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Greens NSW Submission
Aboriginal Cultural Heritage Reform
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By email: ach.reform@environment.nsw.gov.au

Aboriginal Cultural Heritage Reform

Thank you for accepting this submission regarding the Aboriginal Cultural Heritage Reform process.

Thousands of Aboriginal cultural heritage sites have been damaged or destroyed in NSW in recent years. Continuing to issue permits to destroy cultural heritage at an alarming and frankly criminal rate

Data collected by the Greens NSW revealed that between 1990 and 2009 the NSW Government issued over 1000 permits (known as Aboriginal Heritage Impact Permits or AHIPs) to damage or destroy Aboriginal heritage, and that between 95% and 100% of applications to damage or destroy Aboriginal cultural heritage were approved. As recently as 2012 each and every one of the 99 applications to destroy or damage Aboriginal heritage that was determined by OEH was approved. It is self-evident that this rate is unacceptably high.

With increasing pressure to destroy the State's remaining Aboriginal heritage coming from the mining, forestry, and development industries there is an urgent need for greater statutory protection.

This generation is the custodian of the world's largest continual civilisation. If we saw any other nation routinely destroying heritage items dating back 500, 1,000 or 10,000 years into the past we would rightly be horrified. However in this state such destruction is routine.

Aboriginal people must be at the centre of managing Aboriginal Cultural Heritage. While the proposed reforms take some modest steps towards this, the proposed scheme will not deliver adequate resources or ownership to Aboriginal people to allow them to protect their culture and history.

This submission addresses only those questions where we considered the experience and understanding of the NSW Greens would be of assistance. We readily acknowledge that in this process determinative weight should be given to submissions from the Aboriginal community.

Again we thank you for considering this submission and we put it forward acknowledging the genuine consultation that the Department and Minister have engaged in to date in this process.

Kind regards,

David Shoebridge

Greens MP and Heritage Spokesperson

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Member of the NSW Legislative Council

Q.1 Should a new stand-alone Aboriginal cultural heritage Act be created? If not, what alternative would you suggest?

The Greens NSW strongly supports stand-alone legislation so that Aboriginal culture and heritage is no longer managed through the *National Parks and Wildlife Act*.

This aspect of the reform proposal is to be commended.

Q.2 Does the proposed preamble respectfully reflect contemporary views and understanding of the value of Aboriginal culture and heritage?
If not, what suggestions would you make to improve the preamble?

The preamble sets out the primary objective of protecting Aboriginal Cultural Heritage values identified as important to the Aboriginal people of NSW.

We strongly support the determination of matters of Aboriginal culture and heritage by the traditional custodians of that heritage, with this as a primary objective of the system. The preamble does not go this far which is unfortunate.

We further note that there has been discussion about the need to balance heritage and other considerations, a balance that experience tells us inevitable privileges economic benefit over other values.

I note that the preamble does not explicitly detail that cultural heritage goes beyond archaeological sites to include connections in the landscape to waterways, plants and animals. These less tangible heritage values are often omitted from understanding of Aboriginal Cultural Heritage and they should be expressly included.

Q.3 Does the proposed definition for Aboriginal cultural heritage appropriately recognise tangible and intangible ACH values?
If not, what alternative wording would you suggest to improve the definition of ACH?

See answer to question 2.

Q.4 Should the composition of the Local ACH Committees include people with the following statutory recognition:
☐ parties to a Native Title determination (NSW Native Title Act 1994)?
☐ registered Native Title claimants (NSW Native Title Act 1994)?
☐ people identified as Aboriginal Owners (Aboriginal Land Rights Act 1983)?
☐ parties to an Indigenous Land Use Agreement (NSW Native Title Act 1994)?
List any other statutory processes Government should consider for identifying Aboriginal people with the cultural authority to speak for Country.

I note ongoing concerns that certain Aboriginal voices will be privileged in the proposed scheme and other voices will be silenced. The committee system while a practical approach to "managing" ACH, runs the risk of entrenching this privilege. It is not supported.

There is also a clear need for the recognition of the role of Elders Councils in Aboriginal heritage matters, something which the reform proposal does not adequately include. Whatever committee structure is adopted, it must not be at the expense of excluding or silencing other recognised Aboriginal voices in the community.

Q.5 Should the Local ACH Committees also include Aboriginal Elders who are Traditional Owners and Knowledge Holders?

See answer to question 4

Q.6 Which of these four proposed options for creating boundaries for the Local ACH Committees do you prefer?

☐ Use the Local Aboriginal Land Council boundaries
☐ Use the regional Aboriginal Land Council boundaries
☐ Use the local Government and Shire boundaries
☐ Use the local land services boundaries to be established

If so, what guidance would you suggest is used to identify Aboriginal Elders who are Traditional Owners and Knowledge Holders that should be recognised for membership of a Local ACH Committee? List any other boundaries Government should consider for the Local ACH Committees.

This is a matter that us best answered by the Aboriginal community and their existing representative structures.

Q.7 Do you agree with the proposal to establish the following three categories for classifying ACH values:

☐ no or low ACH value?
☐ high ACH value?
☐ incomplete ACH information?

List any other criteria Government should consider for Local Aboriginal Committees and people to map and categorise local ACH values.

While the need for understanding the relative importance of heritage items and locations is important a categorisation system like this runs the real risk of legitimating the destruction of items whose heritage value is not currently known or understood. The historical displacement of traditional owners from their land inevitably means that many heritage items are not able to be proactively identified to prevent their destruction.

There must always be a requirement for ongoing monitoring and reporting of Aboriginal heritage in major developments in NSW.

Care should be taken to ensure that adequate funding is provided to ensure that any such categorisation reflects the best available evidence and that all possible traditional knowledge holders are consulted.

The proposed system also seems to allow the destruction of low ACH value items essentially at will. This essentially means that anything receiving this categorisation has no protection, despite the fact that cumulatively many such items for instance may assume a larger significance.

Q.9 Should Project Agreements be negotiated between the Local ACH Committee and proponents?
What process would you suggest the Local ACH Committee undertake to negotiate a Project Agreement?

The concept of project agreements negotiated between the proponents and the Local ACH Committee creates a new set of potential issues. In the first place there is the possibility that through political or economic influence proponents may secure agreement for damaging activities in areas that are mapped as having incomplete or high ACH values. This could occur in conflict with the views of the traditional landholders in the area and the lack of appeal rights would mean there would be little they could do about it.

The existing practice of negotiating project specific Aboriginal heritage management plans is dysfunctional and, especially in regards to resource industry projects, often leads to divided, and disempowered Aboriginal communities and poor heritage outcomes. A prime example of the failures of the existing regime is in the cultural management plan that was adopted for the Maules Creek Whitehaven Coal project in Leard Forest.

This management plan for that project was accepted by only a small minority of the local Aboriginal community, allowed for the industrial destruction of Aboriginal heritage sites in the path of the Whitehaven mine and was routinely breached to exclude local registered Aboriginal custodians from access to the site.

If project specific agreements are to be a feature of any new legislative scheme then they come with strong statutory protections and powers for the local Aboriginal community to counter the otherwise enormous power and financial imbalance these communities face when negotiating with the resource industry.

In any such system the agency oversighting the process must be the OEH and not Planning and Infrastructure.

Q.10 Will the creation of a public ACH Register, which will be publicly accessible and contains all ACH information for NSW, help:
☐ raise awareness of ACH values?
☐ with strategic planning and development processes?
☐ lead to better opportunities to protect ACH?
☐ inform land use decisions?
☐ create ACH conservation outcomes at both local and state levels?
List any other suggestions for improving the use of the ACH Register.

While the AHIMS register is a valuable tool to identify Aboriginal heritage, there is much heritage in NSW that is not recorded, registered or known, outside of Aboriginal communities. Information, advice and support to facilitate the recording and mapping Aboriginal heritage which addresses the concerns of Aboriginal groups, who are often reluctant to provide the location of sacred sites for registration, is required to address the large number of sites which remain unregistered.

Concerns have been raised that highlight the need for clarity for how much information is made available through this process. In particular it should be noted that there is often a high degree of sensitivity around the mapping of sites that may relate to secret business.

Balancing the inclusion of sufficient information to protect heritage, with the need to protect cultural restrictions on access to information, is not an easy task. However, ongoing protections concerning the access and recording of culturally sensitive information must be retained, and enhanced, in any reformed scheme

Q.11 Will the State of ACH Report will be an effective tool for:
☐ monitoring cumulative impacts and conservation outcomes?
☐ informing local, **regional and state-wide government policy and programs?**
☐ evidence **based decision making at the local and state-wide levels?**
☐ informing community and government conservation priorities?
Describe what you believe the State of ACH report should include, and the benefits it would provide to stakeholders.

Ongoing transparent reporting on Aboriginal heritage is a welcome initiative.

To be truly useful it is critical that the ACH report includes consideration not just of decisions made under the new legislation, but also management plans for the risks to heritage values associated with climate change. Consideration of developments should also include consideration of their climate impacts generally and specifically insofar as this will have impact on Aboriginal cultural heritage values.

Q.15 Will the following serve as incentives for people to better protect, conserve and manage ACH values:
☐ maintaining the existing penalties for harm to ACH values?
☐ maintaining the existing offences of harm to ACH **values?**
☐ maintaining the existing defences of harm to ACH values?
☐ maintaining the existing powers to investigate harm to ACH values?
☐ introducing a penalty for failing to comply with a Project Agreement?
☐ introducing a penalty for failing to comply **with consultation requirements?**
List any other incentives the Government should consider to protect, conserve and manage ACH values.

Although it is an offence to harm Aboriginal heritage without a permit, it is evident that DECCW/ OEH has been unwilling to prosecute breaches of Aboriginal heritage protections in the *National Parks and Wildlife Act*, with less than 10 prosecutions over ten years.

Penalty regimes for non-compliance with heritage legislation need to act as a genuine deterrent. Penalties currently issued are paltry in comparison to the damage done. As a result, certain developers and resource companies are able to see such fines as a modest cost of business rather than a genuine threat to their preferred project.

To address this concern a significant increase in the maximum penalty is required, with a specific sentencing consideration being included that requires Courts to consider the financial benefit

obtained by the guilty party as a result of the destruction of the heritage when determining the appropriate penalty.

To be effective, increased penalties must also come an increased willingness to prosecute serious or ongoing breaches.

We further note that under the existing system a large number of activities are currently defined as 'low impact' by the *National Parks and Wildlife Regulations*. These activities do not require a permit and include mineral testing (such as bulk sampling and drilling) and certain logging activities. Some industries also have codes which they can follow and avoid a permit – e.g. Minerals Council's Due Diligence Code of Conduct and Forestry codes.

The Greens do not support these industry specific codes being used as a tool for avoiding compliance with considered legislative protections.

Q.19 Would developing Project Agreements at the earliest stages of the planning process, rather than after a development approval is issued, be a more effective way to consider and manage ACH values?
List any other mechanisms to encourage Project Agreements to be created early in the planning process.

Rather than specific project agreements, the prospect of a significant development application should trigger closer scrutiny of any existing heritage management plan for the area impacted by any pending project.

Our concerns regarding project specific agreements are otherwise noted above.

Q.25 Will the need for dispute resolution and the likelihood of appeals be reduced by:
☐ requiring compliance with minimum standards and guidelines for the development and approval of ACH Maps and Plans of Management?
☐ placing Plans of Management and ACH Maps on public exhibition submissions before decisions are made?
☐ setting mandatory timeframes, minimum standards and guidelines for consultation?
☐ compliance with a mandatory Code of Conduct and Negotiation Framework for Project Agreements?
☐ mandatory criteria and minimum standards for development of Project Agreements?

Minimum standards and guidelines for the development and approval of ACH Maps and Plans of management would be appropriate .

Mandatory time frames are likely to prejudice heritage protection and are not supported. Standard timeframes, with express allowances for the complexity of consulting with what is often a diverse local Aboriginal community would be appropriate.

Q.26 When Plans of Management are made by the Local ACH committees:
☐ should any member of the public have the right to appeal the making of those plans, on the basis that that person does not think that the plan is appropriate, fair, equitable, and have the Court decide the plan (i.e. merits appeal)?

☐ should any member of the public have the right to appeal the making of those plans, on the basis that the process contravened legal principles (i.e. judicial review)?

Yes. Appeal rights and judicial review mechanisms enhance first instance decision making.

However the views and opinions of the local Aboriginal community should be given determinative weight in any consequential appeal.

Q.27 When Project Agreements are made by the Local ACH committees:
☐ should any member of the public have the right to appeal the making of those Agreements, on the basis that that person does not think that the Agreement is appropriate, fair, equitable, and have the Court decide the Agreement (i.e. merits appeal)?
☐ should any member of the public have the right to appeal the making of those agreements, on the basis that the process leading to the Agreement contravened legal principles (i.e. judicial review)?

Yes. Appeal rights and judicial review mechanisms enhance first instance decision making.

However the views and opinions of the local Aboriginal community should be given determinative weight in any consequential appeal.

Dated: 2 April 2014.