

Native Title Alert

NSW Aboriginal cultural heritage reform

Proposed model for new Aboriginal cultural heritage legislation released

WHAT YOU NEED TO KNOW

- New standalone legislation proposed to manage and protect Aboriginal cultural heritage in NSW.
- New Local Aboriginal Cultural Heritage Committees proposed as a 'one stop shop' for Aboriginal cultural heritage identification, consultation and approvals.
- Aboriginal Heritage Impact Permits to be replaced by 'fit for purpose' project agreements with the local Aboriginal Cultural Heritage Committee.
- Continuation of existing Aboriginal cultural heritage offences, related penalties and defences.

WHAT YOU NEED TO DO

- Comments and submissions on the proposed legislative model are required by 14 February 2014.
- Land users and developers should review the proposed model and consider making a submission.

A new model for Aboriginal cultural heritage protection in NSW

The recognition, management and protection of Aboriginal cultural heritage (ACH) in New South Wales is principally provided by the *National Parks and Wildlife Act 1974* (the NPW Act). The NSW Government commenced a review of the effectiveness of the NPW Act regime in 2011. The purpose of the ACH reform process is to develop a more effective and contemporary model for recognising, protecting and managing ACH than is currently provided by the NPW Act.

In early October 2013 the NSW Government, following an assessment of recommendations made by the Aboriginal Culture and Heritage Reform Working Party, published its proposed model for new, standalone ACH legislation (the Proposed Model) and response to the Working Party's recommendations in the *Reforming the Aboriginal Cultural Heritage System in NSW* paper (the Consultation Paper).

While the Proposed Model maintains the current offences, exemptions and defences, there are some interesting and novel approaches contemplated for future identification, management and protection of ACH in NSW.

A new approach to ACH in NSW

For both pragmatic and symbolic reasons, the Proposed Model contemplates a new, standalone ACH Act which is intended to strike a balance between Aboriginal self-determination, minimal Government intervention, and reliability for land-users.

Redefining 'Aboriginal cultural heritage'

An important change under the Proposed Model is the broader scope of ACH that can be protected. Moving away from the archaeological approach encouraged by the NPW Act, the scope of ACH afforded protection under the Proposed Model includes those intangible aspects insofar as they are "reflected" in the landscape:

"Aboriginal cultural heritage [under the Proposed Model] means the practices, representations, expressions, knowledge and skills – as well as associated objects and artefacts – that Aboriginal people recognise as part of their cultural heritage, insofar as these values are reflected in the landscape."

Although the Proposed Model still links ACH values with a particular area, the ACH values to be protected will include the intangible elements incorporated in this definition of ACH.

The Consultation Paper notes that the ACH definition may need refining following public consultation.

New Local ACH Committees

At the heart of the Proposed Model is the creation of Local ACH Committees that will each operate as a 'one stop shop' for all ACH issues and decision-making processes for the committee's area of authority. They are also given the significant task of mapping all ACH values in that area.

Local ACH Committee composition

These committees are proposed to be comprised of up to 10 Aboriginal people with particular knowledge of the ACH values of the committee's area of authority. The members will be appointed by the Minister for Heritage according to (currently unknown) membership criteria and drawn from:

- 'Aboriginal Owners' registered under the *Aboriginal Land Rights Act 1983*;
- determined native title holders or representatives of registered native title claims;
- representatives of registered Indigenous Land Use Agreements; and
- representatives of elders and family groups with cultural authority.

Local ACH Committee boundaries

The number and boundaries of the Local ACH Committees are yet to be determined. The Consultation Paper proposes a range of options from:

- using Local Aboriginal Land Council boundaries and requiring each Land Council to form the Local ACH Committee for that area; to
- using existing local government and shire boundaries.

If Local ACH Committees come under the umbrella of the Local Aboriginal Land Councils, they may also include Land Council representatives.

Local ACH Committee funding

At this stage it is unclear how these committees will be funded. The Consultation Paper states that current funding for cultural initiatives will not be sufficient for the proposed workload of these committees, and suggests three options for consideration and comment. Those options all contemplate land-users and project proponents financing, through one mechanism or another, the activities that Local ACH Committees will be required to perform.

ACH maps and plans of management

ACH values will primarily be managed through the development of ACH maps and corresponding plans of management.

ACH Maps

Each Local ACH Committee will be solely responsible for identifying the ACH values within its area of authority, mapping the significance of those ACH values according to minimum standards, and submitting proposed maps to the Minister for Heritage for approval. The Government intends to take a hands-off role in the ACH identification process.

Once approved, ACH maps will be publicly available for proponents to review when planning their projects and approval requirements. Provided such ACH maps can be prepared and approved in a timely fashion, this approach is likely to offer proponents increased certainty and efficiency when identifying the ACH risk profile of their particular project.

However, the proposed broader definition of ACH may result in these ACH maps identifying a larger range of sites and landscape features as significant for ACH purposes. The minimum standards and criteria to be applied by the Minister when considering these maps are likely to be an important mechanism in balancing the broader definition of ACH and its objective reflection in the ACH maps.

ACH plans of management

Once ACH values have been identified, each Local ACH Committee must prepare a plan of management that describes how those values will be managed and protected. Specific criteria for these plans of management are proposed to be set by regulation but have not yet been released. It is contemplated that

each plan of management will include a procedure to be followed in the event of an unexpected ACH find.

As with the ACH maps, the plans of management are required to be approved by the Minister and will then be placed on a public register.

Proposed approvals process

Upfront public access to the Ministerially approved ACH maps and plans of management is proposed to form the basis of a streamlined ACH approval process. Proponents will be able to reference their project against mapped ACH values and determine whether ACH approval requirements apply for any activities that are not otherwise exempt (ie 'low impact activities' or acts that have only a trivial or negligible impact).

Where there are low or no ACH values, proponents will be able to proceed without further ACH requirements. In areas with incomplete or high ACH values, proponents will need to consult with the Local ACH Committee about the need for a project agreement that authorises any impact to known ACH values.

Project agreements

Bespoke agreements between proponents and Local ACH Committees are the main forms of approval under the Proposed Model replacing the Aboriginal heritage impact permit (AHIP). The Consultation Paper emphasises that there will be a statutory process for negotiating a project agreement with mandatory timeframes and support resources (such as guidelines).

The process described in the Consultation Paper specifies a 40 business day consultation and negotiation period. However, excluded from those 40 business days is a requirement to carry out an ACH assessment which must be conducted before negotiation of a project agreement can be finalised.

Negotiating agreements

Once any ACH assessment has been carried out, there will be a 20 business day negotiation period to conclude the project agreement. If agreement cannot be reached, an 'independent dispute resolution service' (the details of which have not been determined) will be available. If disputes cannot be resolved within 35 business days, proponents will be able to proceed with their project by complying with the applicable ACH plan of management.

However, the Consultation Paper does not suggest how any conflict between proposed activities and requirements of an ACH plan of management might be managed. For example, it may be the case that proponents are required to obtain Local ACH Committee agreement in order to authorise any harm to known ACH values.

Government oversight

Once concluded, project agreements will be required to be lodged with and reviewed by the Heritage Division "to ensure they meet minimum standards" before being placed on the ACH register.

It is unclear from the Consultation Paper whether Heritage Division approval is required before project agreements become effective or what happens if agreements are rejected.

Links to the NSW planning process

The Consultation Paper makes it clear that there is proposed to be a symmetry between the reformed ACH and planning systems in NSW. For example, it is proposed that:

- ACH plans of management will double as code-based assessment criteria for some projects;
- project agreements could be relied upon to demonstrate compliance with any ACH requirements for planning purposes; and
- ACH maps and plans of management will be incorporated into the proposed e-planning system.

ACH offences and defences maintained

The existing offences and associated penalties and defences in the NPW Act will be maintained under the Proposed Model. This includes the unintentional and strict liability offences for harming ACH, as well as an exemption for 'low impact activities' and the 'due diligence' defence.

The due diligence defence

The 'due diligence defence' under the NPW Act is established by complying with one of a number of approved codes of practice. It is not yet clear to what extent these approved codes, such as the Government's *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW*, will be maintained under the Proposed Model, as there will need to be 'minor amendments to reflect the new processes and statutory instruments' envisaged under the new ACH Act.

To this end, the Government proposes to carry out a survey 'to establish the level of understanding of the due-diligence requirements' to inform the development a draft ACH Bill. Details of such a survey have not yet been released.

Executive powers

The Proposed Model will confer similar powers on executive officers to issue stop-work orders, directions, rehabilitation orders and to investigate potential offences as are available under the *Protection of the Environment Operations Act 1997*.

Penalties

The Proposed Model simply states that the current penalties regime under the NPW Act will be maintained. The seriousness of penalties for ACH offences in NSW (particularly compared to other jurisdictions) should be considered against the enlarged definition of ACH and the associated risk of

encountering broader categories of protected ACH values in the landscape.

Conclusion

The Proposed Model represents a significant break from the ACH protection scheme under the NPW Act. The replacement of the inefficient AHIP requirement, with its potential to attract large numbers of interested Aboriginal parties and susceptibility to legal challenge, with a 'fit for purpose' project agreement negotiated directly with the local Aboriginal Heritage Committee, has considerable attraction. However, whether a new system is successful in creating structures which deliver both ACH protection and proportionality between compliance costs and risk depends on the detail. You have until 14 February 2014 to let the NSW Government have the benefit of your thoughts. The email address for submissions is ach.reform@environment.nsw.gov.au

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