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Aboriginal cultural heritage protection: proposed reforms

by Lenny Roth

1. Introduction

Aboriginal people have lived in Australia for over 40,000 years. They have developed a rich cultural heritage which continues to have great importance to them and to the nation as a whole.

NSW laws to protect Aboriginal cultural heritage were first enacted in 1969, and these provisions were incorporated into the *National Parks and Wildlife Act 1974*. For decades, Aboriginal people and communities have argued for reform. In 2010, the NSW Government commenced a process to create new stand-alone legislation to protect Aboriginal cultural heritage. In September 2013, the Government released a proposed model for consultation. The reforms are still being finalised.

This e-brief presents a summary of the existing laws in NSW, the proposed reforms, and some selected stakeholder views. Commonwealth and other State laws are also briefly discussed.

2. Aboriginal cultural heritage

A 1998 [report](#) for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission provided this definition of heritage:

Heritage consists of the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems that have been developed, nurtured and refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity, including:

- Literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry)
- Languages
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna)
- Spiritual knowledge
- All items of moveable cultural property, including burial artefacts

- Indigenous ancestral remains
- Indigenous human genetic material (including DNA and tissues.)
- Cultural environment resources (including minerals and species)
- Immovable cultural property (including Indigenous sites of significance, sacred sites and burials)
- Documentation of Indigenous people's heritage in all forms of media (including scientific, ethnographic research reports, papers and books, films, sound recordings.)

The heritage of an Indigenous people is a living one and includes items which may be created in the future based on that heritage.¹

3. Pressures on cultural heritage

In 2011, a [report](#) on the state of Indigenous cultural heritage was prepared for the Commonwealth Department of Environment. One part of the report examined pressures on Indigenous cultural heritage, stating in summary:

The high level of approved destruction of significant Aboriginal heritage remains a major threat to Indigenous heritage. While nearly all jurisdictions introduced stronger requirements to assess Indigenous heritage and consult with Indigenous people about development, there is little evidence that this has led to improved protection for Indigenous heritage sites.

The past five years have been remarkable for the number of high-profile conflicts between Indigenous people, government decision-makers and industries (including mining, forestry and urban development) about developments that destroy significant and sacred sites. A number of recent legal challenges by Indigenous people have highlighted the lack of legal avenues or formal rights for Indigenous people seeking to enforce protection of their heritage.

There has been an increase in recording and listings of Indigenous sites but there is little to no accounting or public reporting of the cumulative impact of the destruction of Indigenous heritage. While in principle support for cultural landscape planning exists, this has not been resourced or actively implemented by policy makers.

The majority of cultural heritage assessments are undertaken by commercial industries seeking to undertake activities which may impact on Indigenous heritage. Economic considerations are prioritised over heritage protection, in the absence of any rigorous assessment of how much of the Indigenous heritage estate has already been destroyed through past activities in the region.²

4. Current laws in NSW

There are several pieces of legislation in NSW that are relevant to the protection of Aboriginal cultural heritage.³ The main Acts are the *Heritage Act 1977* and the *National Parks and Wildlife Act 1974*. The first is briefly noted and the second is discussed in more detail.

4.1 Heritage Act 1977

The [Heritage Act 1977](#):

...protects the state's most outstanding natural and cultural heritage, including Aboriginal heritage, through the establishment of a State Heritage

Register. Aboriginal places or objects of importance to the State of NSW (called heritage items) may be listed on the Register. Currently there are over 20 heritage items (at April 2012) listed on the Register specifically because of their Aboriginal heritage importance. These places include the Wooleybah Sawmill and Settlement, Ulgundahi Island, and Bomaderry Aboriginal Children's Home. Any changes to items listed on the Register must be approved by the NSW Heritage Council.⁴

4.2 National Parks and Wildlife Act 1974

Part 6 of the [National Parks and Wildlife Act 1974](#) contains provisions for the protection of Aboriginal objects and Aboriginal places. A brief summary of these provisions follows.⁵

Definitions: An *Aboriginal object* means:

...any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains. [s 5]

An *Aboriginal place* is a place that is so declared by the Minister, being a place that is or was of special significance to Aboriginal culture: s 84. The Office of Environment and Heritage notes:

There are currently 78 declared Aboriginal Places in NSW (at April 2012). The types of places that have been declared Aboriginal Places include sacred sites (such as natural features including mountains and water holes), settlement places (such as missions and reserves), burial grounds (such as mission cemeteries and repatriation sites) and some other site types (such as stone axe quarries).⁶

Offences: The key offences are set out below. The penalties for these offences were substantially increased in 2010.⁷

Offence	Maximum penalty (Individual)	Maximum penalty (Corporation)
A person must not harm or desecrate an object that the person knows is an Aboriginal object: s 86(1)	Fine of \$275,000 or imprisonment for 1 year, or both, or (in circumstances of aggravation) fine of \$550,000 or imprisonment for 2 years, or both	Fine of \$1,100,000.
A person must not harm an Aboriginal object: s 86(2)	Fine of \$55,000 or (in circumstances of aggravation) fine of \$110,000	Fine of \$220,000
A person must not harm or desecrate an Aboriginal place: s 86(4)	Fine of \$550,000 or imprisonment for 2 years, or both	Fine of \$1,100,000

Circumstances of aggravation are (a) that the offence was committed in the course of carrying out a commercial activity; or (b) that the person had previously been convicted of an offence under section 86.

Defences: It is a defence to all of these offences if the harm or desecration was authorised by an Aboriginal heritage impact permit (see below); and the conditions to which that permit was subject were not breached: s 87(1).

It is a defence to an offence under section 86(2) if the defendant shows that the defendant exercised due diligence to determine whether the act or omission constituting the offence would harm an Aboriginal object and, on that basis, reasonably determined that no Aboriginal object would be harmed: s 87(2). Compliance with prescribed codes of practice can constitute due diligence. A number of codes of practice have been prescribed in the *National Parks and Wildlife Regulation 2009* (cl 80A) including the Department's [Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW](#) (September 2010).

It is also a defence to an offence under section 86(2) if the defendant shows that the act or omission constituting the offence is prescribed as a low impact act or omission: s 87(4). Several activities are prescribed in the Regulations (cl 80B): e.g. certain farming and land management work (e.g. cropping) on land that has been disturbed; and certain mining exploration work (e.g. drilling) on land that has been disturbed.

Prosecutions: It appears that there have only been six successful prosecutions of these offences; in another case a conviction was quashed on appeal.⁸ All but one of these cases occurred under the pre-2010 penalties which were substantially lower: the maximum penalty for knowingly damaging an Aboriginal object or place was \$5,500 and/or 6 months imprisonment for an individual; and \$20,000 for a corporation).

Case	Offence	Penalty
Chief Executive, Office of Environment and Heritage v Ausgrid [2013] NSWLEC 51	Harming an Aboriginal object: s 86(2). Ausgrid damaged an Aboriginal rock engraving at Cromer in Sydney.	Fine - \$4,690
Wellington Council (Wellington Local Court, September 2009)	Disturbing an Aboriginal object: former s 90. Council damaged an Aboriginal scarred tree	Fine- \$1,500
Craig Alison (Bourke Local Court, October 2008)	Disturbing and defacing Aboriginal objects: former s 90. Person disturbed up to 129 Aboriginal objects and defaced 2 Aboriginal objects from around a property near Bourke.	Fine - \$1,650
Garrett v Williams, Craig Walter [2007] NSWLEC 96	Knowingly damaging an Aboriginal object or place: former s 90. Mining company destroyed several Aboriginal artefacts and damaged an Aboriginal place near Broken Hill. The sole director was prosecuted (3 offences).	Fine - \$1,400
Plath v O'Neill [2007] LEC 553	Knowingly damaging an Aboriginal object or place: former s 90. Owners of a residential property at Woombah on the North Coast damaged Aboriginal shell middens (sites containing remains of Aboriginal meals of shellfish)	Fine - \$800 for each person
Cowra Shire Council (Cowra Local Court, April 2005)	Knowingly destroying an Aboriginal object: former s 90. Council destroyed an Aboriginal scarred tree.	Fine - \$750

Director of National Parks and Wildlife v Histollo Pty Limited [1995] NSWLEC 240. The conviction was quashed on appeal: see <i>Histollo Pty Ltd v Director-General of National Parks & Wildlife Service</i> (1998) 45 NSWLR 661	Knowingly damaging an Aboriginal object or place: former s 90. Owner of rural property on outskirts of metropolitan Sydney damaged Aboriginal relics (3 offences).	Fine - \$40,000
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Note that enforcement action for harming an Aboriginal object or place can also be taken under the *Environmental Planning and Assessment Act 1979* if there is a breach of development consent conditions (see discussion below of “exemption for State significant development”).

Impact permits: An application may be made to the Director-General for the issue of an Aboriginal heritage impact permit: s 90A. The Regulations require the application to be accompanied by a cultural heritage assessment report: cl 80D. The Director-General may issue an Aboriginal heritage impact permit in relation to an Aboriginal object, Aboriginal place, land, activity or person, or classes of such objects, places, land, activities or persons: s 90. The permit may be issued subject to conditions or unconditionally. In making a decision in relation to a permit, the Director-General must consider various matters including (for example):

- actual or likely harm to the Aboriginal objects or Aboriginal place;
- practical measures that may be taken to protect and conserve the Aboriginal objects or Aboriginal place;
- the significance of the Aboriginal objects or Aboriginal place;
- the results of any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place (and whether this substantially complied with the regulations);
- the social and economic consequences of the decision: s 90K.⁹

The Regulations outline an Aboriginal community consultation process: cl 80C. This includes notifying relevant Aboriginal persons, allowing them an opportunity to make submissions on the proposed methodology for the cultural heritage assessment report, and subsequently, on the draft report.

If any condition of a permit is contravened, the holder of the permit is guilty of an offence: s 90J. In the case of an individual, the maximum penalty is a fine of \$110,000 and/or six months imprisonment; and in the case of a corporation, the maximum penalty is a fine of \$220,000.

Since 2010, the Director-General has been required to keep a public register containing the details of each application for a permit, each decision on such an application, and each permit issued, varied, transferred, surrendered, suspended or revoked: s 188F. This register can be accessed on the Office of Environment and Heritage [website](#).

The register does not contain statistics. However, in [answer](#) to a question in 2015-16 budget estimates, Mark Speakman, the Minister for Environment and Heritage stated that in 2014-15 there were 108 Aboriginal heritage impact permits issued; with none being refused;¹⁰ and in [answer](#) to a

question in 2014-15 budget estimates, Rob Stokes, then Minister for Environment and Heritage, stated that 82 permits had been issued in 2013-14; with none being refused.¹¹ The Minister added:

The AHIP application process comes at the end of a period of negotiation and consultation with the Registered Aboriginal parties and the Office of Environment and Heritage. The process is designed so that those that do reach the application stage include only what is legal, appropriate and acceptable following consultation with the Aboriginal community.

In response to a separate question, the Minister noted that 292 permits had been issued since October 2010.¹² In July 2007, in an [answer](#) to a question on notice, the relevant Minister advised that “approximately 800 section 90 Aboriginal Heritage Impact Permits have been issued since 1990”.¹³

Orders and directions: If the Director-General is of the opinion that any action is being, or is about to be, carried out that is likely to significantly affect an Aboriginal object or Aboriginal place, the Director may order that the action is to cease: s 91AA. This does not apply in relation to anything that is essential for carrying out a development consent. If the Director-General is satisfied that any Aboriginal object, or any Aboriginal place, has been harmed in or as a result of the commission of an offence under the Act (whether or not any person has been proceeded against or convicted), he or she may direct a person to carry out specified remediation work: s 91L.

Exemption for State significant development: The *Environmental Planning and Assessment Act 1979* states that an Aboriginal heritage impact permit is not required in relation to approved State significant development and State significant infrastructure (and accordingly the offences under Part 6 of the *National Parks and Wildlife Act 1974* do not apply): ss 89J, 115ZJ. The developer may be required to include in an Environmental Impact Statement an assessment of impacts of the project on Aboriginal cultural heritage; and a development consent may contain conditions relating to Aboriginal cultural heritage: e.g. to comply with a Cultural Heritage Management Plan. A recent example of an enforcement action for breach of such consent conditions is the \$3,000 fine imposed on Narrabri Coal Mine for disturbing an Aboriginal artefact during roadworks.¹⁴

5. Proposals for reform

The reform process has a long history. In February 2010, the Labor Government committed to new stand-alone legislation to protect Aboriginal cultural heritage.¹⁵ In November 2010, it announced the formation of the Aboriginal Cultural Heritage Reform Working Party to provide advice within two years. It appears that the reform process stalled following the change of Government but recommenced in October 2011.¹⁶ In December 2012, the working party provided the Government with a [discussion paper](#) containing draft recommendations. In September 2013 the Government released its own [discussion paper](#) with a proposed model for stand-alone Aboriginal cultural heritage legislation. Some of the key features are:

- The definition of Aboriginal Cultural Heritage (ACH) will include more than Aboriginal objects and places.

- Local ACH Committees will be established across NSW and will be 'one-stop-shops' for all consultation and decision-making.
- Each Local ACH Committee will be responsible for developing local ACH Maps and Plans of Management. The maps will show areas of high ACH value, low or no ACH value, and areas where knowledge is incomplete. The plans will outline strategies for managing each type of ACH value identified in the map. Maps and plans approved by the Minister will be placed on an ACH Register. It can be accessed to inform strategic land use at a regional level or to assist with planning decisions at the local level.
- Aboriginal Heritage Impact Permits will be replaced with Project Agreements that are negotiated and agreed on by the Local ACH Committee and the project proponent. Project Agreements will be required for certain activities in areas that are mapped as having incomplete or high ACH values. There will be mandatory time frames for the consultation and negotiation process. If a dispute arises either party may seek assistance from an approved dispute resolution service. If it remains unresolved, the proponent can proceed with caution in accordance with the Plan of Management.
- The current penalties regime and alternative sentencing provisions will be maintained but provisions will be added to reflect enforcing any conditions contained within Project Agreements.
- The Department will be required to publish every three years a State of Aboriginal Cultural Heritage Report.

There have been no government announcements about next steps since the consultation process was completed in March 2014.¹⁷ In September 2015, the Minister for Environment and Heritage, Mark Speakman, was asked about the delay in finalising this legislation and he responded:

Yes, there has been a delay, but at the end of the day it is more important to get things right than to cut corners. This area is extremely sensitive. There are difficult issues. One difficult issue is who speaks for country...We exhibited a model in 2013, where we tried to have traditional owners do that. As I understand it, the New South Wales Aboriginal Land Council, among others, preferred a model where the land councils are the interlocutors, if you like. That is a difficult issue to resolve. It is a sensitive issue and we want to take the time to do it properly.¹⁸

6. Stakeholder views

The Government received 147 [submissions](#) on its proposals. The views of selected stakeholders are outlined in brief below (this selection aims to provide a reasonably representative sample of views).

Aboriginal Cultural Heritage Advisory Committee: The ACHAC, which is the peak statutory advisory body to the NSW Government on Aboriginal cultural heritage matters, generally supported the proposed legislation but raised some issues. For example, the majority of ACHAC members objected to the options put forward for Local ACH Committee boundaries. It proposed that the boundaries be developed based on traditional customs.

NSW Aboriginal Land Council: The NSWALC commented that it was extremely concerned that the proposed model:

- Undermines the culture and heritage roles of Aboriginal Land Councils,
- Fails to provide a genuine Aboriginal controlled process for the protection of Aboriginal culture and heritage by establishing government appointed Local Aboriginal Culture and Heritage Committees,
- Supports the continued significant control and oversight by government in Aboriginal culture and heritage protections, rather than an independent Aboriginal body, and
- Perpetuates a system that focuses on the destruction of Aboriginal culture and heritage, rather than protection.

NTSCORP: NTSCORP, the native title service provider for NSW, stated:

Unfortunately, NTSCORP considers that the model proposed by the NSW Government falls short of the expectations of Aboriginal Traditional Owners and fails to meet the key principles and minimum standards enunciated in the [1980] Keane Report and in submissions by Peak Aboriginal bodies, such as NTSCORP and NSWALC over a very long period of time. Most significantly, the model proposed does not deliver a system operated and controlled by Aboriginal People and proposes to import several of the shortcomings of the current NPW Act into new legislation to the detriment of Aboriginal People and other Stakeholders, such as proponents.

Australians for Native Title and Reconciliation: ANTA supported some elements of the proposals but also made strong criticisms:

...the so-called “clear and streamlined” process the Government is proposing, to support the social and economic growth of NSW “in the best interests of all people in NSW” must not be enacted as it would will breach the United Nations Declaration on the Rights of Indigenous People to ‘maintain, control, protect and develop their cultural heritage.’

The proposed reforms would force Aboriginal people into an unacceptable process which will continue to deny them genuine power to maintain, control, protect and develop their cultural heritage.

NSW Environmental Defenders Office: The EDO NSW submitted:

In summary, while the overall proposal to enact stand-alone legislation to protect Aboriginal culture and heritage is a positive and long-overdue reform, we are concerned that some key elements of the Discussion Paper are inconsistent with the cultural values of Aboriginal communities, traditional owners and traditional custodians. Some of the proposed measures are unrealistic for Aboriginal communities to accomplish in the short-term and possibly long term, due to the lack of resources and history of dispossession.

The EDO submitted that the legislation should, amongst other things, provide for the establishment of an overarching independent Aboriginal culture and heritage body to support the local ACH Committees; and provide for the free prior and informed consent of ACH Committees to veto a development if it unacceptably impacts an area of cultural significance.

NSW Minerals Council: The NSW Minerals Council stated:

There are many aspects of the proposed model with significant merit including the commitment to stand-alone legislation; clarification of cultural

knowledge holders and promotion of local decisions on cultural heritage; provision of cultural heritage information through maps and plans of management as well as streamlined consultation processes with defined timeframes.

There is, however, a substantial lack of detail in key aspects of the proposed model. The success of the proposed model as a whole will be determined by the effectiveness of this detail. NSWMC believes further opportunity to comment on revisions of the model, draft legislation, regulation and guidance information is needed.

Property Council of Australia: The Property Council commented:

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

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

In terms of establishing independent oversight of the new system (point 1 above), the Property Council submitted that the Government adopt the Reform Working Party's recommendation to establish an Aboriginal Cultural Heritage Commission supported by an ACH Office within Government.

7. Commonwealth laws

There are various Commonwealth laws to protect Aboriginal cultural heritage.¹⁹ The main ones are the *Environment Protection and Biodiversity Conservation Act 1999* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The first is briefly noted and the second is outlined in more detail.

7.1 Environment Protection and Biodiversity Conservation Act 1999

The [Environment Protection and Biodiversity Conservation Act 1999](#):

...establishes the National Heritage List, which includes natural, Indigenous and historic places that are of outstanding heritage value to the nation. The Act also establishes the Commonwealth Heritage List, which comprises natural, Indigenous and historic places on Commonwealth lands and waters or under Australian Government control, and identified by the Minister for the Environment (the Minister) as having Commonwealth Heritage values.²⁰

7.2 Aboriginal and Torres Strait Islander Heritage Protection Act 1984

The [Aboriginal and Torres Strait Islander Heritage Protection Act 1984](#), allows the Minister, on application from an Aboriginal or group of Aboriginals, to make a declaration to protect significant Aboriginal areas and objects in cases where they are under threat of injury or desecration. Section 13 qualifies the Minister's power to make a declaration:

The Minister shall not make a declaration in relation to an area, object or objects located in a State or the Northern Territory unless he or she has

consulted with the appropriate Minister of that State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area, object or objects from the threat of injury or desecration.

It is an offence for a person to contravene a provision of a declaration. The maximum penalties vary according to the type of declaration:

- in the case of a declaration relating to an Aboriginal area: for a natural person, a fine of \$10,000 or 5 years imprisonment, or both; and for a body corporate – a fine of \$50,000.
- in the case of a declaration relating to an Aboriginal object: for a natural person, a fine of \$5,000 or 2 years imprisonment, or both; and for a body corporate, a fine of \$25,000.

An August 2009 Department of Environment [discussion paper](#) commented:

The [Act] has not been effective in meeting its purpose, which was to provide a direct and immediate means for the Commonwealth to protect traditional areas and objects when there are gaps in state and territory legislation. Instead it has created uncertainty about decisions made under other laws, provoked disputes and led to duplication of decisions, with increased costs for all parties involved.

The [Act] has not proven to be an effective means of protecting traditional areas and objects. Few declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. Also Federal Court decisions overturned two of the five long term declarations that have been made for areas.²¹

The discussion paper contained reform proposals which were designed to:

...clarify responsibilities for protecting Indigenous heritage, to set standards of best practice nation-wide, to remove duplication of state and territory decisions that meet the standards, and to improve processes for Australian Government decisions about protection when the standards are not met.²²

These proposals have not yet been implemented.

8. Laws in other States

8.1 Overview

The five other States have stand-alone Aboriginal cultural heritage legislation. The ACT's Aboriginal cultural heritage laws form part of its *Heritage Act*. The Northern Territory has stand-alone legislation in relation to Aboriginal sacred sites as well as provisions in the *Heritage Act*. A 2012 Office of Environment and Heritage paper compared the relevant laws across Australia; as did a 2014 paper by Justice Pepper from the Land and Environment Court.²³ That 2014 paper noted that Victoria's legislation was "the most comprehensive, most well-resourced, and arguably, the most representative of Aboriginal interests". The Victorian scheme and proposed reforms to it are discussed below. In recent years, reforms have also been proposed in Western Australia and Tasmania.²⁴

8.2 Victorian laws

The key features of the *Aboriginal Heritage Act 2006* are:

- the establishment of a [Victorian Aboriginal Heritage Council](#) to provide a state-wide voice for Aboriginal people and to advise the Minister for Aboriginal Affairs on issues relating to the management of cultural heritage
- the introduction and management of a system of [Registered Aboriginal Parties](#) that allows for Aboriginal groups with connections to country to be involved in decision making processes around cultural heritage
- the establishment of [Cultural Heritage Management Plans](#) and [Cultural Heritage Permit](#) processes to manage activities that may harm Aboriginal cultural heritage
- a system of [cultural heritage agreements](#) to support the development of partnerships around the protection and management of Aboriginal cultural heritage
- strengthened provisions relating to enforcement of the Act - including [Aboriginal Heritage Protection Declarations](#) and stop orders, and
- clearer powers for [Inspectors](#) and increased [fees and charges](#) for breaches of the Act.

The Act also has processes for handling dispute resolution. This includes the review of certain decisions through the [Victorian Civil and Administrative Tribunal \(VCAT\)](#).²⁵

With respect to the processes to manage activities that may harm Aboriginal cultural heritage (point 3 above), it can be noted that:

- A Cultural Heritage Permit must not be granted in respect of Aboriginal human remains or a secret or sacred Aboriginal object: s 37. In addition, the Secretary of the Department *must* refuse to grant a permit if a Registered Aboriginal Party (RAP) objects to it within the 30-day time period; and must include in a permit any reasonable condition recommended by the RAP: ss 40-41. A refusal of a permit or the inclusion of a condition can be appealed to the Victorian Civil and Administrative Tribunal (VCAT): s 121
- Similarly, an RAP has the power to refuse to approve a Cultural Heritage Management Plan put forward by a sponsor (certain activities require such plans to be prepared instead of applying for a permit) if the plan does not adequately address certain matters outlined in the Act (e.g. whether the activity will be conducted in a way that will avoid or minimise harm): ss 42, 61-66. If an RAP refuses to approve a plan, this can be appealed to VCAT: s 116.

Following a [review](#) of the Act, in 2014, the Coalition Government released for consultation an [Aboriginal Heritage Amendment Bill 2014 – Exposure Draft](#). The proposed reforms included:

- A new process to provide sponsors with certainty about when a cultural heritage management plan is required for their proposed activity

- A new process for consulting with Traditional Owners in areas without a registered Aboriginal party
- A new system of public land management agreements to streamline Aboriginal cultural heritage and public land management
- An expanded compliance system to establish greater Traditional Owner participation in enforcement activities
- A new Aboriginal ancestral remains system.²⁶

The Labor Government has not yet introduced a Bill.

9. Conclusion

There is a general consensus that NSW should have stand-alone legislation to protect Aboriginal cultural heritage; bringing NSW into line with other Australian jurisdictions. The process to develop a new Act commenced in 2010 and in 2013 the Government put forward a proposed model. A number of Aboriginal organisations and others criticised this model, primarily on the basis that it does not give Aboriginal people sufficient control over decisions impacting on their heritage. Two key industry bodies supported elements of the model but expressed concerns about the lack of details and identified areas for further review. The reform process is continuing, with the Minister saying recently that one difficult issue the Government is trying to resolve is who speaks for country.

¹ T Jenke and M Frankel and Company Solicitors, [Our Culture : Our Future Report on Australian Indigenous Cultural and Intellectual Property Rights](#), 1998, p11-12

² E Schnierer, S Ellsmore and S Schnierer, [State of Indigenous Cultural Heritage 2011](#), Report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee, 2011, p11

³ For an outline of the various pieces of legislation, see NSW Office of Environment and Heritage, [Aboriginal heritage legislation in NSW: How the Aboriginal heritage system works](#), 2012, p4ff.

⁴ See NSW Office of Environment and Heritage, note 3, p4

⁵ For a history of this legislation, see NSW Office of Environment and Heritage, [Aboriginal heritage legislation in NSW: Reform milestones 1969–2011](#), 2011. For a more comprehensive outline of the legislation, see NSW Office of Environment and Heritage, [Aboriginal heritage legislation in NSW: How the Aboriginal heritage system works](#), 2012

⁶ See NSW Office of Environment and Heritage, [Aboriginal heritage legislation in NSW: How the Aboriginal heritage system works](#), 2012, p12; and see also NSW Office of Environment and Heritage, NSW [Atlas of Aboriginal Places](#), [online]

⁷ [National Parks and Wildlife Amendment Act 2010](#)

⁸ See A Packham, 'Between and rock and a hard place: Legislative shortcomings hindering Aboriginal cultural heritage protection' (2014) 31 *Environmental and Planning Law Journal* 75 at 78 and 88-89; Legislative Council Questions on Notice, [#2384—Climate Change and the Environment—National Parks and Wildlife Amendment Act 2001](#), 5 January 2009; and Department of Environment [Annual Reports](#) from 2003-04 to 2013-14. The Department's [2004-05 Annual Report](#) referred to the prosecution of Cowra Shire Council and noted that "This was a landmark case as it was the first successful prosecution for a breach of a section 90 consent" (p43).

⁹ The Office of Environment and Heritage has published a [Guide to Aboriginal Heritage Impact Permit Processes and Decision-Making](#).

¹⁰ General Purpose Standing Committee No 5, *Budget Estimates 2015-16: Examination of proposed expenditure for the portfolio areas The Environment, Heritage*, 4 September 2015, p22

- ¹¹ General Purpose Standing Committee No 5, *Budget Estimates 2014-15: Answers - Supplementary Questions - The Environment, Heritage, The Central Coast*, 12 September 2014, Questions 9-10
- ¹² General Purpose Standing Committee No 5, note 11, Question 15
- ¹³ Legislative Council Questions on Notice, [#0127—Climate Change Environment and Water—Aboriginal cultural heritage, 31 July 2007](#). For information permits granted from 2004 to 2008, see Legislative Council Questions on Notice, [#2091—Climate Change and the Environment—s90 National Parks and Wildlife Act 1974](#), 28 October 2008
- ¹⁴ See NSW Department of Planning and Environment, [Compliance Report November 2014](#), p2; and personal communication with an officer at the Department of Planning & Environment dated 16 November 2015
- ¹⁵ F Sartor, [Aboriginal Cultural Heritage Laws Get Strengthened](#), Media Release, 25 February 2010
- ¹⁶ R Parker, [Aboriginal Culture and Heritage Laws to be Reformed](#), Media Release, 25 October 2011; and J Hunt, NSW cultural heritage reform: does the proposed model reflect the United Nations Declaration on the Rights of Indigenous People (2014) 8(10) *Indigenous Law Bulletin* 15
- ¹⁷ N Laing and K Stanford, 'Aboriginal cultural heritage law: a long road to reform (2015) 2(7) *Law Society Journal* 88 at 89
- ¹⁸ General Purpose Standing Committee No. 5, note 10, p22
- ¹⁹ See Department of Environment, [Indigenous heritage](#), [online]
- ²⁰ See Department of Environment, [Indigenous heritage](#), [online]
- ²¹ Department of the Environment, Water, Heritage and the Arts, [Indigenous heritage law reform: Possible reforms to the legislative arrangements for protecting traditional areas and objects](#), August 2009, p4
- ²² Department of the Environment, Water, Heritage and the Arts, note 21, p7
- ²³ NSW Office of Environment and Heritage, [Aboriginal heritage legislation in NSW: Comparing the NSW Aboriginal heritage system with other Australian systems](#), 2012; R Pepper, [Not Plants or Animals: the Protection of Indigenous Cultural Heritage in Australia](#), Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 5 March 2014. See also National Native Title Tribunal, [Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation](#), December 2010; and *Australian Environment Review* Vol 28 No.2 March 2013 for articles outlining the legislation in several States.
- ²⁴ In Western Australia, see the [Aboriginal Heritage Amendment Bill 2014](#), which was introduced into Parliament on 27 November 2014. The Bill has not yet been debated. For some commentary on the Bill, see A Kwaymullina, B Kwaymullina and L Butterly, [Opportunity lost: changes to Aboriginal heritage law in WA](#) (2015) 8(16) *Indigenous Law Bulletin* 24; and ABC News, [National MPs unlikely to support changes to the Aboriginal Heritage Act](#), 25 May 2015; and [Aboriginal Heritage Act: WA minister rejects criticisms changes give too much power to single bureaucrat](#), 26 May 2015. In Tasmania, in October 2013 the Government introduced the [Aboriginal Heritage Protection Bill 2013](#). It passed the Assembly on 12 November 2013 but had not passed the Council when Parliament was prorogued before the State election in March 2014.
- ²⁵ Department of Premier and Cabinet, [Aboriginal Heritage Act 2006](#), [online]
- ²⁶ See Department of Premier and Cabinet, [Exposure Draft: Aboriginal Heritage Amendment Bill 2014](#), Information Sheet, [Online]

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ISSN 1838-0204