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**Creating for Generations**

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Ms Catherine Allen  
Director  
Heritage Policy Branch  
Policy Division  
Office of Environment and Heritage

Dear Ms Allen,

A handwritten signature in blue ink that reads "Catherine".

## **Aboriginal Cultural Heritage Reforms 2018**

We welcome the development of a new streamlined system for Aboriginal cultural heritage protection and development approvals in NSW. It is our position that tangible and intangible Aboriginal values are protected and the process by which these values are protected and integrated into our current planning system.

Industry is pleased to see the establishment of a new approach that draws upon the principles of respect for Aboriginal culture, legislative balance, government efficiency, and strategic planning for heritage protection.

Our focus is in ensuring that new system and associated bodies operate efficiently and transparently in ensuring the protection of Aboriginal Cultural Heritage and do not unnecessarily delay or add additional cost to the development process.

The *Aboriginal Cultural Heritage Bill (2018)* (ACHB) will modernise NSW's regime for protecting and conserving Aboriginal cultural heritage (ACH). The new definitions of ACH, ACH significance, Aboriginal object and intangible ACH show a more sophisticated understanding of Aboriginal culture than the equivalent definitions in the *National Parks and Wildlife Act 1974*.

The Aboriginal Cultural Heritage Authority (ACHA) and Local ACH Consultation Panels (Consultation Panels) will vest day-to-day administration of the Act and most decisions concerned with ACH in Aboriginal people.

The new planning pathway will bring questions on ACH to the start of the development approval process and minimise the risk that projects are derailed by unexpected ACH issues. Significantly increased penalties for offences under the Bill will deter non-compliance.

Overall, we support the reforms to ACH system. Without the proposed regulation and the Authority Code of Practice, the structure of Aboriginal Cultural Heritage Management Plans (ACHMPs), the ACHA's Negotiation Framework, or key guidelines on the assessment of heritage value, it is difficult to comment on the full effect of the reforms. Once these documents have been created and released, the Property Council is happy to provide further comment and a complete position can be provided. This submission will identify areas that require further review and development and some recommendations, including:

- The formation and operation of the ACHA and Consultation Panels
- The creation and maintenance of data, maps and information systems
- The creation of strategic plans and conservation tools using consistent values
- The development of a robust dispute resolution pathway
- The appropriate collection and use of contributions made through ACHMPs
- The concurrent assessment of ACH with a DA.

If you would like to discuss this submission further, please contact William Power (Manager, Communications and Policy) on 0429 210 982 or [wpower@propertycouncil.com.au](mailto:wpower@propertycouncil.com.au)

Yours Sincerely,



**Jane Fitzgerald** – NSW Executive Director, Property Council of Australia



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## **1. Formation of Aboriginal Cultural Heritage Authority and Local Consultation Panels**

The formation of the Aboriginal Cultural Heritage Authority (ACHA) that will oversee Local Consultation Panels (Consultation Panels) is a good development and one that was supported in the Property Council's 2014 submission. Consultation Panels and the ACHA should provide Aboriginal people legal responsibility for and authority over Aboriginal cultural heritage.

The effectiveness of the entire regime will largely turn on the efficiency and effectiveness of the ACHA.

It is difficult to comment on the operation of the ACHA and operation of Consultation Panels without viewing regulations or a Code of Practice. A clear delineation of responsibility, timeframes to frame efficient responses to proponents and other bodies, a robust dispute resolution framework and clear communication to planning authorities and integration into the planning system will be critical.

The governance structures within the bodies of both the panels and authority will also be critical to ensure the timely assessment of applications and the formation of ACHMPs. Without these elements, decision making could slow development timelines.

It is important that Consultation Panels have the support of resources and guidance of Local Aboriginal Land Councils as they are the key contact point for proponents. The Consultation Panels remit is significant and in areas of higher development the workload may be large. It is important that the appropriate support, expertise and resources are provided to local Consultation Panels. Support may also be required from Office of the Environment and Heritage and/or the Department of Planning on the best approach to internal governance, process management, resourcing and decision making.

### **Recommendations**

- That appropriate resources and support is provided to Local Consultation Panels to ensure they can operate efficiently and accurately
- That support and advice is provided by Office of the Environment and Heritage and Department of Planning to both the ACHA and Consultation Panels.

## **2. Better information systems**

A consistent, thorough mapping approach across NSW is critical to the effectiveness of these reforms. The draft Bill requires the ACHA to prepare and publish a NSW Aboriginal Cultural Heritage Map that identifies land with known and likely presence of ACH values, but does not publicly identify specific locations or details about those values. There must be mandated timelines outlined on the creation of the maps, their alignment with clear preparation guidelines and their publication.

It is imperative for mapping to occur and be completed prior to the commencement of the new system so that ACH can be functionally integrated within the planning system, at both strategic and assessment stages.

Relatedly, there must also be clear timelines for the creation of Local Aboriginal Cultural Heritage Maps and clear regulatory requirements to ensure their consistency and accuracy.

Inconsistencies and mistakes will occur if there is a misalignment between local maps, Strategic Plans and state-wide maps, undermining the reforms.

The access to maps, Strategic Plans and other data should all be accessible online and the maintenance and integrity of this information is critical. The regular audit and updating of material should be a key part of the ACHA's work.

### **Recommendations**

- That a timeframe is set on the completion of NSW Aboriginal Cultural Heritage Map and Local Aboriginal Cultural Heritage Maps and their alignment and they are completed before the start of the system.
- The regular audit and updating of materials including maps should be a key part of the ACHA's work, identifying inconsistencies in the system and updating any changes.

### **2.1 Develop standard definitions of values**

The interpretation of heritage values and impact of activity will be central to dispute resolution and appeal determinations.

Any assessment of ACH values – whether in ACH Maps, Strategic Plans or ACH Management Plans – needs to be balanced alongside other values within the State.

The proposed regulations should outline how differing categories of values will be defined by the ACHA as part of state-wide standards for assessment, just as those values that are exempt are defined and listed for a proponent to view.

This will be particularly important in the three tiers of Management Plans – basic, standard and complex. Different tiers will determine the level of detail and investigation required during the ACH assessment and so a consistent and transparent approach to how values are assessed is critical.

Standard definitions of values and impact would provide a clear context for local communities to establish and communicate what is of value and how those values are best protected. It also

provides uniformity of terminology across the State, thereby facilitating greater certainty to development assessment processes.

If values and impact are not defined clearly and concisely, they will be subject to variable interpretation at the local level. This would lead to poor assessment decision-making and increased appeals.

We recommend that clear definitions of values and impact are developed by the ACHA in consultation with legal experts, Local Consultation Panel representatives and industry.

### **Recommendations**

- That a clear definition of values is developed by the ACHA in consultation with legal experts, Local Consultation Panels representatives and industry
- That these values are consistent across the state and feed into conservation tools, ACH Strategic Plans and ACHMPs.

## **2.2 Consistent, compulsory Strategic Plans**

Consultation Panels will be encouraged to develop ACH Strategic Plans either individually or collectively at appropriate regional scales. Strategic plans will proactively identify conservation priorities within local areas for the purpose of influencing and informing government agencies or public authorities, such as planning authorities, public land managers and infrastructure providers in making planning and resource management decisions.

These plans are critical to guide good decision making at a local level and should be compulsory. Much like Local Environment Plans within the mainstream planning system, there must be mandated timeline on the creation and updating of these plans. Should a Local Consultation Panel fail to create or update the plans within a designated time, the ACHA should have the power to step in and create the local plan. If this is not the case, then the absence of a ACH Strategic Plan will undermine the reforms, their integration within the planning system and could slow the development process.

In addition, the plans must be consistent across the state both in their structure and type of content. This will create efficiencies for development proponents and public authorities as ACH Strategic Plans are considered for planning purposes from region to region.

### **Recommendations**

- That the creation of ACH Strategic Plans should be compulsory for each Local Consultation Panel/s
- They should be created and approved within a mandated timeframe
- The ACHA should have the power to step in and create the local plan if the Local Consultation Panel fails to create one.
- The ACH Strategic Plans must be consistent across the State both in their structure and type of content on a standard template.

### 2.3 Conservation Tools

Three conservation tools will be part of the new model; Declared ACH, ACH Conservation Agreements and intangible ACH agreements. The two most relevant to development are Declared ACH and Conservation Agreements. Declared ACH will be for particularly high value heritage sites where development is allowed, but only under exceptional circumstances. ACH Conservation Agreements will be for other sites where the landowner and ACHA can negotiate an agreement on how to best conserve the heritage value.

Both new tools underline the importance of establishing a consistent assessment of values across the state to ensure consistency and avoid disputes.

The new tool, Declared ACH, is an important aspect of the reforms to protect Aboriginal heritage replacing what is currently known as Aboriginal Places established under the *National Parks and Wildlife Act 1974*. Any Declared ACH considered by the ACHA and recommended to the Minister must be based on a consistent and uniform value so that each decision can be assessed and there is consistency and transparency in decision making.

Although under the draft Bill, the landowner, local planning authorities and the Local Consultation Panel must be consulted, there is considerable detail required in the regulations as to how this process will be convened, under what timeline and under what consistent and uniform guidelines to heritage values.

ACH Conservation Agreements will provide flexibility in approach to protecting heritage.

While it is positive that ACH agreements, once registered, will run with the land (so all subsequent owners have the benefit of them), that tenants and mortgagees have to agree to each agreement and every variation is exceedingly onerous and unworkable in practice. The obligation should simply be that notification of the agreement must be provided to tenants and mortgagees. Whether this means that once an agreement is in place, it has to be novated or assigned to every new tenant and mortgagee is unclear – again, this will be practically unworkable.

### Recommendations

- The obligation should simply be that notification of the ACH Conservation Agreement must be provided to subsequent tenants and mortgagees on the land rather than having to agree to each agreement and every variation.

### 2.4 Transparent Aboriginal Cultural Heritage Management Plans (ACHMPs)

- To be negotiated between proponent and Local Consultation Panel
- May be basic, moderate or complex depending on heritage value and size of development
- Supported through the Negotiation Framework, ACHMP templates, mediation services and mandatory timeframes (yet to be developed)
- Will be assessed and approved by the ACHA against clear standards and guidelines.

The outlined timeframes for consideration and approval of ACHMPs are important to ensure an efficient process. The ACHMPs must be transparent, consistent and align with guidelines agreed by industry, the Authority and local panels. The proponent and the public must be able to see a clear nexus between what has been agreed within a ACHMP and outcomes for Aboriginal cultural heritage including any conservation agreements or funding contributions

It is not presently clear whether ACHMPs will run with the land. Currently there is considerable uncertainty about whether AHIP's run with the land so that subsequent owners and developers can take the benefit of them. The general view is that they are personal to the applicant and have to be re-issued to each subsequent owner/developer. This is highly unsatisfactory and should be remedied in the new legislation. That does not appear to have occurred because section 53(2) of the ACHB provides:

*An amendment of an ACH management plan may change the proponent or class of proponents authorised by the plan to harm Aboriginal cultural heritage. If the proponent of an activity changes because of a change in the ownership of the land concerned, the new proponent is entitled to an amendment of the plan to authorise the new proponent to harm that heritage in accordance with the existing terms of the plan.*

This suggests that an application has to be made to change the name of the holder of the management plan, rather than an automatic "transfer" of the management plan to subsequent owners/developers as should be the case.

## **Recommendations**

- That ACHMPs run with the land.

### **3. Flexible ACHMPs**

We understand that the ACHA will be responsible for identifying ACH funding priorities and allocating funding from the ACH Fund.

We recommend a standard schedule of items for funding ACH be established by the State and ACHA – in consultation with Local Consultation Panel representatives, industry and expert advisors – from the outset.

This would ensure that:

- there is nexus between a proponent's development and its direct impact on ACH
- funds collected are invested based on their intended use, and
- Project Agreements are not held up unnecessarily due to funding disputes.

The schedule of funding could still provide the flexibility needed for ACH preservation activities, and allow local communities to prioritise their funding needs. It would provide a framework for parties to ensure that appropriate resources are committed to conservation efforts, and diminish the occurrence of disputes in the process and could provide a structure for the ACHA's three year Funding Strategy (to be developed).

This approach will complement the creation of discrete accounts that will have different funding sources and management arrangements appropriate to their intended purposes.

Both will assist in ensuring transparency.

#### **Recommendations**

- That a standard schedule of items for funding ACH be established by the State and ACHA
- That a clear nexus is shown between funding contributions and outcomes for ACH.

#### **4. Develop a robust dispute resolution framework**

The Property Council welcomes the provision of mandatory timeframes for response periods on ACHMPs. However, clear dispute resolution options need to be established.

Currently there are no formal procedures to resolve disputes that arise in relation to the management of ACH.

Section 51 of the ACHB provides for dispute resolution. If the dispute is between a development proponent and the Local Consultation Panel, either party may request the ACHA to appoint an independent mediator to assist.

It is noted that further details of dispute resolution procedures will be contained in the regulation, not the Bill, and will be open to public feedback in the future.

There needs to be a definite dispute process for those times when negotiations break down irreconcilably.

It is essential that dispute resolution exists where due diligence for each regulatory step occurs. We strongly recommend a broad framework be developed to address areas where potential conflict could arise such as:

- a lack of alignment or technical differences between a ACHMP and an ACH Map (state or local)
- inconsistent decision-making between local consent authorities
- a break down in discussions regarding a ACHMP
- where retrospective decision-making could arise after the mandatory response period to a proponent has lapsed (deemed refusal).

A robust dispute resolution framework would provide the foundation needed to deliver an efficient and effective system. We support the right to appeal to the Land and Environment Court but this should be considered a final port of call.

#### **Recommendations**

- That a robust dispute resolution process is formed and implemented



## **5. Allow DAs to proceed while Aboriginal Heritage processes are taking place.**

Development applications should be allowed to be lodged under the reforms in lieu of a finalised ACHMP.

Requiring proponents to wait to lodge a DA until the ACHMP process is finalised could undermine the feasibility of projects. Finance and pre-commitments are often dependent on development consent and projects might take years to progress if a Court appeal process has to be undertaken before a DA can be lodged.

Development Applications should progress concurrently with the Aboriginal Heritage process, not following its conclusion. Proponents should simply be required to attach recognition from the Local Consultation Panel that an application has been lodged. The Local Planning Authority and the Local Consultation Panel or ACHA can then communicate during the process to ensure a uniform approach.

Further guidance is also required in the future regulations as to how a planning authority is to manage a situation where a change is imposed to a proponent's application that may affect ACH values being considered by the ACHA. This process has the capacity to dramatically slow DA approvals and requires clarification and a clear pathway.

### **Recommendations**

- That the Aboriginal Heritage process can run concurrently with a Development Application
- That further guidance is provided in the Regulations on the process to follow if a planning authority imposes a change to a proponent's application that may affect ACH values being considered by the ACHA. This should include mandated timeframes on this process.