

Submission on behalf of:
Indigenous Knowledge Forum
University of Technology Sydney



To:
The NSW Government, Office of Environment and Heritage
In response to
Aboriginal cultural heritage reforms in NSW:
A proposed new legal framework

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Executive Summary

This submission is made by Dr Evana Wright and Professor Natalie Stoianoff in response to the proposed new legal framework for the protection of Aboriginal cultural heritage in New South Wales.

The proposed Aboriginal cultural heritage reforms represent a significant development and make positive changes in the recognition of Aboriginal people's rights in Aboriginal cultural heritage and the need to conserve and protect Aboriginal cultural heritage from harm. Most importantly, the NSW Government is to be commended for taking positive steps to recognise that Aboriginal cultural heritage belongs to Aboriginal people and establishing a legal regime that affirms the rights of Aboriginal people to control and make decisions in relation to their cultural heritage.

However, we would like to express our concern regarding the various gaps in the draft Aboriginal Cultural Heritage Bill 2018. The following submission addresses a number of concerns in relation to the protection of intangible Aboriginal cultural heritage under the draft Bill. The key concerns may be summarised as follows:

1. The definition of 'Aboriginal cultural heritage' does not appropriately reflect the holistic nature of Aboriginal cultural heritage, knowledge and expressions nor does it reflect the fact that Aboriginal cultural heritage, knowledge and expressions are constantly evolving and developing in response to the needs of community and the environment.
2. While the proposed legal framework recognises the importance of Aboriginal decision making in relation to Aboriginal cultural heritage, the model vests much of the decision making power with the ACH Authority and does not recognise the importance of grass-roots, community led decision making. Local communities must provide free, prior and informed consent to any decision made in relation to their Aboriginal cultural heritage including intangible Aboriginal cultural heritage.
3. The draft Bill notes that a number of details are yet to be finalised including the process for determining membership of both the ACH Authority and Local ACH Consultation Panels; as well as the regulations and protocols governing the ACH Information System. These yet to be developed regulations, protocols and procedures must be subject to a public consultation process providing the opportunity for the community to engage and inform the outcomes including the opportunity to make submissions.

The following submission further details our concerns including in relation to databases established as part of the ACH Information System and agreements for the use of registered intangible Aboriginal cultural heritage.

We thank you for the opportunity to engage with the Office of Environment and Heritage in the process of developing a framework for the protection of Aboriginal cultural heritage and welcome any questions or requests for further information.

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Aim A: Broader recognition of ACH values

A1. Proposed definition of 'Aboriginal cultural heritage'

The draft Aboriginal Cultural Heritage Bill 2018 proposes the following definition of Aboriginal cultural heritage

'For the purposes of this Act, **Aboriginal cultural heritage**, is the living, traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with the associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of the cultural heritage and identity.'

The authors are concerned that this definition does not recognise the holistic nature of Aboriginal cultural heritage, knowledge and expressions. As observed by Professor Natalie Stoianoff, Indigenous knowledge and culture 'is imbued with community social norms, customary laws and protocols, cosmology but also connection with the land, environment and location of that community in an integral sense.'¹ Indigenous knowledge and cultural expressions are 'dynamic, innovative and constantly responding or adapting to the needs of the community, their environment and sense of place.'² This is reinforced by the prior seminal works of Terri Janke.³

The definition of Aboriginal cultural heritage should reflect this holistic nature, especially the fact that Aboriginal cultural heritage, knowledge and expressions are constantly evolving and developing. The current definition restricts the definition of Aboriginal cultural heritage to current and past manifestations of knowledge and culture and does not reflect the potential for Aboriginal cultural heritage to develop in the future.

The definition of Aboriginal cultural heritage should be amended to include reference to '...living, **future**, traditional and historical practices, representations, expressions, beliefs, knowledge and skills...'

The draft Aboriginal Cultural Heritage Bill also includes a definition of 'intangible Aboriginal cultural heritage'. The link between the definitions of 'Aboriginal cultural heritage' and 'intangible Aboriginal cultural heritage' should be made explicit to reflect the holistic nature of Aboriginal knowledge and

¹ Natalie P. Stoianoff, 'Navigating the Landscape of Indigenous Knowledge – A Legal Perspective' (2012) 90 *Intellectual Property Forum* 23, 25.

² Ibid.

³ For example: Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Company and Terri Janke, 1998; and Terri Janke, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke and Company Pty Ltd, 2009.

cultural expressions. The definition of ‘Aboriginal cultural heritage’ should recognise that the term includes ‘intangible Aboriginal cultural heritage.’

The definition of Aboriginal cultural heritage should be further amended to include express reference to intangible Aboriginal cultural heritage ‘...that Aboriginal people recognise as part of the cultural heritage and identity and includes intangible Aboriginal cultural heritage.’

Aim B: Decision making by Aboriginal people

B1. ACH Authority

B1.1 Functions of the ACH Authority

The draft Aboriginal Cultural Heritage Bill 2018 identifies many functions for the proposed ACH Authority including the registration of intangible Aboriginal cultural heritage.

The authors acknowledge the positive steps taken to establish a governance structure that recognises the rights of Aboriginal people to make decisions in relation to Aboriginal cultural heritage. However, it is critical to ensure that decision making is made at a grass roots level. A top down approach where local communities (and in particular, traditional owners and traditional knowledge holders) are not the ultimate decision makers will not have cultural legitimacy.

The authors are concerned that the proposed structure concentrates decision making power in a central body which may have the potential to disenfranchise local communities as has happened in other jurisdictions such as India.⁴ The importance of local decision making is endorsed in the United Nations Declaration on the Rights of Indigenous Peoples, which requires that

‘States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’⁵

As a New South Wales government agency, the ACH Authority must ensure that they obtain the free, prior and informed consent of Aboriginal peoples before implementing administrative measures such as making decisions in relation to Aboriginal cultural heritage.

⁴ The *Biological Diversity Act 2002* (India) establishes a tiered structure involving a National Biodiversity Authority, State Biodiversity Board and Local Biodiversity Management Committees. This approach has removed much of the decision making power to the national and state authorities and has disenfranchised local communities.

⁵ United Nations *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) art 19.

At a minimum, the local communities should be responsible for making decisions in relation to their Aboriginal cultural heritage including decisions in relation to the registration of intangible Aboriginal cultural heritage. The role of the ACH Authority should be to operate as a clearing house responsible for administering the legal framework; collecting information on decisions made by the local communities; facilitating engagement between local Aboriginal communities and development proponents or other third parties seeking access to intangible Aboriginal cultural heritage, providing support and advice to local communities; and enforcing the provisions of the Act.

B1.2 Membership of the ACH Authority

The draft Aboriginal Cultural Heritage Bill 2018 provides for an ACH Authority Board of 13 members being Aboriginal members appointed by the Minister. The Bill does not provide further detail on how members are to be selected and notes that this process is ‘intended to be a community-driven process to ensure that Board has cultural legitimacy and the requisite skills and expertise.’

The outcomes of this community-driven process must be subject to further review with draft legislation presented to the community for consultation prior to proceeding through parliamentary process. The New South Wales government must commit to a full consultation and submission process in relation to these provisions. This is critical to ensure cultural legitimacy.

In addition, the authors draw attention to concerns raised by Aboriginal communities of New South Wales in relation to the role of Local Aboriginal Land Councils in the management of Aboriginal knowledge. Section 8(4) of the draft Bill provides that ‘The Minister is to appoint a representative of the New South Wales Aboriginal Land Council as a member of the Board.’

During consultations as part of the North-West Local Land Services funded project ‘*Recognising and Protecting Aboriginal Knowledge associated with Natural Resource Management*’, some local communities raised concerns about the involvement of land councils in the management of and decision making in relation to Aboriginal knowledge.⁶ This is particularly an issue when land council leadership does not include representation from cultural knowledge holders in the communities.

B1.3 Resourcing of the ACH Authority

Adequate funding is essential for the ACH Authority and Local ACH Consultation Panels to perform their functions. This includes fully funding administrative costs in relation to the ACH Authority such as employing appropriate staff, engaging experts where necessary, establishing and maintaining

⁶ UTS – Indigenous Knowledge Forum and North West Local Land Services (formerly Namoi CMA), ‘Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management’ (White Paper, Office of Environment and Heritage, Government of New South Wales, 2014) 45-46 <<https://www.indigenousknowledgeforum.org/white-paper>>.

offices, as well as funding the building and maintenance of the ACH Information System. The NSW Government must commit to continued funding of the ACH Authority in a manner sufficient to allow the ACH Authority and Local ACH Consultation Panels to completely and comprehensively perform their duties and functions. The manner in which the NSW Land Council was funded when initially formed might provide a viable model of funding.

B.2. Local ACH Consultation Panels

B2.1 Functions of Local ACH Consultation Panels

Section 16(1)(b) provides that Local ACH Consultation Panels have a 'role under this Act in decisions that affect Aboriginal cultural heritage in relation to that area or aspect' and section 16(1)(c) states that Local ACH Consultation Panels shall 'provide advice to the ACH Authority in relation to that area or aspect'. Furthermore, section 16(2)(c) states that the Local ACH Consultation Panel shall advise the ACH Authority on various matters including information to be included in the ACH Information System. This language does not go far enough to secure the role of Local ACH Consultation Panels in making decisions in relation to their Aboriginal cultural heritage.

As observed above in section B1.1, it is critical that decisions in relation to Aboriginal cultural heritage are made by, or with the free, prior and informed consent of, local communities. Therefore, the language used in section 16(1) and 16(2) should be revised to reflect the need for Local ACH Consultation Panels to consent to decisions that affect Aboriginal cultural heritage in their area.

Furthermore, the use of the term 'advise' implies that the ACH Authority does not need to act in accordance with the decisions made by local communities. Therefore, the term 'advise' or 'advise' where used in section 16(1)(c) and 16(2)(c) should be amended to 'notify' or 'notifying' (as appropriate).

B2.2 Membership of the Local ACH Consultation Panels

The draft Bill provides that 'members of a Local ACH Consultation Panel are to be appointed by the ACH Authority in accordance with procedures publicly notified by the ACH Authority' and that '[p]rocedures, policies and guidelines with respect to the establishment, membership and operation of Local ACH Consultations Panels are to be developed by the ACH Authority through a process of consultation with the Aboriginal community in New South Wales.'

As discussed above in section B1.2, the proposed procedures must be subjected to a public consultation process providing the opportunity for submissions to be made. This process is critical to ensure the cultural legitimacy of the Local ACH Consultation Panels. In recognition of the right to self-determination, the structure and membership of the Local ACH Consultation Panels should be

flexible enough to adapt to the needs and customary laws of each Aboriginal community. These differences may be reflected in the membership of each Local ACH Consultation Panel, the decision makers and decision-making processes and procedures used.

B3. Role of the Minister

The authors acknowledge that section 7(1) of the draft Bill states that the ACH Authority 'is not subject to the control or direction of the Minister.' However, as set out in the draft Bill, the Minister does have a role in certain decisions or functions including:

- Appointing the ACH Authority Board members
- Appointing a representative of the New South Wales Aboriginal Land Council as a member of the ACH Authority Board.
- Making declarations of Aboriginal cultural heritage
- Approving the methodology to be used to prepare ACH maps (including local draft maps)
- Approving ACH maps, including any amendment or replacement of ACH maps
- Directing the variation or termination of an ACH conservation agreement if a mining or petroleum authority is or has been granted in respect of the land
- Consenting to development by a public authority on land subject to an ACH conservation agreement and directing the variation or termination of the ACH conservation agreement is necessary to enable the public authority to carry out the development
- Approving the ACHAP Code of Practice including any amendment or replacement
- Approving the funding allocation strategy
- Making interim protection orders

The authors acknowledge that the Minister may be required to perform certain functions that have regulatory impact (such as the ACH maps etc) however the Minister should not be able to act contrary to the advice or recommendations of the ACH Authority. At a minimum, where the Act provides a role for the ACH Authority to provide advice or a recommendation to the Minister for the Minister to then make a decision (for example, section 18(1) 'The Minister may, on the recommendation of the ACH Authority...'), the Minister must not be allowed to over-rule the ACH Authority.

In addition, it is not clear from the draft Bill as to how the Minister will make these decisions. At the very least there needs to be a set of guidelines. The Minister must be required to consult with the ACH Authority before making any decision in relation to the ACH Authority and matters covered by

the legislation. There should be very limited, if any, opportunity for the Minister to act contrary to the advice or recommendations of the ACH Authority.

Furthermore, the new legislation does not identify the responsible Minister. Careful consideration should be given to the appropriate portfolio for administering the legislation including the involvement of both the Environment and Heritage, and Aboriginal Affairs portfolios.

Aim C: Better information management

C1. ACH Information System

C1.1 Databases

The draft Bill provides for the establishment of two databases as part of the ACH Information System: a restricted access database, and a public online portal. In relation to the restricted access database, the draft Bill identifies those who can access the contents of the database as the Local ACH Consultation Panels, the Board of the ACH Authority, persons engaged in the administration of the Act authorised by the Board, and other persons authorised in the regulations. Other than this list, there is little information contained in the Bill setting out how the ACH Information System will be established and maintained and how information will be collected and managed. Regulations and protocols will need to be developed to ensure that any databases operate in a culturally appropriate fashion and adequately protect Aboriginal cultural heritage including intangible Aboriginal cultural heritage. Information on Aboriginal cultural heritage, in particular information relating to intangible Aboriginal cultural heritage, must only be documented and registered in a database following the free, prior and informed consent of the relevant Aboriginal community.

The regulations and protocols must provide rules governing:

- The kinds of information can be registered in each database (restricted access or public portal)
- The management of culturally sensitive or gender specific knowledge (such as men's or women's business) including the use of sub-registers and ensuring that access is restricted to the appropriate gender
- Who has authority to nominate or make an application to register information in a database
- Who will make decisions about whether information may be included in a database
- Who will make decisions on which database (restricted access or public portal) the information will be included in
- The validation process (if any) that will be implemented before information can be registered in a database

- The technology that will be used including the technological standards that will be implemented to govern operation of the ACH Information System and the security systems that will be implemented to protect the contents of the ACH Information System

The authors recommend the following principles be incorporated into the regulations and/or protocols relating to the ACH Information Systems:

- Provide for two types of register as part of the ACH Information System: a public portal; and restricted access register, to be maintained by the ACH Authority. Provision must be made for separate female and male registers to deal separately with women and men's business. This also requires the appointment of a male registrar and a female registrar to oversee these registers.
- The inclusion of Aboriginal cultural heritage, in particular intangible Aboriginal cultural heritage, in one of these registers must be by agreement of the relevant Aboriginal community and knowledge holders in accordance with community protocols for the Aboriginal community. This requires the free, prior and informed consent of the Aboriginal community and knowledge holders. Any Aboriginal community may apply to the ACH Authority for the registration of Aboriginal cultural heritage, in particular intangible Aboriginal cultural heritage, held by it in the public portal or in the restricted access register.
- The public portal should only contain that intangible Aboriginal cultural heritage that is already available in the public domain.
- The contents of restricted access register must not be divulged to third parties and others who do not have authorisation of the ACH Authority and the relevant Aboriginal community to access the information recorded on it. This is particularly important in relation to intangible Aboriginal cultural heritage. Information in the restricted access register must only be disclosed to a third party if disclosure is approved by the relevant knowledge holder and in accordance with the relevant Aboriginal community's protocols.

The authors draw attention to the registers proposed in the White Paper 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' presented to the Office of Environment and Heritage in 2014.⁷

⁷ UTS – Indigenous Knowledge Forum and North West Local Land Services (formerly Namoi CMA), 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management' (White Paper, Office of Environment and Heritage, Government of New South Wales, 2014) <<https://www.indigenouknowledgeforum.org/white-paper>>.]

The regulations and procedures to be developed for the management of the ACH Information System must be subjected to a public consultation process providing the opportunity for submissions to be made. This process is critical to ensure the cultural legitimacy of the ACH Information System.

C1.2 Registering intangible Aboriginal cultural heritage

Reflecting the fact that intangible Aboriginal cultural heritage is collectively owned, the draft Bill provides that only certain people may apply to register intangible Aboriginal cultural heritage.

- A Local ACH Consultation Panel
- A Local Aboriginal Land Council
- A board of management under Division 6 of Part 4A of the *National Parks and Wildlife Act 1974*
- A registered native title body corporate under the *Native Title Act 1993* of the Commonwealth or a person registered under the Act as holding native title rights and interests
- An Aboriginal and Torres Strait Islander corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* of the Commonwealth
- Any other person or body prescribed by the regulations

This list does not recognise that certain intangible Aboriginal cultural heritage may be held by knowledge holders and not shared with the wider community. The legislation or regulations should provide the ability for knowledge holders or others with cultural authority to apply for their knowledge to be registered independent of the groups listed above.

The legislation or regulations must also provide mechanisms for information to be removed and for registrations to be challenged by members of the Aboriginal community where information is registered contrary to community protocols or customary law.

C1.3 Freedom of Information

The contents of the databases, in particular the restricted access register, must be exempted from the operation of Freedom of Information legislation. This is necessary to maintain the cultural legitimacy of the ACH Information System and ensure that information is kept confidential. This is particularly important for intangible Aboriginal cultural heritage which may be sacred or should otherwise be protected from public disclosure (for example, in order to preserve options in relation to applications for intellectual property rights such as patent protection).

C1.4 Database Rights

Current intellectual property rights do not provide sufficient legal protection for the contents of a database or register. Copyright law merely provides limited protection as a literary work and does not prevent third parties from examining the contents and exploiting the information by putting it into practice. Similarly, while the compilation of information in a database may be able to attract some form of limited protection, this typically extends only to the way the information is organised and stored, as opposed to protecting the contents of the database.⁸ Overseas experience has demonstrated that Indigenous and local communities are reluctant to store their information in databases due to fears that the contents will be misappropriated and exploited because of gaps in legal protection.⁹ While addressing the issue of protecting the contents of databases is a matter for the Commonwealth and therefore beyond the scope of this consultation, the NSW Government should be aware of the weaknesses associated with the current system and the potential impact this may have on the operation of the ACH Information System.

Aim D: Improved protection, management and conservation of ACH

D1. Intangible ACH agreements

D1.1 Scope of Protection

It is proposed intangible ACH agreements be used to protect registered intangible Aboriginal cultural heritage from unauthorised commercial use. For intangible Aboriginal cultural heritage to be protected it must be registered on the ACH Information System. The proposed system raises a number of issues:

Choice of database

As discussed above, it is critical that intangible Aboriginal cultural heritage be kept confidential in order to maintain the cultural legitimacy of the ACH Information System and to preserve intellectual property rights in relation to such intangible Aboriginal cultural heritage. Therefore, intangible Aboriginal cultural heritage should be recorded in the restricted access register. If it is necessary for information to be included in the public portal, then only the bare minimum of details should be made publicly available with the majority registered on the restricted access register.

⁸ See *Nine Network Australia Pty Ltd v Ice TV Pty Ltd* [2007] FCA 1172. See also, Merle Alexander, K Chamundeeswari, Alphonse Kambu, Manuel Ruiz and Brendan Tobin, *The Role of Registers & Databases in the Protection of Traditional Knowledge: A Comparative Analysis* (UNU-IAS, January 2004) 12.

⁹ See the example of People's Biodiversity Registers in India (established under the *Biological Diversity Act 2002*). Kanchi Kohli, Mashqura Fareedi and Shalini Bhutani, *6 years of the Biological Diversity Act in India* (Kalpavriksh and GRAIN, 2009) 41.

Protection beyond registered intangible Aboriginal cultural heritage

There are several reasons why a community may choose not to register intangible Aboriginal cultural heritage such as lack of trust in the ACH Authority, lack of trust in databases or technology, the perception that databases facilitate exploitation and misappropriation of intangible Aboriginal cultural heritage, inability to meet registration requirements, or other technical impediments. All intangible Aboriginal cultural heritage requires protection, not just intangible Aboriginal cultural heritage that has been registered in the ACH Information System. The framework should provide for the protection of all intangible Aboriginal cultural heritage and require an agreement for the use of any intangible Aboriginal cultural heritage, registered or not.

D1.2 Commercial Use and Agreements

The draft Bill provides protection of registered intangible Aboriginal cultural heritage from unauthorised commercial use. The approach does not provide adequate protection for intangible Aboriginal cultural heritage. Intangible Aboriginal cultural heritage requires protection from both commercial and non-commercial use including research purposes.

Non-commercial use of intangible Aboriginal cultural heritage must be subject to free, prior and informed consent of the knowledge holder or Aboriginal community. This approach is consistent with the AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies 2012. In accordance with the AIATSIS Guidelines,

‘Indigenous people who contribute traditional knowledge, practices and innovations, cultural expressions and intellectual property, skills, know-how, cultural products and expressions, and biological and genetic resources should receive fair and equal benefits. A reciprocal benefit should accrue for allowing researchers access (often intimate) to personal and community knowledge.’¹⁰

Furthermore, the draft Bill does not provide any detail on what terms and conditions should be contained in an agreement for the use of intangible Aboriginal cultural heritage. The legislation or regulations should set out minimum terms and conditions for such agreements. The ACH Authority should also be required to provide support to knowledge holders and Aboriginal communities in the negotiation of agreements for the use of intangible Aboriginal cultural heritage.

¹⁰ AIATSIS, Guidelines for Ethical Research in Australian Indigenous Studies (2012), Principle 11 <<https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf>>

D1.3 Role of the ACH Authority

Under the draft Bill, before registering intangible Aboriginal cultural heritage, 'the ACH Authority is to consult any relevant Local ACH Consultation Panel and have regard to any relevant provisions of an ACH strategic plan.' This approach is inappropriate as it vests decision making power in the ACH Authority. As observed above in sections B1.1 and B2.1, decisions in relation to Aboriginal cultural heritage including the registration of intangible Aboriginal cultural heritage must be made by local communities. Furthermore, the draft Bill's approach limits consultation to the Local ACH Consultation Panel and does not include the views of other relevant people such as knowledge holders who may not be represented on the Local ACH Consultation Panel.

The legislation should also provide clarification as to the meaning of 'consult' in this context. Consultation should provide opportunities for full and effective participation with a real opportunity to influence the outcome. This approach is endorsed by the United Nations Declaration on the Rights of Indigenous Peoples.

'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.'¹¹

'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'¹²

The legislation and/or regulations should provide guidance on whether the Local ACH Consultation Panel or Aboriginal community should be able to veto the registration of intangible Aboriginal cultural heritage. This is particularly important where applications to register intangible Aboriginal cultural heritage are made contrary to customary law or practices. Clarification must be provided as to whether the decision to register intangible Aboriginal cultural heritage (or otherwise) will be subject to some form of administrative review.

¹¹ United Nations *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) art 18.

¹² *Ibid*, art 19.