

Dharriwaa Elders Group



Dharriwaa Elders Group's Barry Simpson, Clem Dodd, Virginia Robinson, Jacob Thurston, Lewis Beale, Stephen Dennis, Latia Sands-Dennis. Sharing a creation story on the Barwon River near Walgett, June 2022. Living Aboriginal Cultural Heritage.

**Some responses to the Aboriginal Cultural Heritage
(Culture is Identity) Bill 2022 (NSW) 23 September 2022.**

Dharriwaa Elders Group (“DEG”) thanks the Planning and Environment Portfolio Committee No. 7 for the invitation to provide comment on the draft Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (NSW), and the granting of one week’s extension.

Background to this submission

The invitation to make a submission to the Committee is the first time we have been asked to comment on any recent thinking of the NSW Government regarding Aboriginal Cultural Heritage since the last submission we made in April 2018¹. It is affirming that some elements DEG proposed in 2018 have been incorporated in this Bill.

The fact that no-one from NSW Heritage or NSW Planning has engaged with DEG regarding the development of this Bill is concerning. More interaction would be appreciated in the future.

The thinking of DEG has evolved since we conducted workshops to develop submissions to comment on the past two iterations of the NSW Government’s work to develop a stand-alone law for Aboriginal Cultural Heritage (“ACH”). DEG has grown its operations yet investment in its cultural-related work remains minimal to non-existent. So while this legislation is of crucial significance to the organisation, staff resources require that this submission only contains high-level feedback workshopped 15 September 2022 that we leave to others to reconcile with the appropriate parts of the Bill. Some references are provided. Justifying evidence and argument can be provided in follow-up conversations if required.

We have witnessed the effects of successive NSW Governments management of ACH under the NSW NPW Act. Neglect caused by poor resourcing and interpretation by the responsible department (now downgraded to a unit within Heritage NSW), have meant death by a thousand cuts of ACH, whereby many little decisions have been determined in isolation and have cumulatively resulted in the mass destruction of ACH throughout NSW.

We are living with the fractured, convenient colonisation and eradication of Aboriginal culture and language in NSW whereby language activities are controlled by Education and its partners, water by irrigators and their captured agencies and politicians, biodiversity by industries intent on clearing vegetation on the surface and extracting and interfering with underground assets, minds and bodies by trauma, poverty, poor nutrition and substances. Aboriginal Cultural Heritage at best in our area is starting to be valued by the NSW Government for its cultural tourism potential. It is viewed as dead and historic. The connection between living people and their knowledge with places and practices is not yet supported. Non-Aboriginal businesses including landowners now struggling in Climate Change and global economic change, and the state govt. agencies that support them are circling Aboriginal Cultural Heritage seeing opportunities. Aboriginal communities are not being supported to practice, develop, promote or protect Aboriginal Cultural Heritage – otherwise local Aboriginal Community-Controlled Organisations (“ACCOs”) like Dharriwaa Elders Group would be well-supported and the norm around NSW. **It is timely that NSW Government reviews ACH legislation and provide leadership to ensure that precious ACH in NSW is supported to thrive.**

It is in this situation that the Bill presides. It is a minimal option – pretty much transferring the current operations of the Aboriginal Cultural Heritage Services and Regulation functions of NSW Heritage that sits as an office within NSW Dept. of Premier and Cabinet – to the proposed ACH Council and the proposed ACH Services which read like the equivalent of regional NPWS offices.

¹ <https://www.dharriwaaeldersgroup.org.au/images/downloads/DEGSubApril2018final.pdf>

DEG does not support a minimal change option. DEG doesn't have the resources provided to design a working model of the instrument required however². Therefore all we can do now is offer some aspirational aims, alongside observations and advice gained from practical skills, knowledge and experience gained over 24 years of operation.

High level comments

There is a need for legislation to support self-determining local Aboriginal communities to manage their Country and associated Aboriginal Cultural Values ("ACVs") including their Aboriginal Cultural Heritage ("ACH").

A clear big picture vision for how this Bill fits with and interacts with other Acts would be helpful.

This Bill's main aim should not be supporting developers to have less processes - "Black Tape" or "Green Tape" to address when planning further destruction of Aboriginal Cultural Heritage ("ACH").

Legislation regarding ACH has to be done properly or outrage and dissent will follow.

DEG applauds that the Bill aims to take effective measures to recognise the UN declaration³ on the Rights of Indigenous Peoples and its application, but the Bill mostly determines how archaeology and places will be managed in the interface with developers. Therefore the Bill only BEGINS to recognise the UN Declaration. Accompanying or expanded legislation is required to support living Culture of self-determining Aboriginal communities.

The definition of "Aboriginal cultural heritage" in the Bill⁴ importantly excludes environment, landscapes and materials that Aboriginal people recognise as part of their cultural heritage & identity except for when they are in a "group of areas (a cultural landscape)".⁵ We believe that offences to ACH must include harms to places, landscapes, story tracks, clusters of native vegetation, habitats of totem and other animals, rivers and waterholes as well as objects and ancestral remains.

ACH Activities to be supported include knowledge management and growth, education and active cultural practices. Offences against their undertaking and continuation should be accommodated by a legal instrument.

"Because the Bill deals with archaeology only, and the intangible knowledge that gives it cultural significance, the reference to "Culture is Identity" must be taken from the title. It is blackwashing. Culture is more than identity. Culture is about more than archaeology and history. Its living memories and practices, the wellspring of Aboriginal people, and it makes us feel good. Culture is much bigger than this Bill, and much bigger than identity." Virginia Robinson Secretary DEG.

The Act will need better provisions to identify and protect environmental values and landscapes. The declaration of ACH is not enough on its own.

The Act will need to provide appropriate standing for Aboriginal communities in the management of landscapes, biodiversity & water, so that they can influence decision-making in regards to culturally significant environments, materials and landscapes.

² Aboriginal Cultural Heritage and Arts Association NSW (our peak ACCO) if appropriately resourced could develop and trial an instrument and funding model

³ Part 1, 4 pg 2

⁴ Part 1, 6

⁵ Part 1, 6.(b) (iii)

For living practices to be sustained, Aboriginal individuals and families must have access to Country. This is vital in order to maintain and revive ACVs connected to Country. Provisions must be made in relevant Acts to provide unrestricted access for Aboriginal individuals and families to Country.

For living practices to be sustained, Aboriginal individuals and families must legally have the standing to challenge decisions about their Country being made by landholders with freehold and western lands titles, and decisions made by government agencies regarding Travelling Stock Routes and other crown lands and waterways important to Aboriginal people.

For living practices to be sustained, Aboriginal organisations like DEG must be supported to maintain living ACVs thru education and other activities in their communities. Local Aboriginal organisations maintaining living ACVs need support to undertake education activities for their communities and also for decisionmakers. DEG witnessed debate regarding Justin Field MLC's Disallowance Motion re Floodplain Harvesting Regulation in the NSW Legislative Council 21 September 2022 and today reflected on the important need to educate those who spoke against the disallowance, for they had a poor knowledge of the situation they were determining. ACH Education of elected representatives is greatly needed if we are to effectively protect ACVs.

The management of ACVs and ACH will only properly occur once the proposed Act facilitates a change in thinking – i.e. that the Act is an instrument that will describe how Aboriginal families and local Aboriginal communities in NSW will be resourced and supported by law and NSW agencies to maintain living ACH.

In the Bill, developers and their destruction of ACH are accommodated far too readily. For example a developer can apply to amend or appeal a protected area declaration⁶ and permits and management plans. For this process to be fair, then **local ACH ACCOs** (Aboriginal Community Controlled Organisations) and the proposed ACH Council must have access to appropriately funded specialist and independent legal advisors e.g. the EDO or a newly created network of publicly-funded ACH specialist lawyers. And be supported with costs reimbursements to defend the challenges of developers.

Aboriginal people prosecuting ACH harms prosecutions must have standing for merit as well as judicial review proceedings. DEG has not obtained legal advice and so is unsure of the Bill provides for this.

Also, ACH must be valued by the Court. In our experience the Land and Environment Court has a long way to go to value ACH. DEG with the help of EDO NSW created a precedent in the Land and Environment Court with a Commissioner whereby ACH must be considered in matters determining Access Management Plans under the NSW Mining Act. We know that much work needs to be undertaken to appoint and educate Commissioners and Judges who could determine ACH matters while winning the respect of local Aboriginal communities.

The role of the NSW Government as deputy for the Commonwealth in the practical enforcement of Commonwealth environmental and ACH laws must also be considered by the Act. Many Commonwealth laws govern activities that this proposed Act will regulate. Will an important role of the proposed ACH Council be to enforce these Acts? What is the NSW Government's plan for how these Acts will work together?

We are vitally interested to know as we have experienced difficulty in the past invoking the *Environment Protection and Biodiversity Conservation Act* when we have advised the Minister that the nationally-significant Dharriwaa (i.e. Narran Lakes) wetland and associated biodiversity are

⁶ Part 4, 64 (1)(b) page 22

threatened by opal mining activities in the Lightning Ridge-Warrambool opal fields around Walgett. Environmental custodians in NSW Government agencies were not heeded when NSW Industry proceeded to authorise opal mining activities. In that case, the NSW Government's responsibilities to the Commonwealth were ignored we believe.

The objects of the *Water Act 2007* acknowledge the need for social, cultural, Indigenous and other public benefits from management of the Murray Darling Basin Plan flows. But water is not mentioned by the Bill.

The meaning of "interested Aboriginal party" for development of ACH management plan processes and notification processes currently would not include a local ACH ACCO like DEG, unless it was contracted to perform local ACH Services. This must be rectified. DEG is an Aboriginal cultural knowledge holder, a holder of tangible ACH and a necessary supporter of Aboriginal Elder individuals who are either cultural knowledge holders and/or practitioners. It is currently a stakeholder in ACH matters and should continue as such.

ACH Council

More consideration needs to be given to the governance of the ACH Council. The ACH Council will need to be resourced with stable budget allocations and specialist lawyers.

It is problematic if the ACH Council is subject to the control and direction of the Minister. If the Board of the ACH Council can be sacked at any time, how can the Board be independent? We ask that the authors of the Act find a way to ensure that the ACH Council is independent of, and not beholden to Ministers or the Governor.

As the arbiter of important decisions about ACH, the members of the ACH Council should be free to operate without fear or favour. Likewise, the government should not be linked to its decisions. If the independence of the ACH Council is strengthened, then its actions will be more just.

Every local Aboriginal community should nominate its ACH Council representatives and elections selecting each community's delegate should be conducted by the NSW Electoral Commission with each relevant Aboriginal community. The ACH Council should be a much bigger entity than the Bill provides and should meet virtually and face to face in full committee and in subcommittees.

DEG applauds that the ACH Council will determine Aboriginal Protected Areas, management plans and protection agreements and that these functions have been made independent of Minister and Government. We are experiencing now where the Minister has delayed gazetting an Aboriginal Place under the current Act because the landholder doesn't support the nomination of a highly significant place to the Walgett Aboriginal community. We are informed that in law, Aboriginal Place gazettals do not require landholder endorsement and that this is only an unwritten policy of the government that has delayed the gazettal. In the meantime the landholder has allegedly cleared areas within the nominated area.

In the Bill the ACH Council has the conflicting duties of protecting ACH and issuing permits to destroy or "management plans". The two functions of protection and promotion of ACH and managing destruction of ACH would be less conflicting if development proponents were not provided with the upper hand as it appears they are in this Bill. This conflict must be resolved with more thinking.

The role given to NSWALC and LALCs by the Bill (e.g. working in "partnership" to promote awareness to ACH, delegating powers to a LALC, nominating ACH Councillors) will create division in communities like Walgett. The NSWALC Network is created by an Act and controlled ultimately by the Governor whereas most ACCOs undertaking cultural work have developed naturally, without

legislation and government support and will continue regardless of government experiments in Aboriginal Affairs. The NSW LALCs were not established for the purpose of managing ACH, and so many of them have not developed this interest or expertise. The governance of LALCs determines that they can be stacked by dominant family groups. LALCs are not systemically designed to distribute voting (and therefore decision-making) fairly and equally to all family groups. They are also severely under-resourced in areas where land sales cannot be leveraged for wealth building or even for operating effectively. The Bill will entrench division and parallel (i.e. duplicated and therefore wasteful) efforts if it delegates functions automatically to LALCs regardless of capability or merit. This will could be the death knell of existing fragile ACH organisations – and at the very least, retraumatise Aboriginal people who have been working for years in the field.

LALCs could contribute to the operations of Local ACCOs involved in ACH management, by offering affordable land and other resources to support their operations.

ACH Services

In the Bill, the proposed local ACH Services negotiate with proponents and knowledge holders, make ACH management plans for the area, provide advice to developers, provide info to ACH council re ACH locations, make submissions to ACH Council to avoid risk of harm, engage with other ACH services, undertake on-ground ID, maintenance, conservation of ACH, reports to ACH Council.

The Bill's ACH Services don't sound like current local Aboriginal organisations who are managing ACH, as no capability-building is envisaged, and they seem to be able to survive on a fee for service basis from developers and funding from the ACH Council. They would need to be spending a lot of energy interacting with development proponents and Aboriginal knowledge holders. They seem like privatised branch offices of the NSW NPWS as they can be designated by ACH Council for "an area". They will most likely end up being companies of archaeologists or regional NGOs that compete with local ACCOs for contracts. Both entities would rely on local ACCOs for capable local staff and knowledge.

Instead DEG proposes that ACH Services must be contracted by local ACCOs experienced with management of local ACH⁷.

These local ACCO ACH management organisations that would contract the ACH Services must be resourced well to undertake this new role to be relinquished by NSW Heritage. They would be the backbone providing the successful implementation of the entire framework designed by the Bill.

DEG understands this role, and the resources that will be required to service it responsibly⁸. DEG would like some recognition for its achievements in this domain. DEG's sister organisations around NSW – members of the Aboriginal Cultural Heritage and Arts Association ("ACHAA") specialising in ACH management probably would too. We don't see described in the Bill a role for ACCOs like DEG – but happy to be corrected.

The staff of the local ACH Services will need to be professionals engaging in constant training and upskilling by Elders and suitable Registered Training Organisations that will also need supporting and establishing. They will need to have the cultural imprimatur and confidence to negotiate with developers. This will mean in places like Walgett that they will require a mix of well-paid imported professionals provided with staff housing and other remote-living subsidies, with local Aboriginal

⁷ An added benefit of this DEG proposal is that another layer of coloniser bureaucracy that local ACH ACCOs will have to navigate will be prevented

⁸ And described the functions required in our earlier submission to the ACH Reform process:
<<http://www.dharriwaaeldersgroup.org.au/images/downloads/NSWACHreformsMarch14.pdf>>

staff providing the relationships, knowledge and links to decision-making with the contracting local ACCO.

ACH Services will have a large ACH surveying and knowledge management role. They will have a large workload defining and making agreements with local Aboriginal community knowledge-holders regarding areas and things to be protected. Their workload will also include a big educative function as explained above.

To make this new structure work, Aboriginal communities will need resourcing to improve their wellbeing and other capacities in order to be fairly matched with the development proponents they will face in order to manage ACVs. Development proponents must only interact with local ACH Service staff trained for the task. These staff would take their orders from the local ACH ACCO and Aboriginal knowledge holders.

To make this new structure work, the ACH Council must have a direct relationship with **local ACH ACCOs**.

Secret and sacred objects and ancestral remains

The new Bill has made a positive change to give rights to local Aboriginal persons, groups or community to be recognised as custodians of ancestral remains and entitled to possession and control of ancestral remains⁹.

It is good that the Bill prescribes that secret & sacred objects must not be removed from NSW¹⁰ and provides a duty to report ACH and advise and transfer secret and sacred objects to the ACH Council¹¹. The ACH Council must then be obligated to report and make arrangements for the repatriation of ACH to **local ACH ACCOs** and support their capability to manage them.

It is also good that Aboriginal people and existing ACCO orgs are exempted¹².

The Act must clearly state that Aboriginal objects and ancestral remains are the property of particular Aboriginal families and current day custodians and custodian groups, that are acting on their behalf. Therefore, **local ACH ACCOs** via their contracted ACH Service unit should be the body notified when Aboriginal sacred items, ancestral remains or other materials are discovered and they must be charged with determining their management.

Part 4 Protected Areas

DEG welcomes that determination and declaration of the Protected Areas is not the remit of Ministers.

ACH Council must be resourced effectively to declare and protect Aboriginal Places in NSW. There is a huge backlog of nominations now. DEG has not yet nominated all its significant places in the Walgett area and needs resourcing to undertake the work required. There must be thousands awaiting gazettal now and that would be the urgent priorities – others will follow once the high priority places are protected.

⁹ Part 3. Rights and duties in relation to Aboriginal Cultural heritage, Division 2 Aboriginal ancestral remains, 36 Rights of Aboriginal people in relation to Aboriginal ancestral remains, page 12

¹⁰ Part 3, Division 3.

¹¹ Part 3, Divisions 3,4

¹² Part 4, Division 1, 34.

DEG has been waiting for its highest priority areas nominated under the current Act, for AP gazettal, since 2002. As mentioned above, this unacceptable delay has caused ACH to be destroyed or harmed.

Currently in the Bill, places or areas, cultural landscapes, access agreements and management of ACH knowledge collections with high Aboriginal Cultural Heritage Values can be protected by **Aboriginal cultural heritage protection agreements** that are voluntary agreements with Aboriginal parties that are endorsed by the ACH Council, including the management of Declared Protected Areas. The ACH Council has powers to protect these things that are subject to **Aboriginal cultural heritage protection agreements** through the issuing of stop activity orders, prohibition orders and remediation orders¹³. It seems these agreements are the mechanisms for which Declared Protected Areas and other areas and things of tangible and intangible ACH would be actively managed by local ACCOs like DEG. It also seems that unless there is an **Aboriginal cultural heritage protection agreement** in place, or a Protected Place Declaration, then there is no active management or protections in place under the Bill. Therefore a high priority will be the resourcing of Aboriginal communities to develop a range of **Aboriginal cultural heritage protection agreements** BEFORE the Act is enabled as the ACH Council will have no other way of ensuring the protection of ACH.

We presume that existing Aboriginal Place Management Plans administered by NSW Heritage or NSW Planning would be transferred and converted into **Aboriginal cultural heritage protection agreements**. This will provide an opportunity to review these Management Plans and ensure local ACH ACCOs are actively engaged in the management activities.

Part 5 Offences about harming ACH

“Aboriginal people are experts in our own cultural knowledge and should be supported to appear in Court if necessary to defend Protected Areas and ACH from harm. The DEG is unsure that individuals or local ACH ACCOs would delegate that right to others i.e. ACH Council delegates for this role. The local voice must be preferenced and heard when ACH is being defended.” and

*Destroying even one bit of ACH is not OK.*¹⁴

Part 5, Division 3, 73 must be altered to create an offence for any person recklessly using and/or commercially benefitting from tangible or intangible ACH if they have not been authorised by the ACH Council which has commissioned advice from the relevant **local ACH ACCOs supported by their local ACH Service**.

Individuals may hold intangible ACH, as might Aboriginal Keeping Places and other local ACH ACCOs currently. DEG would propose that they should not exploit intangible ACH for commercial purposes unless the families attached to that IP agree and benefit. The Act could usefully resource a process that assists this to be worked through. In addition, the Act could resource a process that will assist Aboriginal people to consider and make provision for cultural IP in their wills and succession planning. Community cultural succession planning is an important activity that must be resourced to occur so that Aboriginal Cultural Values are maintained.

Serious harm depends on the degree of significance given to tangible or intangible thing of ACH and this can only be advised by the local Aboriginal community custodians of that thing. This should be added to part 5, Division 1, 68. **Local ACH ACCOs supported by their local ACH Services would have to be commissioned to provide this advice.**

¹³ Part 7

¹⁴ Both quotes from DEG workshop 15 September 2022.

It is DEG's opinion that it is immaterial if a harmful event occurred by accident¹⁵ and so asks that the words "including by accident" are also added to the Part 5, Division 2, 71 and 72.

Part 6 Managing activities that may harm Aboriginal Cultural Heritage

The **ACH Directory** must not be accessed directly by development proponents¹⁶. This is for the protection of the items listed and also because on-ground evidence gathering and monitoring for compliance must be evident in applications for ACH Management Plans and ACH Permits.

The process of developing ACH Management Plans or ACH Permits for works that impact ACH must not be the responsibility of developer proponents. They must be undertaken by **local ACH Services contracted by local ACH ACCOs**. Costs for this process must be invoiced to the proponent by the ACH Council. The funding of the process of the local ACH Service's work to prepare a viable ACH Management Plan or ACH Permit must be undertaken on a full cost recovery basis as negotiated and contracted between the local ACH ACCO and the ACH Council. The resourcing of the preparation of the ACH Management Plan or ACH Permit must be separated from the invoicing of the proponent. This process will eliminate the direct interaction between the proponent and local ACH ACCO that has contracted the ACH Service preparing the ACH Management Plan or ACH Permit.

The introductions between the ACH Council and local people envisaged by Division 2, 81 must be eliminated. There is no level playing field and informed and prior consent is not possible between develop proponents and local ACH ACCOs. Local ACH ACCOs must be supported by their contracted professionals presumably engaged by the ACH Service, and the ACH Council at all times during the preparation of these permits for the destruction of ACH, and for protecting ACH.

It will be the duty of the ACH Council to endorse and support the local ACH ACCO in its determination of an appropriate ACH Management Plan or ACH Permit. The pressure for unacceptable ACH Management Plan or ACH Permits would need to come from the developer only – not from within the system created by the Bill.

Mitigations for all impacts on ACH including environmental, pollution etc and the cumulative impacts on ACH of proposed actions must be included in the ACH Management Plans or ACH Permits.

As above, persons to be notified about proposed activities must be amended to include Aboriginal organisations like DEG with an interest.¹⁷

Part 7 Stop activity orders, remediation, prohibition orders and Part 8 Aboriginal Cultural Heritage protection agreements

The processes of developing Aboriginal Cultural Heritage protection agreements has been commented on above.

Resourcing for effective on-ground compliance activities and development of ACH protection agreements will be needed for ACH Services to function well to support the Bill's system. DEG would like to spend more time considering these parts of the Bill with legal advisors.

Part 9 Aboriginal Cultural Heritage Directory, Register of Aboriginal Owners

Division 2 Access to ACH Directory

¹⁵ Part 5, 70 (2)

¹⁶ Part 6, 79 (3)

¹⁷ Part 6, Division 2. 80

The DEG will never agree to a NSW Government body owning or managing Community Intellectual Property.

DEG has raised concerns¹⁸ regarding the poor resourcing of archiving and digitising IP assets of communities collected in the past by NSW National Parks & Wildlife Service (and its successors) sites officers and archaeologists. We believe paper records are in danger of being skipped or lost due to the individual gatekeepers of Aboriginal communities' ACH IP leaving the workforce and IP management policies not being resourced adequately for communities to be assured their knowledge is safe.

This will always be a risk when knowledge is separated from those who manage and value it.

We require caretakers of our community's knowledge to safeguard and manage information so that it is digitised, stored safely and made accessible to our community. How the knowledge is shared should be determined by the relevant community. It is no longer acceptable to make communities rely on Aboriginal employees of government agencies for this role. They are still government employees, not representatives of communities. They are usually under-supported and quickly churned to greener industry pastures¹⁹. DEG and its sister organisations around NSW have been undertaking a knowledge-maintenance role up until now, and should be supported to continue and enhance our practice, locate and safeguard our communities' IP before it ends up in the skips.

In the past DEG has also been concerned about the risks of knowledge being revealed or shared. The NSW Government published maps of known / mapped Aboriginal sites on an opal mining website which we believed put those sites at risk from destruction by miners who would gain financially by those sites not existing. Because very little resourcing has been devoted to monitoring compliance with ACH laws, those sites were definitely risked. And they were not given appropriate context when published either. We know that those sites represented only a small subsection of places of ACH. However those sites were published as if they were the only Aboriginal sites present on those lands. The inference by the poor context given was that that if miners' activities did not jeopardise the sites mapped, then they would have a legal defence if other sites and places were destroyed. DEG requested NSW DPI take down the map from its website.

The Act must resource local ACH ACCOs and their support ACH Services with the skills and resources to access live satellite imagery to monitor change in order to alert its officers to live investigations needed. This custodian/monitoring ability must rest at the local community level, where timely on-the-ground responses will need to occur in order for the local ACH ACCOs to stay on top of realistic preventative and compliance needs. Currently live imagery is inaccessible. It would be helpful if this imagery is made available to local ACH ACCOs as a proprietary layer to the NSW Govt. SixMaps²⁰ service²¹. In addition, local ACH ACCOs need access to data layers that identify the type of title of Lots and DPs e.g. whether a Lot and DP is a crown land, or other land title. Local ACH ACCOs and their support ACH Services will also need access to private contact information for landholders tied to location.

DEG recommends that legal protections for the IP of local Aboriginal communities against national and international predators is considered. The Bill may be sufficient to protect cultural knowledge from unauthorised commercial use, but how will it prevent its use in jurisdictions outside of

¹⁸ Emails to NSW State Library 15/8/2017 and subsequent phone meeting and emails with NSW State Records

¹⁹ sometimes ACH-destroying industries

²⁰ <https://maps.six.nsw.gov.au/>

²¹ Or similar fee-free service

Australia? What mechanisms will be put in place to ensure this knowledge is secure and safe from such unauthorised use?

Only the local ACH ACCOs and their support ACH Services should have the authority to prepare, approve, publish or amend its own maps. The NSW Government must resource and support local ACH ACCOs so that all stakeholders can have confidence in the advice given by local ACH ACCOs, who shall refer to their own knowledge resources, including their maps, when considering matters.

IT and governance capacity must reside in local Aboriginal communities so that they can prepare and manage their own IP and maps. It is no longer acceptable that employees within NSW Heritage or NSW Planning (even if they are Aboriginal) are delegated this task. It will require a concerted effort to provide this capability to communities but this capability must be delivered. Some communities like Walgett, are very close to being able to meet this capability. It is not hard to envisage a process whereby formal advice would be sought by the ACH Council from the local ACH ACCOs, who would consult their locally-held maps and databases, as information is required. Full use should be made of IT capabilities by the local ACH ACCOs, including surveillance of assets and the logging of authorised and unauthorised access to the databases. Landholders and other developers would need to be held at arms-length from the local ACH ACCOs, by intermediary processes provided by the staff of the ACH Council.

It will be an important role for the ACH Council to ensure that Local ACH ACCOs and their supporting ACH Services are resourced to have this capacity, including to be able to undertake overnight off-site data backups to secure, Australian data centres. The NBN or similar, high capacity communications infrastructure will be required in each local Aboriginal community for this to be possible. At DEG, we are unable to make off-site overnight backups due to the large size of data to be backed-up. The ACH Council should use the Local ACH ACCOs' group purchasing power to negotiate and obtain benefits for its member Local ACH ACCOs with telecommunications and Australian sovereign data centre providers.

Surveying and documentation skills must also reside in Aboriginal communities so that the Local ACH ACCOs preside over an accumulating, organised dataset, collected from on-ground surveys, previous surveys, cultural knowledge recordings and other resources it values to inform its decisions. There will be an important role for the ACH Council to ensure that Local ACH ACCOs and their supporting ACH Services have access to knowledgeable ecologists, botanists, zoologists, hydrologists, archaeologists, anthropologists and other professionals, who will assist them to prepare the knowledge resources they will require in order to provide informed, independent advice to government and developers in regards to all Country in their domains. While government agencies and their contractors have often allowed themselves to be captured by powerful interests, Aboriginal communities are motivated to commission independent scientific advice. The Act must ensure that the scientific advice provided to decision makers is not solely advice that has been commissioned by the development proponent (as is the current situation provided by the Bill).

In our area, there are large areas of lands unsurveyed for habitats and native vegetation communities, archaeology and Aboriginal history values. This is because until now, most surveys have been undertaken by landholders before making development proposals, by companies engaged by developers, or by under-resourced NPWS and NSW OEH employees who have usually only surveyed lands subject to development applications or planning proposals. And we are lucky in that the big push for land clearing for broadacre farming, mining activities etc. is only recently upon us. A large surveying, mapping and documentation effort is required.

All Country within a Local ACH ACCO's area of concern, must be surveyed for areas, objects and intangible ACH values. Local ACH ACCOs must be resourced to undertake this activity via their agents and contracted ACH Services. Local ACH ACCOs must be resourced to use all locational technologies available in order to accurately locate and revisit, and assess the Aboriginal Cultural Values of Country within their purview. Local ACH ACCOs must be resourced to access ACH intangible assets located both in their communities and outside it, in collecting institutions, government and scientific agencies. They must be resourced to create and safely store and manage data, and develop policies regarding these practices.

This activity will require NSW Government to provide Local ACH ACCOs with expedited access to NSW State Archives and other collecting institutions, in order to locate relevant information from local Aboriginal communities residing in the archives of those institutions. A significant effort will be required from those institutions to digitise and catalogue afresh their assets in order for these assets to be discovered by communities.

DEG and the Indigenous Unit of NSW State Library have been considering this need for some years. Witness the resources supplied to NSW State Library from Rio Tinto²² so that the Aboriginal language resources on the library's shelves could be discovered for the first time. The library had realised that aged catalogue descriptions often ignored assets of interest to Aboriginal communities.

Forget "Green Tape" and "Black Tape" delaying developers' desires. Aboriginal organisations need to recover their cultural assets (or at least the information about them in digital form) from collecting institutions in order to support healing and informed ACH decision-making in communities. When will this activity be prioritised? When will the wellbeing of NSW Aboriginal communities be prioritised?

We can guarantee now that Walgett's IP assets will not be handed over to the NSW Government, nor any other entity which has not established trust with DEG Directors. We are acutely aware however, of the need to develop further our own internal IP and information management policies and practices, and acknowledge our urgent need for more capacity in this field. Due to DEG's capability in this area, we could offer upskilling to sister Aboriginal community organisations in the future.

More thinking will need to be undertaken regarding the statutory role of ACH Management Plans and ACH Protection Agreements and their interaction with LEPs and other planning instruments.

We ask for a "State of Aboriginal Cultural Heritage Reports"²³ and requirement for tabling in both houses of Parliament. We support the inclusion of matters impacting ACH such as cumulative impacts, and analyses of costs and benefits of conserving ACH, including with respect to Aboriginal people and communities²⁴. This requirement, if undertaken correctly, will provide much evidence to governments to justify the considerable investments that will be required for the improved management of ACH. It will also provide a picture for the first time to decision makers of the extent of the destruction of ACH to date (and likely ongoing). It should include estimates of destruction in the past as well, so impacts can be measured against a realistic baseline. This will require considerable input from academics who must work in partnership with local Aboriginal communities to undertake this important research.

²² <https://www.sl.nsw.gov.au/support-foundation-success-stories/partnership-rio-tinto-australia-rediscovering-indigenous>

²³ 22. Part 3, page 11, Aboriginal Cultural Heritage Bill 2018

²⁴ 22 (3). Part 3, page 11, Aboriginal Cultural Heritage Bill 2018

Again – the reporting and research must be undertaken and owned by the Local ACH ACCOs with their own resourcing bodies, and co-ordinated state-wide through collaborative practice of these academics being locally-directed. The Local ACH ACCOs will need the data in these reports for their own planning and evaluation purposes. DEG would be happy to provide advice on the model it uses in its partnership with UNSW²⁵ which we think is unique in Australia for its community-led approach.

Part 10 Compliance, Part 11 Legal proceedings, Part 12 Miscellaneous

We have not obtained specialist legal advice and so unfortunately cannot comment much on these parts.

DEG welcomes the opportunity to employ authorised ACH Inspectors with inspection and other powers under an ACH Act within its contracted ACH Service under an ACH Act.

DEG welcomes the provisions for confidentiality²⁶ and asks that legal advisors ensure that they at least provide cover given in commercial in confidence protection regimes.

DEG welcomes the proposal for an Aboriginal Cultural Heritage Compensation Fund.

Consideration will have to be given to determining relative compensation values of destruction. For example, ACH in areas of high land values brought about by the values of non-Aboriginal populations and industries is just as valued by Aboriginal communities as ACH in remote areas like Walgett where land values are not as high. How will the legislation assist Local ACH ACCOs to propose appropriate compensation values across the state? How will compensation for activities that destroy huge areas of land and biodiversity (like broad acre cotton farming) be measured against loss of individual scarred trees in an individual's backyard, or when measured against a mining proposal that might produce enormous wealth for overseas shareholders?

A principle that income generated from local loss should be quarantined for the relevant local community, must be established in the Act. But ACH provides so much more than the prideful activity of managing it for Aboriginal people. How will the loss of it be appropriately compensated for?

We request modelling to be undertaken to assess the financial values of ACH and its loss, on Aboriginal communities and the NSW economy, and common sense guidelines to be offered in the Act for the consideration of Local ACH ACCOs when determining compensation.

The ACH Council (but realistically the local ACH ACCOs and their supporting ACH Services) will need staff on the ground to ensure court order compliance. The ACH Council will have to sue the offender for contempt of court if court orders are disobeyed. Resourcing again must be considered here. It is all very well to have an Act but we know from bitter experience that this means nothing when resources are not applied to enforce the ACH protection laws. And governments wonder why Aboriginal people do not vote!

The Act should provide a process in which the offender is brought together with those offended against, in a safe place by an independent arbitrator to help mediate between offender and victims, if the Local ACH ACCO believes this may assist. It may provide a wonderful opportunity to educate the offenders of the harms that they are causing. In many cases the offender may require a health referral and offered intensive therapy and resocialisation support. The person who the order is made against needs to be educated or retrained and also must “face the music” for their offence. DEG members are sceptical whether landholders, miners and other developers would ever willingly

²⁵ Yuwaya Ngarra-li < <http://www.dharriwaaeldersgroup.org.au/index.php/yuwayangarrali> >

²⁶ Part 12, Division 6, 255

listen to blackfellas, and think that they would only use an option for restorative justice as a cheap and dishonest way of eluding a fine or jail term. So DEG proposes that the Act must fund a widespread attitudinal-change media campaign in order to bring about widespread community understanding and appreciation of ACH and the importance of Aboriginal communities' ACH management roles. ACH is a valuable unrealised asset for NSW. Money spent on a well-crafted advertising campaign will save many dollars for NSW in the long run, and make everyone's job easier in the ACH management field. ACHAA members (like DEG) are well-placed to lead this task.

It is usually impossible to repair ACH that has been harmed. This is why there needs to be really strong fines imposed, and why most resources need to be devoted to prevention of ACH harms.

A proportion of fines revenue should be devoted to ACH conservation activities so that the sentence not only punishes an offender, but also will be used to conserve ACH. Fines revenue should be used to support the work of Local ACH ACCOs and for more community education re ACH.

Appendix 1. Introduction to Walgett's Dharriwaa Elders Group

The Dharriwaa Elders Group²⁷ (DEG) takes a leading interest in the protection of ACH and maintaining Aboriginal Cultural Values ("ACVs") in Walgett landscapes. DEG was born 20 November 2000 after Elders had worked together on projects since 1998. The Group took its name from one of its sacred sites - Narran Lakes - Dharriwaa (common meeting place) and its full members are Aboriginal people over 60 who live in Walgett. With the aid of governments, sponsors and volunteers, and now a multi-faculty long term partnership with University of NSW – Yuwaya Ngarrali (*Vision*), the organisation has worked to support Aboriginal Elders to resume leadership roles in the community, keep active and healthy; promote local Aboriginal cultural knowledge and identity; and develop the Walgett Aboriginal community.

An important activity has been to protect and manage the ACVs of the Walgett area. This activity has involved supporting the people who hold the knowledge that provides Aboriginal Cultural Values, understanding and documenting Elders' knowledge and mapping significance in the landscape. It has involved conducting education activities including exhibitions, magazine production, schools programs, community induction for government and community education programs. It has also involved advocacy and negotiation with landholders and government agencies which has sometimes produced outcomes that have protected culturally significant places from destruction. It has involved maintaining knowledge and other productivity infrastructure and continually training and mentoring local Aboriginal staff at levels determined by scarce resources.

²⁷ A charitable incorporated Association with deductible gift recipient status.