

Thursday 17 April 2014

Ms Sally Barnes
Chief Executive
Aboriginal Cultural Heritage Reform Secretariat
NSW Office of Environment and Heritage
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Dear Ms Barnes,

Reforming the Aboriginal Cultural Heritage System in NSW

Thank you for providing the Property Council of Australia with the opportunity to comment on *Reforming the Aboriginal Cultural Heritage (ACH) system in NSW – A NSW government model in response to the ACH Reform Working Party's recommendations and public consultation*.

The Property Council is the nation's peak representative of the property and construction industry. Our 2,200 members are Australia's major investors, developers and owners of commercial, residential, retail, industrial, retirement living and hotel assets worth over \$320 billion.

We welcome the development of a new streamlined system for Aboriginal cultural heritage protection and development approvals in NSW. Industry strongly supports a root-to-branch overhaul of legislation and governance arrangements to introduce a contemporary understanding of ACH, and its integration within the broader planning system.

This reform seeks to address the failings of the current system by introducing stand-alone legislation with updated definitions of ACH that reflect both tangible and intangible values. 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.

We understand that this reform will align with the Commonwealth's current reform of national Aboriginal cultural heritage legislation. This will ensure that duplication will be mitigated from the outset, and we encourage that this is reflected in the Draft Exposure Bill to be released.

The proposed model has communicated the need for a new administrative system to deliver reform of this scale. Independent oversight is critical to delivering certainty and clarity for all stakeholders, and we emphasise the following top-line recommendations for inclusion in the model:

- incorporate a hierarchical governance structure with clear checks and balances to deliver seamless decision-making at the local level - this is crucial to addressing road-blocks where disputes may arise within Local ACH Committees, and
- ensure the regulatory framework includes broader planning DA requirements such as re-zoning protocols to deliver the streamlined and integrated system imagined.

On balance, we support the proposed framework for a new ACH system but have identified critical areas that demand further review and development. Our recommendations outlined in detail below focus on:

- establishing independent oversight
- addressing gaps in the assessment framework
- formalising integration in the broader planning system
- setting standard definitions of values
- cementing flexible project agreements
- developing a robust dispute resolution framework.

We understand next steps involve the finalisation of the Draft Exposure Bill for public consultation. The Property Council looks forward to continuing to work closely with the Office of Environment and Heritage for the successful implementation of a modern and streamlined ACH system.

If you would like to discuss this submission further, please contact me on (02) 9033 1906 or gbyres@propertyoz.com.au, or Amelia Jalland (Senior Policy Advisor) on (02) 9033 1951 or ajalland@propertyoz.com.au.

Yours sincerely,



Glenn Byres

NSW Executive Director
Property Council of Australia

RECOMMENDATIONS TO REFORMING THE ACH SYSTEM IN NSW

1. Establish independent oversight and a clear governance hierarchy

Comprehensive legislative reform can only be achieved if associated governance structures are re-designed. And, a new Act introduces an opportunity to overhaul red-tape and introduce a contemporary system.

The proposed model seeks to leverage existing arrangements by introducing an Aboriginal Cultural Heritage Advisory Committee and a Heritage Division within the Office of Environment and Heritage. However, this would put the new system at risk of inheriting existing challenges to the detriment of reform objectives.

The Property Council recommends the Government adopt the Working Group Party's recommendation to establish a NSW ACH Commission supported by an ACH Office within Government, as this would provide a level of independence, oversight and balance of policy implementation that would benefit all stakeholders in the process.

Although new governance structures demand upfront investment, a Commission and an Office would secure the long-term dividends that reform offers. A new administration with independent oversight would:

- strip existing costly red-tape and cleanse systematic blockages
- adequately resource personnel and processes required to deliver implementation
- introduce checks and balances to administer reform
- facilitate relations among all those involved in Aboriginal heritage assessment, including within the indigenous community as well as Government and industry
- secure appropriate autonomy from competing agency priorities.

It is essential there be a governmental authority with the role of balancing the responsibilities of the State – planning, infrastructure needs, the environment, and heritage – so that growth can be fostered for the future.

If the Commission is not regarded as a viable option for budgetary reasons, the Office of Environment and Heritage needs to have the ability to perform the functions and role envisaged for the Commission by the Working Party.

This is crucial to implementing the checks and balances required for a modern system. Circuit breaking mechanisms are absent in the model, and the Discussion Paper does not outline how decision-making disputes that could occur within Local ACH Committees would be resolved effectively and efficiently.

Governance arrangements must be reviewed further to ensure a clear hierarchy of oversight is established. This would guarantee that implementation occurs as it is intended and the assessment framework envisaged delivers certainty.

We recommend that the Working Party be established as a Standing Committee that can continue to provide guidance on the development of a new system, its framework and policies.

Recommendations

Adopt the Working Party's recommendation to establish a NSW ACH Commission supported by an ACH Office within Government.

And, transform the Working Party into a Standing Committee to provide continued guidance for reform implementation.

2. Address gaps in the assessment framework

In principle, the proposed assessment framework would deliver a more balanced approach to heritage assessment. We support in particular:

- the proposed function of Local ACH Committees as a one-stop shop for local heritage mapping and approvals would provide a coordinated approach for consultation
- upfront conditions of consent on regulatory pathways and requirements for project agreements
- a hierarchy of planning where local decision making and project agreements are fit for purpose but guided by State minimum standards, code of conduct, and timeframes.

However, we believe compliance measures beyond minimum standards and mandated timeframes are must be developed to deliver an efficient assessment framework.

The following areas require further review:

1. The onus is on the proponent to liaise with heritage advisors and undertake assessments to inform Project Agreements between Local ACH Committees and proponents. Yet, the role of the Committees is to map local areas from the outset. It should be reinforced that Local ACH Committees bear the responsibility for assessment. Adequate resources need to be provided to Committees to develop Plans of Management and ACH Maps early on to promote certainty and clarity in the regulatory process.
2. Cross-agency engagement is required to integrate ACH pathways in the broader planning system. Strategic collaboration between consent authorities is needed to deliver streamlined conditions in regional and local planning instruments. The development of standards must include re-zoning requirements to ensure that ACH Maps and Plans of Management are concurrent with the broader DA system to prevent unnecessary duplication and delays in decision-making.
3. A pathway to address misalignment between Plans of Management and ACH Maps is absent from the proposed model. Heritage Advisers should be charged with project coordination responsibilities to ensure any gaps or difficulties that arise during mapping are resolved at the time.
4. Local ACH Committees and proponents would be required to comply with CoPAI and State-wide assessment and negotiation standards, but it is unclear as to how these procedures would be

managed. To reduce the risk of assessment being drawn out and falling into dispute resolution, we recommend that Heritage Advisors are appointed to oversee complex projects.

5. As discussed earlier in this submission, the model does not provide a clear resolution framework to address decision-making disputes that could arise within Local ACH Committees. We recommend a clear governance structure of State oversight is articulated, as well as the development of a robust dispute resolution framework (see Point 6 for more detail).

Provide resources and timeframes for early mapping

The proposed regulatory framework for mapping provides upfront direction on strategic land-use planning. Industry welcomes the Government's proposal to support approval processes with State-approved ACH Maps and Plans of Management.

However there needs to be greater incentive to complete the mapping process, rather than leave it to a residual category of 'Incomplete ACH Value'. This 'residual' approach will mean that ACH values and maps will be developed on an *ad hoc* basis in response to the demands of development.

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.

We support the Government's intent to establish the register and undertake mapping prior to the new system coming into effect. But, timeframes need to be set for the development of maps, with appropriate resources committed for their development and finalisation.

While a commitment to early mapping of ACH across the State may demand upfront investment, the expense will be rapidly paid off in faster development assessment times and greater certainty among all stakeholders. Plans of Management will be clearer and therefore more useful, as they will be made according to known data, and not reliant upon abstract formulations about unknown circumstances.

Once the timetable for mapping is complete, development should be able to proceed with caution in areas of 'Incomplete ACH Value' without the need for further regulation under ACH procedures, save where finds are made as development proceeds.

Define 'non response'

A concerning issue which needs clarification is where a proponent does not receive a response from a Local ACH Committee within the required decision-making timeframe the proponent could proceed with caution according to the Plan of Management.

This is an ambiguous compliance measure that would likely result in appeals. For example, a proponent could be subject to an appeal after works have occurred on the basis of a response being issued but not received. Or, a response could be issued on the basis of decision-making still pending without a clear resolution outcome.

The procedures for providing a response and lines of responsibility for delivering the response need to be clearly stated so that Local ACH Committees and industry know when a response has been received or not.

We strongly recommend that clear standard terms and conditions that define 'non-response' are developed.

Recommendations

Review the assessment framework further to:

- reinforce Local ACH Committees' assessment responsibilities
- provide resources and timeframes for early development of Plans of Management and ACH Maps, with the ability for development to proceed with caution if timeframes are not met
- establish cross-agency collaboration to integrate ACH pathways in the broader planning system – and incorporate re-zoning and broader DA considerations in State ACH standards for local decision-making
- articulate clear governance structures with circuit breakers to address decision-making disputes that could arise at the local level
- award Heritage Advisors with coordination oversight of local mapping procedures and complex project agreements
- establish clear standard terms and conditions to define 'non-response' by a Local ACH Committee as a condition of consent.

3. Formalise integration in the broader planning system

The Government supports the Working Party's recommendation to integrate ACH assessment within the broader planning system, and we believe that this should be formalised. As noted above, integrating heritage measures within the overarching planning system would deliver streamlined strategic land-use planning.

We recommend that ACH standards for assessment are developed in consultation with Planning and Infrastructure NSW for a seamless system – as it will be necessary to balance the various needs of the State and its economic progress.

As aforementioned in this submission, the model must incorporate re-zoning and broader planning requirements to ensure alignment, and the delivery of a seamless system. Without integrated strategic planning, reform objectives will not be achieved. As a result, we reinforce it is crucial that mapping is expedited and completed prior to the new system coming into effect.

We support the Working Party's recommendation that ACH Maps must be considered in all statutory planning instruments and processes. Although planning reform has stalled, integration can occur via regulation by:

- building overarching values into regional plans from the outset to set the direction of priorities for sub-regional and local planning controls
- coordinating policy development with other concurring agencies to ensure full integration of DA requirements and standards for harmonious alignment
- reinforcing 'switch off' points for heritage approvals in DA assessment to ensure clarity for timely local decision-making
- requiring councils to issue statements to proponents outlining what is needed where they may require greater heritage assessment to determine DA consent, and
- as proposed and strongly supported by Industry – linking ACH mapping with the Government's ePlanning website.

We welcome the Government's proposed development of a central register for ACH Maps, Plans of Management and relevant data from concurring agencies.

It is crucial that the register is underpinned by a statutory framework that includes mandating data quality, standards and conditions for all stakeholders. And as a result, we recommend that clear communication and circulars are issued to agencies, local councils, and industry in advance with sufficient lead time for implementation of changes.

Recommendations

Develop ACH standards for assessment in consultation with Planning and Infrastructure for formal integration.

And, issue clear communication of reform changes to all stakeholders with sufficient lead time for implementation.

4. Set standard definitions of values

We support the concept that ACH Maps and Project Agreements would be allocated statutory weight and deemed binding. As a result, the interpretation of heritage values and impact of activity will be central to dispute resolution and appeal determinations.

We applaud the principle that ACH values are best expressed by local Aboriginal communities.

However, any assessment of ACH values – whether in ACH Maps, Plans of Management or Project Agreements – needs to be balanced alongside other values within the State.

While the establishment of the ACH Commission or other supervisory body as described above will assist this, greater clarity and certainty will be created if the definitions of values are given statutory definition.

The proposed model should outline how differing categories of values will be defined by the State as part of State-wide standards for assessment.

In the same vein, the Government's proposed model intends to include a statutory list of activities for exempt, low-impact, trivial or negligible, or the potential to harm values. This must also be underpinned by standard definitions which apply uniformly across the State.

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 Office of Environment and Heritage in consultation with ACH and legal experts, Local ACH Committee representatives and industry.

Recommendation

Introduce clear State-wide standard definitions of values and impacts for consistent, fair and transparent mapping and assessment.

5. Cement flexible Project Agreements

We support in principle the Government's proposed framework for Project Agreements – it provides a fit for purpose approach to negotiating assessment.

Project Agreements will operate best when they are made in the context of thorough mapping of clearly understood values developed against the background of the overall needs of the State.

Flexible Project Agreements provide the most appropriate avenue for voluntary funding support for ACH preservation activities. We recommend the Government model adopt the Working Party's recommendation that conditions of funding for ACH initiatives are negotiated as part of a Project Agreement.

We particularly welcome the commitment to set timeframes for the development of Project Agreements, as this will maintain the momentum in discussion between stakeholders and in development in general. However, we recommend a standard schedule of items for funding be established by the State from the outset – and in consultation with Local ACH Committee representatives, industry and expert advisors.

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.

Please note: The Property Council does not support the other funding options such as a development levy, offsets, or and cost recovery plus conservation. These models have been applied in the broader planning system and have resulted in perverse economic outcomes such as costly delays, increased red-tape and court appeals, and unclear spending on community infrastructure. Introduction of these options would undermine the objectives of reform.

Recommendation

Introduce flexible Project Agreements with a standard schedule of items for negotiable funding arrangements.

6. Develop a robust dispute resolution framework

The Property Council welcomes the provision of mandatory timeframes for response periods and negotiation of planning agreements in the proposed regulatory process. However, clear dispute resolution options need to be established.

The Discussion Paper (Figure 8, p.48) only refers to seeking assistance from an approved dispute resolution service, with resolution to be achieved within 35 days.

The occurrence of disputes will be minimised by the recommendations discussed above, however there needs to be a definite dispute process for those times when negotiations break down irreconcilably.

The Government supports the Working Party's recommendation to revise appeal and resolution processes, but a complementary system has not been included in the proposed model.

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 Plan of Management and an ACH Map
- inconsistent decision-making between local consent authorities
- discord between Local ACH Committee's and Heritage Advisor's advice to a proponent where works have proceeded with caution
- a break down in discussions regarding a Project Agreement

- where retrospective decision-making could arise after the mandatory response period to a proponent has lapsed.

We recommend the model adopt the Working Party's concept that where disputes occur over conditions or approvals that cannot be resolved via negotiation, the State (via the recommended Commission) would arbitrate a final decision within 35 days, and if arbitration fails, an appeal can be lodged to the Land & Environment Court for final determination.

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

Recommendation

Develop a complementary robust dispute resolution framework from the outset.