local outcomes

Within the current system there are a number of parties whose views influence the approval of impacts to Aboriginal heritage. The parties include: planning authorities, Aboriginal people identified through a consultation process, proponents, the Office of Environment and Heritage (OEH) and, in most instances, a heritage specialist. The decision of whether an Aboriginal site(s) is to be harmed under an Aboriginal Heritage Impact Permit (AHIP) is decided by OEH based on information provided by the parties.

These OEH decisions are made according to section 90K of the *National Parks and Wildlife Act 1974*. The section 90K criteria was a recent amendment made to the Act which aimed to provide fairness in the process and encourage conservation, promote avoidance and mitigation and increase the level of ACH input into the assessment.

Feedback received during the first phase of consultation for this reform process highlighted the difficulties Aboriginal people experience in providing information required to address the criteria. For example, when responding to questions about the significance of an object (section 90K(e)), it was interpreted by heritage specialists and Aboriginal community as ‘identify the significance of this object in comparison to the significance of that object’. Aboriginal people have repeatedly expressed that cultural heritage and ‘objects’ cannot be compartmentalised and/or separated from the landscape; that an object belongs within a landscape and the landscape tells a story. A stone object can’t tell a story on its own.

The feedback highlighted to the Working Party that for a new system to truly provide a fair process that considers the cultural context of the item, area or place, and encourages conservation, promote avoidance and mitigation and increases the level of Aboriginal cultural input into the assessment – it would require Aboriginal people to have a greater decision making role in the determination of significance, processes and assessment, both at local and state levels.

The recommended system recognises that the LALCs know and understand the priorities for protecting and managing ACH in their local areas. The needs, priorities and significance of individual objects, areas, places will vary across the state. Therefore, a blanket approach to applying significance criteria would not reflect local and diverse Aboriginal cultures, histories and heritage values.

The Commission would ensure that decisions, policies and guidelines about ACH are developed by Aboriginal people so a fair and respectful process occurs. The role of the ACHO and the ACH Office would provide support to the LALC and to the new administrative structure as required.

The major advantages of the recommended system include:

- supporting people with the cultural authority to be involved in identifying and planning protection measures for local ACH values
- supporting local ACH priorities identified in a PoM by Aboriginal people
- early involvement and a negotiation role by the LALC representing the views of people with cultural association at the local level
- decisions of significance and protection priorities made by Aboriginal people with cultural authority at the local level
- LALC are supported by a regional ACHO
- a Commission comprised of Aboriginal people developing guiding criteria, minimum standards, processes and guidelines – with oversight of the process to ensure timely delivery of quality ACH outcomes and
- an ACH Office providing support, guidance and governance of the process to ensure timely delivery of quality ACH outcomes.
POINTS TO CONSIDER AND RESPOND TO

Question 13  Do you agree with this chapter?

Question 14  Do you think strategic mapping and planning is a useful way to get ACH considered earlier in planning processes? If not, how would you like ACH considered in the planning process?

Question 15  Do you agree that decisions about ACH values should be made by Aboriginal people at a local level and included as strategic maps and plans on the ACH Register? If not, what other ways of decision making, mapping and planning would you like considered?

Question 16  Do you agree there should be one state-wide register that holds correlated local ACH information that would inform decision making and assist engagement processes and give proponents access to information at the local level? If not, what would you suggest?

Question 17  Do you agree the recommendations in this Chapter will lead to better ACH conservation outcomes? If not, what other conservation strategies would you like considered?

Question 18  Do you agree that ACH should be assigned levels of value or significance according to criteria developed by the Commission? If not, what would you suggest would be an appropriate way to assist with identifying important areas for management and protection?
Chapter 7  Links with the planning process

Integration with other planning processes

The recommendations for integrating a new Act with the NSW planning system is based on the system proposed within the Department of Planning and Infrastructure’s Green Paper: A New Planning System for NSW (June 2012) (Planning Green Paper). The Planning Green Paper places an emphasis on the coordination of the state, regional and local strategic planning needs. The role of broad community consultation through the proposed Public Participation Charter and greater strategic planning emphasis would lead to consultation occurring earlier, and with less need for community involvement at the latter stages of planning approval processes.

The implication of these proposals for ACH is that knowledge of cultural heritage values across NSW must be readily available at the beginning of planning processes to ensure ACH has the best opportunity to be conserved or impacts minimised. It would be imperative that the LALC, ACHO, ACH Office and the Commission are adequately funded to achieve this quickly. They need to work together to ensure the ACH mapping and planning can be considered within the proposed NSW Planning Policies, Regional Growth Plans, Subregional Delivery Plans, Local Land Use Plans and all other relevant statutory planning instruments. Figure 5 illustrates how the two proposed systems would intersect.

It is recommended it be made mandatory for the ACH Register to be consulted in the development of all strategic planning instruments relating to land, water and NRM at the local, regional and state levels. For example, development of instruments such as the NSW Planning Policies, Regional Growth Plans, Subregional Delivery Plans and Local Land Use Plans, Strategic Regional Land Use Plans (SRLUP), Catchment Action Plans (CAPs) would all use the NSW ACH Register to integrate cultural heritage values into management strategies for the purpose of protecting identified significant areas, and avoiding or minimising harm wherever feasible.

Early consideration or involvement in activities that may involve or impact on ACH values

The recommendations include the early involvement of Aboriginal people in both strategic planning and on a project-by-project basis for ACH matters:

- the ACH Register would include maps and PoMs – the first reference point of information for large land use planning proposals
- proponents would refer to the ACH Register to inform and plan for the requirements of the relevant cultural heritage value(s) in the preliminary project design
• LALCs would communicate the significant places early in decision making processes
• the ability to ‘plan to avoid’ and/or consider ways to minimise ACH impacts early in the planning of the project wherever feasible
• a regulatory system which requires individual projects to ensure:
  – consultation occurs when work is to be conducted in areas with ACH value and incomplete ACH information
  – when harm has been identified as unavoidable an ACH Approval is developed
  – when unexpected ACH objects are located during work/activities the ACH PoMs are followed.

For planning authorities to make informed decisions as they review submissions, they may direct proponents to conduct assessments in areas where ACH information is incomplete, where previous assessments are out-of-date, or where there is contradictory information about the cultural heritage values. Conversely, the planning authorities can waive the need for further assessments where cultural heritage values have previously been assessed or where low ACH values occur in an area.

The recommendations are a fundamental shift away from the rigid ‘one size fits all’ permit system. This process would allow LALCs and proponents to negotiate ‘fit for purpose’ approvals (refer to Figure 6).

Links to the current planning system

This paper proposes ways for ACH matters to be considered earlier in the planning system. There are two main stages within the Environment Planning and Assessment Act 1979 (EP&A Act), where the planning system might interact with a new regime for the protection of cultural heritage values. These are outlined.

Rezoning processes

Currently in NSW, land can be rezoned under either:

1. State Environmental Planning Policies (SEPP’s) made by the Governor at the recommendation of the Minister for Planning and Infrastructure, who determines the level of public consultation over the proposed SEPP or
2. Local Environmental Plans (LEP’s), which are typically developed by the local council and are made by the Minister for Planning and Infrastructure pursuant to the ‘gateway’ process set out in section 56 of the EP&A Act.

It is recommended that:

1. The local council would consider the ACH maps and PoMs, when preparing its rezoning submission to the Minister for Planning and Infrastructure.
2. The Minister would determine whether the LALC and/or the Commission would be consulted on matters of ACH as part of the rezoning process.

ACH Approvals in the rezoning process

In many cases, a proponent will request a local council to commence the rezoning process. In areas where the rezoning was in a low ACH value area on the ACH map, the proponent would proceed with caution without further assessments. In such circumstances, if the rezoning was within an ACH value area or an incomplete ACH information area there would be the opportunity for the proponent to develop an ACH Approval with the LALC at the rezoning stage. This would then govern the conditions under which the land might be developed once the rezoning takes place. Templates and guidelines would be available to assist parties to negotiate the assessment process and drafting of ACH Approvals. Mediation processes and mandatory timeframes would be built into the process to deliver project outcomes.

Where a proponent had an ACH Approval they would provide a copy to the local council at any time during the rezoning process.

When the land which has been the subject of such an early ACH Approval is subsequently rezoned, it could be developed without the need for any further requirements. The local council would not need to refer any development application to the LALC for consultation purposes where the application accords with the ACH Approval. An example of how an ACH Approval might inform the rezoning stage is outlined in Box 2, for rezoning a residential site.
Development application process

Where an ACH Approval is needed, and it has not been obtained at the rezoning stage, it is likely to be sought during the development application (DA) stage in the planning process. A DA is typically the responsibility of the local council to assess and determine within a set timeframe. Negotiations for an ACH Approval would potentially be enhanced at this later stage of the process with access to additional studies (initial heritage assessment, riparian corridor, ecology reports etc). However, the ability to redesign the layout to avoid impacts may be limited at that point in the planning process.

In this recommended model, the integrated assessment process under sections 90 to 93B of the EP&A Act would still apply to a development which requires both development consent and an ACH Approval:

- first, council would refer a DA located within either an ACH value area or an incomplete ACH information area to the LALC
- second, the proponent and the LALC would negotiate draft general terms of approval (GTAs) for the DA and
- third, the LALC would provide GTAs to council for incorporation into the DA consent.

If an ACH Approval is finalised before the development consent is issued, a copy is to be provided to the council which would issue the development consent on terms consistent with the ACH Approval. If the proposed DA is within an low ACH value area, council would not refer the application. It is recommended that appeal rights will be:

- where the issues in dispute over a DA are limited to matters of ACH significance as indicated by the LALC to the council, then an appeal concerning the DA would be first referred to the Commission for mediation before proceeding to the Land & Environment Court, in which case, both the LALC and Commission would have a right to appear in the matter as a party
- where the issues in dispute over a DA include matters of ACH significance and other matters, the appeal may proceed directly to the Land & Environment Court, in which case both the LALC and Commission would have a right to appear in the matter as a party.

Box 2 Process for the Proponent and LALC for a residential rezoning

1. A proponent approaches the local council with a request that a defined area of land be rezoned for residential purposes. The proponent has referred to the relevant ACH maps and PoM (on the ACH Register) and reviewed these in close consultation with the LALC, and informed by heritage assessments.

2. The LALC and proponent agree on measures from the ACH PoM for relevant actions and protection of the heritage values in the project area. These are set out in conditions within the ACH Approval (Approval issued by the Commission and placed on the ACH Register). Where agreements are not reached for either assessment process or drafting an ACH Approval, the Commission would provide mediation processes within the mandatory timeframes (refer to Figure 6).

3. A copy of the ACH Approval is provided to the local council preparing the gateway submission to the Minister to rezone the land.

4. The Minister, satisfied by the ACH Approval that ACH matters have been addressed through appropriate processes conditions in the ACH Approval, does not require additional consultation.

5. The rezoning process continues with the area of land ultimately rezoned for residential uses.

6. Any subsequent development applications (DA’s) for housing or lot release within the ACH Approval boundary need not consider ACH matters, or subsequent ACH Approvals, providing that the development continues to be implemented in accordance with the ACH Approval.

7. A copy of the final report is uploaded to the ACH Register and the ACH map is updated accordingly.
State Significant Development or Infrastructure project processes

State Significance Developments (SSD) projects and State Significance Infrastructure (SSI) projects are determined by the Minister for Planning and Infrastructure. This approval power has been delegated to the Planning Assessment Commission (PAC). Applications for SSD and SSI are administered by the Director-General of the Department of Planning and Infrastructure (DP&I). Both processes ‘switch off’ the current requirement for an Aboriginal Heritage Impact Permit but other parts of the legislation still apply. The Director-General must advertise any application for SSD and SSI for at least 30 days under section 89F and section 115Z of the EP&A Act.

It is recommended that:

- all new SSD/SSI projects would be required to refer to the relevant ACH map and PoM on the ACH Register in their project planning to provide the best opportunities for ACH to be considered early in the process
- any project proposing works that would impact on declared Aboriginal Places or listed State Significant items would require consultation with the Commission and relevant LALC
- all projects within ACH value areas or areas with incomplete ACH information would follow the consultation process recommended in Chapter 5. There would be an option for proponents with existing approvals to transition into this consultation process
- for all new SSD/SSI projects, proponents would choose whether to seek approval for ACH matters either through the current Aboriginal cultural heritage management plan (as is the current SSD/SSI requirement), or develop an ACH Approval for the project
- all SSD/SSI projects would follow these steps:
  - the Commission provides minimum standards to be included in NSW Director-Generals requirements
  - the proponent undertakes the engagement process outlined in Appendix A
  - if the project requires approval by the PAC under current planning legislation and there is disagreement between the proponent and the Commission regarding draft conditions in the ACH Approval, the Commission can provide direct expert advice to the PAC
  - if the project requires approval by the NSW Department of Planning and Infrastructure, and a disagreement emerges between the proponent and the Commission regarding draft conditions in the ACH Approval, then both parties would provide advice to the DP&I.

Key considerations for ACH Approvals in the planning process

An ACH Approval would ‘run with the land’ and be available on the ACH Register by search of Lot or DP. Therefore, land purchasers would know what has been agreed and there would be no need to apply for a new approval for that activity.

The process could allow copies of the ACH Approvals to be provided to local councils to include on the Section 149 Certificates, if councils wanted to include it. Copies of issued ACH Approvals would also be available on the ACH Register.

The streamlined process, with mandatory timeframes, clarity about who to speak to, mediation processes and clear minimum standards, would provide a much easier process for navigating the planning approvals for all parties.

Box 3 provides an example of how early planning at the local government level can lead to positive changes for ACH outcomes.
Box 3 Good plans, good decisions: Protecting heritage, supporting local decision making and facilitating community growth

Local councils in NSW are tasked with developing strategic land use plans to establish how their towns and cities would be shaped. A plan should identify strategies that provide medium- to long-term strategic direction for the growth and change in the local council area, and to address environmental, social and economic issues.

Currently, land use considerations are governed by local environmental plans (LEPs) and development control plans (DCPs). While these are likely to evolve into other planning tools as indicated in the Planning Green Paper, it is envisaged that the recommended ACH maps and PoMs would inform new planning instruments. Unless heritage values are incorporated into databases that local councils can refer to when making their planning decisions, then protection or impact decisions would only occur at the latter stages of the planning process. That is, on a project by project basis; not early or strategically. The review of the NSW Planning System is suggesting amendments to these current processes.

Most local councils do not have inhouse heritage experts to assist in considering or identifying ACH in their area. Traditionally the benchmark for councils has been to include within the LEP a list of sites with buffers identified from the AHIMS database. As a result of limited ACH information being included in the strategic planning considerations, local councils have had limited opportunities to work with local Aboriginal people to plan for the protection of values, areas or natural landscapes that are culturally significant. Instead, frequently, the local councils only become aware of potential and actual impacts to heritage when they receive development applications (DAs) that detailed ACH impacts, which is often too late to devise protection options and strategies.

How would the recommended approach provide different outcomes?

- Identifying the different heritage areas within the ACH mapping would be an accessible data source on the ACH Register.
- Including the ACH data within legally binding instruments, such as the LEP, raises the profile and responsibility for appropriately managing heritage values in NSW.
- Being able to consider heritage values early in the planning process empowers local councils to protect, promote and celebrate Aboriginal culture in partnership with the local Aboriginal community.
- Mapping heritage values would provide clear guidance for local councils as to which developments would require referral to LALCs for consultation.
- ACH mapping would also enable councils to cross check when DAs are submitted, and establish if the applicants need to liaise with the LALC to discuss ACH matters. This is presently not possible and is a major issue for both local councils and LALCs.
- It allows local councils to have the resources to consider ACH matters beyond the current project by project basis, and therefore have greater opportunities to devise management opportunities that seek to protect and celebrate the cultural values in the local area.
- While the ACH mapping and PoM may not provide specific ACH data, they would provide local councils with maps of the heritage values within their boundary. Local councils might identify potential conflicts against mapped heritage values, such as of development release areas, rezoning areas or the like during their strategic planning. In these cases, the council would be required to contact the relevant LALC to discuss management approaches for sustainable cultural heritage. Conversely, the council could also contact the relevant LALC to discuss and to consider ways to respectfully reflect the cultural values where impacts are unavoidable. Examples could include, promoting the heritage and culture by using local Aboriginal names for local street signs, including ACH signage along public walkways, cultural heritage information promoted through local tourist centres and/or develop Aboriginal culture displays together etc.
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<td>Question 20</td>
<td>Do you think the ACH maps and PoM will assist with strategic planning and development processes? If not, what would you suggest to streamline, improve and inform the processes?</td>
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<td>Question 21</td>
<td>Do you agree with the links to the local and state planning processes? If not, what would you suggest to improve these links and increase ACH consideration in the planning process?</td>
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Measures for ensuring conservation outcomes

Under this recommended legislation, the requirement for mapping and establishing local ACH plans of management (PoM) for cultural heritage values creates a platform for commencing strategic and integrated conservation planning. It also supports implementing important cultural heritage functions within the ALR Act. The ACH maps and PoMs would guide activities that support, promote, conserve and protect cultural practice.

Key measures for ensuring conservation outcomes

ACH Approvals can include conditions for ACH protection and conservation, such as:

- conservation outcomes and conditions associated with project areas
- access to maintain or enhance or rehabilitate the values of those areas
- conduct natural resource management (NRM) initiatives
- care or ownership of ACH
  and
- conducting cultural activities.

Voluntary ACH Access Agreements – a non-regulatory approach to negotiate access to privately owned land to:

- maintain or enhance or rehabilitate the values of those areas
- conduct NRM initiatives
  and
- conduct cultural activities.

Existing statutory conservation mechanisms such as:

- Aboriginal Places – to protect places of special significance to Aboriginal culture, on private and public land
- voluntary conservation agreements – an existing alternative NPW Act mechanism to the ACH Approval to protect landscapes on lands that have heritage and/or natural values that are not linked to development proposals
- State Heritage Register Listings – to protect places of significance to the state, including those with Aboriginal, natural or built heritage values, on private and public land.

These mechanisms provide opportunities to enhance partnerships between the LALC and landholders that aspire to support sustainable cultural and natural resource management approaches to land management and can be included as conditions within ACH Approvals regardless of whether the activities are associated with a development approval process.

Appendix B has further information on access and ownership issues.

Development processes

The NPW Act requires anyone in NSW whose actions may affect ACH to take reasonable steps (precautions) to consider if any Aboriginal objects may be present and avoid harm. This is known as due diligence. Information about the due diligence requirements can be found in the document National Parks and Wildlife Act 1974 Fact Sheet 2 – Providing Certainty for the Protection of Aboriginal Heritage through Due Diligence at www.environment.nsw.gov.au/resources/cultureheritage/NPWAct/10702npwfacts2.pdf and the Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales at www.environment.nsw.gov.au/resources/cultureheritage/ddcop/10798ddcop.pdf.
In the current legislation there is a range of defences for the strict liability offence of harming an Aboriginal object. One of these defences is that an activity is classified as a low-impact activity\(^9\) in the NPW Regulation. It is recommended these low-impact activities be included in the new ACH Act and the Act’s effectiveness examined in the required five-year review of the new legislation.

The LALCs will be a local one-stop-shop for consultation on ACH matters for proponents preparing their projects. Clear statutory timeframes for engagement (minimum to maximum) will be set within regulations. The engagement process allows the LALC to choose whether it would like to be consulted on individual projects based on its own local priorities. The data on the ACH Register would allow each LALC to consider both local and state-wide cumulative impacts and values when developing the ACH maps and PoMs, and negotiating conditions within the ACH Approvals.

Consultations would document efforts to negotiate avoidance and mitigation efforts. They would only allow harm as the final option. The Commission would set minimum standards to guide and clarify which factors must be considered when negotiating an ACH Approval.

The process for formalising an ACH Approval would be supported through guidelines and templates developed by the Commission. The ACHO or ACH Office would provide assistance to both the LALC and proponent to ensure the requirements are understood and complied with. The Commission would review and issue ACH Approvals that meet the mandatory requirements within 15 working days. If mandatory timeframes are not met the proponent could proceed with caution. The LALC or proponent may make an appeal to the Land and Environment Court (L&EC).

ACH Approvals could be adapted for the scale and area for each individual project to include, where relevant:

- access and conservation arrangements, protocols (i.e. behaviours adapted to ensure culturally respectful practices, such as men excluded near a women’s area and vice versa)
- how investigation, research, salvage processes should be conducted, identify works not permitted, rehabilitation programs, area maintenance, natural resource management projects
- how unexpected finds should be managed
- identify areas where no further works are required
- voluntary contribution to fund a specified ACH priority identified in the PoM.

ACH Approvals would be considered by the Commission to ensure transparency, timeliness and quality ACH conservation outcomes. All ACH Approvals would be legally binding licences that provide certainty to both parties by ensuring that agreed actions and conditions are able to be monitored and enforced – with clear legal and independent processes to manage non-compliance.

The recommended legislation would allow opportunities for mediation and appeal processes. These processes would include minimum–maximum timeframes to enable fair and transparent processes for mediating solutions in a timely manner. When disputes cannot be resolved between the proponent and LALC, the Commission would consider the matter against the minimum standards and locally identified priorities and values set out in the PoM to find a resolution. A determination of an ACH Approval made by the Commission may then be appealed in the L&EC. Appeals could be made by the LALC or proponent. If the Commission does not resolve a dispute within mandated timeframe of 35 days, the proponent may proceed with caution.

**Assessment requirements and processes**

In the assessment process, it is recommended that when conservation or harm has been identified as part of the due diligence process, the Code of Practice for Archaeological Investigation in NSW (CoPAI)\(^10\) would require a project manager. A project manager may be a person from the LALC, a heritage advisor or the proponent. This project manager would coordinate gathering the necessary information from all parties to fulfil the requirements of the assessment process. They would access the ACH maps and PoMs via the ACH Register. The CoPAI would require the project manager to discuss the cultural heritage values with the LALC prior to developing an agreed investigation.

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\(^10\) Updates to the CoPAI would be required to ensure the changes in approach by the proposed model are outlined (e.g. conservation requirements and processes) but it is not envisaged that all of the CoPAI will be revised.
strategy. The initial cultural heritage value data obtained from the ACH maps and PoMs would be elaborated on for
the project manager. Consultation would require efforts to negotiate avoidance in the first instance, and only conduct
subsurface investigations in areas where mitigation or harm are unavoidable.

In recognition that several disciplines are crucial to assess, protect and manage Aboriginal cultural heritage, people
will be required to have the necessary qualifications, skills and experience for their associated ACH activity.

Any required CoPAI works in an assessment would be undertaken in consultation with the LALC as per the
engagement process outlined in Appendix A, with assessment timeframes negotiated in Stage 2. The CoPAI would
have prescriptive approaches for the ACH Approval process, including scientific criteria for key site types – similar to
the current process. For example, investigations near a rare culturally modified or scarred tree would require different
approaches to investigations of a stone artefact scatter site. Additionally, the proposed works would need to consider
and adhere to the requirements identified in the PoM for the respective area. The heritage advisors would only
conclude the scientific significance of a site or area as guided by criteria within the CoPAI while the LALC would
conclude the cultural value of the site(s) or area.

The intent is for scientific findings to complement and contribute to the ACH maps and PoM on the ACH Register but
not to overshadow the cultural values. The reporting of results arising from CoPAI works would need to meet the
minimum standards for report writing, and all reports must be submitted to the ACH Register. Reporting on the
completed CoPAI requirements provides a further opportunity for the LALC and heritage advisors to discuss updating
the ACH maps and PoMs as necessary.

In instances where research or conservation projects are proposed, and the required approach is not permissible or
appropriate under the CoPAI, the stakeholders would negotiate a methodology to be included in an ACH Approval
with the LALC prior to seeking the Commission’s approval.

**Offences, defences, penalties in the new legislation**

Important factors for developing new legislation include considering how conserving and protecting ACH values can
be encouraged and what deterrents need to be included to ensure people comply with the law. The following are the
offences, defences, exemptions, penalties and powers that are recommended for the new legislation. Many of these
provisions would be retained and transferred from the current NPW Act; some would require amendment.

**Offences and penalties** for the following would be included within the recommended ACH legislation:

- knowingly harming an Aboriginal value identified within the ACH maps and PoMs
- knowingly desecrating Aboriginal values identified within the ACH maps and PoMs
- harming an Aboriginal object, or a nominated or declared Aboriginal Place (whether or not the person knows it is
  an Aboriginal object, a nominated or declared Aboriginal Place) – strict liability
- failure to consult when required
- failure to provide new or updated data to the ACH Register
- failure to comply with an ACH Approval condition.

**Penalties**

- maintain the current penalties regime and alternative sentencing provisions such as publication orders, monetary
  orders and conservation orders.

**Defences**

- following conditions within an ACH Approval
- following requirements set within any relevant code of practice
- undertaking due diligence
- undertaking a low-impact activity as listed in the regulation
- adhering to requirements in the PoM
- complying with orders issued by the NSW Land and Environment Court.
Exemptions (retained from the NPW Act)

The NPW Act provides exemptions to the offences of harming Aboriginal objects and Aboriginal Places in certain circumstances. These are for:

- Aboriginal people and their dependents when carrying out non-commercial traditional cultural activities
- any emergency fire-fighting for bushfire hazard reduction work within the meaning of the Rural Fires Act 1997 that is authorised or required to be carried out under that Act
- emergency activities carried out under the State Emergency and Rescue Management Act 1989 that are reasonably necessary in order to avoid an actual or imminent threat to life or property
- works by, or directed by, authorised OEH officers to protect or conserve Aboriginal objects
- anything specifically required or permitted under the express terms of a conservation agreement entered into under Division 12 of Part 4 of the NPW Act.

Powers

- Reflect the powers in Chapter 7 of the Protection of the Environment Operations Act 1997 (POEO Act):
  - entry powers
  - seize evidence
  - stop-work orders
  - rehabilitation orders
  - powers to direct.

POINTS TO CONSIDER AND RESPOND TO

Question 22  Do you agree with this chapter?

Question 23  Do you agree with the proposed offences, defences, powers and penalties? If not, what would you like to see changed?

Question 24  Do you agree with the recommendation to maintain and strengthen provisions for Aboriginal Places, voluntary conservation agreements and State Heritage Register Listings in order to protect ACH? If not, what other conservation mechanisms should be considered?

Question 25  Do you agree with the recommendation to develop a process that supports voluntary access agreements to be negotiated with private landholders when the land is not subject to a development process? If not, what other processes would you like considered?
Figure 6  Recommended regulatory system for managing Aboriginal cultural heritage

Key
ACH – Aboriginal Cultural Heritage
ACHO – Aboriginal Cultural Heritage Officer (regional)
Commission – NSW Aboriginal Cultural Heritage Commission
Heritage Advisor – a suitably qualified person with a discipline directly relevant to the management of Aboriginal cultural heritage.
LALC – Local Aboriginal Land Council
PoM – Plan of Management for the LALC on the ACH Register
Proponent – A person undertaking an activity such as a development or conservation.

Note: Where mandatory timeframes are not met, the proponent may proceed with caution. When negotiations breakdown at anytime through this process the LALC or proponent can request the Commission mediate the situation.
Chapter 9 Voluntary Funding ACH conservation and outcomes

One of the main objectives of the recommended Act would be to implement a system that not only protects cultural heritage values, it also enables and supports Aboriginal people to continue practising their culture. Funding would be required for the recommended legislation to successfully deliver sustainable and strategic outcomes, as well as move the current system away from an ‘impact focus’ toward a focus on conservation and promotion of ACH values. While the Working Party’s recommendations include administrative structures that government would be required to fund (refer to Chapter 5), identified ACH values to be protected will also require funding. It is acknowledged that while government provides grants for a range of cultural initiatives, it would not be enough to sustain new conservation areas. New innovative ways to fund LALCs responsibility to maintain enhance and protect ACH values should be considered.

The recommendations include allowing the ACH Approvals to consider any or all of the following ways for promoting and protecting ACH values (as well as to avoid, minimise or rehabilitate impacts). It is recommended the ACH Approvals would be flexible enough to allow any conservation and/or sociocultural outcomes listed in the PoM priority list. This is considered by both the LALCs and the proponent to be appropriate for the proposed project to be negotiated and included as conditions in the ACH Approval.

Under the recommended system, funding could voluntarily be offered by the proponent of a project to support ACH enhancement projects identified in the ACH PoM. For example, ACH Approval negotiations could consider the proponent voluntarily funding a project which supported maintaining or improving the local ACH values outside of the impact area, rather than spending the equivalent on collecting impacted ACH objects from within the development impact area. The option to negotiate conditions to provide funds to support local ACH values would be voluntary. It would need to be agreed by the LALC and proponent, and require the support and approval of the Commission. If one party did not agree with the funding option, the Commission would not include such conditions in the issued ACH Approval. The Commission could assist with mediation if requested by either party.

Possible initiatives for funding that may appear in a PoM as priorities are suggested below. However, the manner in which projects are designed is not intended to be prescriptive. Negotiations would be flexible to allow innovative and positive outcomes to emerge that suit both the LALCs and the proponent. The concept of how this would work, and the support for the approach, is outlined below and further in Box 4.

The aim of funding projects is to enhance and maintain local ACH priorities to ensure cultural heritage practices would continue to be supported. Funding could be for projects, such as:

- projects to maintain, rehabilitate, enhance or re-create the ACH values (cultural, natural and built) on Aboriginal-owned land (LALC, IPA etc)
- projects to protect or conserve areas of high ACH value
- assessment projects to identify local ACH values at risk of harm or impact
- projects to conserve significant sites
- tools and resources for the LALC to manage their local priorities
- repatriating ACH objects or ancestral remains projects
- training in cultural and natural heritage identification and management skills
- purchasing land identified as having high ACH values (cultural, natural and built)
- raising awareness in local (broader) community about cultural heritage values in the area
- negotiating informal agreements with local landholders
- projects to promote traditional bush medicines and foods and/or cultural tourism initiatives
- scholarships and mentoring projects.
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A major focus of the Working Party’s deliberations has been to utilise parts of the existing legislative framework that work well, capitalise on the existing infrastructure where possible and provide further support to LALCs. However, it is acknowledged that the recommended legislative changes would require some components to be implemented in a staged approach. Transitional arrangements and varying staged commencement dates for certain provisions would be required. For those elements requiring a staged approach, the relevant processes in the current system would be used as an interim measure.

The NSW Government would ensure that relevant provisions in any new Act do not commence until the following key elements are in place to allow the operation of Act:

- minimum standards, policies, procedures, guidelines and templates
- administrative structures
- ACH Register
  - LALC boundaries
  - Initial ACH maps for all LALC areas in NSW.

If these recommendations are adopted there would be consequential amendments to the:

- *Aboriginal Land Rights Act 1983*
- *Environment Planning and Assessment Act 1979.*
Appendix A  Engagement processes

Triggers for engagement

If, after the due diligence process, an unexpected find occurs during works in an area of low value
1. Stop work.
2. Proponent logs the site details on the ACH Office website for inclusion in ACH Register and then refers to the relevant LALC PoM.
3. If the PoM does not have a management strategy identified listed for the same site type as the unexpected find, proceed with caution.
4. If the PoM does have a management strategy listed for the same site type as the unexpected find, follow the requirements in the PoM.

The proposed mandatory timeframes

- the proponent must register the unexpected find on the ACH Register within 48 hours of its identification.
- the proponent must notify the LALC when required (refer to the PoM) within 48 hours of its identification.
- The LALC must respond and undertake the PoM actions within 10 working days of being notified, or the proponent may proceed with caution.

The due diligence process shows the activity is on an area of mapped ACH value or an area with incomplete ACH information

Stage 1 – Notice to engage
1. Proponent contacts LALC at project inception and provides project details.
2. The LALC has a maximum of 15 working days to provide formal notice of whether to engage or not (15 working days commencing from the first full-day after direct contact was made with the LALC).
3. If the LALC wishes to engage, it would provide the proponent with a range of times and dates to meet (these would be included in the formal response in the 10-day notification).
4. If the LALC notifies the proponent that it does not wish to engage (or fails to respond within the mandatory timeframe), the proponent must adhere to the requirements set out in the PoM as it proceeds with its proposed works with the heritage advisor, as required.

Stage 2 – Initial engagement and develop project plan
5. The initial discussion would be held within 10 working days of receiving all necessary project information and include a meeting between all relevant parties to discuss and develop the project plan (i.e. the steps for gathering additional information).
6. Discussions would include: the project concept, the maps and PoM, cultural and historical connections to the area, archaeological considerations (CoPAI), agreed assessment timeframes and the next steps. These discussions would be guided by a standard template for ACH Approvals available via the ACH Office website. If agreement is not reached it is to be minuted with a list of issues and how/who would address these within agreed timeframes.

Stage 3 – Information enhancement
7. Additional research, investigation, engagement etc (a cultural heritage assessment) would be undertaken to enhance the existing cultural and scientific data (CoPAI).
8. Where disagreement arises from the works not being completed within the agreed timeframes set within Stage 2 (step 6) matters can be referred to the Commission to resolve within a maximum of 35 days. The proponent may proceed with caution if the matter is not resolved by the Commission within 35 days.
9. The LALC and the proponent would be provided with the assessment reports at the same time as the cultural heritage assessment report (with recommendations).

The period of time identified within each mandatory timeframe refers to working days only (i.e. not weekends or public holidays). The mandatory time starts from the first full-day after direct contact was made or applications are received.
10. For reviewing reports and negotiating ACH management, a maximum of 10 working days would be provided to the LALCs to respond to small projects or 20 working days to respond to large projects. The mandatory timeframe starts from the date the report was received by the LALC.

11. The LALC responses to the reports would include initial draft conditions to discuss in Stage 4 about managing the ACH values outlined in the reports in the ACH Approval.

Stage 4 – Development of ACH Approval with conditions

12. The proponent would prepare a draft ACH Approval in negotiation with the LALC.

13. A mandatory 10 working days would start from when both parties are provided with a copy to review and negotiate.

14. Any future revisions of the ACH Approval for both administrative and information edits would include review timeframes negotiated between the LALC and the proponent.

15. When agreement is reached the Commission is provided with copies of the ACH Approval submission with 15 days to determine the proposal. The mandatory timeframe starts from the date the application was received by the Commission.

16. Where agreement is not reached by the LALC and proponent within the 10 days, the ACH Approval is provided to the Commission to resolve within a maximum of 35 days. The mandatory timeframe starts when a mediation application is received by the Commission.

17. If the Commission has not resolved the matter within the mandatory 35 days timeframe, the proponent may proceed with caution and adhere to the requirements of the PoM.

18. Decisions on ACH Approvals may be appealed in the Land and Environment Court.

When consultation is triggered, all parties must keep the engagement documentation with decisions and processes as a defence.

Interactions with other statutory groups

Section 82(2)(b) of the ALR Act should identify other people with other statutory roles who the LALCs must consult. Where this has not occurred, the following would apply:

- Interaction with Native Title holders and/or parties with a valid ILUA if activities are proposed on land identified in a Native Title determination or a valid ILUA, then engagement with the Native Title holders and people identified on the valid ILUA parties must occur.

Engagement would also occur with the LALC in order to inform the LALC of the decision. The decision making around the ACH Approval remains with the Native Title holders/ILUA holders and the Commission would review and issue the ACH Approval.
Appendix B  Access, care and ownership

Ownership
In relation to the issue of ownership of Aboriginal cultural heritage, it is recommended the legislation include:

1. Statements of acknowledgement and recognition consistent with the preamble of the NSW Constitution.

2. Recognition that Aboriginal cultural knowledge is part of Aboriginal cultural heritage and includes:
   - specific knowledge about places and objects
   - knowledge about natural resources and processes, food sources, medicine, biodiversity, land management and landscape functions
   - knowledge about language, cultural traditions and social processes.

3. The transfer of ownership of salvaged Aboriginal cultural heritage/objects from the Crown to the Commission.

4. The Commission would:
   - be vested ‘in trust’ with the ownership of Aboriginal cultural heritage/objects on behalf of Aboriginal people of NSW
   - be required to make decisions according to legislated minimum standards
   - have the ability to return ownership (real property or otherwise) of the Aboriginal cultural heritage/objects to the relevant Aboriginal people
   - have the ability to include ‘care and control’ conditions within ACH Approvals (regardless of development activity)
   - include those persons considered to be the rightful cultural owners/custodians on the ACH Register
   - have responsibility for managing Aboriginal cultural heritage/objects and
   - have the authority to delegate some management functions to others including Aboriginal communities.

5. When rightful cultural owners/custodians secure ownership of Aboriginal cultural heritage/objects the regulatory provisions of the Act would to continue to apply to those objects.

6. The Minister for the Environment and the Minister for Lands would be empowered to have discretion to vest ownership of unmovable ACH sites on national parks and/or crown lands to those Aboriginal people identified as the rightful cultural owners.

What does this allow?
- Affords recognition of Aboriginal peoples rights to ‘own’ and be responsible for managing their cultural heritage/objects
- Provides for the devolution of formal crown ownership of Aboriginal cultural heritage/objects to the Commission
- Provides for the Commission to act as a trustee until care and ownership of Aboriginal cultural heritage/objects can be agreed with the rightful cultural owners
- Provides for the Commission to act as a trustee and include care and ownership conditions in ACH Approvals for LALCs
- Establishes a new form of ‘cultural ownership’ that provides for the capacity to regulate aspects of cultural property (both physical and intangible) without impinging on the real property rights of landowners and
- This avoids impinging on individual beliefs and rights to culture and as such does not cover the individual aspects of Aboriginal cultural heritage.
Care or ownership of objects in ACH Approvals

Care and ownership would be incorporated into the conditions of an ACH Approval. Those conditions would provide for the transfer of Aboriginal cultural heritage/objects to registered Aboriginal owners under the ALR Act or to LALCs under the new legislation.

Care or ownership may be negotiated as a condition of an ACH Approval:

- in order to effectively care for and control Aboriginal cultural heritage/objects that are located or salvaged from development or any other type of activity that would impact on the landscape.
- in order to more appropriately care for Aboriginal cultural heritage/objects that have been temporarily stored elsewhere.
- in order to appropriately care for ancestral remains that are unearthed due to or during development or any other type of activity that impacts on the landscape.
- as part of a repatriation activity to return Aboriginal cultural heritage/objects and ancestral remains back into community ownership.

Recommendations and strategies from LALCs and heritage advisors regarding short and long-term management of Aboriginal cultural heritage/objects would be discussed with the proponent during the development of an ACH Approval prior to commencing any activity.

The Australian Museum may also assist by agreeing to hold Aboriginal cultural heritage/objects collected according to the conditions of an ACH Approval until such time as the LALC is able to take full care and ownership. This process must follow the Australian Museums Archaeological Collection Deposition Policy and Protocols for the Deposition of Archaeological Materials.

Access to land

Education

Both private and public land owners can play a crucial role in protecting and managing, and access to, land containing Aboriginal cultural heritage values. However, education and awareness programs are required for both the Aboriginal community and private landholders. An education program needs to be developed for the Aboriginal community outlining existing mechanisms for negotiating access opportunities. For private landholders, an awareness program is required to outline their requirements to protect ACH values on their land and the potential sources of funding that can support cultural heritage conservation outcomes. For the general public, greater awareness is required about the benefit of protecting ACH and providing access that supports cultural practices and increases knowledge about the importance of ACH to the state.

It is recommended that support is maintained for those government programs that protect native vegetation, biodiversity, land, rivers and coastal waterways by engaging Aboriginal people to assist with management of Country such as joint management and hand/lease-back programs for national parks. It is also recommended that the Aboriginal Places (APs) and voluntary conservation agreement (VCAs) provisions within the NPW Act are retained and strengthened, with a greater emphasis placed on promoting the opportunities that APs and VCAs provide for protecting Aboriginal cultural heritage values (tangible and non tangible heritage and natural values) and the opportunities to support access to private land. It is also recommended that the State Heritage Register (SHRs) listings as per the NSW Heritage Act 1977 are retained. SHRs provide a high level of protection and also provide for public access to places of ACH state-wide significance whilst assisting with promoting the benefits of protecting ACH.
This approach, combined with early engagement and decision making by Aboriginal people to manage cultural heritage, provides a whole system approach which supports access to land for cultural practices in the following ways:

- benefit of establishing and maintaining the ACH maps and plans, by each LALC that informs negotiations with proponents of any cultural conservation strategies, including access to Country via an ACH Approval
- the requirement within minimum standards for all ACH plans to negotiate possible access to land would provide more opportunities to develop meaningful access to public and private lands; in addition, the ability of the LALC to develop informal voluntary ACH Aboriginal Cultural Access Agreements with private or public landholders to assist in access to Country, provide better outcomes for NRM and cultural wellbeing for Aboriginal people
- the NSW Government would continue to support the development of co-management/joint management arrangements for parks/reserves
- the existing structures, programs and funding (with or without some amendments after gaps/benefits analysis is undertaken) continue to be funded and supported to assist Aboriginal people gaining access to lands and waters for maintaining and practising cultural knowledge of, and on, their traditional Country
- this approach is also consistent with a number of minimum accreditation standards proposed by the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* review.

**Access to land for cultural purposes**

The ACH maps and plans developed by the LALC would be updated by the LALC, supported by Regional Aboriginal Cultural Heritage Officers (ACHO) who are employed and supervised by the Commission prior to referral to government for approval. This approach provides three avenues for Aboriginal people to access Country:

1. **Access to Country through a condition in an ACH Approval for land associated with developments (including associated offsets), crown and public lands**

   With the benefit of ACH maps and plans, each LALC would be in an informed position to negotiate with proponents and execute an ACH Approval. Along with conservation strategies and/or sociocultural outcomes, access to Country for cultural heritage activities could be negotiated via specific conditions in the ACH Approval. Any negotiated outcomes would be required to be reviewed by the Commission according to minimum standards before being recorded on the ACH Register.

2. **Voluntary Aboriginal Cultural Heritage Access Agreements for private land not associated with development activity**

   If the mapping process identifies access requirements within the LALC area that are not subject to a development, or where there is not a requirement to have an ACH Approval, the LALC may be able to negotiate with landholders and develop a voluntary ACHAA to access lands, regardless of tenure, for cultural heritage and NRM activities. These agreements would be noted on the ACH Register, and may be withheld from public access if the two parties stipulate that request.

   It is intended that to assist in better informing local communities, government and proponents, all programs, initiatives and legislative provisions that currently exist should be reviewed, and amended where required, to ensure standardisation and consistency in language and criteria and to identify any gaps or further opportunities for Aboriginal people to access Country. This could also involve developing and endorsing a standardised state-wide *pro forma* of a voluntary ACHAA.

3. **Access to crown and public lands that are not subject to development through access conditions in a ACH Approval or voluntary ACHAA**

   If the mapping process identifies access requirements to public land for cultural heritage and NRM activities the LALC can negotiate with the public land manager and, if agreed, develop either a voluntary ACHAA or an ACH Approval if that was deemed to be more appropriate by both parties.