



LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 7

# Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

Report 15

November 2022

7



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Portfolio Committee No. 7 – Planning and Environment

# **Aboriginal Cultural Heritage (Culture is Identity) Bill 2022**

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Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

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Chair: Ms Sue Higginson, MLC.



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## Terms of reference

That:

- (a) the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 be referred to Portfolio Committee No. 7 - Planning and Environment for inquiry and report,
- (b) the bill be referred to the committee at the conclusion of the mover's second reading speech in the Council, and
- (c) the committee report by 8 November 2022.

The terms of reference were referred to the committee by the Legislative Council on 9 August 2022.<sup>1</sup>

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<sup>1</sup> *Minutes*, NSW Legislative Council, 9 August 2022, pp 3531-3532.

## Committee details

### Committee members

<b>Ms Sue Higginson MLC</b>	The Greens	<i>Chair</i>
<b>The Hon Mark Pearson MLC</b>	Animal Justice Party	<i>Deputy Chair</i>
<b>The Hon Scott Barrett MLC</b>	The Nationals	
<b>The Hon Rose Jackson MLC</b>	Australian Labor Party	
<b>The Hon Aileen MacDonald MLC**</b>	Liberal Party	
<b>The Hon Shayne Mallard MLC</b>	Liberal Party	
<b>Revd the Hon Fred Nile MLC*</b>	Independent	
<b>The Hon Penny Sharpe MLC</b>	Australian Labor Party	

\* Revd the Hon Fred Nile MLC is a participating member from 9 August 2022 for the duration of the inquiry.

\*\* The Hon Aileen MacDonald MLC became a substantive member of the committee from 16 August 2022.

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### Secretariat

Emily Treeby, Principal Council Officer

Holly McDonald, Seconded

Madolyn Hollins, Administration Officer

Sharon Ohnesorge, Director

## Chair's foreword

The Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 is a private member's bill that was introduced in the Legislative Council by Reverend the Hon Fred Nile on 22 June 2022. The bill is co-sponsored by Mr Justin Field MLC, Mr Alex Greenwich MP, the Hon Emma Hurst MLC, the Hon Mark Pearson MLC and Mr Greg Piper MP.

The bill addresses an incredibly important and complex matter which is of immense significance to Aboriginal people in New South Wales. The bill's object is to 'provide a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage and recognise the fundamental importance of Aboriginal cultural heritage to Aboriginal people'.

In this report, the committee finds that modernised and standalone Aboriginal cultural heritage legislation is both necessary and long overdue. The NSW Government has taken too long to translate into legislative reform its decade-long work and consultation on creating standalone legislation that improves Aboriginal cultural heritage protection and regulation.

Reform is urgently needed. Looking at the current statutory system, it fails adequately protect Aboriginal cultural heritage, which is treated as an ancillary consideration in the planning and development process. During the inquiry, the committee heard from Aboriginal people and organisations about the community's strong frustration, disappointment, hurt and anger that Aboriginal cultural heritage matters remain governed by the *National Parks and Wildlife Act 1974*, which they told us facilitates a 'licence to destroy' approach to Aboriginal cultural heritage. It is the case that under the current system Aboriginal cultural heritage is largely seen as something that can be removed, harmed, desecrated, or destroyed.

In the context of these significant and long-standing issues with the current system, the committee's focus was on whether this bill is the appropriate mechanism to achieve the long sought-after and much needed reforms to Aboriginal cultural heritage laws. Looking to the bill itself, we have listened to stakeholders about the aspects of the bill that hit the mark, and the areas which are seen to require improvements.

In the committee's view, the bill represents a considerable step forward in terms of two key principles. First, protection would be extended to both tangible and intangible Aboriginal cultural heritage – the latter not being protected under current laws. Second, Aboriginal people would have rights of ownership of or control over Aboriginal cultural heritage and its management and protection – a role that presently lies with the NSW Government. Best practice and international standards demand that Aboriginal people be responsible for making decisions about Aboriginal cultural heritage, which is a significant deficiency of the current framework.

Further to this point, it was very clear that a key challenge in establishing any Aboriginal cultural heritage scheme that facilitates Aboriginal decision-making is that the scheme holds, and is seen to hold, cultural legitimacy. Foundational to the success of any Aboriginal cultural heritage framework is that it gives these responsibilities to individuals and entities who can be said to have cultural authority to speak for Country in accordance with traditional lore, custom and community expectation.

The committee has concerns that, as currently drafted, the bill has some way to go when it comes to the complex issue of cultural authority, and the suggestions put forward by stakeholders as to potential amendments to the bill should be seriously and carefully considered. This is particularly important for the composition of the entities that would be established under the bill – the state-wide representative body, known as the Aboriginal Cultural Heritage Council, and the network of area-specific and regional Local Aboriginal Cultural Heritage Services.

Other key aspects of the bill that will need to be considered include the fact that State significant development and State significant infrastructure projects, that would harm or destroy Aboriginal cultural heritage, are subject to the statutory protective mechanisms in the bill, and the so-called 'right of veto' by the Aboriginal Cultural Heritage Council.

The committee believes the bill has merit and should be referred back to the House. We recommend that debate on the bill is informed by committee comments, stakeholders' views expressed in this report, and that any amendments include further consultation with stakeholders.

However, there is the possibility that time may simply run out to debate the bill, and any amendments, with the consideration and time it deserves before the dissolution of this Parliament ahead of the election in March 2023. As such, if debate on this bill is not able to be concluded before that time, then the committee has recommended that, early in the next term of Parliament, a bill should be introduced to enact standalone Aboriginal cultural heritage legislation that takes into account committee comments and stakeholders' views expressed in this report.

Particular attention should be paid to the importance of statutory protections for Aboriginal cultural heritage in the context of all development and infrastructure projects, including protection of intangible elements, and creating Aboriginal decision-making processes that appropriately recognise cultural authority. Similarly, the NSW Government's progress in its reforms should consider and engage with those same points, among the other views expressed in this report.

This bill and the evidence obtained through this inquiry meaningfully contributes to the inevitable establishment of standalone Aboriginal cultural heritage laws that will provide strengthened protection against harm and destruction.

I note that the committee has had a very short time in which to examine and form views and recommendations on a detailed bill. I want to acknowledge that the short timeframe set by the Legislative Council for the committee to examine this bill has meant that our consultation process simply has not been able to be as effective, comprehensive and culturally safe as it could have been if the committee had longer to conduct its inquiry.

On behalf of the committee, I sincerely thank all individuals and organisations who participated in the inquiry. I particularly thank Steven Collins and Lauren Davies, the NSW Parliament's Aboriginal Liaison Officers, who provided advice, support, and assistance throughout the inquiry. I also acknowledge and thank my committee colleagues for their thoughtful contributions to the inquiry and to everyone who worked away behind the scenes to make this inquiry possible.

I commend this report to the House.



Ms Sue Higginson MLC  
**Committee Chair**

## Findings

### Finding 1

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That:

- new, modernised and standalone legislation for the recognition, protection, conservation and preservation of Aboriginal cultural heritage is both necessary and long overdue
- best practice and international standards demand that Aboriginal people be responsible for making decisions about Aboriginal cultural heritage
- the current Aboriginal cultural heritage system is failing to adequately protect Aboriginal cultural heritage, both tangible and intangible, with cultural heritage matters treated as an ancillary consideration.

## Recommendations

### Recommendation 1

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The committee believes the bill has merit and should be referred back to the House. The committee recommends that debate on the bill is informed by committee comments, stakeholders' views expressed in this report and that any amendments include further consultation with stakeholders.

### Recommendation 2

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That if debate on the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 is not able to be concluded before the dissolution of the 57th Parliament, a bill to enact standalone Aboriginal cultural heritage legislation in New South Wales be introduced early in the 58th Parliament. This bill should take into account the committee comments and stakeholders' views expressed in this report, particularly around the importance of:

- including statutory protections for intangible Aboriginal cultural heritage
- moving decision-making responsibility for the recognition, protection, conservation and preservation of Aboriginal cultural heritage from the NSW Government to Aboriginal people
- the Aboriginal decision-making entity appropriately recognising cultural authority
- State significant development and State significant infrastructure projects being subject to Aboriginal cultural heritage protections.

### Recommendation 3

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That the NSW Government:

- consider and engage with the committee comments and stakeholders' views expressed in this report, particularly the matters listed in Recommendation 2, in progressing its own reforms to Aboriginal cultural heritage laws in New South Wales
- support its reforms to Aboriginal cultural heritage laws with the funding necessary to ensure their success.

## Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 9 August 2022.

The committee received 27 submissions and two supplementary submissions.

The committee received 25 responses from individual participants to an online questionnaire.

The committee held two public hearings at Parliament House in Sydney on 23 September 2022 and 4 October 2022. The committee also held a public forum at Parliament House in Sydney on 4 October 2022.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, the report on the online questionnaire and answers to questions on notice.



## Chapter 1 Introduction and background

This chapter provides an overview of the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 and background on Aboriginal cultural heritage laws in New South Wales.

The chapter begins with a summary of the objects of the bill. It then summarises in some detail the current Aboriginal cultural heritage framework in place in New South Wales and then provides a summary of the bill's key provisions, so that the bill's proposed reforms can be read in the context of the current framework and its concepts and language.

The chapter concludes with an outline of the NSW Government's work over the past decade on Aboriginal cultural heritage policy reform, and a high-level explanation of best practice and international standards relating to the protection of Aboriginal cultural heritage.

### Objects of the bill

**1.1** The Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (the bill) was introduced in the Legislative Council by Reverend the Hon Fred Nile on 22 June 2022. The bill is co-sponsored by Mr Justin Field MLC, Mr Alex Greenwich MP, the Hon Emma Hurst MLC, Reverend the Hon Fred Nile MLC, the Hon Mark Pearson MLC and Mr Greg Piper MP.

**1.2** The explanatory note to the bill states that the object of the bill is:

to provide a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage and recognise the fundamental importance of Aboriginal cultural heritage to Aboriginal people.<sup>2</sup>

**1.3** Clause 3 of the bill sets out the bill's objects:

- (a) to recognise, protect, conserve and preserve Aboriginal cultural heritage,
- (b) to recognise—
  - (i) the fundamental importance to Aboriginal people of Aboriginal cultural heritage and the central role of Aboriginal cultural heritage in Aboriginal communities past, present and future, and
  - (ii) that Aboriginal people have custodianship over Aboriginal cultural heritage, and
  - (iii) the importance of Aboriginal cultural heritage to Aboriginal people and the wider New South Wales community, and
  - (iv) the living, historical and traditional nature of Aboriginal cultural heritage,
- (c) to promote—
  - (i) the management of Aboriginal cultural heritage as an integral part of land and natural resource management, and
  - (ii) access for future generations to Aboriginal cultural heritage,

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<sup>2</sup> Explanatory note, Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, p 1.

- (d) to establish effective processes for—
  - (i) conserving and managing Aboriginal cultural heritage, and
  - (ii) regulating activities that may cause harm to Aboriginal cultural heritage,
- (e) to manage activities that may harm Aboriginal cultural heritage in a way that provides—
  - (i) clarity, confidence and certainty, and
  - (ii) beneficial outcomes for Aboriginal people and Aboriginal owners,
- (f) to work in partnership with Aboriginal people with appropriate cultural authority,
- (g) to promote an appreciation of Aboriginal cultural heritage.

1.4 Clause 4 of the bill states that 'Parliament recognises the rights of Indigenous people as set out in the *United Nations Declaration on the Rights on Indigenous Peoples* and the application of those rights to Aboriginal persons by this Act'.

## Current Aboriginal cultural heritage framework in NSW

1.5 The current framework for the protection of Aboriginal cultural heritage in New South Wales is made up of several different state and federal statutes. This section first summarises the principal statute governing Aboriginal cultural heritage in this state – the *National Parks and Wildlife Act 1974* (NSW) (National Parks and Wildlife Act).

1.6 It then turns to summarise the two key mechanisms by which Aboriginal people in New South Wales have land rights recognised: at the state level under the *Aboriginal Land Rights Act 1983* (NSW) (Aboriginal Land Rights Act), and the at the federal level through the *Native Title Act 1993* (Cth) (Native Title Act).

### National Parks and Wildlife Act

1.7 At the state level, the National Parks and Wildlife Act is the key mechanism through which protection is afforded to 'Aboriginal objects and places' and allows for Aboriginal places to be gazetted as areas of special significance to Aboriginal communities.<sup>3</sup>

1.8 The Secretary of the Department of Premier and Cabinet is the 'authority for the protection of Aboriginal objects and Aboriginal places in New South Wales' and 'is responsible for the proper care, preservation and protection of any Aboriginal object or Aboriginal place on any land reserved under the Act'.<sup>4</sup>

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<sup>3</sup> *National Parks and Wildlife Act 1974*, pt 6; National Native Title Tribunal, *Commonwealth, State and Territory Cultural Heritage Regimes: Summary of provisions for Aboriginal consultation: A report prepared for the New South Wales Aboriginal Land Council* (Research report), December 2010, p 73, <https://alc.org.au/wp-content/uploads/2019/12/101221-nntt-heritage-regimes-aboriginal-consultation-final.pdf>.

<sup>4</sup> *National Parks and Wildlife Act 1974*, s 85.

- 1.9** With respect to Aboriginal objects, the Secretary may dispose of Aboriginal objects that are in the property of the Crown by returning the Aboriginal objects to an Aboriginal Owner entitled to it and willing to accept possession, custody or control of the object in accordance with Aboriginal tradition, or by otherwise dealing with the object in accordance with any reasonable directions of an Aboriginal Owner.<sup>5</sup>
- 1.10** In terms of Aboriginal places, the process for the Minister to declare and gazette an Aboriginal place is essentially as follows.
- The first stage of assessment determines if a proposed Aboriginal Place has, or is likely to have, special significance to Aboriginal culture and its significance must be validated by the Aboriginal community. The proposal is then included as an 'Aboriginal Place Proposal' on the Aboriginal Heritage Information Management System.
  - Where possible, draft management plans are developed and agreed to before a detailed assessment and recommendation is provided to the responsible Minister. The assessment identifies what actions will require an Aboriginal Heritage Impact Permit.
  - Once an Aboriginal place is declared by the Minister, a notice is published in the Government Gazette with a Statement of Special Significance and other information relating to the site.<sup>6</sup>
- 1.11** Any development or activity that may harm an Aboriginal object or place requires an Aboriginal Heritage Impact Permit. Before applying for such a permit, the proponent must carry out an Aboriginal community consultation as per the process set out in the National Parks and Wildlife Regulation 2019 (discussed further below).<sup>7</sup>
- 1.12** In addition, an application for an Aboriginal Heritage Impact Permit must be accompanied by a cultural heritage assessment report detailing:
- the significance of the Aboriginal objects or Aboriginal places subject of the application
  - the actual or likely harm to those Aboriginal objects or places from the proposed activity
  - any practical measures that may be taken to protect and conserve those Aboriginal objects or places
  - any practical measures that may be taken to avoid or mitigate any actual or likely harm to those Aboriginal objects or places
  - any submissions received from any registered Aboriginal party as part of the consultation process.<sup>8</sup>
- 1.13** The Secretary can issue the permit with or without conditions.<sup>9</sup>

<sup>5</sup> *National Parks and Wildlife Act 1974*, s 85A.

<sup>6</sup> Heritage NSW, NSW Government, *Aboriginal Places – Fact sheet* (15 March 2021), pp 1-2, <https://www.heritage.nsw.gov.au/assets/Fact-Sheet-Aboriginal-Places.pdf>.

<sup>7</sup> National Parks and Wildlife Regulation 2019, cl 60.

<sup>8</sup> National Parks and Wildlife Regulation 2019, cl 61.

<sup>9</sup> *National Parks and Wildlife Act 1974*, ss 9(2) and 90J.

- 1.14** The National Parks and Wildlife Act establishes several offences in relation to harming or desecrating Aboriginal objects and Aboriginal places with associated penalties.<sup>10</sup> It is a defence to these offences if the harm or desecration concerned was authorised by an Aboriginal Heritage Impact Permit and the permit conditions were not contravened.<sup>11</sup>
- 1.15** Under the Act, Heritage NSW and the Department of Planning and Environment have joint responsibility for the protection of Aboriginal cultural heritage. The *Heritage Act 1977* (NSW) also provides some recognition for Aboriginal heritage via the State Heritage Register, which includes various places and objects of Aboriginal and non-Aboriginal cultural heritage of value.<sup>12</sup>

### ***Registered Aboriginal party for Aboriginal Heritage Impact Permit***

- 1.16** As noted above, the process to obtain an Aboriginal Heritage Impact Permit involves Aboriginal community consultation. The applicant must consult with any 'registered Aboriginal party' and must give such parties the opportunity to make submissions. The process for identifying and becoming a 'registered Aboriginal party' is explained below.
- 1.17** The permit applicant must ascertain the names of any Aboriginal persons who may hold knowledge relevant to the affected Aboriginal objects or Aboriginal places from the Department of Planning and Environment, the relevant Local Aboriginal Land Council, the Registrar appointed under the Aboriginal Land Rights Act (see below), the relevant local council, the National Native Title Tribunal (see below), NTSCORP Limited and the Local Land Services.<sup>13</sup>
- 1.18** Persons who are named by those bodies must be notified of the proposed activity that is the subject of the application, and are invited to register interest in a process of community consultation with the applicant, thus becoming a registered Aboriginal party under the Act.<sup>14</sup> The Department of Planning and Environment and the relevant Local Aboriginal Land Council are notified of any registered Aboriginal party and these parties are provided with detailed information regarding the proposed activity and a proposed methodology to be used in the preparation of the cultural heritage assessment report to be submitted with the permit application, on which a registered Aboriginal party may make a submission.<sup>15</sup>

### ***Aboriginal Cultural Heritage Advisory Committee***

- 1.19** Heritage NSW is supported by the Aboriginal Cultural Heritage Advisory Committee (ACHAC). Established in 2006, the ACHAC is constituted under the National Parks and Wildlife Act. The ACHAC is composed of 13 Aboriginal people with expertise in Aboriginal cultural heritage, which includes a member nominated by each of the NSW Aboriginal Land

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<sup>10</sup> *National Parks and Wildlife Act 1974*, s 86.

<sup>11</sup> *National Parks and Wildlife Act 1974*, s 87.

<sup>12</sup> National Native Title Tribunal, *Commonwealth, State and Territory Cultural Heritage Regimes: Summary of provisions for Aboriginal consultation: A report prepared for the New South Wales Aboriginal Land Council* (Research report), December 2010, p 73, <https://alc.org.au/wp-content/uploads/2019/12/101221-nntt-heritage-regimes-aboriginal-consultation-final.pdf>.

<sup>13</sup> National Parks and Wildlife Regulation 2019, cl 60(2).

<sup>14</sup> National Parks and Wildlife Regulation 2019, cl 60(4).

<sup>15</sup> National Parks and Wildlife Regulation 2019, cl 60(6).

Council, the Native Title Services Corporation (NTSCORP) and the Heritage Council of NSW, as well as ten members appointed from nominees of Aboriginal elder groups, Native Title Holders under the Native Title Act and Aboriginal Owners under the Aboriginal Land Rights Act. The Executive Director of Heritage NSW (representing the Secretary of the Department of Planning and Environment) is a non-voting member.<sup>16</sup>

- 1.20** One of the key roles of the ACHAC 'is to give independent advice to the Minister responsible for Heritage and to the Executive Director of Heritage NSW on any matter relating to the identification, assessment and management of Aboriginal cultural heritage in NSW'.<sup>17</sup> This function includes 'providing strategic advice on the plan of management and the heritage impact permit process, whether or not the matter has been referred to the Committee by the Minister or the Secretary'.<sup>18</sup>

### *Aboriginal joint management of National Parks*

- 1.21** Part 4A of the National Parks and Wildlife Act provides for land which is a national park and which has been assessed to be culturally significant to Aboriginal communities and for conservation purposes can be returned to registered Aboriginal Owners (registered Aboriginal Owners are discussed further below in the section on the Aboriginal Land Rights Act). The Act specifies that 'land is of cultural significance to Aboriginal persons if the land is significant in terms of the traditions, observances, customs, beliefs or history of Aboriginal persons'.<sup>19</sup>
- 1.22** The NSW Government negotiates with Aboriginal Owners of lands (which can be formalised as an 'Aboriginal negotiating panel' under the Act), with the relevant Local Aboriginal Land Councils whose members have a cultural association with the land in question, or with the NSW Aboriginal Land Council on its own behalf or on behalf of a relevant Local Aboriginal Land Council.<sup>20</sup>
- 1.23** This process, known as joint management, involves a Local Aboriginal Land Council holding the title of the land on behalf of Aboriginal Owners, and negotiating a lease-back agreement with the NSW Government. In the view of the NSW Aboriginal Land Council, joint management 'allows Aboriginal Owners and the NSW Government to jointly manage the land as a conservation area, usually as a national park or some other form of reserve'.<sup>21</sup>

<sup>16</sup> *National Parks and Wildlife Act 1974*, s 71J and sch 9, cl 1; Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 1.

<sup>17</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 1.

<sup>18</sup> *National Parks and Wildlife Act 1974*, s 28.

<sup>19</sup> *National Parks and Wildlife Act 1974*, s 71D(1).

<sup>20</sup> *National Parks and Wildlife Act 1974*, s 71J.

<sup>21</sup> New South Wales Aboriginal Land Council, *Factsheet – Aboriginal Culture and Heritage – Management of National Parks (Part 4A)* (February 2016), p 1, <https://alc.org.au/wp-content/uploads/2019/12/160421-accessing-country-3-joint-management-part-4a-updated-2.pdf>.

### Aboriginal Land Rights Act

- 1.24** The Aboriginal Land Rights Act provides land rights for Aboriginal people in New South Wales.<sup>22</sup> Land rights are granted in the form of freehold title where the responsible Minister decides that the land is 'claimable land' for the purposes of the Act.<sup>23</sup> The land is vested in the relevant Local Aboriginal Land Councils, of which there are 120 across New South Wales.<sup>24</sup>
- 1.25** Local Aboriginal Land Councils and the NSW Aboriginal Land Council (the peak body) are established under the Aboriginal Land Rights Act. Among other functions (see below), these entities have roles in relation to Aboriginal cultural heritage, namely, that they must 'take action to protect the culture and heritage of Aboriginal persons in the council's area' and to 'promote awareness in the community of the culture and heritage of Aboriginal persons in the council's area'.<sup>25</sup>
- 1.26** The NSW Aboriginal Land Council and Local Aboriginal Land Councils' functions also include:
- land acquisition either by land claim, purchase or land agreement
  - land use and management, such as considering applications to prospect or mine for minerals on the council's land, and to protect the interests of Aboriginal persons in its area in relation to the acquisition, management, use, control and disposal of its land
  - financial stewardship, such as the development, implementation and management of community, land and business plans, investment assets, and business enterprises
  - the establishment of community benefit schemes.<sup>26</sup>
- 1.27** The NSW Aboriginal Land Council also has a number of additional functions, including to:
- administer the NSW Aboriginal Land Council Account and Mining Royalties Account
  - grant funds for payment of the administrative costs and expenses of Local Aboriginal Land Councils
  - acquire land on behalf of, or to be vested in, Local Aboriginal Land Councils
  - determine and approve or reject the terms and conditions of agreements proposed by Local Aboriginal Land Councils to allow mining or mineral exploration on Aboriginal land

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<sup>22</sup> Aboriginal Affairs NSW, NSW Government, *Land Rights*, <https://www.aboriginalaffairs.nsw.gov.au/land-rights/#:~:text=The%20Aboriginal%20Land%20Rights%20Act,to%20Aboriginal%20communities%20in%20NSW>.

<sup>23</sup> *Aboriginal Land Rights Act 1983*, s 36; NTSCORP Limited, *What are Land Rights in NSW?*, <http://www.ntscorp.com.au/about-native-title/what-are-land-rights-in-nsw/>.

<sup>24</sup> Aboriginal Affairs NSW, NSW Government, *NSWALC and the Local Aboriginal Land Council Network*, Administering the NSW Aboriginal Land Rights Act, <https://www.aboriginalaffairs.nsw.gov.au/land-rights/nswalc-and-the-lalc-network-to-aboriginal-land-councils-in-nsw/>.

<sup>25</sup> *Aboriginal Land Rights Act 1983*, s 52(4). See also Submission 6, Dr Janet Hunt, p 6.

<sup>26</sup> *Aboriginal Land Rights Act 1983*, ss 52, 52A and 106.

- make claims on Crown lands, either on its own behalf or at the request of Local Aboriginal Land Councils
- with the agreement of the particular Council, manage any of the affairs of that Council
- hold, dispose of or otherwise deal with land vested in or acquired by NSW Aboriginal Land Council
- advise the Minister on matters relating to Aboriginal land rights.<sup>27</sup>

### *Aboriginal Land Agreements*

**1.28** The Aboriginal Land Rights Act allows the NSW Government and Local Aboriginal Land Councils to create and enter into Aboriginal Land Agreements which are voluntary and legally binding agreements to resolve land claims. An agreement can resolve multiple land claims at the same time as an alternative to relying on the original process of determining one claim at a time. An agreement may make provision for the following matters:

- financial payment or other considerations
- exchange, transfer or lease of land
- conditions or restrictions on the use of any land to which the agreement relates
- joint access to and management of land.<sup>28</sup>

### *Registrar of Aboriginal Owners*

**1.29** The Aboriginal Land Rights Act establishes the Registrar of the Act whose responsibilities and functions include to:

- maintain the Register of Aboriginal Land Claims, Register of Aboriginal Land Agreements and Register of Aboriginal Owners
- maintain a consolidated roll of all members of Local Aboriginal Land Councils
- provide mediation, conciliation or arbitration of disputes relating to the Aboriginal Land Rights Act
- investigate complaints and provide support to Local Aboriginal Land Councils to ensure compliance with the Aboriginal Land Rights Act
- providing advice to the Minister in relation to Aboriginal land rights.<sup>29</sup>

**1.30** The Aboriginal Land Rights Act defines an 'Aboriginal Owner' to mean 'Aboriginal persons whose names are entered on the Register of Aboriginal Owners because of the persons' cultural association with particular land'.<sup>30</sup> The Register of Aboriginal Owners contains a list of

<sup>27</sup> New South Wales Aboriginal Land Council, *Our Organisation*, <https://alc.org.au/our-organisation/>.

<sup>28</sup> *Aboriginal Land Rights Act 1983*, s 36AA; Aboriginal Affairs NSW, NSW Government, *Administering the NSW Aboriginal Land Rights Act 1983 – Aboriginal Land Agreements*, <https://www.aboriginalaffairs.nsw.gov.au/land-rights/aboriginal-land-agreements/>.

<sup>29</sup> *Aboriginal Land Rights Act 1983*, pt 9; Office of the Registrar of the Aboriginal Land Rights Act 1983 (NSW), *About*, <https://www.oralra.nsw.gov.au/#about>.

<sup>30</sup> *Aboriginal Land Rights Act 1983*, s 4.

Aboriginal people who have a cultural association with land in New South Wales and notes the location of that land and nature of the cultural association. Each person nominated for the Register must give written consent to be registered.<sup>31</sup>

### **Native Title Act**

**1.31** As described by NTSCORP, the statutory native title representative body in New South Wales and the Australian Capital Territory, native title rights are legally enforceable communal property rights recognised under the Commonwealth Native Title Act:

Native title is the legal recognition of the individual or communal rights and interests which Aboriginal People have in land, waters and seas, where Aboriginal People have continued to exercise their rights and interests in accordance with traditional law and custom since before the British asserted sovereignty over Australia.<sup>32</sup>

**1.32** For a native title claim to be recognised under the Native Title Act, three matters must be established:

- the native title claim group has rights and interests that are possessed under traditional laws acknowledged and traditional customs observed
- the native title claim group by those laws and customs, has a connection with the land or water
- those rights and interests are capable of being recognised by Australian law.<sup>33</sup>

**1.33** The Federal Court of Australia has made 16 determinations recognising that native title exists in various parts of New South Wales. In addition, there are currently extensive native title claims on foot filed by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People, Gomeroi People, South Coast People and Widjabul Wia-bal People. NTSCORP noted that 'native title holders are generally described by naming the ancestors from which each member of the group descends and each of the property rights determined by the Federal Court of Australia are individually identified'.<sup>34</sup>

**1.34** NTSCORP explained that 'any determination that native title exists includes all of the Aboriginal People who have native title rights and interests in land, waters or seas'.<sup>35</sup> It is common for native title holders to be referred to as 'Traditional Owners', which recognises that they are the original owners of the lands, waters and seas.<sup>36</sup>

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<sup>31</sup> New South Wales Aboriginal Land Council, *Factsheet – Aboriginal Culture and Heritage – Management of National Parks (Part 4A)* (February 2016), p 1, <https://alc.org.au/wp-content/uploads/2019/12/160421-accessing-country-3-joint-management-part-4a-updated-2.pdf>.

<sup>32</sup> Submission 21, NTSCORP Limited, p 5.

<sup>33</sup> Submission 21, NTSCORP Limited, p 27.

<sup>34</sup> Submission 21, NTSCORP Limited, p 27.

<sup>35</sup> Submission 21, NTSCORP Limited, p 27.

<sup>36</sup> Submission 21, NTSCORP Limited, p 5.

**1.35** Native title rights are almost always defined to include rights in, or connected to, Aboriginal cultural heritage.<sup>37</sup> NTSCORP explained that native title rights and interests commonly include rights:

- to have access to, to maintain and to protect from physical harm, sites and places of importance which are of significance to the native title holders under their traditional laws and customs
- to engage in cultural activities including:
  - visiting places of cultural or spiritual importance and protecting those places by carrying out activities to preserve their physical or spiritual integrity
  - conducting and participating in ceremonies and rituals including in relation to birth and death
  - holding cultural gatherings
  - passing on knowledge about the physical and spiritual attributes of places of importance.<sup>38</sup>

**1.36** Once a native title determination is made, native title holders must establish a corporation – known as a Prescribed Body Corporate – to manage and protect their native title rights and interests. Once a Prescribed Body Corporate is registered with the National Native Title Tribunal, it becomes a Registered Native Title Body Corporate. The key role of these entities is to protect native title on behalf of Native Title Holders.<sup>39</sup>

### *Indigenous Land Use Agreements*

**1.37** An Indigenous Land Use Agreement (ILUA) is a voluntary agreement between native title parties and other parties about the use and management of areas of land and waters. An ILUA can be made where native title has been determined to exist, where a native title claim has been made, or where no native title claim has been made. Once registered, the ILUA binds all native title holders to the agreement. Any native title matter that has been agreed to by the parties can form part of an ILUA, including settlement or exercise of native title rights and interests or a surrender of native title rights to governments, land management, future development, mining, cultural heritage, coexistence of native title rights with other rights, access to an area, and compensation for loss or impairment of native title.<sup>40</sup>

<sup>37</sup> Submission 21, NTSCORP Limited, p 5.

<sup>38</sup> Submission 21, NTSCORP Limited, p 28.

<sup>39</sup> National Native Title Tribunal and National Indigenous Australians Agency, Australian Government, *About PBCs*, PBC, <https://nativetitle.org.au/learn/role-and-function-pbc/about-pbcs>.

<sup>40</sup> National Native Title Tribunal, *About Indigenous Land Use Agreements*, Indigenous Land Use Agreements (2021), <http://www.nntt.gov.au/Information%20Publications/ILUA%20factsheet.pdf>.

## Operation of the bill

1.38 This section sets out the bill's key provisions, including:

- the definition of Aboriginal cultural heritage
- the application of the Aboriginal Cultural Heritage Council's (ACH Council) 'right of veto' to State significant development and State significant infrastructure
- the establishment, composition and functions of the ACH Council and Local Aboriginal Cultural Heritage Services (Local ACH Services)
- rights and duties in relation to ancestral remains and secret or sacred sites
- declarations by the ACH Council of certain areas of land to be 'protected areas'
- managing activities that harm Aboriginal cultural heritage through the ACH Council granting Aboriginal cultural heritage permits (ACH Permits) and Aboriginal cultural heritage management plans (ACH Management Plans)
- making stop activity, prohibition and remediation orders
- protecting Aboriginal cultural heritage through the ACH Council granting Aboriginal cultural heritage protection agreements (ACH Protection Agreements)
- offences relating to harming Aboriginal cultural heritage.

### Definition of Aboriginal cultural heritage

1.39 The bill defines 'Aboriginal cultural heritage' to mean 'the tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual and historical values, as recognised by Aboriginal people'.<sup>41</sup>

1.40 The bill states that this includes:

- an area (an Aboriginal place) in which tangible elements of Aboriginal cultural heritage are present, including a place where Aboriginal ancestral remains are buried,
- an object (an Aboriginal object) that is a tangible element of Aboriginal cultural heritage,
- a group of areas (a cultural landscape) interconnected through tangible or intangible elements of Aboriginal cultural heritage, including lands, plants, animals, water and sky,
- the bodily remains of a deceased Aboriginal person (Aboriginal ancestral remains), other than remains that are buried in a cemetery where non-Aboriginal persons are also buried or remains that have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.<sup>42</sup>

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<sup>41</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, definition of 'Aboriginal cultural heritage'.

<sup>42</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, definition of 'Aboriginal cultural heritage'.

### State significant development and State significant infrastructure

- 1.41** Clause 11 sets out how the proposed Aboriginal cultural heritage protections in the bill would interact with State significant development and State significant infrastructure. Pursuant to the *Environmental Planning and Assessment Act 1979*, some development and infrastructure is deemed to be 'State significant' due to its nature, size, location in a sensitive area, economic value or potential impacts.<sup>43</sup>
- 1.42** The bill proposes that existing development, for which consent has been granted or for which consent is not required under the *Environmental Planning and Assessment Act 1979*, which includes State significant development and State significant infrastructure, must not be carried out unless it is carried out in accordance with the requirements of the bill.
- 1.43** Clause 11 of the bill provides that a development application or planning proposal for future development and infrastructure, which would require an ACH Permit or an approved or authorised ACH Management Plan, must not be lodged with the relevant consent authority unless the ACH Permit has been granted, or the ACH Management Plan has been approved or authorised.<sup>44</sup>

### Aboriginal Cultural Heritage Council

- 1.44** Section 13 of the bill establishes the ACH Council. This section summarises the provisions of the bill relating to the ACH Council's composition, its functions and powers relating to the protection, conservation and preservation of Aboriginal cultural heritage, and its role in the establishment and maintenance of the Aboriginal Cultural Heritage Directory and Register of Aboriginal Owners.

#### *Constitution and composition*

- 1.45** Division 2 of Sch 1 sets out the ACH Council's composition, functions and powers. With respect to its constitution, clause 13 provides that the ACH Council is established as a body corporate that is not subject to the direction or control of the Minister.
- 1.46** Regarding its composition, the process for the appointment of members to the first ACH Council includes the following features.
- The NSW Aboriginal Land Council and Native Title Holders can nominate potential members, who must be Aboriginal persons, for appointment to the ACH Council.
  - Within 30 days of receiving these nominations, the Minister must appoint between six and eleven nominees, ensuring that:

<sup>43</sup> *Environmental Planning and Assessment Act 1979*, div 4.7. The NSW Government has deemed the following types of development to be 'state significant': new educational establishments, hospitals and correctional centres, chemical and other manufacturing, mining and extraction operation, tourist and recreation facilities, some port facilities, waste management facilities and energy generating facilities: NSW Department of Planning and Environment, *State Significant Development*, <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/State-Significant-Development>.

<sup>44</sup> *Environmental Planning and Assessment Act 1979*, div 4.2.

- the ACH Council has the knowledge, skills and experience considered appropriate to perform its functions
- an equal number of nominees appointed are from or represent Aboriginal Land Councils, Native Title Holders and Aboriginal Owners
- as far as practicable, the gender composition of the ACH Council is balanced.

**1.47** A member appointed to the ACH Council holds that office for a period of five years and is eligible for reappointment. At the first meeting of the ACH Council the members must appoint joint chairpersons. One chairperson must have traditions, rights, interests and responsibilities in relation to women's business, and the other in relation to men's business.

### *Functions and powers*

**1.48** Under the bill, the ACH Council has powers and functions in relation to:

- designating Local ACH Services (Pt 2 of the bill)
- receiving notification about Aboriginal ancestral remains and secret or sacred objects and assisting in their return to custodians (Pt 3 of the bill)
- providing special protections for land where there is Aboriginal cultural heritage of outstanding significance (Pt 4 of the bill)
- granting ACH Permits and endorsing or approving ACH Management Plans for the management of activities that may harm Aboriginal cultural heritage (Pt 6 of the bill)
- making orders to stop, prohibit or remediate activity that may harm Aboriginal cultural heritage (Pt 7 of the bill)
- endorsing ACH Protection Agreements (Pt 8 of the bill)
- preparing proposed guidelines on matters such as consultation, the identification of persons who are knowledge holders for an area, and the factors to be considered in determining whether Aboriginal cultural heritage is of outstanding or State significance for the purposes the bill (Pt 12 of the bill)
- preparing policies and procedures for Local ACH Services, in consultation with the Aboriginal community, relating to the provision of Local ACH Services' functions, as well as their financial, reporting and consultation activities (Pt 12 of the bill).

**1.49** In relation to the preparation of guidelines, the ACH Council is required to notify certain parties, and give them an opportunity to comment on the proposed guidelines, including Local ACH Services, native title parties and representative bodies, the NSW Aboriginal Land Council, Local Aboriginal Land Councils and Aboriginal Owners.

**1.50** Other functions and powers are discussed in more detail in later sections of this chapter.

### *Aboriginal Cultural Heritage Directory and Register of Aboriginal Owners*

- 1.51** Part 9 requires the ACH Council to establish and maintain the Aboriginal Cultural Heritage Directory. Division 1 of Part 9 sets out that the Directory is to assemble, organise and maintain various forms of information and documents about Aboriginal cultural heritage proposed by the bill, including:
- the areas that are declared 'protected areas' by the ACH Council
  - the Local ACH Services for the area
  - ACH Permits, ACH Management Plans, ACH Protection Agreements
  - orders to stop, prohibit or remediate
  - determinations of Aboriginal cultural heritage that is of State significance
  - the Native Title Holders and knowledge holders for particular areas.
- 1.52** Division 3 of Part 9 requires the ACH Council to establish and maintain a Register of Aboriginal Owners which would include:
- the name of every Aboriginal person who has a cultural association with land in New South Wales
  - the location of the land with which the Aboriginal person has a cultural association
  - the nature of the cultural association the Aboriginal person has with the land.
- 1.53** A person can request that their name be entered or removed from the register. There are some requirements that must be met before a person's name is entered on the register and the person must also consent to the entry.

### **Local Aboriginal Cultural Heritage Services**

- 1.54** Division 3 of Part 2 requires the ACH Council to as far as practicable designate entities as Local ACH Services for different areas across New South Wales. The ACH Council may make this determination subject to the Commonwealth law, cultural rights and legal rights of interested Aboriginal parties to Aboriginal cultural heritage on or of the land. In this context, interested Aboriginal parties includes Aboriginal Owners, a Local Aboriginal Land Council, and a Registered Native Title Body Corporate for some or all of an area.
- 1.55** Clause 29 sets out the functions of Local ACH services, which include:
- managing, protecting and maintaining sites, places or material in relation to Aboriginal cultural heritage
  - engaging and negotiating with persons intending to carry out activities in the area and native title parties and knowledge holders for the area
  - making ACH Management Plans for the area
  - providing advice to proponents carrying out, or intending to carry out, activities in the area about whether Aboriginal cultural heritage is located in the area

- providing information to the ACH Council about Aboriginal cultural heritage in the area to assist the ACH Council in its functions and the accuracy of the Directory.

## **Rights and duties in relation to Aboriginal cultural heritage**

### *Aboriginal ancestral remains*

- 1.56** Division 2 of Part 3 sets out the rights and duties in relation to Aboriginal ancestral remains. Clause 36 states that an Aboriginal person, group or community where Aboriginal ancestral remains are located or are reasonably believed to have originated from is the custodian of the remains and is entitled to the possession and control of the remains.
- 1.57** Clauses 37 to 42 place obligations on individuals, organisations and the ACH Council to deal with Aboriginal ancestral remains in a certain way. In summary, there are obligations around identifying the custodian of the ancestral remains and returning, or facilitating the return of, the remains to them, or dealing with them in a certain way if the custodian cannot be identified. There are offences associated with the failure to fulfill these obligations. There are also obligations on the ACH Council to deal with the remains in a way requested by the custodian, or if the custodian cannot be identified, in a way the ACH Council considers appropriate.
- 1.58** Clause 42 makes it an offence to do the following activities, unless done in accordance with the person's traditional rights, interests or responsibilities in relation to the object:
- the disturbance or removal of the remains from an area, unless the activity being performed was:
    - authorised under an ACH Permit (see below)
    - performed in accordance with a function under the bill
    - the person did not reasonably suspect that Aboriginal ancestral remains would be on the land, or the person stopped carrying on the activity as soon as practicable once aware of the remains
  - the sale, exchange or disposal of remains
  - the removal of remains from New South Wales
  - the concealment of remains.

### *Aboriginal secret or sacred objects*

- 1.59** Division 3 of Part 3 sets out the rights and duties of Aboriginal people in relation to secret or sacred objects. Clause 44 states that an Aboriginal person, group or community with a cultural connection to a secret or sacred object is the custodian of the object and is a rightful owner of it and entitled to its possession and control.
- 1.60** Clause 45 places an obligation on individuals and organisations to notify the ACH Council when in possession of Aboriginal secret or sacred objects. Clause 46 requires certain public authorities in possession of an Aboriginal secret or sacred object to return them to the custodian or hold the object on the custodian's behalf if so requested. There are offences associated with the failure to fulfill these obligations.

- 1.61** Clause 47 states that for Aboriginal secret or sacred objects that are transferred into the ACH Council's custody, the ACH Council must return them to the custodian, hold them for safekeeping on behalf of the custodian, if that is their request, or if the custodian cannot be identified, deal with them in a way it considers appropriate.
- 1.62** Clause 48 makes it an offence to do the following activities, unless done in accordance with the person's traditional rights, interests or responsibilities in relation to the object:
- sell exchange or otherwise dispose of a secret or sacred object
  - remove, or cause or permit the removal of, a secret or sacred object from New South Wales
  - conceal a secret or sacred object.

*Other duties and rights relating to Aboriginal cultural heritage*

- 1.63** Clause 49 sets out that it is an offence for a person to fail to notify the ACH Council that the person knows of the existence of an Aboriginal place, object or ancestral remains.
- 1.64** Clause 50 provides that an Aboriginal person who holds cultural knowledge of Aboriginal cultural heritage may use and commercially benefit from the heritage whether or not the person is a Local ACH Service, an Aboriginal Owner or another Aboriginal entity or person identified as having particular rights, functions and duties under the bill.
- 1.65** Clause 73 makes it an offence to knowingly or recklessly use intangible Aboriginal cultural heritage for commercial purposes without the consent of the ACH Council, unless the person holds cultural knowledge for that intangible Aboriginal cultural heritage.

**Declaration of land as a protected area**

- 1.66** Part 4 of the bill provides for areas of land to be declared as 'protected areas'. Clause 52 states that the purpose of declaring an area as protected is to recognise that Aboriginal cultural heritage of outstanding significance is located in the area and to provide special protection for the area from activities that may harm the Aboriginal cultural heritage. Aboriginal cultural heritage which is of 'outstanding significance' means that it is of 'outstanding significance to an Aboriginal group or community, and the significance is recognised through social, spiritual and historical values, as recognised by Aboriginal people'.<sup>45</sup>
- 1.67** Clauses 54 and 55 provide the process for an Aboriginal group or community to make an application to the ACH Council for an area to be declared a protected area. If the ACH Council forms a preliminary view that the application area or part of the application area should be declared a protected area, the ACH Council must give public notice of this view and notify several different parties, such as each Local ACH service, native title parties, relevant Local Aboriginal Land Councils and knowledge holders for the area.
- 1.68** To declare an area a protected area, the ACH Council must be satisfied that the Aboriginal cultural heritage of outstanding significance is located in the area, and that the area needs to be provided with special protection from activities that may harm Aboriginal cultural heritage.

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<sup>45</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 54.

The ACH Council may place conditions on the declaration of the protected area, contravention of which is an offence.<sup>46</sup>

### **Managing activities that may harm Aboriginal cultural heritage**

- 1.69** Part 6 sets out how the ACH Council manages activities that may harm Aboriginal cultural heritage. The bill sets out two levels of harm to Aboriginal cultural heritage: tier 1 and tier 2. Tier 1 activity involves no or a low level of ground disturbance. Tier 2 activity involves a moderate to high level of ground disturbance. A proponent who intends to carry out an activity in an area must seek guidance from the ACH Council about whether the activity is a tier 1 or tier 2 activity. If it constitutes one of these, the ACH Council must direct the proponent to apply for an ACH Permit or ACH Management Plan.
- 1.70** Clause 83 requires proponents who intend to carry out tier 1 or tier 2 activities in an area that may harm Aboriginal cultural heritage to give written notice to a number of parties, including each Local ACH Service and Local Aboriginal Land Council for the area, and local Aboriginal people who are likely to be affected by the proposed activity. If there is not a Local ACH Service for the area, the proponent must give written notice to each native title party and knowledge holder for the area. If none of these exist for the area, the proponent must give written notice to each native title representative body for the area.
- 1.71** These groups are given the opportunity to submit to the proponent a statement about their views on the risk of harm being caused to Aboriginal cultural heritage. Pursuant to clause 85 and clause 103, once the period for receiving any submissions has passed, the proponent is required to apply for an ACH Permit or ACH Management Plan if they have been so directed by the ACH Council.

### ***Aboriginal Cultural Heritage Permit***

- 1.72** Division 4 of Part 6 establishes the ACH Permit system, whereby a proponent who intends to carry out a tier 1 or a tier 2 activity in an area may, if directed by the ACH Council in relation to the activity, apply for an ACH Permit to carry out the activity.<sup>47</sup> As noted above, the ACH Council must provide notice of the application to certain parties.<sup>48</sup>
- 1.73** Clause 90 provides that the ACH Council may grant a permit if satisfied of the following matters:
- the proposed activity is a tier 1 activity or a tier 2 activity
  - the area where the applicant intends to carry out the activity is not part of a protected area
  - each of the persons to be notified about the proposed activity have been notified
  - the applicant will take all reasonable steps possible to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity
  - the proposed activity is not inconsistent with the objects of the bill

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<sup>46</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cls 65 and 66.

<sup>47</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 85.

<sup>48</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 88.

- the person has otherwise complied with the requirements of Part 6
- the likely impact on Aboriginal cultural heritage will be minimal.

**1.74** Clause 89 requires the ACH Council, when making its decision on an application for an ACH Permit, to have regard to submissions made by the proponent as well as submissions from those who were notified about the activity.

**1.75** ACH Permits have conditions that the permit holder must notify the ACH Council if it learns of new information about the cultural heritage in the area, must comply with certain reporting requirements and must comply with any stop activity, prohibition or remediation orders.<sup>49</sup>

**1.76** ACH Permits expire after four years and may be extended for a further two years on application of the proponent. The ACH Council can also amend, suspend or cancel an ACH Permit in certain circumstances. Clause 100 states that a permit can be cancelled if the ACH Council is no longer satisfied about the matters set out above in paragraph 1.73, if the permit holder carries out an activity that may harm Aboriginal cultural heritage or is not permitted under the permit, or the permit holder breaches a condition on the permit. It is also an offence to contravene a permit condition.

### *Aboriginal Cultural Heritage Management Plan*

**1.77** Division 5 of Part 6 permits the ACH Council to make and approve ACH Management Plans, which is a plan that must be obtained for the management of a tier 1 or tier 2 activity that may harm Aboriginal cultural heritage before the commencement of that activity.

**1.78** Subdivision 1 sets out the steps the proponent of the activity must take, which include:

- with the assistance of the ACH Council, identifying the interested Aboriginal parties (that is, the relevant Local ACH Service, Local Aboriginal Land Council, and any native title party and native title representative body for the area)
- consulting with interested Aboriginal parties
- identifying and understanding the characteristics of the Aboriginal cultural heritage located in the relevant area
- using best endeavours to reach agreement about the terms of an ACH Management Plan with interested Aboriginal parties.

**1.79** Subdivision 2 sets out the process for the ACH Council to approve an ACH Management Plan that has been agreed to by the proponent and each interested Aboriginal party. The ACH Council may approve an ACH Management Plan if satisfied that:

- the activity to which the plan relates is an activity that may harm Aboriginal cultural heritage in the relevant area
- the area to which the plan relates is not part of a protected area
- there has been consultation with each interested Aboriginal party
- the Aboriginal cultural heritage is not of State significance

<sup>49</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 89.

- each interested Aboriginal party for the plan has given informed consent to the plan.

**1.80** If the proponent and each interested Aboriginal party do not agree on an ACH Management Plan within the timeframe agreed to by the parties, the proponent can make an application to the ACH Council for it to authorise an ACH Management Plan. The powers and process for this are set out in Subdivision 3 of Division 5.

**1.81** The ACH Council may assist the proposed parties to reach agreement about the terms of the plan and then ultimately authorise or not authorise the plan.<sup>50</sup> The ACH Council may authorise an ACH Management Plan if satisfied of certain matters, including that the activity is managed to avoid or minimise the risk of harm, and that the likely impact on Aboriginal cultural heritage will be minimal.<sup>51</sup>

**1.82** An ACH Management Plan has effect until it is cancelled, the authorisation period expires or the activities under the plan are completed.<sup>52</sup> Similarly to ACH Permits, the ACH Council can suspend or cancel an ACH Management Plan on the grounds set out at paragraph 1.76, and can attach conditions as outlined at paragraph 1.75.<sup>53</sup>

### *Aboriginal cultural heritage of State significance*

**1.83** The bill also establishes a process for Aboriginal cultural heritage to be designated as being of State significance and places particular protections on this type of cultural heritage. The bill defines 'State significance' in relation to Aboriginal cultural heritage to mean that the 'Aboriginal cultural heritage is of exceptional importance to the cultural identity of the State'.<sup>54</sup>

**1.84** Clause 140 states that when considering the approval or authorisation of an ACH Management Plan, the ACH Council may form the view that the Aboriginal cultural heritage related to the plan may be of State significance. In this instance, the ACH Council must give public notice that the ACH Council is considering making this type of determination and notify the following persons for the relevant notice area, who may make submissions to the ACH Council:

- each Local ACH Service
- each native title party
- each knowledge holder
- each landholder of land
- each public authority or any other person that the ACH Council considers has an interest in the notice area.

**1.85** If the ACH Council makes a determination that Aboriginal cultural heritage is of State significance, the ACH Council cannot approve of an agreement reached between parties for an ACH Management Plan. Instead, it must use the process set out in Division 5 of Part 6 whereby there must be an application for the ACH Council to authorise an ACH Management Plan for

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<sup>50</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cls 126 and 128.

<sup>51</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 129.

<sup>52</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 131.

<sup>53</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cls 132, 133 and 138.

<sup>54</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 77.

the management of a tier 1 or tier 2 activity that may harm Aboriginal cultural heritage before the commencement of that activity.<sup>55</sup>

### **Stop activity, prohibition and remediation orders**

- 1.86** Division 2 of Part 7 permits the ACH Council to give a stop activity order to a person if the ACH Council is of the opinion that Aboriginal cultural heritage is being harmed or there is an imminent risk of such harm. A stop activity order lasts for 60 days unless extended or cancelled earlier.<sup>56</sup>
- 1.87** Division 3 of Part 7 permits the ACH Council to give prohibition orders. These orders can be given to a landholder or occupier of land where the activity is taking place, the proponent of the activity, or a person who has control over the activity.<sup>57</sup> Clause 149 outlines that the ACH Council has the power to give a prohibition order generally and, in addition, when the ACH Council has given a stop activity order the ACH Council must decide whether to also give a prohibition order. A prohibition order can be of unlimited duration (unless cancelled) or can include an expiry date. It is an offence to not comply with a stop activity order or a prohibition order.<sup>58</sup>
- 1.88** Clause 145 states that the harm for which a stop activity order or a prohibition order can be made includes:
- harm caused by carrying out a tier 1 or tier 2 activity that is not authorised under an ACH Permit
  - carrying out an activity in a protected area
  - if the harm or imminent risk of harm is caused by the carrying out of an activity in accordance with an ACH Permit or an ACH Management Plan and there is new information about the cultural heritage in the relevant area.
- 1.89** Division 4 of Part 7 permits the ACH Council to order a person to remediate harm done to Aboriginal cultural heritage. Clause 157 states that this order can be given to a person who, in the opinion of the ACH Council, had control over the activity that harmed Aboriginal cultural heritage or is the landholder or occupier of the land where the activity that harmed Aboriginal cultural heritage was carried out.

### **Aboriginal Cultural Heritage Protection Agreements**

- 1.90** Part 8 of the bill relates to the protection of Aboriginal cultural heritage that is not subject to an ACH Permit or an ACH Management Plan. An ACH Protection Agreement may deal with:
- the recognition, protection, conservation, preservation or management of Aboriginal cultural heritage in relation to an area,

<sup>55</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cls 141 and 142.

<sup>56</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cls 145 and 147.

<sup>57</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 150.

<sup>58</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cls 148, 153 and 154.

- the protection, maintenance or use of a cultural landscape, or a part of a cultural landscape,
- the protection, maintenance or use of Aboriginal objects, rights of access to, or rights to use, Aboriginal places or Aboriginal objects by Aboriginal people,
- the restoration and preservation of Aboriginal places, cultural landscapes and Aboriginal objects,
- any other matter prescribed for the purposes of this paragraph.<sup>59</sup>

**1.91** The parties to an ACH Protection Agreement must include at least one Aboriginal person, group or community. A party to an ACH Protection Agreement may submit the agreement to the ACH Council for endorsement and the ACH Council must decide whether to endorse the agreement or refuse it.<sup>60</sup>

### **Offences for harming Aboriginal cultural heritage**

**1.92** Part 5 of the bill establishes offences for harming Aboriginal cultural heritage, defines the concepts of 'serious harm' and 'material harm', and sets out a number of defences in relation to the offences.<sup>61</sup>

**1.93** To 'harm' Aboriginal cultural heritage includes:

- to destroy or damage the Aboriginal cultural heritage,
- to move the Aboriginal cultural heritage,
- to lose the Aboriginal cultural heritage,
- an act that desecrates the Aboriginal cultural heritage.<sup>62</sup>

**1.94** The bill states that 'an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities in relation to the Aboriginal cultural heritage cannot harm the Aboriginal cultural heritage'.<sup>63</sup> In terms of definitions, the bill states that 'serious harm' is 'irreversible, of a high impact or on a wide scale, or harm to Aboriginal cultural heritage located in a protected area'. The bill defines 'material harm' to be 'harm that is neither trivial nor negligible'.<sup>64</sup>

**1.95** The bill establishes offences for causing 'harm', 'material harm' or 'serious harm' to Aboriginal cultural heritage. It is also an offence to cause 'serious harm' by accident. Depending on the level of harm caused, the penalties range from 500 penalty units to 18,000 penalty units or five years imprisonment (or both) for individuals, and from 5,000 penalty units to 180,000 penalty

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<sup>59</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 169.

<sup>60</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cls 169, 170 and 173.

<sup>61</sup> Explanatory note, Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, p 2.

<sup>62</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 67.

<sup>63</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 67.

<sup>64</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 68.

units for a body corporate.<sup>65</sup> The bill also sets out a range of defences to the 'cause harm' and 'cause serious harm' offences.<sup>66</sup>

## NSW Government's Aboriginal cultural heritage reforms

**1.96** Since 2011, the NSW Government has been undertaking work on reforming Aboriginal cultural heritage laws. Aboriginal Affairs NSW, an agency of the Department of Premier and Cabinet, informed the committee that the NSW Government supports standalone Aboriginal cultural heritage laws and is working on new standalone Aboriginal cultural heritage legislation.<sup>67</sup>

**1.97** At a hearing, Mr Shane Hamilton, Deputy Secretary of Aboriginal Affairs NSW, stated that Aboriginal Affairs NSW could not provide a timeframe for the introduction of the government's new Aboriginal cultural heritage legislation and that it is undertaking consultation and working with key stakeholders.<sup>68</sup> When asked about the circumstances required to make progress towards introducing new legislation, Mr Hamilton emphasised the importance of comprehensive consultation:

Extensive consultation to the extent that we're satisfied that everybody that needs to be consulted and have a say has had a say in that and has been part of developing that, and making sure that that's as wide and extensive as we possibly can and no one gets left behind or left out. I think that's the fundamental practice that we need to engage in ...<sup>69</sup>

**1.98** The submission from Aboriginal Affairs NSW noted that the NSW Government's legislation seeks to respond to five key aims identified by Aboriginal communities across New South Wales as critical to improving Aboriginal cultural heritage management and protection.

- Better recognition of Aboriginal cultural heritage values: Key principles being examined by the NSW Government are protection, preservation, celebration and prosperity.
- Aboriginal decision-making: The guiding principle for the NSW Government's new legislation is that Aboriginal people are best placed to protect and decide on Aboriginal cultural heritage matters.
- Improved information gathering and management: Cultural knowledge and intellectual property rights of knowledge holders are fundamental to the protection, celebration and growth of cultural practice on country and must guide the protection and management of Aboriginal cultural heritage.
- Improved protection and conservation: Aboriginal cultural heritage systems must align with planning and heritage systems in order to be acceptable to both community and the

<sup>65</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cls 69-72. See also Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest No. 46/57(9 August 2022)*, pp 27-37.

<sup>66</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 75.

<sup>67</sup> Submission 12, Aboriginal Affairs NSW, pp 4-5.

<sup>68</sup> Evidence, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 4 October 2022, p 9.

<sup>69</sup> Evidence, Mr Hamilton, 4 October 2022, p 11.

NSW Government, which requires a balancing of improved protections for Aboriginal cultural heritage and avoiding any break in development.

- Improved confidence in the regulatory system: Creating a regulatory system that aligns with the planning system in an efficient and effective manner while building community confidence through improved monitoring, reporting and enforcement of compliance protocols and offences.<sup>70</sup>

**1.99** The ACHAC's submission listed some of the policies on which Aboriginal communities expressed support as part of the 2018 consultation on the NSW Government's draft bill:

- ACH provisions should be removed from the National Parks and Wildlife Act
- There should be standalone legislation for ACH in NSW
- Statutory definitions of ACH should explicitly include elements such as landscape, water and living Aboriginal culture
- There should be statutory acknowledgement that ACH is owned by Aboriginal people and not the Crown
- There should be a new, independent state-wide body governed by a board of Aboriginal people as a regulatory decision-making body
- Local Panels: community-led, local decision making on ACH by Aboriginal people with recognised cultural authority
- Up-front assessment of ACH within the planning (development approval) system
- New, regulated ACH information management systems that are managed by Aboriginal people, and that have strong safeguards and protocols
- Improved compliance and enforcement including penalties that provide a true deterrent.<sup>71</sup>

**1.100** The submission from Aboriginal Affairs NSW provided an overview of the approach taken by the NSW Government since 2011 in advancing reforms to Aboriginal cultural heritage laws, as set out below.

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<sup>70</sup> Aboriginal Affairs NSW, Submission 12, pp 10-11.

<sup>71</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 5.

**Table 1 NSW Government's approach to developing new Aboriginal cultural heritage legislation**

Year	Event	Outcomes
2011-12	Legislative review	
2013-14	Draft legislative model released	<u>Outcome:</u> State-wide body with decision-making powers supported by local advisory bodies
2015-16	ACH Model reviewed and amended draft ACH Bill	<u>Outcome:</u> Governance model – state-wide body of Aboriginal people by local panels
2017-18	A proposed new legal framework: Aboriginal cultural heritage in NSW Discussion Paper released and internal consultation process commenced. Progression to drafting the 2018 ACH Bill.	<p><u>Feedback</u></p> <ul style="list-style-type: none"> <li>• based on 313 submissions and nearly 700 people, two-thirds of those identified as Aboriginal</li> <li>• organisations and individuals, 20 Local Aboriginal Land Councils (LALCs), industry, heritage consultants</li> <li>• local government, provided written submissions</li> <li>• Sept/Oct 2017 info sessions in 19 locations across NSW</li> <li>• March/April 2018, workshops in same 19, plus Tamworth</li> </ul> <p><u>Key themes from consultation</u></p> <ul style="list-style-type: none"> <li>• stand-alone legislation required for more strategic Aboriginal cultural heritage protection</li> <li>• improved assessment process to provide upfront consideration of Aboriginal cultural heritage with support for stronger compliance</li> <li>• enforcement, penalties, equal access to appeals giving greater clarity for proponents</li> <li>• a more contemporary definition of Aboriginal cultural heritage in legislation, including waters, skies and intangible heritage</li> <li>• strong support of Aboriginal decision-making, ownership and control of Aboriginal cultural heritage through a governance structure of an ACH Council and local panels, as opposed to the Minister</li> </ul>

Year	Event	Outcomes
		<ul style="list-style-type: none"> <li>• the improved Aboriginal cultural heritage information system must be protected as trust is paramount</li> <li>• appropriate resourcing through Aboriginal cultural heritage fund allocated based on transparent reporting of Aboriginal cultural heritage outcomes.</li> </ul>
2018	Draft ACH Exposure Bill released	<p><u>Outcome</u></p> <ul style="list-style-type: none"> <li>• stand-alone legislation</li> <li>• pro-active conservation approach, moving away from management of harm approach</li> <li>• self-determination and decision-making on Aboriginal cultural heritage by Aboriginal people through an Aboriginal cultural heritage Authority and local panels</li> </ul>
2020	Targeted Consultations (Aboriginal key stakeholders and key government agencies)	<p><u>Outcome</u></p> <ul style="list-style-type: none"> <li>• review of the 2018 draft Aboriginal cultural heritage exposure bill</li> <li>• NSW Aboriginal Land Council, NTSCORP and ACHAC co-design an Aboriginal cultural heritage model</li> <li>• simplify system to improve transparency and ease of application of Aboriginal cultural heritage conservation</li> </ul>
	Key principles identified; ongoing meetings with Aboriginal stakeholders and the Minister	<p><u>Feedback</u></p> <ul style="list-style-type: none"> <li>• strengthen self-determination and empower Aboriginal people</li> <li>• be led by Aboriginal people</li> <li>• inclusive and respectful of cultural and native title rights</li> <li>• build on existing structures of land rights and native title</li> <li>• independent of government</li> <li>• improve ACH protection, promotion &amp; repair, including rights to say no (free, prior, informed consent) including approaches to protection, regulation, intangible, knowledge, languages, cultural access &amp; use, repatriation, water, cultural practices</li> </ul>

Year	Event	Outcomes
		<ul style="list-style-type: none"> <li>have no detrimental impacts to land rights, native title or ACH</li> </ul> <p><u>Outcome:</u> NSW Aboriginal Land Council, NTSCORP, Aboriginal Cultural Heritage and ACHAC jointly expressed key principles that must be considered in ACH reforms.</p>
2021	Facilitated discussion between AANSW, NTSCORP, NSWALC, ACHAC; submissions from key Aboriginal stakeholders to the Minister on ACH reforms	
	Amendments to draft 2018 Bill	<u>Outcome:</u> Updated policy position workshopped with key Aboriginal stakeholders to reflect the previous consultation feedback and make the legislation less costly and less complex.
2021-22	Ongoing, monthly inter-agency discussions to finalise a whole of Government approach – principles and mechanisms developed for better alignment with existing systems	<u>Outcome:</u> Inter-agency consultation with Department of Planning and Environment (DPE) Planning Policy, DPE Legal and DPE Secretaries through the Aboriginal cultural heritage Steering Committee and officer level meetings.
2022	Finalising amended policy position with NSWALC and NTSCORP	<u>Outcome:</u> Majority of policy position supported in principle.

Source: Submission 12, *Aboriginal Affairs NSW*, pp 5-7.

## Best practice and international standards

- 1.101** This section contains an overview of the Dhawura Ngilan Vision and Best Practice Standards, the United Nations Declaration on the Rights of Indigenous People, the Juukan Gorge Report, and the National Agreement on Closing the Gap.

### Dhawura Ngilan Vision and Best Practice Standards

- 1.102** The Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) is a bi-annual meeting of Chairs of Australia's national, state and territory Indigenous heritage bodies and counterpart representatives from Aotearoa New Zealand.<sup>72</sup>
- 1.103** On 16 September 2020, HCOANZ released *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Dhawura Ngilan Report). The Dhawura Ngilan Report encompasses

<sup>72</sup> Heritage Chairs and Officials of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (26 September 2020), p 28.

two documents: the Vision and the Best Practice Standards. The Report was designed as 'a roadmap for improving approaches to Aboriginal and Torres Strait Islander heritage management in Australia'.<sup>73</sup>

**1.104** The Dhawura Ngilan Vision has four key focus areas.

- Aboriginal and Torres Strait Islander people are the Custodians of their heritage. It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians.
- Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage.
- Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice.
- Aboriginal and Torres Strait Islander heritage is recognised for its global significance.<sup>74</sup>

**1.105** The Dhawura Ngilan Best Practice Standards provide guidance to achieve the Vision's focus areas with the objective of achieving consistent Aboriginal cultural heritage legislation across Australia which is of the highest standard.<sup>75</sup>

### **United Nations Declaration on the Rights of Indigenous People**

**1.106** The *United Nations Declaration on the Rights of Indigenous People* (UNDRIP) 'establishes a universal framework of minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world'.<sup>76</sup>

**1.107** A number of rights contained in the UNDRIP specifically relate to the management and protection of Aboriginal cultural heritage, including:

- right to self-determination (Article 3)
- right to culture (Article 11)
- right to spiritual and religious traditions and customs (Article 12)
- right to participation in decision-making (Article 18)
- free, prior and informed consent for laws and policies (Article 19)
- right to spiritual relationship with traditional land and resources (Article 25)

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<sup>73</sup> Heritage Chairs and Officials of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (26 September 2020), p 28.

<sup>74</sup> Heritage Chairs and Officials of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (26 September 2020), p 14.

<sup>75</sup> Heritage Chairs and Officials of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (26 September 2020), p 13.

<sup>76</sup> Submission 21, NTSCORP Limited, p 16.

- right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional expressions (Article 31).

**1.108** The Dhawura Ngilan Report references the UNDRIP as guiding principles for Aboriginal cultural heritage, stating that 'As a foundational principle, Australia's Indigenous Peoples are entitled to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in the UNDRIP'.<sup>77</sup> The Report highlights the importance of Article 3:

The key to UNDRIP is the principle of self-determination. In the context of [Aboriginal cultural heritage], this principle requires that the affected Indigenous Community itself should be the ultimate arbiter of the management of the [Aboriginal cultural heritage] aspects any proposal that will affect that heritage.<sup>78</sup>

### Juukan Gorge Report

**1.109** The Commonwealth Parliament's Joint Standing Committee on Northern Australia conducted an inquiry into Rio Tinto's destruction of the 46,000+ year-old Juukan Gorge rock shelters on 24 May 2020. In its report, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Juukan Gorge Report), it found that 'there are serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework, in all states and territories and the Commonwealth'.<sup>79</sup>

**1.110** The Juukan Gorge Report made eight recommendations that considered each state and territories' legislation, Commonwealth legislation and stakeholder perspectives in light of the events at Juukan Gorge.

**1.111** A key recommendation was that the Australian Government legislate a new framework for cultural heritage protection which has the following minimum standards:

- a definition of cultural heritage recognising both tangible and intangible heritage;
- a process by which cultural heritage sites will be mapped, which includes a record of past destruction of cultural heritage sites (with adequate safeguards to protect secret information and ensure traditional owner control of their information on any database);
- clear processes for identifying the appropriate people to speak for cultural heritage that are based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist;
- decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage;
- a requirement that site surveys involving traditional owners are conducted on country at the beginning of any decision making process;

<sup>77</sup> Heritage Chairs and Officials of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (26 September 2020), p 32.

<sup>78</sup> Heritage Chairs and Officials of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (26 September 2020), p 35.

<sup>79</sup> Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge* (October 2021), p xi.

- an ability for traditional owners to withhold consent to the destruction of cultural heritage;
- a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent as set out in the UNDRIP;
- mechanisms for traditional owners to seek review or appeal of decisions
- adequate compliance, enforcement and transparency mechanisms;
- adequate penalties for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners;
- the provision of adequate buffer zones around cultural heritage sites;
- a right of timely access by Aboriginal and Torres Strait Islander peoples to protected cultural heritage sites;
- a process by which decisions can be reconsidered if significant new information about cultural heritage comes to light.<sup>80</sup>

### **National Agreement on Closing the Gap**

**1.112** Under the National Agreement on Closing the Gap (Closing the Gap Agreement), the NSW Government has agreed to 17 socioeconomic outcomes and associated targets by which to measure those outcomes. Particularly relevant in the consideration of Aboriginal cultural heritage legislation are the following outcomes:

Outcome 15, 'Aboriginal and Torres Strait Islander People maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters';

- Target 15a: By 2030, a 15 per cent increase in Australia's landmass subject to Aboriginal and Torres Strait Islander people's legal rights or interests.
- Target 15b: By 2030, a 15 per cent increase in areas covered by Aboriginal and Torres Strait Islander people's legal rights or interests in the sea.

Outcome 16, 'Aboriginal and Torres Strait Islander cultures and languages are strong, supported and flourishing'.<sup>81</sup>

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<sup>80</sup> Submission 21, NTSCORP Limited, pp 15-16.

<sup>81</sup> Submission 21, NTSCORP Limited, p 22; *National Agreement on Closing the Gap* (July 2020), [https://www.closingthegap.gov.au/sites/default/files/2022-09/ctg-national-agreement\\_apr-21-comm-infra-targets-updated-24-august-2022\\_0.pdf](https://www.closingthegap.gov.au/sites/default/files/2022-09/ctg-national-agreement_apr-21-comm-infra-targets-updated-24-august-2022_0.pdf).

## Chapter 2 Key issues – Part One

Chapters 2 and 3 detail key issues relating to the bill. This chapter begins with a summary of evidence from Aboriginal people and organisations who participated in this inquiry about connection to culture and Country. The chapter then summarises key issues identified in the evidence with the current Aboriginal cultural heritage legislative framework, and the need for strengthened protection for Aboriginal cultural heritage through new and standalone legislation. The chapter then sets out views on whether this bill is the appropriate mechanism to reform Aboriginal cultural heritage laws, including issues with the level of consultation on the bill.

The chapter then discusses key aspects of the bill which, according to some inquiry participants, represent improvements to the current system. This includes a change to recognise and protect both tangible and intangible Aboriginal cultural heritage, and the ability of the new entity proposed by the bill – the Aboriginal Cultural Heritage Council (ACH Council) – to make decisions on the impact of proposed activity on Aboriginal cultural heritage before development and planning assessment and approval takes place.

The ACH Council, the principle of self-determination and key issues relating to cultural authority are examined in chapter 3. The committee's comment, findings and recommendations in relation to the bill are in chapter 3.

### Connection to Country and culture

- 2.1** This section presents the meaning and significance of connection to Country and culture as expressed by Aboriginal inquiry participants. In summary, these statements convey that Aboriginal cultural heritage is enduring and living, encompasses tangible and intangible culture, and has at its core obligations and responsibilities to Country and culture.
- 2.2** Mr Paul Knight, a Dharawal Yuin descendant and representative of Country in that area, who gave evidence to the committee in his capacity as a representative of the Aboriginal Cultural Heritage Advisory Committee (ACHAC), explained that Country provides identity to place, and that culture is multi-dimensional. He said:

... the notion of culture is a bit of a nebulous idea in some respects. It's really a set of values constructs that determines a behaviour and a way of doing and practices and principles that sit behind that, and you express that through language, dance, song, art. But they all form part of culture. That's where culture comes in: it's how you bring all that together. I think we forget that. We put so much emphasis on one particular aspect over another, rather than the whole. ...

Country is the very reason that we are here today. It is what provides us with our identity to place. It is what holds up our values, our knowledges and our practices. In our current worldview, these things are often referred to flexibly and, in my view, simplistically as culture. This is what defines us as Aboriginal people and it is what should define all people within a place. As custodians of country for millennia, it is our role to ensure that the embodiment of country is well recognised, respected and celebrated. Everyone

within country takes on the obligation to embrace the structures of land, community and relationship that country is.<sup>82</sup>

**2.3** Ms Mavis Ahoy, elder and panel member of the Armidale Aboriginal Cultural Centre and Keeping Place, highlighted the connection between past and present, stating 'we can't move forward to our future without our past. Heritage is our land, our country, our songs, our walking trails, our stories ...'.<sup>83</sup>

**2.4** Mr Kevin Duncan of the Gomeroi people and the Awaba people, stressed the responsibility that Aboriginal people have to Country and culture, bringing in the notion of family. He said:

We were, and we are, a proud Aboriginal people. We had sovereignty. We enjoyed these lands before European contact for tens of thousands of years. We had systems and laws in place. The kinship structure ... is a law unto itself. It shows us how we treat one another—how we treat our wider family, the environment. It gives us that responsibility—and one of the most important words here is responsibility—that we have as Aboriginal people to our lands and to our culture. ...

That's the way that we treat it—as family—because it's embedded in our social laws, as such, in the kinship structures. They're not just trees and sites and animals and plants; they are actual family. So it's those religious and spiritual connections to those things.<sup>84</sup>

**2.5** Mr Michael Bell, a Ngunnawal Gomeroi man and the Chairperson of NTSCORP Limited – native title representative body in New South Wales and the Australian Capital Territory – emphasised that culture extends beyond tangible elements:

We're talking about 60,000-odd years of ongoing connection to country, culture and language, songline and story. We have to protect that. It's more than stones and bones; it's the intangible. It's about the connection. It's about our wellness.<sup>85</sup>

**2.6** The intangible nature of Aboriginal culture was also emphasised by the Darkinjung Local Aboriginal Land Council:

Aboriginal cultural heritage is more than just physical sites. It is also the songlines that we created. Ancient Aboriginal culture is embedded within these songlines that has shaped the environment today. This environment includes the animals and plants that are part of what we call 'country'.<sup>86</sup>

**2.7** Several Aboriginal stakeholders emphasised that culture is not simply historical, but it is living and practiced. Ms Virginia Robinson, Secretary of the Dharriwaa Elders Group, stated that 'culture is about more than archaeology and history. It's living memories and practices. It's the wellspring of Aboriginal people and it makes us feel good'.<sup>87</sup> Ms Yvonne Stewart, Bundjalung

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<sup>82</sup> Evidence, Mr Paul Knight, Representative, Aboriginal Cultural Heritage Advisory Committee, 23 September 2022, pp 30 and 35.

<sup>83</sup> Evidence, Ms Mavis Ahoy, Elder and panel member, Armidale Aboriginal Cultural Centre and Keeping Place, 4 October 2022, p 31.

<sup>84</sup> Evidence, Mr Kevin Duncan, 4 October 2022, pp 51 and 54.

<sup>85</sup> Evidence, Mr Michael Bell, Chairperson, NTSCORP Limited, 23 September 2022, p 9.

<sup>86</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 2.

<sup>87</sup> Evidence, Ms Virginia Robinson, Secretary, Dharriwaa Elders Group, 4 October 2022, p 47.

of Byron Bay (Arakwal) elder and member of Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) Registered Native Title Body Corporate, commented:

I know a bit of bone or a bit of stone or a bit of landscape doesn't mean much to non Aboriginal people, but it means a lot to us. Destroying our pathways is destroying our songlines, cutting ourselves from areas that we can't go to, telling us how many kangaroo or, for me, pipis, worms ...<sup>88</sup>

**2.8** Mr Warlpa Thompson, Director of the Barkandji Native Title Group Aboriginal Corporation Registered Native Title Body Corporate, added 'those living bits of collecting pipis or scarring a tree, they're living parts of culture that people still practise. So it would be great if it dealt with having protection mechanisms in place so that we can still live the bits that we know'.<sup>89</sup>

**2.9** Similarly, this passage from Mr Scott Franks, an appointed applicant for the Registered Native Title Claimants for the Plains Clans of the Wonnarua People in the Hunter Valley, demonstrates the centrality of intangible culture:

...[T]he problem with archaeology from a commercial setting is that it's designed to find remnant artefacts, stone tools, markings on trees and so on to show that society was here. We know we don't need that. The true element to understand culture in law is not those stones and bones that we heard spoken about a minute ago; it's about what I'm trying to tell you that's coming out of my head right now that was passed down to me from my father, his father and his mother and his mother. Archaeologists can't do that ...<sup>90</sup>

## Key issues regarding current Aboriginal cultural heritage laws

**2.10** This section outlines key concerns that inquiry participants raised regarding the current operation of Aboriginal cultural heritage laws, namely:

- the need for standalone Aboriginal cultural heritage legislation
- the current legislation's failure to adequately protect Aboriginal cultural heritage from harm or destruction
- the current system's failure to afford Aboriginal people rights of ownership of or control over Aboriginal cultural heritage and its management and protection
- the current approach to consultation with Aboriginal people and communities on activities that may harm Aboriginal cultural heritage, particularly around whether some of the individuals and groups consulted have cultural knowledge and authority.

<sup>88</sup> Evidence, Ms Yvonne Stewart, Bundjalung of Byron Bay (Arakwal) elder and member of Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) Registered Native Title Body Corporate, 23 September 2022, p 8.

<sup>89</sup> Evidence, Warlpa Thompson, Director of the Barkandji Native Title Group Aboriginal Corporation Registered Native Title Body Corporate, 23 September 2022, p 8.

<sup>90</sup> Evidence, Mr Scott Franks, Wonnarua man, client of the Environmental Defenders Office, 23 September 2022, p 39.

## The need for standalone Aboriginal cultural heritage legislation

- 2.11** It was widely accepted in evidence to the inquiry that the current Aboriginal cultural heritage system and legislation is outdated and that reforms are overdue.<sup>91</sup> The vast majority of inquiry participants expressed the view that Aboriginal cultural heritage matters should be removed from the *National Parks and Wildlife Act 1974* (National Parks and Wildlife Act) and enshrined within new standalone legislation.<sup>92</sup> NTSCORP stated that standalone Aboriginal cultural heritage legislation 'has long been advocated for by the Aboriginal people of NSW and is a key aspiration of Native Title Holders and Traditional Owners in NSW'.<sup>93</sup>
- 2.12** The committee heard a variety of perspectives among different stakeholder groups as to why standalone legislation is required.
- The NSW Government expressed that standalone legislation 'is needed to reflect the dynamism of culture and help expand the importance and knowledge of Aboriginal cultural heritage beyond archaeological artefacts and objects'.<sup>94</sup>
  - NTSCORP referred to statements made in 2010 by the then Minister for Environment that 'it is important that we move to stand-alone legislation to protect Aboriginal heritage and to remove it from what is really an Act more concerned about the protection of flora and fauna in our national parks'.<sup>95</sup> On this point, some inquiry stakeholders stated that the inclusion of Aboriginal cultural heritage in the National Parks and Wildlife Act is 'unacceptable' and 'highly insulting', as it considers Aboriginal cultural heritage alongside flora and fauna.<sup>96</sup>

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<sup>91</sup> See, for example, Submission 6, Dr Janet Hunt, p 1; Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 1; Submission 9, Environmental Defenders Office, p 3; Submission 10, Christian Voice Australia, p 2; Submission 15, NSW Minerals Council, p 1; Submission 16, The National Trust of Australia (New South Wales), p 2; Submission 17, New South Wales Aboriginal Land Council, p 1; Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), pp 1-2; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 2; Submission 21, NTSCORP Limited, p 5; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, p 1; Evidence, Mr Josh Pallas, President, New South Wales Council of Civil Liberties, 23 September 2022, pp 51-52; Evidence, Councillor Leeanne Hampton, Councillor for the Wiradjuri Region, NSW Aboriginal Land Council, 23 September 2022, p 14; Evidence, Ms Tara Mercy, Business Manager, Bandjalang Aboriginal Corporation Prescribed Body Corporate Registered Native Title Body Corporate, 23 September 2022, p 5; Evidence, Mr Roy Ah-See, Co-Chair, Uluru Dialogue, 23 September 2022, p 47.

<sup>92</sup> See, for example, Submission 6, Dr Janet Hunt, p 1; Submission 9, Environmental Defenders Office, p 2; Submission 15, NSW Minerals Council, p 15; Submission 21, NTSCORP Limited, p 5; Submission 16, The National Trust of Australia (New South Wales), pp 2-3; Submission 24, Lock the Gate Alliance, p 1; Evidence, Mr Duncan, 4 October 2022, p 54.

<sup>93</sup> Submission 21, NTSCORP Limited, p 36.

<sup>94</sup> Submission 12, Aboriginal Affairs NSW, p 4.

<sup>95</sup> Submission 21, NTSCORP Limited, p 4.

<sup>96</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 4; Evidence, Mr Pallas, 23 September 2022, p 53; Evidence, Ms Rachel Chick, Senior Solicitor, Environmental Defenders Office, 23 September 2022.

- From the perspective of the NSW Minerals Council, Mr Andrew Abbey, Policy Director at NSW Minerals Council, characterised the current framework as creating 'regulatory frustration' for the mining industry.<sup>97</sup>

### **Inadequate protection of Aboriginal cultural heritage from harm and destruction**

**2.13** Aboriginal and non-Aboriginal inquiry participants argued that the current framework offers inadequate protection of Aboriginal cultural heritage from harm and destruction. Stakeholders identified specific deficiencies in the National Parks and Wildlife Act, namely:

- the Aboriginal Heritage Impact Permit system
- the delayed consideration of Aboriginal cultural heritage matters in the assessment of development project proposals
- the exemption of State significant development and State significant infrastructure from the legislative protections
- the narrow definition of Aboriginal cultural heritage
- inadequate penalties for harming Aboriginal cultural heritage
- difficulties with alternative avenues for protecting cultural heritage.

**2.14** In the view of NTSCORP, the National Parks and Wildlife Act 'creates permissible ways to damage or destroy Aboriginal cultural heritage for the benefit of third parties'.<sup>98</sup> Ms Karra Kinchela, a Gomeroi traditional custodian and a Narrabri Community Outreach Coordinator with Lock the Gate Alliance, stated 'the traditional culture and heritage is not being cared for appropriately and is subject to mismanagement, with government favouring State development over the protection of sacred and cultural heritage sites'.<sup>99</sup>

**2.15** Inquiry participants contended that the system established under the National Parks and Wildlife Act, whereby the Secretary of the Department of Premier and Cabinet may grant to proponents an Aboriginal Heritage Impact Permit, is not operating to protect Aboriginal cultural heritage. NTSCORP and others argued that this is demonstrated by the high number of Aboriginal Heritage Impact Permit applications that are successful and the very low number that are rejected.<sup>100</sup>

**2.16** For example, the Darkinjung Local Aboriginal Land Council referred to NSW Aboriginal Land Council's figures that for the first half of 2020, approximately four Aboriginal Heritage Impact

<sup>97</sup> Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 4 October 2022, p 16.

<sup>98</sup> Submission 21, NTSCORP Limited, p 4. See also Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 4.

<sup>99</sup> Evidence, Ms Karra Kinchela, Narrabri Community Outreach Coordinator, Lock the Gate Alliance, 4 October 2022, p 24.

<sup>100</sup> Submission 21, NTSCORP Limited, p 4; Submission 16, The National Trust of Australia (New South Wales), p 1; Evidence, Mr Bell, 23 September 2022, p 8; Submission 13, Darkinjung Local Aboriginal Land Council, p 3; Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 4.

Permits per week were granted.<sup>101</sup> Darkinjung Local Aboriginal Land Council added that it believes 'more than 1,000 sites have been approved by the NSW Government for destruction'. It also referred to the previous work of Honorary Associate Professor Janet Hunt, a cultural heritage academic, which stated that '100 to 200 sites and objects are lawfully destroyed every year' and 'between 2012 and 2017, 704 permits were issued and only one was rejected'.<sup>102</sup>

**2.17** Making a similar point, Mrs Yvonne Stewart, a Bundjalung of Byron Bay (Arakwal) elder and member of the Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) Registered Native Title Body Corporate, commented that 'some 450 sites have been destroyed over the last 10 years and every single one of them was passed to be destroyed. Not one got knocked back for preservation'.<sup>103</sup>

**2.18** Mr Franks detailed the destruction of culture that has occurred on his Country:

... I've seen firsthand now the systematic destruction of 97 per cent of my peoples' country. I've got one birthing site left in our country. We have eight grinding groove pads. The Bulga Bora ceremonial sites have been impacted. The only Bora sites we have left you can only find by satellite imagery because the land has been so scarred.<sup>104</sup>

**2.19** A further concern noted by the Dharriwaa Elders Group was the destruction which occurs while waiting for an Aboriginal place to be recognised, gazetted and protected under the National Parks and Wildlife Act – a process that can incur lengthy delays. The Group stated that it has been waiting since 2002 to have its highest priority areas nominated under the National Parks and Wildlife Act and, as a consequence, Aboriginal cultural heritage has been destroyed in the interim.<sup>105</sup>

**2.20** Another issue highlighted by inquiry participants was that Aboriginal cultural heritage matters are considered after development assessment processes have occurred or after Aboriginal cultural heritage has been placed at risk.<sup>106</sup> For example, Mr Hamilton stated: 'We're the last thought rather than the first thought when it comes to development or changes that impact on Aboriginal cultural heritage'.<sup>107</sup> In this regard, Councillor Donnelly reflected on the practical impact of this when it comes to big projects:

If you know what is there beforehand, whether it's a European heritage site or an Aboriginal heritage site, you plan accordingly. But we get, "We've already started this work on this mine so were going to have to take this particular site out anyway." And then we get the old, "There are 50,000 jobs in this thing," and then we're sort of pushed up into a corner there to do nothing about it.<sup>108</sup>

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<sup>101</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 3.

<sup>102</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 4.

<sup>103</sup> Evidence, Mrs Stewart, 23 September 2022, p 8.

<sup>104</sup> Evidence, Mr Franks, 23 September 2022, p 43.

<sup>105</sup> Submission 22, Dharriwaa Elders Group, p 8.

<sup>106</sup> See, for example, Submission 13, Darkinjung Local Aboriginal Land Council, p 4; Evidence, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 4 October 2022, p 11; Evidence, Councillor Dallas Donnelly, Councillor for the North Coast Region, NSW Aboriginal Land Council, 23 September 2022, p 17.

<sup>107</sup> Evidence, Mr Hamilton, 4 October 2022, p 11.

<sup>108</sup> Evidence, Councillor Donnelly, 23 September 2022, p 17.

**2.21** In addition, many inquiry participants identified as concerning the fact that the minimal protection for Aboriginal cultural heritage afforded under the National Parks and Wildlife Act does not apply to State significant development and State significant infrastructure.<sup>109</sup> Ms Mishka Holt, Principal Solicitor at NTSCORP, told the committee:

... I think everybody in the room knows how completely ludicrous it is that the largest projects, the largest developments, the largest mining is allowed to be exempted from the very minimal cultural heritage protections that exist in New South Wales. We've got the bare minimum in the whole country and State significant infrastructure and development doesn't even have to comply with that.<sup>110</sup>

**2.22** Mr Thompson highlighted an example of State significant infrastructure causing harm to Aboriginal cultural heritage where the concerns of the community were ignored:

... the freeway up the coast went through a sacred mountain, to the objection of a local traditional owner, and because it is State significant infrastructure he had no right of veto. But there are some pretty old records about how significant that site was as a healing place with lots of sacred objects still intact and in place, but they just got ignored.<sup>111</sup>

**2.23** As State significant development, mining and extraction activities are not subject to the requirement under the National Parks and Wildlife Act to apply for an Aboriginal Heritage Impact Permit. However, the NSW Minerals Council contended that mining companies are subject to rigorous regulation when it comes to Aboriginal cultural heritage matters:

I would say that mining projects are more thoroughly assessed and deal with cultural heritage issues, including all the other issues, way more thoroughly and way more rigorously than any other project in the State. Part of that is because they're so heavily scrutinised. They are very, very heavily regulated.<sup>112</sup>

**2.24** The NSW Minerals Council explained that, pursuant to the Secretary's Environmental Assessment Requirements, mining and extraction activities must assess Aboriginal cultural heritage requirements, among other considerations. In addition, once a project has been assessed and approved by the Department of Planning and Environment and the Independent Planning Commission, the project can be subject to a number of conditions under a cultural heritage management plan. The NSW Minerals Council noted that the Independent Planning Commission is an independent and standalone decision-making body that is not subject to the direction or control of the Minister for Planning, except in relation to procedural matters.<sup>113</sup>

<sup>109</sup> See, for example, Submission 16, The National Trust of Australia (New South Wales), p 1; Submission 21, NTSCORP Limited, p 4; Evidence, Ms Mishka Holt, Principal Solicitor, NTSCORP Limited, 23 September 2022, p 9; Evidence, Dr Tim Owen, 4 October 2022, p 52; Evidence, Ms Robinson, 4 October 2022, pp 42-43; Evidence, Mr Greg Bondar, 4 October 2022, p 50; Evidence, Mr Geoffrey Winters, Chief Executive Officer, Just Reinvest NSW, 4 October 2022, p 5; Evidence, Mr Brendan Moyle, Chief Executive Officer, Darkinjung Local Aboriginal Land Council, 23 September 2022, p 16.

<sup>110</sup> Evidence, Ms Holt, 23 September 2022, p 9.

<sup>111</sup> Evidence, Mr Thompson, 23 September 2022, p 8.

<sup>112</sup> Evidence, Mr Abbey, 4 October 2022, p 21.

<sup>113</sup> Submission 15, NSW Minerals Council, pp 8-9; Evidence, Mr Abbey, 4 October 2022, p 18.

- 2.25** A further deficiency of the National Parks and Wildlife Act identified by several stakeholders was its narrow definition of Aboriginal cultural heritage.<sup>114</sup> NTSCORP commented that the current system for Aboriginal cultural heritage 'fails to take into account all facets of tangible and intangible Aboriginal Cultural Heritage and the broader landscape in which Aboriginal Cultural Heritage exists'.<sup>115</sup> Mr Knight described the Act's approach to be a '... "stones and bones" Western-scientific view and analysis of heritage ...'. He added that this way of thinking 'actually forgets that we are still living. It is the oldest living culture and it's still moving forward, and it's still there'.<sup>116</sup>
- 2.26** The Darkinjung Local Aboriginal Land Council also argued that penalties for destruction of Aboriginal cultural heritage are inadequate, particularly compared to penalties for the destruction of heritage listed buildings:
- ... in 2015 the NSW Land and Environment Court issued a property developer a \$250,000 fine for the destruction of a heritage listed building. Another developer/construction company was fined \$55,000 and \$25,000 in legal costs for the destruction of heritage listed items in a historic Sydney building. This is compared to Ausgrid being fined in 2013 \$4,690 for the destruction of a significant rock engraving at Cromer.<sup>117</sup>
- 2.27** Some inquiry participants reflected on the limitations of alternative avenues to protect Aboriginal cultural heritage when the National Parks and Wildlife Act fails to do so. Dr Tim Owen, an Aboriginal archaeology expert, explained that one avenue is to take the matter to the New South Wales Land and Environment Court, however, this is costly and usually beyond the practical means of most Aboriginal people and groups.<sup>118</sup>
- 2.28** The committee also heard that applications for an emergency declaration by the Federal Minister under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) for the preservation or protection of a specified significant Aboriginal area from injury or desecration are very difficult to obtain.<sup>119</sup> For example, Yinnaar Burrim Jane Delaney-John highlighted that the Gomeroi people's attempt to obtain an application under that Act in relation to the Shenhua mine project was unsuccessful:

Even though we met all the criteria [under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)] and the significance of the area had all been proven and acknowledged, at the end of the day, we were denied on the basis that there would be a social and economic benefit to the broader community because mining companies make money.<sup>120</sup>

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<sup>114</sup> See, for example, Evidence, Mr Knight, 23 September 2022, p 32; Evidence, Mr Moyle, 23 September 2022, p 18; Evidence, Mr Winters, 4 October 2022, p 7.

<sup>115</sup> Submission 21, NTSCORP Limited, p 4.

<sup>116</sup> Evidence, Mr Knight, 23 September 2022, p 35.

<sup>117</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 5.

<sup>118</sup> Evidence, Dr Owen, 4 October 2022, p 52.

<sup>119</sup> Evidence, Dr Owen, 4 October 2022, p 52.

<sup>120</sup> Evidence, Yinnaar Burrim Jane Delaney-John, Representative of the Gomeroi Traditional Custodians, 4 October 2022, pp 26-27. See also Evidence, Dr Owen, 4 October 2022, p 52.

**2.29** Turning to the impacts of harm to or destruction of Aboriginal cultural heritage, Darkinjung Local Aboriginal Land Council pointed to the comments of the NSW Aboriginal Land Council about the profoundly harmful impacts caused by the destruction of Aboriginal cultural heritage:

The high rates of destruction of Aboriginal sites, both 'approved' and illegal, continues to cause deep distress within our communities. The destruction of Aboriginal sites impacts on the ability of our peoples to maintain living cultures and create wellbeing and healthy communities. Our sites tell important stories and must be protected so Aboriginal peoples can strengthen and maintain our cultures now and in the future'.<sup>121</sup>

**2.30** Further, Mr Dalliss Ramage, Director at One Connection Aboriginal Disability Services, described harm and destruction of Aboriginal cultural heritage 'as breaking and building on identity trauma ... once you start breaking our identity by us losing our culture and our sites, that is when we are going to start going backwards again'.<sup>122</sup>

### **Lack of Aboriginal control and decision-making**

**2.31** Many inquiry participants noted that under the current Aboriginal cultural heritage legislation, Aboriginal people are provided no rights of ownership of or control over Aboriginal cultural heritage.

**2.32** Inquiry participants considered that the National Parks and Wildlife Act does not empower Aboriginal people, nor effectively represent them, in the management, protection or decisions in relation to Aboriginal cultural heritage.<sup>123</sup> Mr Duncan emphasised that the approach in New South Wales is a global outlier: '... in regard to talking about full autonomy of our heritage, we're the only Indigenous people on this earth that don't have full autonomy of their own heritage'.<sup>124</sup>

**2.33** Instead, as noted in chapter 1, these powers and responsibilities rest with the NSW Government in accordance with the following framework:

- the Secretary of the Department of Premier and Cabinet grants Aboriginal Heritage Impact Permits, as per the National Parks and Wildlife Act
- the Heritage Council of NSW grants work approvals that may harm items listed on the State Heritage Register or subject to interim protection orders, as per the *Heritage Act 1977*
- the Heritage Council of NSW, the local council, the Minister, or the Independent Planning Commission of NSW Development decides applications of various kinds under the *Environment Planning and Assessment Act 1979*.<sup>125</sup>

<sup>121</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 3. See also Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 3.

<sup>122</sup> Evidence, Mr Dalliss Ramage, Director, One Connection Aboriginal Disability Services, 4 October 2022, p 32.

<sup>123</sup> See, for example, Submission 13, Darkinjung Local Aboriginal Land Council, p 3; Submission 21, NTSCORP Limited, p 8; Evidence, Mr Duncan, 4 October 2022, p 50; Evidence, Ms Mercy, 23 September 2022, p 5; Evidence, Dr Owen, 4 October 2022, p 53; Evidence, Mr Nathan Moran, Chief Executive Officer, Metropolitan Local Aboriginal Land Council, 23 September 2022, p 15.

<sup>124</sup> Evidence, Mr Duncan, 4 October 2022, p 50.

<sup>125</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 3.

**2.34** Darkinjung Local Aboriginal Land Council noted that although the ACHAC advises the Minister responsible for Heritage and the Executive Director of Heritage NSW on any matter relating to the identification, assessment and management of Aboriginal cultural heritage, the decision-making power lies with the NSW Government. Darkinjung Local Aboriginal Land Council added that the ACHAC's recommendations are considered by the Department of Planning and Environment before a recommendation is made to the Minister.<sup>126</sup>

**2.35** Mr Brendan Moyle, Chief Executive Officer of Darkinjung Local Aboriginal Land Council, considered the ACHAC's role to be inadequate because it is solely advisory:

We, as Aboriginal people under the current regimes, can only advise, which means that we can be ignored. We, as Aboriginal people and legitimate Aboriginal organisations with cultural authority, do not control the protection or promotion of Aboriginal cultural heritage.<sup>127</sup>

**2.36** Some Land Council representatives viewed the ACHAC as government-controlled and expressed doubt about whether it is representative of the Aboriginal community. Councillor Dallas Donnelly for the North Coast Region and a representative of the NSW Aboriginal Land Council stated: 'I still say that ACHAC is appointed by yiralis—non-Aboriginal people, Government people there'.<sup>128</sup> Mr Nathan Moran, Chief Executive Officer of the Metropolitan Local Aboriginal Land Council, expressed a similar view:

I wanted to confess to say with regard to ACHAC, that is a Government-established body; it is not an Aboriginal body. I feel that ACHAC could be much more strengthened if it represented Aboriginal people and was a 100 per cent authorised Aboriginal body whereby it was empowered in the principles of Aboriginal self-determination ... That's the reality: ACHAC works for government. It doesn't work for the Aboriginal community; it doesn't even work in collaboration with us ...<sup>129</sup>

### **Requirement to consult with registered Aboriginal parties**

**2.37** Some inquiry participants held concerns about the process mandated by the National Parks and Wildlife Act for proponents of potentially harmful activity to consult with Aboriginal people and communities.

**2.38** As discussed in chapter 1, the current framework facilitates a process whereby the applicant for an Aboriginal Heritage Impact Permit must consult with any 'registered Aboriginal party'. The proponent must ascertain the names of any Aboriginal persons who may hold knowledge relevant to any relevant Aboriginal objects or Aboriginal places in the relevant area. The proponent must then invite Aboriginal people to register their interest in a process of community consultation. Heritage NSW holds a list of who proponents should invite for consultation.<sup>130</sup>

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<sup>126</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 4.

<sup>127</sup> Evidence, Mr Moyle, 23 September 2022, p 13.

<sup>128</sup> Evidence, Councillor Donnelly, 23 September 2022, p 21.

<sup>129</sup> Evidence, Mr Moran, 23 September 2022, p 21.

<sup>130</sup> Evidence, Mr Knight, 23 September 2022, p 33; Evidence, Dr Owen, 4 October 2022, p 54.

**2.39** There were criticisms that this process can lead to the situation where individuals or organisations are engaged in the decision-making process about activity that may harm Aboriginal cultural heritage without actually holding cultural authority in relation to that cultural heritage.<sup>131</sup> This issue stems from the foundational question about which individuals or groups can be said to hold cultural authority to speak for Country and Aboriginal cultural heritage, which is examined in more detail in chapter 3.<sup>132</sup>

**2.40** Dr Owen explained that there are issues regarding the criteria and process for individuals and organisations to be included on the invitation list. In addition, there is nothing to stop the invitation to register being passed on within the community. This can lead to situations where there are many registered Aboriginal parties. For example, in the case of the Shenhua coal mine, the committee heard that there were 144 separate registered Aboriginal parties involved in the consultation process.<sup>133</sup>

**2.41** Highlighting the same issue, Mr Knight drew attention to the lack of rigour in the criteria for registered Aboriginal parties:

The issue is the way the current legislation is being enacted around—and we heard the term before—RAPs, or registered Aboriginal parties, where basically anybody can put up their hand and register as an Aboriginal party. There is no validation requirement around that; there is no way of ensuring that the person has capacity or the knowledge of the background.<sup>134</sup>

**2.42** Darkinjung Local Aboriginal Land Council noted that this creates situations where 'Aboriginal people and entities with no cultural authority undertake cultural heritage and site inspections on country'.<sup>135</sup> In its view, individuals and entities with no cultural authority participating in consultations places 'the management of cultural heritage sites and knowledge at risk for future generations which may undermine Aboriginal cultural heritage, stories and lore'.<sup>136</sup> Darkinjung Local Aboriginal Land Council added that the impacts of this stretch beyond the destruction of tangible Aboriginal cultural heritage to the intangible creation stories which date back over 65,000 years.<sup>137</sup>

**2.43** Another issue highlighted by Dr Owen in this context was that there are no requirements or guidelines about how proponents of projects are to weigh and balance the views of registered Aboriginal parties, leaving this matter in the hands of the proponent:

... a registered party could just be one individual or it could be in this instance a land council and the land council could have a membership of 400 people or it could be in this instance the registered native title applicant who has a membership of several

<sup>131</sup> Submission 13, Darkinjung Local Aboriginal Land Council, pp 5-6; Evidence, Dr Owen, 4 October 2022, p 54; Evidence, Mr Moran, 23 September 2022, pp 16-17; Evidence, Mr Moyle, 23 September 2022, pp 13-14 and 17; Evidence, Mr Knight, 23 September 2022, p 33.

<sup>132</sup> Evidence, Mr Knight, 23 September 2022, p 33.

<sup>133</sup> Evidence, Mr Knight, 23 September 2022, p 33.

<sup>134</sup> Evidence, Mr Knight, 23 September 2022, p 33.

<sup>135</sup> Evidence, Mr Moyle, 23 September 2022, pp 13-14.

<sup>136</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 6.

<sup>137</sup> Submission 13, Darkinjung Local Aboriginal Land Council, pp 5-6; Mr Brendan Moyle, Chief Executive Officer, Darkinjung Local Aboriginal Land Council, 23 September 2022, pp 13-14.

hundred people. But then a proponent is allowed to weight opinion however they want to across those registered parties currently. So a proponent might call a public meeting and 10 people might turn up out of 100, and then nine people might agree to a particular action and then the tenth, who is representing say 500 people, might disagree but then the proponents say, "Nine of you agreed and one of you disagreed." There is no requirement for weighting there, and they can then just table, "The majority of the people at the meeting agreed with action X".<sup>138</sup>

- 2.44** In addition, Mr Moyle and Mr Moran emphasised that cultural fraud is common in their respective Local Aboriginal Land Council areas. The issue centers on the ability under law for individuals or entities to hold themselves out to be Aboriginal without necessarily satisfying the legal definition of Aboriginality applied under the Aboriginal Land Rights Act or Federal Court of Australia legal determinations.<sup>139</sup>

## **Views on whether the bill is the right way forward**

- 2.45** This section sets out the differing views heard during the inquiry on whether the bill is the appropriate mechanism to reform Aboriginal cultural heritage laws and create a standalone scheme for its protection and management. This includes stakeholders' assessment of the bill's merits in the context of the NSW Government's delay in introducing Aboriginal cultural heritage reforms, as well as the level of consultation on the bill with Aboriginal people, stakeholders, and community.

### **An opportunity to enact standalone Aboriginal cultural heritage legislation**

- 2.46** The committee heard a level of frustration expressed at the NSW Government's failure to deliver Aboriginal cultural heritage reforms and standalone legislation despite the bi-partisan commitment to do so made in 2010 and a draft bill being released in 2018.<sup>140</sup> Some stakeholders, including The National Trust of Australia (New South Wales) and the NSW Minerals Council, called on the NSW Government to prioritise reform and introduce legislation on Aboriginal cultural heritage reform.<sup>141</sup> In the view of the NSW Minerals Council, the 'NSW Government is best placed to develop and actually deliver any new ACH framework if it's to be feasible, effective, practical, and able to be implemented'.<sup>142</sup>

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<sup>138</sup> Evidence, Dr Owen, 4 October 2022, p 55.

<sup>139</sup> Submission 13, Darkinjung Local Aboriginal Land Council, pp 5-6; Evidence, Mr Moyle, 23 September 2022, pp 13-14; Evidence, Mr Moran, 23 September 2022, p 17.

<sup>140</sup> See, for example, Submission 16, The National Trust of Australia (New South Wales), p 1; Submission 17, New South Wales Aboriginal Land Council, p 1; Submission 22, Dharrivaa Elders Group, pp 2-3; Evidence, Councillor Hampton, 23 September 2022, p 14; Evidence, Dr Owen, 4 October 2022, p 52; Evidence, Mr Pallas, 23 September 2022, p 52; Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 3.

<sup>141</sup> Submission 16, The National Trust of Australia (New South Wales), p 3; Submission 15, NSW Minerals Council, pp 2-3. See also Evidence, Mr Pallas, 23 September 2022, p 52; Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 5.

<sup>142</sup> Submission 15, NSW Minerals Council, p 2.

**2.47** Mr Hamilton, Deputy Secretary of Aboriginal Affairs NSW, stated that the length of time the NSW Government has taken to work on these reforms reflects the understanding that it is essential to work closely with stakeholders throughout the process.<sup>143</sup>

**2.48** Some stakeholders were critical of the fact that New South Wales has fallen behind the rest of Australia in terms of strengthened, modernised and standalone Aboriginal cultural heritage laws. For example, Mr Moran stated:

I'd also point out that we're the last State. What an abysmal register of reality check for the New South Wales Government and society as a whole that we, being the first part of Australia colonised, are the last State to have a cultural heritage bill appropriately identified as Aboriginal standalone.<sup>144</sup>

**2.49** Similarly, the NSW Aboriginal Land Council noted that Aboriginal cultural heritage reforms have a long history:

NSW is the last jurisdiction in Australia without modernised Aboriginal Cultural Heritage (ACH) laws. This Bill represents a significant opportunity for this Parliament to finally deliver long overdue, meaningful laws, in the making for over 40 years.<sup>145</sup>

**2.50** Therefore, it was widely acknowledged that this bill would deliver standalone Aboriginal cultural heritage legislation. Some stakeholders considered that this was a strong reason to support the bill. For example, Mr Moyle said that a 'circuit breaker' is needed in order to propel Aboriginal cultural heritage reforms which have been spoken about for 40 years and been negotiated with the NSW Government for 12 years.<sup>146</sup> Mr Josh Pallas, President of the New South Wales Council for Civil Liberties stated that '... anything that is a standalone cultural heritage law is inherently better than the status quo'.<sup>147</sup>

**2.51** Some argued that the details on some aspects of the new system and processes could be worked out after the bill is passed, such as via delegated legislation, and that any issues and challenges with the new framework could be worked through and resolved via future reviews of, and amendment to, the legislation.<sup>148</sup>

**2.52** When asked at the hearing about the proposal for the NSW Parliament to pass the bill with a view to resolving issues that arise via future reviews and amendments, Mr Hamilton emphasised the importance of broad consultation before any legislation is introduced:

We run the risk of not engaging extensively, outside of those organisations that are in this space on a regular basis. ... If we don't take those views into consideration, I think

<sup>143</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 4.

<sup>144</sup> Evidence, Mr Moran, 23 September 2022, p 16.

<sup>145</sup> Submission 17, New South Wales Aboriginal Land Council, p 1.

<sup>146</sup> Evidence, Mr Moyle, 23 September 2022, p 22.

<sup>147</sup> Evidence, Mr Pallas, 23 September 2022, p 52.

<sup>148</sup> Evidence, Mr Ah-See, 23 September 2022, pp 47-48; Evidence, Mr Winters, 4 October 2022, pp 7-8; Evidence, Councillor Donnelly, 23 September 2022, p 21; Submission 17, New South Wales Aboriginal Land Council, p 2.

at this particular point in time—again, I emphasise the front end of the development of it is far better than trying to do it at a later stage.<sup>149</sup>

**2.53** Mr Hamilton added that progressing the bill and working out solutions to problems at a later stage:

- '... will not provide community with the desired outcomes, has the potential to increase lateral violence ...'<sup>150</sup>
- would be inconsistent with best practice as set out in the Commonwealth Parliament's Joint Standing Committee on Northern Australia's report *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Juukan Gorge Report), and with the free, prior and informed consent principle under Article 19 of the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP).<sup>151</sup>

### **Limited consultation on the bill with Aboriginal stakeholders and community**

**2.54** A key theme in the evidence to the inquiry was that there has been inadequate consultation on the bill and its proposed reforms.

**2.55** A particular concern identified was that there had not been broad consultation with the Aboriginal community and that only a select handful of individuals or organisations were involved in, or were consulted during, the development of the bill. Inquiry participants highlighted that a key principle to reforming Aboriginal cultural heritage laws is that it is based on extensive and inclusive consultation with Aboriginal people and communities.<sup>152</sup>

**2.56** In his evidence, Mr Hamilton emphasised the reasons why meaningful and comprehensive community consultation is critical to reforming Aboriginal cultural heritage:

Self determination must be at the heart of reforming the current approach to Aboriginal cultural heritage management, and Aboriginal leadership is at the forefront of the Government's reform priorities. The private member's bill has not been developed through the extensive consultation processes needed and it does not reflect the expectations of Aboriginal people in New South Wales, beyond a handful of organisations.<sup>153</sup>

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<sup>149</sup> Evidence, Mr Hamilton, 4 October 2022, p 10.

<sup>150</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 7.

<sup>151</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, pp 1 and 6.

<sup>152</sup> See, for example, Evidence, Mr Reece Sheumack, Aboriginal Community Engagement & Culture Officer, Armidale Community Corrections, 4 October 2022, p 32; Evidence, Mr Michael Young, Community member, 4 October 2022, p 37; Evidence, Mr Abbey, 4 October 2022, p 10; Submission 16, The National Trust of Australia (New South Wales), p 1; Submission 2, Mr Scott Franks, p 1; Submission 9, Environmental Defenders Office, p 2; Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 4.

<sup>153</sup> Evidence, Mr Hamilton, 4 October 2022, p 9. See also Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 4.

- 2.57** Mr Hamilton added that the bill does not satisfy the recommendations in the Juukan Gorge Report regarding the importance of 'co-designing policies and processes with Aboriginal stakeholders to recognise Aboriginal self-determination', which he contended has been demonstrated by inquiry participants' concerns about the lack of consultation on the bill.<sup>154</sup>
- 2.58** The ACHAC was also highly critical of what it considered to be a failure to widely consult with Aboriginal individuals and communities on the bill and to adhere to best practice and international standards regarding self-determination:

Arguably the most serious weakness of the ACH Bill 2022 is that its proponents have put the Bill into Parliament without making any attempt to consult in a culturally appropriate way with NSW Aboriginal communities. It may be that the proponents ACH Bill 2022 believe their Bill will do better within the non-Aboriginal NSW Parliament than it would if it were exposed to Aboriginal community consultation, but that is no excuse for no consultation.

A short, fast, Upper House Inquiry is not Aboriginal consultation. The proponents of the Bill must know that legislating for Aboriginal people without consulting Aboriginal people is a breach of the United Nations Declaration on the Rights of Indigenous People (UNDRIP 2007) of the National Closing the Gap Agreement (2020), of the Dhawura Ngilan Vision Statement (2020) and of every other public sector standard for Aboriginal consultation on Aboriginal policy making.<sup>155</sup>

- 2.59** The ACHAC urged the NSW Parliament to 'not support any approach to ACH reform that has been poorly conceived, quickly and quietly, without culturally appropriate consultation with NSW Aboriginal communities'.<sup>156</sup>
- 2.60** Mr Knight also reflected on the NSW Government's consultation process for its draft bill in 2018, noting there was wide consultation, and the community was informed about the NSW Government's proposed reforms. In contrast, he commented that this bill 'basically just landed in Parliament and people weren't aware of it'.<sup>157</sup>
- 2.61** Several Native Title Holders and claimants expressed concern that the bill was developed without their proper consultation.<sup>158</sup> Mr Franks criticised the limited consultation undertaken with traditional owners:

I sit here today absolutely confused with a private member's bill that has had such limited consultation, such limited working within the community—as in the traditional owner community—that has been presented and hurriedly and hastily thrown through the same way that a longboat came off the Endeavour post haste to the shore to

<sup>154</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 4.

<sup>155</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 4. See also Submission 16, The National Trust of Australia (New South Wales), p 2.

<sup>156</sup> Submission 8, Aboriginal Cultural Heritage Advisory Group, pp 1-2.

<sup>157</sup> Evidence, Mr Knight, 23 September 2022, p 34.

<sup>158</sup> Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), p 5; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 5; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, p 6; Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 6.

convince the traditional owners that we were here to look after you when they had no intention of doing that. They were here to steal our culture—not just our land, our law and our customs, but our culture. You cannot place a Wonnarua man in a position to accept a white man's culture in the guise of a bill that's never ever been put out there for any other mob to discuss.<sup>159</sup>

**2.62** Some stakeholders, including ACHAC and the NSW Minerals Council, considered that further consultation on the bill is required before it progresses in the NSW Parliament.<sup>160</sup> For example, Mr Knight remarked that 'it is unthinkable that any ACH reform would proceed through our Parliament before exhaustive consultation of those primary Aboriginal ACH stakeholders is completed'.<sup>161</sup>

**2.63** The limitations of the committee's inquiry process were also highlighted in terms of the short timeframe hindering meaningful consultation. Mr Knight stated that the 'time allowed for public responses is very short, precluding Aboriginal consultation as we understand it. Of itself, the culturally inappropriate mechanism of an Upper House Inquiry also precludes Aboriginal consultation as we understand it'.<sup>162</sup> Similarly, the Environmental Defenders Office stated:

The current inquiry process provides insufficient time for genuine consultation with NSW First Nations. Further, the decision to only have two hearings in Sydney will deprive many First Nations from having the opportunity to participate in the inquiry. We note that the inquiry process itself is a colonial construct and not conducive to ensuring genuine input from NSW First Nations. Accordingly, we recommend NSW First Nations must be provided with a genuine opportunity to review the ACH Bill.<sup>163</sup>

**2.64** An individual who participated in the online questionnaire emphasised that this inquiry is not a substitute for consultation, which is critical on a matter as important as Aboriginal cultural heritage:

This Upper House Inquiry is a sorry alternative to Aboriginal community consultation. No Parliament should legislate for Aboriginal people - on something as fundamental to identity as Aboriginal cultural heritage - without culturally appropriate Aboriginal community consultation.<sup>164</sup>

**2.65** Conversely, while recognising the position of some stakeholders that the bill requires further consultation, the NSW Aboriginal Land Council was concerned that 'further delays will only serve to undermine the protection of Aboriginal cultural heritage and allow a broken system to remain in place'.<sup>165</sup> Mr Geoffrey Winters, Chief Executive Officer at Just Reinvest NSW, acknowledged that the bill was not as widely consulted on as the NSW Government's 2018 draft bill. However, he expressed the view that, thanks to the reform work to date on Aboriginal

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<sup>159</sup> Evidence, Mr Franks, 23 September 2022, p 39.

<sup>160</sup> See, for example, Submission 24, Lock the Gate Alliance, p 1; Evidence, Mr Knight, 23 September 2022, pp 30 and 34; Evidence, Mr Abbey, 4 October 2022, p 16.

<sup>161</sup> Evidence, Mr Knight, 23 September 2022, p 30.

<sup>162</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 4. See also Portfolio Committee No. 7 – Planning and Environment, Report on the Online Questionnaire (October 2022), p 4

<sup>163</sup> Submission 9, Environmental Defenders Office, p 2.

<sup>164</sup> Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 4.

<sup>165</sup> Submission 17, New South Wales Aboriginal Land Council, p 2.

cultural heritage, the evidence given in this inquiry has been 'unsurprising' and consistent with organisations' preexisting positions.<sup>166</sup>

## Key aspects of the bill

**2.66** Stakeholders expressed a range of views on the strengths and drawbacks of the following key features of the bill:

- broadening the current legislative definition of Aboriginal cultural heritage to include tangible and intangible culture
- prioritising the protection of Aboriginal cultural heritage by making Aboriginal cultural heritage matters a 'gateway' consideration
- establishing entities that give decision-making power on Aboriginal cultural heritage matters to Aboriginal people on behalf of knowledge holders.<sup>167</sup>

**2.67** The last point was perhaps the most prominent during the inquiry. Therefore, the principle of self-determination, cultural authority and the new decision-making entity proposed in the bill – the ACH Council – are examined in chapter 3. The first and second points are discussed in the sections below.

### Intangible Aboriginal cultural heritage

**2.68** There was widespread support among stakeholders for the bill's definition of 'Aboriginal cultural heritage' including tangible and intangible cultural heritage and cultural landscapes.<sup>168</sup>

**2.69** As noted in chapter 1, the bill defines 'Aboriginal cultural heritage' to mean 'the tangible and intangible elements that are important to Aboriginal people of the State, and are recognised through social, spiritual and historical values, as recognised by Aboriginal people'. This includes an Aboriginal place, an Aboriginal object and Aboriginal ancestral remains. It also includes a 'cultural landscape', which means 'a group of areas interconnected through tangible or intangible elements of Aboriginal cultural heritage, including lands, plants, animals, water and sky'.<sup>169</sup>

<sup>166</sup> Evidence, Mr Winters, 4 October 2022, p 7.

<sup>167</sup> See, for example, Submission 6, Dr Janet Hunt, p 1; Submission 21, NTSCORP Limited, p 37; Evidence, Ms Kinchela, 4 October 2022, p 24; Submission 27, The Law Society of New South Wales, p 3; Evidence, Mr Moyle, 23 September 2022, p 18; Evidence, Councillor Hampton, 23 September 2022, p 14.

<sup>168</sup> See, for example, Submission 6, Dr Janet Hunt, p 1; Submission 21, NTSCORP Limited, p 37; Submission 23 Dharriwaa Elders Group, pp 5-7; Submission 27, The Law Society of New South Wales, p 3; Evidence, Mr Moyle, 23 September 2022, p 18; Evidence, Mr Knight, 23 September 2022, p 32; Evidence, Mr Winters, 4 October 2022, p 7; Evidence, Dr Owen, 4 October 2022, p 53; Evidence, Mr Abbey, 4 October 2022, p 23; Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 3.

<sup>169</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, definition of 'Aboriginal cultural heritage'.

**2.70** Through sharing a creation story, Mr Moyle illustrated to the committee that tangible Aboriginal cultural heritage is the physical representation of intangible culture:

Our creation story is Baiame. Baiame came down from the Mirrabooka—from the stars and from the sky. He actually came down to what we now know as earth, at the back of the Central Coast. It is a place we now call and know as Mount Yengo. He created the mountains. He created the waterways. He brought the spirits down that became our totems—our animals. ...

When Baiame created life, he then lived amongst the people. He gave us lore—as in l-o-r-e—culture, kinship. When he left, he left his spirits down here that stayed as our totems. He left from Mount Yengo back to the Mirrabooka. The importance of these stories is weaved within the songlines today. The sites that you see are only a physical representation, quite often, of the intangible.<sup>170</sup>

**2.71** Mr Knight held the view that protection of intangible Aboriginal cultural heritage is the most important element of any Aboriginal cultural heritage framework:

... intangible heritage needs to be included within the bill or any legislative framework around Aboriginal cultural heritage. It is, from my personal perspective, the most important part of it. If you build a brick wall, you can see all the bricks. But if you don't have the mortar, the whole thing falls down. It's that mortar that is the intangible. It's the thing that really makes the wall safe. Until we can actually appreciate, highlight and celebrate the intangible heritage, we're going to really struggle to recognise Aboriginal cultural heritage in its entirety... like to talk about intangibles as what are the story, the principles, the values, the behaviours? What are the things that really create identity? They're those value constructs that say, "This is the way we need to act. These are the things we need to do. These are the practices we need to enable." Because those are the intangible aspects of what makes us who we are.<sup>171</sup>

**2.72** Mr Winters highlighted that the definition of Aboriginal cultural heritage in the bill better reflects best practice cultural heritage legislation in comparison to the NSW Government's 2018 draft bill and the *Native Title Act 1993* (Cth):

This is another difference between the 2018 bill and the bill that you've got before you: the way it talks about cultural landscapes, which are—if you go and look at native title law and the way it's developed, obviously, the earlier cases are very old-fashioned ways of considering anthropology and connection to country. I think, in the years since '93, we've really developed a body of understanding Aboriginal cultural heritage and how it interacts with the physical and the intangible. This bill incorporates landscapes and intangible cultural heritage, which—I think that would be high watermark, best practice cultural heritage legislation in the country.<sup>172</sup>

**2.73** NTSCORP advised that incorporation of tangible and intangible cultural heritage and 'cultural landscape' is 'consistent with the recommendations of the Juukan Gorge Report and the Dhawura Ngilan Best Practice Standards and the incorporation of the United Nations

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<sup>170</sup> Evidence, Mr Moyle, 23 September 2022, p 18.

<sup>171</sup> Evidence, Mr Knight, 23 September 2022, p 32.

<sup>172</sup> Evidence, Mr Winters, 4 October 2022, p 7.

Declaration on the Rights of Indigenous Peoples principles adds additional strength to the regime'.<sup>173</sup>

- 2.74** Dr Owen stated that the bill's definition of Aboriginal cultural heritage 'represents a seismic shift in thinking and better aligns with Aboriginal peoples' concepts of [Aboriginal cultural heritage]'.<sup>174</sup> Mr Abbey commented that the bill's definition brings New South Wales in line with the approach in other Australian jurisdictions.<sup>175</sup>

### **Aboriginal cultural heritage matters to be a 'gateway' consideration**

- 2.75** This section examines inquiry participants views on the bill's proposal to require the ACH Council to make decisions in relation to the impacts of proposed activity or projects on Aboriginal cultural heritage before development and planning assessments can commence, including for State significant development and State significant infrastructure projects.
- 2.76** As noted in chapter 1, the bill creates a system whereby, in instances where an ACH Permit or ACH Management Plan is required, the proponent is not permitted to lodge a development application or planning proposal with the relevant consent authority unless the ACH Council approves the ACH Permit or ACH Management Plan. This process was described by stakeholders variously as a 'veto power' or 'gateway' process, as it involves the ACH Council deciding on matters of Aboriginal cultural heritage before the project can progress to development or planning approvals and assessment.<sup>176</sup>
- 2.77** Importantly, this process would apply to State significant development and State significant infrastructure.<sup>177</sup> NTSCORP and the NSW Minerals Council remarked that subjecting such projects to a preliminary process where approval via a permit or plan is required before Aboriginal cultural heritage can be impacted is a key point of difference between the bill and the NSW Government's 2018 draft bill.<sup>178</sup>
- 2.78** Several Aboriginal people and organisations who participated in the inquiry considered that the ACH Council's 'power of veto' is one of the bill's key strengths.<sup>179</sup> NTSCORP highlighted that the Dhawura Ngilan Vision states that Aboriginal people with an interest in particular Aboriginal cultural heritage should have to provide their 'free, prior and informed consent', in accordance

<sup>173</sup> Submission 21, NTSCORP Limited, p 37.

<sup>174</sup> Evidence, Dr Owen, 4 October 2022, p 53.

<sup>175</sup> Evidence, Mr Abbey, 4 October 2022, p 23.

<sup>176</sup> Submission 15, NSW Minerals Council, p 5; Submission 21, NTSCORP, p 23; Submission 24, Lock the Gate Alliance, p 1; Evidence, Mr Moyle, 23 September 2022, p 17; Evidence, Mr Winters, 4 October 2022, p 6; Evidence, Ms Kinchela, 4 October 2022, p 24; Evidence, Yinnaar Burrum Jane Delaney-John, 4 October 2022, p 26; Evidence, Ms Robinson, 4 October 2022, p 42.

<sup>177</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 11.

<sup>178</sup> Evidence, Ms Holt, 23 September 2022, p 11; Evidence, Mr Abbey, 4 October 2022, p 21. See also Mr Geoffrey Winters, Chief Executive Officer, Just Reinvest NSW, 4 October 2022, p 5.

<sup>179</sup> Submission 21, NTSCORP, p 23; Evidence, Mr Bondar, 4 October 2022, p 50; Evidence, Ms Robinson, 4 October 2022, pp 42-43; Evidence, Yinnaar Burrum Jane Delaney-John, 4 October 2022, pp 25 and 28; Evidence, Mr Winters, 4 October 2022, p 5. See also Submission 24, Lock the Gate Alliance, p 1.

with Article 19 of the UNDRIP, before approvals to affect that culture are granted.<sup>180</sup> Following on from this, NTSCORP argued that 'any legislation enacted must deliver improved protections for Aboriginal cultural heritage, including providing Aboriginal people with the legislative right to veto on actions which would destroy or harm Aboriginal cultural heritage'.<sup>181</sup>

**2.79** Ms Robinson questioned the value of Aboriginal cultural heritage protections if that protection can be overturned, commenting: 'The right of veto is essential. ... What is the point of legislation to protect ACH when, theoretically, protection determinations of ACH custodians can be overruled?'<sup>182</sup>

**2.80** Similarly, Mr Winters emphasised the importance of upholding and respecting consent in relation to impacting Aboriginal cultural heritage, regardless of the project type:

I think if you're actually serious about protecting Aboriginal cultural heritage, you say that it's not destroyed, harmed or impacted without the community's consent no matter what the project is. And that's what [the] bill does.<sup>183</sup>

**2.81** In expressing support for the ACH Council's veto power regarding State significant development and State significant infrastructure projects, Mr Greg Bondar argued that this empowers true Aboriginal custodianship over heritage matters:

It protects the Aboriginal cultural heritage from being continually—pardon the pun—bulldozed. That's critical ... the beauty of this particular bill is that it is aimed at preventing the destruction of Aboriginal heritage by awarding true custodianship of sites, objects and remains to the newly created State agency, the Aboriginal Cultural Heritage Council'.<sup>184</sup>

**2.82** While also in support of the ACH Council's veto power regarding State significant development and State significant infrastructure projects, Mr Moyle emphasised that the ACH Council's preliminary assessment of impact on Aboriginal cultural heritage would occur for all activity and projects that may impact Aboriginal cultural heritage:

... the bill is so much more than just major infrastructure. It is so much more. But having the inclusion of State significant, State infrastructure has to be critical because quite often when the assessment is made about what is important it is being made through a non-Indigenous lens. With Juukan Gorge we saw the destruction of caves and art that were 46,000 years old for mining. We have faced the same challenges ... for powerlines and infrastructure that society needs that a decision is made that it's okay to just desecrate something that is thousands upon thousands of years old.<sup>185</sup>

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<sup>180</sup> Submission 21, NTSCORP Limited, p 10.

<sup>181</sup> Submission 21, NTSCORP, p 23.

<sup>182</sup> Evidence, Ms Robinson, 4 October 2022, pp 42-43.

<sup>183</sup> Evidence, Mr Winters, 4 October 2022, p 5.

<sup>184</sup> Evidence, Mr Bondar, 4 October 2022, 4 October 2022, p 50. See also Submission 27, The Law Society of New South Wales, p 3.

<sup>185</sup> Evidence, Mr Moyle, 23 September 2022, p 16.

**2.83** The right of veto was also of central importance to Yinnaar Burrim Jane Delaney-John, representative of the Gomeroi Traditional Custodians, especially given the power imbalance between mining companies and traditional custodians:

In our experience, there's been no protection whatsoever. They're so big and they're so wealthy, and there's so much at stake, and we are so under-resourced. We just try to do what we do because—we have a saying: We'll never win in the system. People say, "Why do we do it?" We're not a campaign. We're defending country and we're defending culture. We don't win against mining companies.<sup>186</sup>

**2.84** In contrast, Aboriginal Affairs NSW told the committee that the proposal in the bill for the ACH Council to have a veto power in relation to State significant infrastructure and State significant development is unworkable and therefore not supported:

This aspect of the Bill is not implementable in its current form. It will give an independent body veto rights over major projects and is inconsistent with federal and all current state legislation. However, early, thorough, and respectful engagement with Aboriginal communities has the potential to mitigate harm and aligns with existing systems.<sup>187</sup>

**2.85** Aboriginal Affairs NSW also stated that the bill does not appropriately balance the competing priorities of '... continued connection to country and the celebration of culture with the systems and operational demands of planning and development',<sup>188</sup> and that any new Aboriginal cultural heritage framework must be embedded within the NSW Government's planning system.<sup>189</sup>

**2.86** Aboriginal Affairs NSW also highlighted that the ACH Council's right to veto on State significant infrastructure and State significant development would be an anomaly in Australian Aboriginal cultural heritage legislation, and reiterated its position that managing and mitigating harm is more appropriately achieved through early consultation.<sup>190</sup>

**2.87** The NSW Minerals Council too expressed opposition to this aspect of the bill. In its view, this aspect of the bill would involve the NSW Government effectively ceding control of development to the ACH Council which would operate outside of the development assessment process. According to the NSW Minerals Council, under the bill the ACH Council would make decisions on which projects should be considered for assessment solely based on Aboriginal cultural heritage considerations, with no capacity to consider broader benefits and costs, or environmental, economic, and social factors.<sup>191</sup>

**2.88** The NSW Minerals Council argued that the current system, whereby the approval of a project, including State significant development and State significant infrastructure projects, is assessed

<sup>186</sup> Evidence, Yinnaar Burrim Jane Delaney-John, 4 October 2022, p 28. See also Evidence, Ms Holt, 23 September 2022, p 9.

<sup>187</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 8.

<sup>188</sup> Evidence, Mr Hamilton, 4 October 2022, pp 10 and 14.

<sup>189</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 1.

<sup>190</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 5.

<sup>191</sup> Submission 15, NSW Minerals Council, p 4.

as part of a holistic, integrated decision-making process that weighs and balances all elements of a project and a variety of environmental, economic and social factors, is more appropriate.<sup>192</sup>

**2.89** On this point, Mr Abbey stated that the position of the mining industry is that an integrated assessment approach should be retained within standalone and modernised Aboriginal cultural heritage reforms:

Our view is, yes, there needs to be strengthened requirements, standalone legislation, et cetera. If the Aboriginal cultural heritage council, in whatever guise, exists, absolutely they can express views and the like and have an important seat or be part of that decision-making process. But then, ultimately, do you have a single issue—and I'm loath to use the word "veto"—acting as a gateway in and of itself and dealing with single-focus issues and not affording an opportunity to balance out the broader range of benefits and costs, whatever they may be.<sup>193</sup>

**2.90** In addition, the NSW Minerals Council noted that there are no appeal rights for proponents if their application for an ACH Permit or ACH Management Plan is refused. Further, the bill provides limited administrative review rights to the NSW Civil and Administrative Tribunal. In the view of the NSW Minerals Council, the Land and Environment Court would be the more appropriate body to deal with these matters.<sup>194</sup>

**2.91** Finally, the NSW Minerals Council contended that the 'gateway' process proposed by the bill is out of step with Aboriginal cultural heritage legislation in other Australian jurisdictions, with most states and territories having an integrated assessment process where decision-makers can weigh up different interests and considerations.<sup>195</sup>

**2.92** Separate to the 'gateway' process, the NSW Minerals Council also expressed concerns with respect to ACH Permits and ACH Management Plans, as set out below.

- The reasons are unclear as to why proponents are required to seek an initial assessment from the ACH Council about whether the proposed activity constitutes tier 1 or tier 2 activity before making an application for an ACH Permit or ACH Management Plan.
- Confusion and uncertainty are created by the provisions under which the ACH Council would approve or authorise an ACH Permit or ACH Management Plan, because they contain different matters about which the ACH Council is to be satisfied.
- The ACH Council can unilaterally suspend or cancel an ACH Permit or ACH Management Plan if no longer satisfied about a matter it was once satisfied of when it granted the approval.<sup>196</sup>

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<sup>192</sup> Submission 15, NSW Minerals Council, p 4.

<sup>193</sup> Evidence, Mr Abbey, 4 October 2022, pp 16 and 19.

<sup>194</sup> Submission 15, NSW Minerals Council, p 9.

<sup>195</sup> Submission 15, NSW Minerals Council, pp 4-5.

<sup>196</sup> Submission 15, NSW Minerals Council, pp 9-10.

## Chapter 3 Key issues – Part 2

One of the key features of the bill is the establishment of an Aboriginal Cultural Heritage Council (ACH Council) and a network of Local Aboriginal Cultural Heritage Services (Local ACH Services). The first part of this chapter examines arguments for the creation of an entity that is Aboriginal controlled and that advances Aboriginal people on behalf of knowledge holders to make decisions about Aboriginal cultural heritage matters. This discussion also examines concerns around the bill's proposed model to achieve this, in particular the ACH Council's independence from government.

The next part examines arguably the most fundamental consideration for reforms which advance Aboriginal decision-making and self-determination in relation to Aboriginal cultural heritage – that is, the question of cultural authority, or in other words, who has and is seen to have the cultural and traditional knowledge to speak for Country.

The final part of this chapter is significant. It discusses one of the leading issues of the inquiry – that is, the extent to which the bill appropriately balances and represents the rights and interests of different Aboriginal people, groups and entities in line with traditional cultural practice and community expectations around who holds cultural authority to speak for Country. The chapter concludes with committee comment, findings and recommendations.

### Aboriginal statewide and local entities for Aboriginal cultural heritage matters

- 3.1 This section focuses on the entities established by the bill which give control to Aboriginal people over decisions about Aboriginal cultural heritage. The key benefits, drawbacks and points for further consideration, as expressed by inquiry participants, are summarised in this section and then examined in further detail throughout this chapter.
- 3.2 As discussed in chapter 1, the bill proposes to create a new statewide entity – the ACH Council – and an accompanying system of authorised local entities – Local ACH Services – to make decisions, independent of government and free from ministerial intervention, about Aboriginal cultural heritage matters.
- 3.3 Starting with the ACH Council, this would be made up of six to eleven individuals. The bill requires that Aboriginal Land Councils, Native Title Holders under the *Native Title Act 1993* (Cth) (Native Title Act) and Aboriginal Owners under the *Aboriginal Land Rights Act 1983* (Aboriginal Land Rights Act) are equally represented on the ACH Council in terms of the number of members who are from these groups or represent their interests. To establish the first ACH Council, members are nominated by the NSW Aboriginal Land Council and holders of native title rights (Native Title Holders), and appointed by the Minister.<sup>197</sup> The ACH Council would be independent of government as it would be established as a body corporate not subject to the direction or control of the Minister.<sup>198</sup>
- 3.4 Many Aboriginal and non-Aboriginal inquiry participants strongly argued for Aboriginal people to have control and decision-making power over Aboriginal cultural heritage and expressed

<sup>197</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, sch 1.

<sup>198</sup> Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, cl 13.

support for the creation of an entity such as the ACH Council,<sup>199</sup> noting that this would advance self-determination principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Dhawura Ngilan Vision).<sup>200</sup>

**3.5** For example, Ms Karra Kinchela, a Gomeroi traditional custodian and a Narrabri Community Outreach Coordinator with Lock the Gate Alliance, stated 'it is our country and we should be given the opportunity to decide how our sites are to be protected'.<sup>201</sup> Similarly, Mr Kevin Duncan of the Gomeroi people and the Awaba people remarked:

Removing our heritage out of the National Parks and Wildlife Act into this body [the ACH Council] would give us full autonomy in regard to us spiritually and physically, and our connections, and to revive some of those things that we have been held back from in identifying properly as who we are and who we have the human right to be as Aboriginal people—our laws, our customs, our traditions, our beliefs. These should be respected properly and taken into account, and our self-determination should be respected too.<sup>202</sup>

**3.6** Honorary Associate Professor Janet Hunt, a cultural heritage academic, noted that the concept of a standalone Aboriginal cultural heritage body was part of the original intent of the 1978 report by the NSW Legislative Assembly Select Committee upon Aborigines which led to the creation of the Aboriginal Land Rights Act.<sup>203</sup>

**3.7** The independence of the ACH Council from government was supported by several stakeholders. For instance:

- Mr Geoffrey Winters, Chief Executive Officer at Just Reinvest NSW, supported the limited role of the Minister in the appointment and removal of ACH Council members.<sup>204</sup>

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<sup>199</sup> See, for example, Submission 6, Dr Janet Hunt, p 1; Submission 9, Environmental Defenders Office, p 2; Submission 13, Darkinjung Local Aboriginal Land Council, pp 4-5; Submission 14, New South Wales Council for Civil Liberties, pp 1-2; Submission 17 NSW Aboriginal Land Council, pp 1-2; Submission 21, NTSCORP Limited, pp 22-24; Submission 23, Dharrivaa Elders Group, p 3; Submission 24, Lock the Gate Alliance, p 1; Submission 27, The Law Society of New South Wales, p 3; Evidence, Mrs Rose Lovelock, Elder and Director, Armidale Aboriginal Cultural Centre and Keeping Place, 23 September 2022, p 34; Evidence, Mr Nathan Moran, Chief Executive Officer, Metropolitan Local Aboriginal Land Council, 23 September 2022, p 16; Evidence, Mr Greg Bondar, 4 October 2022, p 49; Evidence, Mr Kevin Duncan, 4 October 2022, p 51; Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 3.

<sup>200</sup> See, for example, Submission 6, Dr Janet Hunt, p 1; Submission 13, Darkinjung Local Aboriginal Land Council, p 2; Submission 14, New South Wales Council for Civil Liberties, pp 1-2; Submission 21, NTSCORP Limited, pp 22-24; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, p 5; Submission 27, The Law Society of New South Wales, p 3.

<sup>201</sup> Evidence, Ms Karra Kinchela, Narrabri Community Outreach Coordinator, Lock the Gate Alliance, 4 October 2022, pp 24-25. See also Evidence, Mrs Lovelock, 23 September 2022, p 34.

<sup>202</sup> Evidence, Mr Duncan, 4 October 2022, pp 51 and 54.

<sup>203</sup> Submission 6, Dr Janet Hunt, p 1.

<sup>204</sup> Evidence, Mr Geoffrey Winters, Chief Executive Officer, Just Reinvest NSW, 4 October 2022, p 5. See also Evidence, Mr Bondar, 4 October 2022, p 49.

- Mr Paul Knight, a Dharawal Yuin descendant and representative of Country in that area, who gave evidence to the committee in his capacity as a representative of the Aboriginal Cultural Heritage Advisory Committee (ACHAC), stated that the bill 'actually puts the regulation of our Aboriginal cultural heritage in the hands of Aboriginal people. That is not the case today'.<sup>205</sup>
- Ms Tara Mercy, Business Manager of the Bandjalang Aboriginal Corporation Prescribed Body Corporate Registered Native Title Body Corporate, remarked that ministerial appointments can be controversial and emphasised that 'Aboriginal cultural heritage protection needs to be Aboriginal designed and Aboriginal led, not subject to political whim or priorities'.<sup>206</sup>

**3.8** However, Aboriginal Affairs NSW expressed strong opposition to the proposal for the ACH Council to be free from Ministerial direction or control. Mr Shane Hamilton, Deputy Secretary of Aboriginal Affairs NSW, contended that such an arrangement would be unworkable:

The bill proposes that its Aboriginal cultural heritage council has independence from government. We believe that's undeliverable. It proposes an independent body corporate that's not subject to the Minister in areas that are legally unworkable.<sup>207</sup>

**3.9** Aboriginal Affairs NSW also expressed concern about the lack of information on the ACH Council's resourcing and 'how its approach would be economically viable'.<sup>208</sup> In this context, it was noted that the NSW Government's 2018 draft Aboriginal cultural heritage bill proposed an independent Aboriginal entity which would have had 'statutory decision-making powers and the resources to support a network of culturally appropriate, culturally appointed ACH Local Panels'.<sup>209</sup> However, it was decided that the entity would be too costly to implement.<sup>210</sup>

**3.10** As noted in chapter 2, in the view of Aboriginal Affairs NSW, it is necessary that any new Aboriginal cultural heritage system be embedded within NSW Government and the planning system. It argued that the bill's proposal for the ACH Council and the management of Aboriginal cultural heritage to sit outside government will have adverse effects on the management and protection of Aboriginal cultural heritage and potentially limit Aboriginal decision-making. Developers would also be negatively impacted due to increased uncertainty and regulatory burden, and added costs and time.<sup>211</sup>

<sup>205</sup> Evidence, Mr Paul Knight, Representative, Aboriginal Cultural Heritage Advisory Committee, 23 September 2022, p 30.

<sup>206</sup> Evidence, Ms Tara Mercy, Business Manager, Bandjalang Aboriginal Corporation Prescribed Body Corporate Registered Native Title Body Corporate, 23 September 2022, p 6. See also Submission 6, Dr Janet Hunt, p 2.

<sup>207</sup> Evidence, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 4 October 2022, p 12.

<sup>208</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 8. See also Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 5.

<sup>209</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 2. See also Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 1.

<sup>210</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 1.

<sup>211</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 1.

**3.11** Turning to the Local ACH Services established under the bill, the majority of stakeholders supported the principle of Aboriginal cultural heritage legislation establishing a system in which local entities reflect local Aboriginal cultural knowledge holders and play a key role in decisions about Aboriginal cultural heritage matters.<sup>212</sup>

**3.12** Mr Knight underscored the necessity of an Aboriginal cultural heritage framework facilitating a system made up of local, regional entities to speak for Country and cultural heritage matters:

It's imperative that that happens because the knowledge that's required to understand and interpret Aboriginal cultural heritage is at that local level. To really achieve that, there are also going to be different perspectives and different views on what's culturally appropriate.<sup>213</sup>

**3.13** Mr Knight highlighted what he considered to be community support for keeping decisions about Aboriginal cultural heritage local:

I think, from reading the bill and reading the 2018 bill, my interpretation of the way that would progress is that the decisions would actually be made at the local level. Really, the only time that it's elevated up to the State body, if you like, is if something is disputed—if there's a challenge to that decision-making process. ...

If that's the case, I think Aboriginal people would generally support this process, because it's saying, "Well, the decision's still kept local; it's still kept by those custodians of knowledge."<sup>214</sup>

## **Cultural authority – speaking for Country**

**3.14** One of the fundamental considerations in reforming Aboriginal cultural heritage laws to facilitate Aboriginal control and decision-making power over cultural heritage matters is the issue of cultural authority: who has, and who is recognised to have, cultural knowledge and authority to speak for Country?

**3.15** This section begins by explaining why cultural authority is so fundamental to Aboriginal cultural heritage laws and regulation. It then outlines the unique challenge for Aboriginal cultural heritage laws to appropriately identify and recognise cultural authority, given the existence of two statutory schemes in New South Wales: land rights and native title. Following this, inquiry participants' views are canvassed on the extent to which Native Title Holders, Registered Native Title Claimants, the NSW Aboriginal Land Council, Local Aboriginal Land Councils and Aboriginal custodians and knowledge holders have cultural authority to speak for Country on Aboriginal cultural heritage matters.

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<sup>212</sup> See, for example, Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), p 5; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 5; Submission 21, NTSCORP Limited, p 41; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, p 5; Evidence, Ms Virginia Robinson, Secretary, Dharrivaa Elders Group, 4 October 2022, p 42; Evidence, Mr Knight, 23 September 2022, pp 31-32; Evidence, Mr Hamilton, 4 October 2022, p 12.

<sup>213</sup> Evidence, Mr Knight, 23 September 2022, p 31.

<sup>214</sup> Evidence, Mr Knight, 23 September 2022, p 33.

### The fundamental importance of cultural authority

- 3.16** The ACHAC explained the concept of cultural authority and outlined the reasons why it was the foremost consideration in this inquiry:

Cultural knowledge and cultural authority (speaking for country) are highly specialist entitlements that are intrinsic to Aboriginal custodianship of ACH. Historical and contemporary Aboriginal cultural practice is that cultural authority is exceptional and stand-alone: it is a primary custodial and representative authority that cannot be made over to third parties, nor can it be bundled up in a wider set of “Aboriginal issues”. It follows that the custodians of ACH will expect any statewide organisation representing ACH interests to have clear representative lines to cultural authority.<sup>215</sup>

- 3.17** NTSCORP Limited also explained the fundamental nature of cultural authority for Aboriginal cultural heritage legislation:

In NTSCORP's view embedding the principles of cultural authority and respect in any legislation enacted is paramount to the successful operation of that legislation.

... any legislation enacted must have cultural legitimacy. It must recognise the Aboriginal People who have the cultural authority and responsibility to care for sites and Country and those who suffer the spiritual consequences for harm to sites, objects and places.<sup>216</sup>

- 3.18** The ACHAC and NTSCORP both stressed the importance of cultural authority in the context of best practice Aboriginal cultural heritage regulation and the principle of self-determination:

The cultural-authority requirement is strongly endorsed by the Dhawura Ngilan Vision Statement, most clearly in Best Practice Statement 5:

BPS 5: Incorporation of Principles of Self Determination

- The key to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is the principle of self-determination. In the context of ICH (ACH) this principle requires that the affected Indigenous community itself should be the arbiter of the management of the ICH aspects of any proposal that will affect that heritage.
- Thus, in the crucial UNDRIP Article 32, reference is made to Indigenous Peoples acting through “their own representative organisations”.
- The identification of a legitimate “representative organisation” capable of exercising an Indigenous community's rights and responsibilities with respect to ICH is a fundamental component in any comprehensive ICH legislation.
- It is for the Indigenous community to decide who represents them, consistent with Free, Prior, Informed Consent.<sup>217</sup>

<sup>215</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 3. See also Submission 21, NTSCORP Limited, p 13.

<sup>216</sup> Submission 21, NTSCORP Limited, p 23. See also Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 1.

<sup>217</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 2. See also Submission 21, NTSCORP Limited, p 13.

- 3.19** The committee heard that the diversity of Aboriginal people and the fact that culture is connected to Country are critical to understanding the issue of cultural authority to speak for Country. Mr Paul Carr, Chairperson of the Three Rivers Regional Assembly, NSW Coalition of Aboriginal Regional Alliances, stated:

Australia has 250 nations, right? So there's 250 people or groups who need to be considered because we're all different. When it comes to Dubbo, we have eight clan groups here. My clan group ... we are known as the Dundullimal clan. There is one tree in this whole community that's a sacred tree to us, which is a healing tree. All my Elders have all sat around that tree, but there are other clan groups that don't recognise that tree, right? That's a challenge for Government decision-makers on whether you're going to cut them trees down or not. Are you going to listen to one group, or are you going to listen to the whole groups? That in itself is the type of challenge when you are dealing with community; we are very different. Aboriginal people change from street to street; they don't have to go from community to community. If anyone knows Aboriginal people who's fair dinkum, we're different people.<sup>218</sup>

- 3.20** Aboriginal Affairs NSW underscored the importance of Aboriginal people determining cultural authority to speak for Country and the limited role any government should play in this question:

It is important that the authority to speak for Country is determined by Aboriginal people before anything is legislated. ACH legislation needs to build a framework that empowers Aboriginal people to lead the conversation about who has the authority to speak for Country. It is not appropriate for government to have a role in determining Aboriginal cultural authority.<sup>219</sup>

- 3.21** Mr Knight emphasised the challenge for Aboriginal cultural heritage laws to appropriately identify and recognise the cultural authority of knowledge holders:

... one of the biggest challenges for any piece of legislation here is actually going to be identifying the knowledge holders and really, as we say, who speaks for country. That in itself is the difficulty, and that's really what we need to be focusing on. From my personal perspective, when I look at ACH reform, we can look at the overarching legislative frameworks. But until we can get down to who really speaks for country and that inherent capacity within communities, and we've worked with that and developed those skills and those knowledges for community themselves, it's really going to be challenged all the time from different perspectives.<sup>220</sup>

- 3.22** Mr Knight also emphasised that central to the success of entities like the ACH Council and Local ACH Services is that the community has confidence in the entities' cultural authority:

... whatever ACH reforms are legislated, if they are unable to attract a critical mass of Aboriginal community confidence, they will fail. Central to Aboriginal community confidence is that the administration of ACH must be overseen by a representative Aboriginal organisation—that is, an Aboriginal board constituted by independent members that have cultural authorisation within New South Wales whose first loyalty

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<sup>218</sup> Evidence, Mr Paul Carr, Chairperson, Three Rivers Regional Assembly, NSW Coalition of Aboriginal Regional Alliances, 23 September 2022, p 25.

<sup>219</sup> Answers to questions on notice, Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, 11 October 2022, p 3.

<sup>220</sup> Evidence, Mr Knight, 23 September 2022, p 32.

and accountability is to New South Wales Aboriginal custodians. The requirement for representative cultural authority extends to the formation of the ACH administrative bodies at the local and regional levels.<sup>221</sup>

### Two statutory schemes: Land rights and native title

- 3.23** The committee heard that a key challenge for any Aboriginal cultural heritage legislation in New South Wales is to recognise the complexity of cultural authority that results from the operation of the two existing statutory schemes regarding Aboriginal peoples' rights and interests in land in New South Wales: the Aboriginal Land Rights Act at the state level and the Native Title Act at the federal level.<sup>222</sup> As Mr Winters remarked:

The task that you've set out to undertake is, I think, probably the most complicated legal question in this State. It's a question that doesn't exist in any other State. Because of the Land Rights Act here in New South Wales ... because of the rights and interests it created, it does put Aboriginal communities in a very complicated position.<sup>223</sup>

- 3.24** As noted in chapter 1, the Aboriginal Land Rights Act establishes the Local Aboriginal Land Council network and the NSW Aboriginal Land Council, and establishes a registration system for Aboriginal Owners.<sup>224</sup> The Native Title Act provides legal recognition of Aboriginal people's individual or communal rights and interests in land, waters and seas.<sup>225</sup>
- 3.25** The committee heard that determining whether an area of land has a native title claim, or identifying which Local Aboriginal Land Council boundary an area falls within, is straightforward.<sup>226</sup> However, stakeholders explained that it is the interaction of these two schemes which complicates matters. Mr Moran commented that there is 'yet to be a great synergy between native title and land rights.'<sup>227</sup> Ms Karra Kinchela, a Gomeroi traditional custodian and a Narrabri Community Outreach Coordinator with Lock the Gate Alliance expressed the view that the purpose of the two Acts are in conflict, with the Aboriginal Land Rights Act advancing economic sustainability and development and the Native Title Act recognising traditional rights and interests.<sup>228</sup> These different objectives, among other issues, are discussed further in the sections below.

<sup>221</sup> Evidence, Mr Knight, 23 September 2022, p 30.

<sup>222</sup> See, for example, Evidence, Mr Knight, 23 September 2022, p 32; Evidence, Warlpa Thompson, Director of the Barkandji Native Title Group Aboriginal Corporation Registered Native Title Body Corporate, 23 September 2022, p 5; Evidence, Mr Moran, 23 September 2022, p 15; Evidence, Mr Winters, 4 October 2022, pp 2 and 6-7.

<sup>223</sup> Evidence, Mr Winters, 4 October 2022, p 2.

<sup>224</sup> *Aboriginal Land Rights Act 1983*.

<sup>225</sup> Submission 21, NTSCORP Limited, p 5.

<sup>226</sup> Evidence, Mr Winters, 4 October 2022, p 3.

<sup>227</sup> Evidence, Mr Moran, 23 September 2022, p 15.

<sup>228</sup> Evidence, Ms Kinchela, 4 October 2022, pp 27 and 29.

### **The rights and interests of Native Title Holders and Registered Native Title Claimants**

- 3.26** There was a level of consensus among stakeholders that Native Title Holders have cultural authority for the determination area.<sup>229</sup>
- 3.27** Native Title Holders and Registered Native Title Claimants who participated in the inquiry highlighted that their legally determined connection to traditional culture and custom establishes their cultural authority.<sup>230</sup> As described by the Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), 'cultural heritage underpins the traditional law and custom which is the basis of native title'.<sup>231</sup> Ms Mercy advised that 'Native title traditional owners are recognised as the rightful custodians who are responsible for maintaining culture and country and all that entails'.<sup>232</sup>
- 3.28** In addition, NTSCORP noted that the Dhawura Ngilan Vision states that Native Title Holders' 'person-land-ancestral inter-relationship' is a living connection between Aboriginal and Torres Strait Islander peoples and Country that gives Native Title Holders the rights, responsibilities and duties to Country and a right to speak for Country.<sup>233</sup> NTSCORP also referred to the Joint Standing Committee on Northern Australia's report, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Juukan Gorge Report), which recognises that Native Title Holders are the correct persons to speak for country.<sup>234</sup>
- 3.29** The Registered Native Title Body Corporates and Registered Native Title Claimants who participated in the inquiry highlighted their responsibilities regarding cultural heritage.<sup>235</sup>

<sup>229</sup> Submission 13a, Darkinjung Local Aboriginal Land Council, p 1; Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), pp 1-2; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 4; Submission 21, NTSCORP Limited, p 23; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, pp 4-5; Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 4; Evidence, Mr Winters, Chief Executive Officer, Just Reinvest NSW, 4 October 2022, pp 3-7; Evidence, Mr Michael Young, Community member, 4 October 2022, pp 39-40; Mr Robert Syron, Registered Aboriginal Owner through the Office of the Registrar and Australian War Veteran, 4 October 2022, pp 40-41; Evidence, Mr Moran, 23 September 2022, p 25; Evidence, Mr Brendan Moyle, Chief Executive Officer, Darkinjung Local Aboriginal Land Council, 23 September 2022, p 22.

<sup>230</sup> See, for example, Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), pp 1-2; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 4; Submission 21, NTSCORP Limited, p 23; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, pp 4-5; Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 4; Evidence, Mr Young, 4 October 2022, pp 39-40; Evidence, Ms Kinchela, 4 October 2022, p 30; Evidence, Mr Franks, 23 September 2022, pp 40 and 44.

<sup>231</sup> Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), p 4.

<sup>232</sup> Evidence, Ms Tara Mercy, Business Manager, Bundjalung Aboriginal Corporation Prescribed Body Corporate Registered Native Title Body Corporate, 23 September 2022, p 5.

<sup>233</sup> Submission 21, NTSCORP Limited, p 7. See also Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 4.

<sup>234</sup> Submission 21, NTSCORP Limited, p 16.

<sup>235</sup> Submission 18, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, pp 2-3; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 2; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, pp 2-3; Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, pp 1-2; Evidence, Ms Mercy, 23 September 2022, p 5; Evidence, Mrs Dianne Chapman, Manager, Office and

For instance, the submission from the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People Native Title Applicant stated:

The Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People have the rights to protect and speak for our Country, and to control access to or use of our Country by other Aboriginal People in accordance with traditional laws and customs, and to manage and protect our native title and to decide on what happens with our culture and heritage in accordance with our traditional law and custom. To allow non-native title holders to speak on matters of Cultural Heritage in Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan Country would be disrespectful and have a discriminatory effect on Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People and would not be in keeping with the traditional laws and customs with any Traditional Owner group in NSW.<sup>236</sup>

- 3.30** Mrs Dianne Chapman, Manager of Office and Administration at Yaegl Traditional Owners Aboriginal Corporation Registered Native Title Body Corporate, noted that Native Title Holders are authorised to make decisions on behalf of their Country as their determination under the Native Title Act demonstrates that bloodlines to Country have never been severed:

In relation to native title ... it's actual blood line. We've got a lot of Aboriginal people who visit home. But, at the end of the day, we don't believe that they have the right to make decisions on our behalf because that's our country. They have their own country. Basically, from day dot, we never severed our blood lines. That's why we ended up with our determinations, because we could validate that.<sup>237</sup>

- 3.31** Many inquiry participants contended that the cultural authority of Native Title Holders is underpinned and demonstrated by the high legal and evidentiary bar that native title claims are required to meet to prove their connection to Country, and the many years or decades it takes to obtain a native title determination.<sup>238</sup> For example, Mr Warlpa Thompson, Director of the Barkandji Native Title Group Aboriginal Corporation Registered Native Title Body Corporate, commented: 'What we're talking about is our rights to culture, and we've all gone through that process of proving our connectedness to that country over a long, long, long period of time'.<sup>239</sup>

- 3.32** On this point, NTSCORP remarked:

This is a high bar, and one which it takes many, many years for most native title claim groups to reach. To establish to the Respondent Parties, including the State and Local Governments and an array of other interest holders, that a native title claim group holds native title it is necessary to provide extensive evidence including expert anthropological

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Administration, Yaegl Traditional Owners Aboriginal Corporation Registered Native Title Body Corporate, 23 September 2022, p 10.

<sup>236</sup> Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 3.

<sup>237</sup> Evidence, Mrs Chapman, 23 September 2022, p 4.

<sup>238</sup> Evidence, Mr Thompson, 23 September 2022, p 10; Evidence, Mr Franks, 23 September 2022, pp 38-39; Evidence, Mr Young, 4 October 2022, pp 37-38; Evidence, Ms Yvonne Stewart, Bundjalung of Byron Bay (Arakwal) elder and member of Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) Registered Native Title Body Corporate, 23 September 2022, p 4; Submission 18, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, p 2; Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 3.

<sup>239</sup> Evidence, Mr Thompson, 23 September 2022, p 5. See also Evidence, Mr Duncan, 4 October 2022, p 52.

and historical reports and affidavits from native title claimants and participate in an arduous process of “credible evidence assessment” by the State of NSW, and in some circumstances, the Commonwealth of Australia.<sup>240</sup>

- 3.33** Other stakeholders, including Local Aboriginal Land Councils, agreed that native title rights have the highest cultural authority and claim to land.<sup>241</sup> For example, Mr Moyle stated that 'native title is the gold standard'.<sup>242</sup> The submission from Darkinjung Local Aboriginal Land Council expanded on this point:

... where a Native Title determination has been made and the applicants have demonstrated through legal processes that they are Aboriginal people with traditional connections to that country, and they have continued to exercise their cultural connections to that country. .... In terms of the proposed hierarchy, we support Native Title being elevated.<sup>243</sup>

- 3.34** Along similar lines, Mr Winters stated:

... it is pretty generally accepted that the rigour and the nature of a right in native title that is created is the primary right of cultural authority. Where there is native title can be determined by the court. That is the greatest and most clear claim to cultural authority over the land.<sup>244</sup>

### **The rights and interests of Local Aboriginal Land Councils**

- 3.35** A key concern raised by several inquiry participants was the cultural authority, or the lack thereof, of the NSW Aboriginal Land Council and Local Aboriginal Land Councils.<sup>245</sup>

- 3.36** In the view of the ACHAC, the NSW Aboriginal Land Council, despite being elected by members of Local Aboriginal Land Councils, 'does not have clear representative lines to cultural authority'. It stated:

... NSW Aboriginal Land Council and the Local Aboriginal Land Councils (LALCs) have no constitutional role, community mandate or accountability as a representative organisation for culturally authorised Aboriginal custodians. ...

The NSWALC Board is drawn from and elected by members of Local Aboriginal Land Councils (LALCs). While many land council members are also acknowledged ACH custodians, LALC members (and those they elect) are not required to have cultural heritage connection within their constituent LALC area.<sup>246</sup>

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<sup>240</sup> Submission 21, NTSCORP Limited, p 27. See also Evidence, Mr Duncan, 4 October 2022, p 52.

<sup>241</sup> See, for example, Submission 24, Lock the Gate Alliance, p 2; Mr Robert Syron, Registered Aboriginal Owner through the Office of the Registrar and Australian War Veteran, 4 October 2022, pp 40-41; Evidence, Dr Tim Owen, 4 October 2022, p 53.

<sup>242</sup> Evidence, Mr Moyle, 23 September 2022, p 17.

<sup>243</sup> Submission 13a, Darkinjung Local Aboriginal Land Council, p 1.

<sup>244</sup> Evidence, Mr Winters, 4 October 2022, p 2.

<sup>245</sup> See, for example, Evidence, Ms Robinson, 4 October 2022, p 45; Evidence, Mr Thompson, 23 September 2022, p 5; Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 8.

<sup>246</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, pp 3 and 8.

**3.37** The objectives of Local Aboriginal Land Councils were described by some participants as being at odds with the protection of Aboriginal cultural heritage from harm. For example, in the view of the ACHAC, Local Aboriginal Land Councils' role in acquiring land and in commercial development conflicts with the role of regulating and protecting Aboriginal cultural heritage.<sup>247</sup>

**3.38** The ACHAC added:

NSWALC and LALCs are not culturally authorised ACH custodians, nor are they representative bodies for culturally authorised custodians. On the contrary, under the terms of their own Act (the *Aboriginal Land Rights Act 1983*) Aboriginal Land Councils are empowered as land marketeers and developers. ACHAC strongly supports the Aboriginal Land Council network as agents for Aboriginal land and economic development, but not as decision makers for Aboriginal cultural heritage.<sup>248</sup>

**3.39** Likewise, some inquiry participants provided examples of what they considered to be Local Aboriginal land Councils' prioritisation of commercial and development interests over the protection of Aboriginal cultural heritage.<sup>249</sup>

**3.40** This view was also expressed by several Native Title Holders.<sup>250</sup> For example, Mr Michael Young, a Paakantji Parenti person under the Barkindji nation and a Native Title Holder, argued that Local Aboriginal Land Councils are 'pro-development' and do not 'represent native title holders in any way, shape or form'.<sup>251</sup> He added:

We've seen the land council selling off lots of land that had been given to them. That was part of the land trusts and Crown land. And yet we still have no say in that. So it's an affront to us to see that happen, after all the time that was spent on native title.<sup>252</sup>

**3.41** Similarly, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) commented:

In our experience, Local Aboriginal Land Councils' membership and priorities do not align with those of the Traditional Owners and native title holders. Allowing non-native title holders to have a role in making decisions over Bundjalung People of Byron Bay's cultural heritage is incredibly disrespectful and goes against the law and custom of Bundjalung People of Byron Bay.<sup>253</sup>

**3.42** In this context, Ms Mercy highlighted that Local Aboriginal Land Councils' members are not necessarily traditional owners and, therefore, do not have a birthright to speak for Country:

Memberships for Aboriginal land councils are not limited to people who might be regarded as traditional owners. It is open to all adult Aboriginal persons who live within the boundary of the Aboriginal land council. The method of becoming a member of an

<sup>247</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 8.

<sup>248</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 4.

<sup>249</sup> Evidence, Mr Thompson, 23 September 2022, p 7; Evidence, Ms Mavis Ahoy, Elder and panel member, Armidale Aboriginal Cultural Centre and Keeping Place, 4 October 2022, p 31.

<sup>250</sup> See, for example, Evidence, Mr Franks, 23 September 2022, p 42; Evidence, Mr Thompson, 23 September 2022, pp 7-8.

<sup>251</sup> Evidence, Mr Young, 4 October 2022, p 38.

<sup>252</sup> Evidence, Mr Young, 4 October 2022, p 38.

<sup>253</sup> Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), p 4.

Aboriginal land council has the potential to allow Aboriginal people living within the boundary of an Aboriginal land council, if their membership is approved, to speak for a country which is not their birthright or cultural association.<sup>254</sup>

- 3.43** In this context, Mr Young highlighted that it is fundamental to Aboriginal lore to not speak for other peoples' Country.<sup>255</sup>
- 3.44** On the issue of membership, Mr Duncan commented that the structure of Local Aboriginal Land Councils is such that they have obligations to represent only their members.<sup>256</sup> The ACHAC drew attention to the low take-up of membership to Local Aboriginal Land Councils across New South Wales, pointing out that only 20 per cent of eligible Aboriginal people in New South Wales are registered members of Aboriginal land councils.<sup>257</sup>
- 3.45** In contrast, the NSW Aboriginal Land Council, the Metropolitan Local Aboriginal Land Council and the Darkinjung Local Aboriginal Land Council highlighted the value of Local Aboriginal Land Councils' role in land rights and Aboriginal cultural heritage protection.<sup>258</sup>
- 3.46** Mr Moran argued that local Aboriginal land councils act as a 'safety net' authority to preserve and protect Aboriginal cultural heritage where there are no Native Title Holders or Aboriginal Owners for an area, which is the case for the Metropolitan Aboriginal Land Council:

I start by acknowledging that in our land council we have a unique background. We are one of the first local land councils. But as of 2022, as I sit here today on 23 September 2022, I affirm we have no registered, verified native title holders, no Aboriginal owners, registered or verified, within the boundaries of Metropolitan land council. In the absence of having those cultural people, the Metropolitan land council has ... been preserving and protecting all cultural heritage.<sup>259</sup>

- 3.47** The importance of Local Aboriginal Land Councils in the context of the impacts of colonisation and dispossession from land was emphasised in Mr Moyle's sharing of his family story:

I will never be able to prove native title. My great-grandmother was born on the Barwon Mission and then forcibly relocated down to Gulargambone, and then was married into the Bakers and Barkers and then ended up all through northern New South Wales and South East Queensland. We were forcibly relocated. I can't prove native title. Many of our mob are in that same kind of boat. But where people can prove native title, we under a cultural lore—as in l-o-r-e—perspective need to respect that. Short of that, Aboriginal registered owners who have gone through a legislative process to actually

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<sup>254</sup> Evidence, Ms Mercy, 23 September 2022, p 5. See also Evidence, Ms Kazan Brown, Gundungurra woman, client of the Environmental Defenders Office, 23 September 2022, p 42; Evidence, Ms Ahoy, 4 October 2022, p 31.

<sup>255</sup> Evidence, Mr Young, 4 October 2022, p 40. See also Submission 13a, Darkinjung Local Aboriginal Land Council, p 1.

<sup>256</sup> Evidence, Mr Duncan, 4 October 2022, p 50.

<sup>257</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 9.

<sup>258</sup> Submission 13a, Darkinjung Local Aboriginal Land Council, p 1; Submission 19a, New South Wales Aboriginal Land Council, p 2; Evidence, Mr Moran, 23 September 2022, p 16.

<sup>259</sup> Evidence, Mr Moran, 23 September 2022, p 15. See also Submission 13a, Darkinjung Local Aboriginal Land Council, p 1.

prove who they are and then for us as land councils to be able to work in partnership where they do exist ...<sup>260</sup>

- 3.48** Mr Winters made a similar point, remarking that Local Aboriginal Land Councils are less culturally sound than native title interests but are a clear legal structure in the absence of Native Title Holders or Aboriginal Owners:

What you are then left with is what about a situation where there is no native title, there are no Aboriginal owners and you've got a land council? I have always asserted that at that point that is a clear legal structure. While it is, I think, less culturally sound than native title, it's probably as good as you can get in that situation. Where you don't have a land council, it's a whole different question. I don't think we need to get into that. Balancing those three voices is really difficult and really complicated.<sup>261</sup>

- 3.49** Mr Robert Syron, a registered Aboriginal Owner through the Office of the Registrar of the Aboriginal Land Rights Act, agreed with this position:

Aboriginal lands councils are not perfect. But, in the absence of native title and registered Aboriginal owners, through the office of the register—Aboriginal Land Rights Act [1983]—they're the next best thing as custodians of this country and as legislated community-controlled entities.<sup>262</sup>

- 3.50** In response to the criticisms of local Aboriginal land councils regarding decision-making and the actual and perceived ability to represent the community, the NSW Aboriginal Land Council emphasised that there are statutory requirements to act in the best interests of Aboriginal communities and in relation to governance, decision-making, transparency, accountability, financial, reporting, management and consultation.<sup>263</sup> In addition, some inquiry participants commented on the financial stressors faced by Local Aboriginal Land Councils, which provides context for their decisions regarding investment and development.<sup>264</sup>

- 3.51** Expressing a different perspective on whether Local Aboriginal Land Councils can be said to have cultural authority to speak for Country, Mr Roy Ah-See, Co-Chair of the Uluru Dialogue, argued that 'Local Aboriginal Land Councils ... is the system and the structure that really has cultural authority because they're the ones that have the protection'. In his view, it is a strength of the Local Aboriginal Land Councils system that once an individual becomes a member, for which there is broad criteria, that individual gets 'a say over what happens in country'.<sup>265</sup>

<sup>260</sup> Evidence, Mr Moyle, 23 September 2022, p 17.

<sup>261</sup> Evidence, Mr Winters, 4 October 2022, p 4.

<sup>262</sup> Evidence, Mr Robert Syron, Community member, 4 October 2022, p 39.

<sup>263</sup> Submission 17a, New South Wales Aboriginal Land Council, p 2.

<sup>264</sup> See, for example, Submission 8, Aboriginal Cultural Heritage Advisory Committee, pp 7-8; Evidence, Mr Bondar, 4 October 2022, p 49; Evidence, Yinnaar Burrim Jane Delaney-John, 4 October 2022, p 28.

<sup>265</sup> Evidence, Mr Roy Ah-See, Co-Chair, Uluru Dialogue, 23 September 2022, p 47.

## Reforms to the bill regarding recognition of cultural authority

- 3.52** Several stakeholders expressed concern about how the bill recognises cultural authority. This concern centred on whether the bill appropriately balances and represents the rights and interests of different Aboriginal people, groups and entities in line with traditional cultural practice and community understanding and expectations around who holds cultural authority to speak for Country.
- 3.53** This section outlines the different views on this point and then sets out stakeholders' views on issues relating to the composition of the ACH Council and designation of Local ACH Services, including suggested amendments to improve the bill.

### The bill's recognition of cultural authority

- 3.54** The committee essentially heard two competing views expressed by inquiry participants on the bill's recognition of cultural authority. On the one hand, the NSW Aboriginal Land Council and Local Aboriginal Land Councils contended that the bill facilitates them working in partnership with Native Title Holders and other legally recognised entities, and that the bill establishes a system whereby they would exercise cultural authority for Aboriginal cultural heritage matters as a 'safety net' measure in instances where there are no Native Title Holders. On the other hand, Native Title Holders and other stakeholders argued that the bill relegates or diminishes native title rights, and prioritises the rights and interests of Local Aboriginal Land Councils.
- 3.55** With respect to the first viewpoint, the NSW Aboriginal Land Council, the Metropolitan Local Aboriginal Land Council and the Darkinjung Local Aboriginal Land Council, which all supported the bill, submitted that it provides a 'tiered solution' to the challenge of recognising cultural authority in New South Wales due to operation of different legislative schemes.<sup>266</sup> Mr Moran argued 'the proposed model is a bringing together of those appropriate, relevant cultural knowledge holders'.<sup>267</sup>
- 3.56** The Darkinjung Local Aboriginal Land Council described the bill as granting decision-making power regarding Aboriginal cultural heritage to 'entities that are established and have appropriate determinations under legislative mechanisms that provide for cultural authority'. These entities are Native Title Holders, Aboriginal Owners through the Office of the Registrar of Aboriginal Land Rights Act, and Local Aboriginal Land Councils.<sup>268</sup>
- 3.57** Mr Moran argued that the bill sets up a framework where Native Title Holders and Aboriginal Owners are recognised and prioritised as the authoritative voice on Aboriginal cultural heritage:

We acknowledge up-front that this is an attempt to establish a culturally appropriate framework whereby culturally appropriate knowledge holders, native title holders, Aboriginal owners are the first pre-eminent people and, in the absence of those that local land councils serve, as the local communities' representative bodies to perform the

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<sup>266</sup> Evidence, Mr Moyle, 23 September 2022, p 13; Submission 13, Darkinjung Local Aboriginal Land Council, p 6; Submission 17a, New South Wales Aboriginal Land Council, pp 1-2; Submission 17a, New South Wales Aboriginal Land Council, pp 1-2.

<sup>267</sup> Evidence, Mr Moran, 23 September 2022, p 20.

<sup>268</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 6.

preservation and protection of Aboriginal culture and heritage, as per the New South Wales Aboriginal Land Rights Act.<sup>269</sup>

**3.58** Mr Moyle explained that he understands that the intent of the bill is to prioritise the cultural authority of Native Title Holders for Aboriginal cultural heritage matters and to establish a framework under which individuals or entities are to speak for Country when there are no native title interests in relation to certain Aboriginal cultural heritage. He illustrated this point at the hearing with an example: '... Yaegl people need to have cultural authority on Yaegl land. In the absence of Yaegl people, where does the authority sit? This is what we are trying to do here'.<sup>270</sup>

**3.59** Mr Moyle summarised his position on the bill as follows:

Native title has an important role to play but so do land rights. There have been 16 determinations across New South Wales. That doesn't cover most of New South Wales and for many of us, as Aboriginal people, we are unable to prove native title because of historical policies around dispossession, forced assimilation and removal. That poses a significant challenge, so you can't have one solution. You need to have a tiered solution. We need to respect where we can prove that there are traditional connections and traditional linkages ... l-o-r-e is what we need to embody, and this is what this legislation can actually do and provides a foundation for. It also enables the ability for local Aboriginal organisations with legitimate cultural authority to generate revenue from the identification, protection and management of cultural heritage.<sup>271</sup>

**3.60** Councillor Leeanne Hampton, Councillor for the Wiradjuri Region and representative of the NSW Aboriginal Land Council, reiterated that the position of NSW Aboriginal Land Council is that legislation should recognise the state and federal legislative schemes and prioritise native title where it exists:

We have not once ever said that it should just be all NSWALC or it should just be all NTSCORP; we've continued to say that both legislations need to be recognised. We absolutely 100 per cent recognise those that have cultural authority, and we recognise that native title holders are the ones that need to be making decisions on the ground for their parcel of land that they hold that authority for.<sup>272</sup>

**3.61** However, regarding the second viewpoint, for many or all of the reasons discussed in the above section, there was concern that the bill inappropriately gives prominence to the NSW Aboriginal Land Council and Local Aboriginal Land Councils and recognises these entities as having cultural authority for Aboriginal cultural heritage matters.<sup>273</sup>

<sup>269</sup> Evidence, Mr Moran, 23 September 2022, p 15.

<sup>270</sup> Evidence, Mr Moyle, 23 September 2022, p 22.

<sup>271</sup> Evidence, Mr Moyle, 23 September 2022, p 13.

<sup>272</sup> Evidence, Councillor Leeanne Hampton, Councillor for the Wiradjuri Region and representative of the NSW Aboriginal Land Council, 23 September 2022, p 20.

<sup>273</sup> See, for example, Submission 8, Aboriginal Cultural Heritage Advisory Committee, pp 2, 5 and 8; Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), p 4; Submission 21, NTSCORP Limited, p 43; Evidence, Mr Young, 4 October 2022, pp 37-38; Evidence, Ms Mercy, 23 September 2022, p 5; Evidence, Ms Brown, 23 September 2022, p 42. See also Evidence, Ms Ahoy, 4 October 2022, p 31; Evidence, Mr Franks, 23 September 2022, p 43; Portfolio Committee No. 7 – Planning and Environment, Report on the Online Questionnaire (October 2022), p 5.

- 3.62** The ACHAC contended that the bill heavily defers a central role in the structure, functions and administration of the Aboriginal cultural heritage system to the NSW Aboriginal Land Council, with Local Aboriginal Land Councils also having a prominent role. In its view of the bill, this is not 'capable of generating the necessary level of Aboriginal community confidence' which was emphasised as being integral to the success of any Aboriginal cultural heritage reforms.<sup>274</sup>
- 3.63** Moreover, the Native Title Holders and Registered Native Title Claimants who participated in this inquiry did not support the bill in its current form because it diminishes their current and prospective rights and legal interests.<sup>275</sup> Ms Mishka Holt, Principal Solicitor at NTSCORP, argued 'native title holders actually go backwards from the current arrangements that they have under the National Parks and Wildlife Act and regulations'.<sup>276</sup>
- 3.64** NTSCORP stated:
- NTSCORP cannot support the enactment of any cultural heritage legislation which fails to recognise the very Aboriginal people who have the cultural authority and responsibility to care for sites, nor respect the legal rights they have as native title holders in relation to the management and protection of cultural heritage.<sup>277</sup>
- 3.65** Looking to the detail of the ways in which native title rights are diminished in the bill, NTSCORP contended that the bill fails to uphold or interferes with the following rights granted under legislation or through the courts.
- Native Title Holders have rights determined by the Federal Court of Australia to maintain and to protect, from physical harm, sites and places of importance under traditional law and custom.
  - Under the National Parks and Wildlife Act, Native Title Holders have exclusive consultation rights with proponents of activity who have applied for an Aboriginal Heritage Impact Permit.
  - Under section 60(10) of National Parks and Wildlife Regulation 2019, some Native Title Holders have secured exclusive rights in relation to Aboriginal Heritage Impact Permits and care agreements in the whole of their determination area.
  - Under the Native Title Act, Native Title Holders and Registered Native Title Claimants have procedural rights in relation to pending proposed activities or developments that

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<sup>274</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, pp 2, 5 and 8.

<sup>275</sup> Submission 21, NTSCORP Limited, p 37; Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), p 3; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 3; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, p 3; Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 4; Evidence, Mr Franks, 23 September 2022, pp 43-44; Evidence, Mr Young, 4 October 2022, p 37.

<sup>276</sup> Submission 21, NTSCORP Limited, pp 31-35; Evidence, Ms Holt, 23 September 2022, p 11.

<sup>277</sup> Evidence, Ms Natalie Rotumah, Chief Executive Officer, NTSCORP Limited, 23 September 2022, p 4. See also Submission 18, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, pp 1 and 3; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 3; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, pp 3-4; Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 3.

may affect native title that are classed as 'future acts' under the Native Title Act, such as the right to negotiate, the right to comment and the right to object.<sup>278</sup>

**3.66** NTSCORP highlighted the provisions in the bill which it argues have the effect of diminishing Native Title Holders' rights and interests, and outlined the amendments that are required to the bill to resolve these concerns.

- The definition of 'Aboriginal cultural heritage' should include 'tradition' so that the voices of Native Title Holders are not displaced (cl 6).
- The ACH Council's power to delegate a power or duty to an ACH member, an ACH staff member, a committee or a Local Aboriginal Land Council should be amended to include that the ACH Council can delegate functions to Registered Native Title Bodies Corporate (cl 17).
- The ACH Council's power to determine an entity to be designated as a Local ACH Service lacks clarity on the composition and hierarchy of Local ACH Services. An order of authority of priority is required as to whom may be designated a Local ACH Service, with Native Title Holders prioritised (cl 23). This is discussed further below.
- Provisions relating to persons to be notified about proposed activity (cl 80), the definition of 'interested Aboriginal party' (cl 104) and consultation requirements for an ACH Management Plan (cl 107) lack clarity and require a hierarchy of parties to be inserted, with Native Title Holders prioritised, followed by Aboriginal Traditional Owners with cultural knowledge and cultural authority to speak for their cultural heritage and for Country, including Registered Native Title Claimants.
- The definition of 'custodian' in relation to ancestral remains and secret or sacred objects does not prioritise Native Title Holders or Traditional Owners and should be amended so that a 'custodian' includes those persons who have traditional rights, interests or responsibilities in respect of an area in which such remains or objects are found (cls 36 and 44).
- Regarding the composition of the ACH Council, NTSCORP recommended that it should be listed as a body which can nominate potential members and that the ACH Council's membership should also have an equal number of nominees from Registered Native Title Claimants. These suggestions are discussed further below.<sup>279</sup>

**3.67** NTSCORP was also concerned by the serious consequences which would flow from the enactment of any legislation in New South Wales that fails to recognise and codify the legal rights of Native Title Holders. In its view, any legislation that requires Native Title Holders to exercise their decision-making functions about sites and places of importance in conjunction with non-Native Title Holders would have numerous ramifications.

- Aboriginal cultural heritage legislation at a state level which is inconsistent with the Native Title Act could be invalid and struck down by the High Court of Australia under section 109 of the *Australian Constitution*.

<sup>278</sup> Submission 21, NTSCORP Limited, pp 25-25 and 31-35; Evidence, Ms Holt, 23 September 2022, p 11.

<sup>279</sup> Submission 21, NTSCORP Limited, pp 37-45. See also Submission 6, Dr Janet Hunt, pp 3-4.

- Native Title Holders would likely be able to seek relief in the Federal Court of Australia or the Supreme Court of New South Wales for the protection of their rights and interests.
- Native Title Holders would likely be able to make a complaint to the United Nations Human Rights Committee regarding breach of their rights to protect culture under the *International Convention on Civil and Political Rights* and the *International Convention on Cultural Economic and Social Rights*.
- The introduction of any legislation which has an effect on native title rights and interests would be a 'future act' under the Native Title Act and would give rise to a compensation entitlement on the part of Native Title Holders and, conversely, a compensation liability for the NSW Government.
- Section 10 of the *Racial Discrimination Act 2008* (Cth) may be breached as the exercise of rights and interests in relation to sites and places under the bill may only be exercised in conjunction with other people who do not possess such rights, which would be an imposition not placed on any other rights holders.
- There would be inconsistency with the right to free, prior and informed consent as contained in the UNDRIP.
- Failure to ensure the integrity of Native Title Holder decision-making would increase disputation, litigation and potential compensation liability arising from decisions made by non-Native Title Holders.
- There would be two separate negotiation processes governing the same Aboriginal cultural heritage matter – one being 'a right to negotiate' process triggered by the 'future act' provisions in the Native Title Act, and the other being the development of an ACH Management Plan or ACH Permit under the bill's proposed framework.<sup>280</sup>

**3.68** The bill's potential impact on community was noted by Mr Young. He stressed the sensitivity and potential consequences of the bill's recognition of cultural authority, and commented that the combination of limited consultation with Native Title Holders and the bill's impact of diminishing the rights of Native Title Holders could result in lateral violence:

It seems the pendulum has swung in the opposite direction and native title in New South Wales has been relegated to a rather low level. I feel that that in itself is going to have flow-on effects within the communities and particularly also for lateral violence—that is my main concern at this stage—due to the structure of it. The powers that are going to be handed over to, for example, land council, doesn't serve native title holders in any way and it conflicts with it ...

If they find out that this has passed without them even knowing about it, which has been the case out here, I think that is a precursor to lateral violence. We have seen lateral violence come up in the community through decisions like this before and I don't see that stopping.<sup>281</sup>

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<sup>280</sup> Submission 21, NTSCORP Limited, pp 26, 30-31 and 35-36.

<sup>281</sup> Evidence, Mr Young, 4 October 2022, pp 37-38.

### *Suggested hierarchy of rights and interests*

- 3.69** In order to resolve some of the issues identified above, a number of stakeholders suggested that the bill should have an order of priority (or hierarchy) of rights and interests of Native Title Holders, Registered Native Title Claimants, Aboriginal Owners and Local Aboriginal Land Councils, and Aboriginal custodians and knowledge holders in order to recognise who holds cultural authority in relation to Aboriginal cultural heritage decision-making. Put simply, as expressed by Mr Winters, 'the order of priority could be made more clear and concrete' in the bill.<sup>282</sup>
- 3.70** As discussed above, it was widely accepted that Native Title Holders have cultural authority and their rights and interests should be prioritised in any legislative framework.<sup>283</sup> It was suggested that the next culturally authoritative entity should be Registered Native Title Claimants, as their claim has passed the registration test and the National Native Title Tribunal has been satisfied that 'the claim meets a number of merit conditions including a factual basis, a prima facie case and a traditional physical connection'.<sup>284</sup>
- 3.71** Some stakeholders considered the next authoritative source should be Aboriginal Owners under the Aboriginal Land Rights Act.<sup>285</sup> For example, Darkinjung Local Aboriginal Land Council contended:
- In the absence of Traditional Owners under the *Native Title Act 1993*, we must recognise Registered Aboriginal Owners under the *Aboriginal Land Rights Act 1983* (NSW). While the scrutiny and evidence is not as deep as that of Native Title, it provides a secondary mechanism for recognising the Aboriginal people with traditional connections to country. Again, in accordance with Aboriginal LORE we must honor and respect this where it exists.<sup>286</sup>
- 3.72** Views were more divergent on the individuals or entities with cultural authority in the absence of Native Title Holders, Registered Native Title Claimants and Aboriginal Owners. As noted above, the NSW Aboriginal Land Council, and the Local Aboriginal Land Councils that participated in the inquiry, considered that they should 'fill the gap' and be the entities with cultural authority to speak for Country.<sup>287</sup> However, some cautioned against this approach,

<sup>282</sup> Evidence, Mr Winters, 4 October 2022, pp 3 and 7.

<sup>283</sup> See, for example, Submission 13a, Darkinjung Local Aboriginal Land Council, p 1; Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), pp 1-2; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 4; Submission 21, NTSCORP Limited, p 23; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, pp 4-5; Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 4; Evidence, Mr Michael Young, Community member, 4 October 2022, pp 39-40; Evidence, Ms Kinchela, 4 October 2022, p 30; Evidence, Mr Franks, 23 September 2022, pp 40 and 44; Evidence, Mr Winters, 4 October 2022, pp 3-7; Evidence, Mr Syron, 4 October 2022, pp 40-41.

<sup>284</sup> Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 3. See also Submission 21, NTSCORP Limited, p 39; Evidence, Mr Winters, 4 October 2022, pp 3 and 7; Evidence, Mr Franks, 23 September 2022, pp 40-41.

<sup>285</sup> Evidence, Mr Winters, 4 October 2022, p 3; Evidence, Mr Syron, 4 October 2022, p 41.

<sup>286</sup> Submission 13a, Darkinjung Local Aboriginal Land Council, p 1.

<sup>287</sup> Submission 13, Darkinjung Local Aboriginal Land Council, p 6; Submission 13a, Darkinjung Local Aboriginal Land Council, p 1; Submission 17a, New South Wales Aboriginal Land Council, pp 1-2; Evidence, Mr Moyle, 23 September 2022, p 22; Evidence, Mr Moran, 23 September 2022, p 15.

with Ms Mercy suggesting that deferring to Local Aboriginal Land Councils should not be the default position:

In the case of country where there is yet to be a determination of native title, there must be a discussion about who has cultural authority to speak for that country. It cannot be the default position that it simply goes to a local Aboriginal land council.<sup>288</sup>

- 3.73** This order of priority is considered further below in discussing the establishment of the ACH Council and Local ACH Services as proposed in the bill.

### **Composition of Aboriginal Cultural Heritage Council**

- 3.74** In the context of the issues articulated above, this section discusses the challenges for a state-wide body to reflect the cultural diversity and local views of the Aboriginal community, and focuses on inquiry participant's views on cultural authority as it relates to the ACH Council's composition.

- 3.75** According to NTSCORP, the composition of the ACH Council was a 'foremost concern'.<sup>289</sup> Ms Holt explained that 'the Aboriginal Cultural Heritage Council then gets to decide who the local services are, so its composition is critical'.<sup>290</sup> Mr Thompson noted that the challenge inherent in the establishment of a state-body is its effective representation of community views: 'Any statewide body will struggle as soon as you create one because it can't fairly represent the people that it is meant to represent'.<sup>291</sup>

- 3.76** Regarding the role of the NSW Aboriginal Land Council on the ACH Council, the ACHAC was critical of what it called the NSW Aboriginal Land Council's 'controlling interest' of 50 per cent representation in the nomination of ACH Council members. In its view, this does not adhere to the principle of establishing a legitimate representative organisation as outlined in the Dhawura Ngilan Best Practice Standards, nor align with the principle that an independent state-body should be drawn from Aboriginal cultural heritage custodians. The ACHAC recommended that the NSW Aboriginal Land Council 'should have a seat on the ACH Council, but that it cannot have 50% representation'.<sup>292</sup>

- 3.77** In response to this view, the NSW Aboriginal Land Council argued that the nomination process is appropriate:

Nomination from NSWALC and native title holders is entirely appropriate and in keeping with recognising the two key legislative regimes in NSW – the Aboriginal Land Rights Act 1983 (NSW) (ALRA) and the Native title Act.

The Bill is very clear that nominees are to be Aboriginal persons, comprised in equal number of Aboriginal Land Council members, native title holders and Aboriginal

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<sup>288</sup> Evidence, Ms Mercy, 23 September 2022, p 5. See also Evidence, Mr Young, 4 October 2022, p 40.

<sup>289</sup> Submission 21, NTSCORP Limited, p 23.

<sup>290</sup> Evidence, Ms Holt, 23 September 2022, p 6. See also Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), pp 3-4.

<sup>291</sup> Evidence, Mr Thompson, Director, 23 September 2022, p 12.

<sup>292</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 3. See also Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 5.

owners, be gender balanced as far as practicable, and have relevant skills and experience. These are important safeguards to ensure the Minister's appointments are based on recognised Aboriginal community-controlled structures.<sup>293</sup>

**3.78** In addition, Mr Ah-See supported the ACH Council's current structure, describing it as a 'good starting point', and suggested that its inclusivity could be improved, if required, after its establishment via future amendment to the bill or via ACH Council regulations.<sup>294</sup>

**3.79** With respect to the representation of native title interests on the ACH Council, NTSCORP and other inquiry participants argued that the bill requires amendment. The ACHAC argued that the current wording of clause 23 of the bill, which sets out the nomination model, suggests that an individual Native Title Holder, rather than a legal entity, could make a nomination to the ACH Council which, in its view, 'is unnecessarily vague and reductive'.<sup>295</sup>

**3.80** In the view of NTSCORP, the nomination provision in the bill should be amended to list it as a body which can nominate potential members of the ACH Council,<sup>296</sup> a point on which Honorary Associate Professor Hunt agreed.<sup>297</sup>

**3.81** NTSCORP also recommended that Registered Native Title Claimants be included in clause 23 so that they can make nominations to the Minister for the ACH Council. As such, NTSCORP contended that the ACH Council should have an amended total number of members:

That was the suggestion—to to have four categories and between eight and 12 members, with equal representation. That might provide a good balance between Aboriginal owners, land council representatives and native title claimants and holders.<sup>298</sup>

**3.82** Some inquiry participants considered that the nomination pathways for the ACH Council's membership should be broadened. For instance, Aboriginal Affairs NSW did not support the narrow focus of the nomination process for the ACH Council:

The bill proposes that nominees for the Aboriginal cultural heritage council can only be put forward by New South Wales Aboriginal Land Council or native title holders. This approach is out of step with best practice community engagement because it ignores a range of other interested parties, including traditional owners ...<sup>299</sup>

**3.83** Similarly, the ACHAC highlighted that not all Aboriginal custodians are Native Title Holders, arguing that Aboriginal custodians should have alternative pathways to representation on the ACH Council:

ACHAC acknowledges that Native Title bodies may provide a direct representative status for one class of culturally authorised Aboriginal custodians. However, a large

<sup>293</sup> Submission 17a, New South Wales Aboriginal Land Council, p 2.

<sup>294</sup> Evidence, Mr Ah-See, 23 September 2022, p 48.

<sup>295</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 3.

<sup>296</sup> Submission 21, NTSCORP Limited, p 45. See also Evidence, Mr Moyle, 23 September 2022, p 20.

<sup>297</sup> Submission 6, Dr Janet Hunt, p 2.

<sup>298</sup> Evidence, Ms Holt, 23 September 2022, p 6. See also Evidence, Mr Franks, 23 September 2022, pp 40-41.

<sup>299</sup> Evidence, Mr Hamilton, 4 October 2022, p 12.

proportion of Aboriginal custodians do not have access to Native Title, and ACHAC does not support Native Title being the only pathway for Aboriginal custodians looking for representation on the ACH Council.<sup>300</sup>

- 3.84** Ms Kazan Brown, a Gundungurra woman, argued that the ACH Council and Local ACH Services prioritise the rights and interests of legally recognised entities, such as Local Aboriginal Land Councils, and therefore that the bill's model would likely fail to give her a voice or represent the community's knowledge holders:

... the bill will create bodies—the ACH Council—and local ACH services will give the power of decision-making to people who are most likely not directly descended from the land in question ... The bill does not give me a voice and it assumes that the ACH bodies will represent all communities. It doesn't go far enough in protecting intellectual property and gives land councils and other Aboriginal corporations too much power. The decision around cultural heritage should be made by the community that lived, or have lived in the area, and has cultural knowledge of that lineage. Land councils and other Indigenous organisations do not speak for every community.<sup>301</sup>

- 3.85** In this context, Mr Knight reflected on the ACHAC's composition, arguing that it better represents Aboriginal cultural heritage custodians compared with the proposed composition of the ACH Council:

NTSCORP, NSWALC and the Heritage Council can all nominate one member of ACHAC. There is no requirement that any of these nominated members demonstrate a representative association with Aboriginal custodians of ACH ... However, under the Act the remaining 10 ACHAC members, which is the vast majority of the committee, must be nominated by Aboriginal Elder groups, native title owners or claimants, registered Aboriginal owners—that is, they must all be able to show an authentic credential as an ACH custodian or as a nominated representative of ACH custodians. A fundamental concern for ACHAC is that there is no such representative requirement ACH council provided for by the ACH reform culture is identity bill.<sup>302</sup>

- 3.86** Looking beyond the proposed nomination model in clause 23 of the bill, the Dharriwaa Elders Group (DEG) proposed an entirely different way of nominating representatives to the ACH with the objective of ensuring that the ACH Council represents traditional custodians:

The New South Wales ACH council would support, resource and enforce local decisions. DEG proposes that the State body supporting these local companies must be representatives elected by the local companies. They could meet in native title national, regional and State groupings and work in a distributed network from their home communities. This would ensure the cultural authority of the New South Wales body and that the New South Wales body, if called the ACH council, would be acting according to local ACH custodians' instructions.<sup>303</sup>

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<sup>300</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, p 3. See also Evidence, Mr Moyle, 23 September 2022, p 20.

<sup>301</sup> Evidence, Ms Brown, 23 September 2022, p 38.

<sup>302</sup> Evidence, Mr Knight, 23 September 2022, p 30.

<sup>303</sup> Evidence, Ms Robinson, 4 October 2022, p 42.

### Designation of Local Aboriginal Cultural Heritage Services

**3.87** Some stakeholders raised issues with the bill's model for the ACH Council to designate entities to be Local ACH Services. There were different views on both the extent to which the bill should prescribe entities to be Local ACH Services, and on the entities that should or should not be designated a Local ACH Service on the basis of cultural authority.

**3.88** The ACHAC criticised the bill for establishing a system where Local Aboriginal Land Councils 'will have as-of-right Aboriginal cultural heritage entitlements at the local ACH Service level'. Further, the ACHAC argued that Local Aboriginal Land Councils will have a 'self-advocacy path' to becoming a Local ACH Service, given that half of the ACH Council's members are nominated by the NSW Aboriginal Land Council. For reasons already noted throughout this chapter, the ACHAC was concerned by this outcome and reiterated that 'this would not be acceptable to the great majority of culturally authorised Aboriginal custodians'.<sup>304</sup>

**3.89** Dr Tim Owen, an Aboriginal archaeology expert, agreed that the role of Local Aboriginal Land Councils as Local ACH Services is viewed as problematic by the Aboriginal community:

... the proposal for local ACH services is already causing friction, factions and issues within Aboriginal communities. Many see the designation of areas as simply a way for local Aboriginal land councils to formalise power. Whilst in many instances it would be appropriate for a land council to become the ACH service, in many places such as western Sydney—due to the long history of politics, disempowerment and local land rights issues—it would not.<sup>305</sup>

**3.90** Mr Hamilton, on behalf of Aboriginal Affairs NSW, contended that the bill is prescriptive about the composition of Local ACH Services and establishes 'a hierarchy which prioritises local Aboriginal land councils over traditional owners who have the authority to speak for country. That has the potential to be a licence to destroy Aboriginal cultural heritage'.<sup>306</sup>

**3.91** Regarding the extent to which the bill should prescribe details around the entities who can or should be designated a Local ACH Service, Mr Hamilton supported legislation to be flexible in order to reflect the diversity of Aboriginal cultural heritage knowledge holders. In reflecting on the NSW Government's 2018 draft bill, Mr Hamilton argued that the local ACH panels as proposed in that model were more culturally appropriate than local ACH services in the bill:

The composition of local services should be determined by Aboriginal people and not dictated by government. The reform also needs to build on existing legislation such as the Aboriginal Land Rights Act and the Native Title Act. The diversity between and within Aboriginal communities calls for a more flexible approach to local services that balances recognition of native title with the flexibility to incorporate the diversity of knowledge holders within Aboriginal communities.

... based on some previous consultation and feedback on New South Wales Aboriginal cultural heritage reforms, the complexity and dynamic nature of cultural heritage and speakers for country has been acknowledged and factored into the role of the Aboriginal cultural heritage council to determine the boundaries and composition of panel areas in

<sup>304</sup> Submission 8, Aboriginal Cultural Heritage Advisory Committee, pp 4 and 9-10.

<sup>305</sup> Evidence, Dr Owen, 4 October 2022, p 53.

<sup>306</sup> Evidence, Mr Hamilton, 4 October 2022, p 12.

a culturally appropriate way [in the 2018 bill]. In its current form—the private member's bill—composition of local services is not reflective of this and has the potential to create conflict.<sup>307</sup>

- 3.92** Mr Knight also reiterated the need for a flexible approach in order to appropriately adapt to the characteristics of each Country and its knowledge holders, highlighting that in some circumstances, cultural knowledge may be held by individuals or groups other than Native Title Holders or Local Aboriginal Land Councils:

I think there needs to be flexibility in those local committees. They couldn't be completely prescriptive. A term could be made up or a committee could be formed from time to time to look at specific issues. That may work, but I think that really needs to be determined at that local level. It's really creating a breadth of possibility within the legislation for the definition and the constituency of those decision-making powers to be determined locally.

...

They will need to change at different occasions because there may be representatives required from different knowledge holders for different areas. Across native title jurisdictions or land council jurisdictions, in my personal experience not everybody will have the full knowledge of those areas. So you're going to have to look at who are the knowledge holders in even those smaller areas within those locations.<sup>308</sup>

- 3.93** NTSCORP, Native Title Holders and Registered Native Title Claimants together presented a different perspective about the appropriate level of prescription in the bill about Local ACH Services. NTSCORP criticised the lack of clarity around the composition and hierarchy of Local ACH Services which, in its view, creates 'a diminishment of Native Title Holders' current and prospective rights'.<sup>309</sup> In addition, NTSCORP argued that this aspect of the bill would be 'vulnerable to litigation as there is no provision as to hierarchy of interests'.<sup>310</sup>
- 3.94** Moreover, NTSCORP and submissions from Native Title Holders argued that the bill does not prioritise Native Title Holders when it comes to Local ACH Services. In their view, this approach is contrary to Dhawura Ngilan Best Practice Standards because it does not adhere to the UNDRIP principle of self-determination to the extent that Native Title Holders 'are the ultimate authority on the management of cultural heritage', yet this right is not recognised in clause 23 of the bill.<sup>311</sup>
- 3.95** NTSCORP contented that the bill should be amended to include an order of authority or priority as to who may be designated a local Aboriginal Cultural Heritage service, which was supported in the submissions received from Native Title Holders:

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<sup>307</sup> Evidence, Mr Hamilton, 4 October 2022, p 12.

<sup>308</sup> Evidence, Mr Knight, 23 September 2022, pp 31-32. See also Evidence, Ms Brown, 23 September 2022, p 42; See also Portfolio Committee No. 7 – Planning and Environment, *Report on the Online Questionnaire* (October 2022), p 4.

<sup>309</sup> Submission 21, NTSCORP Limited, p 39.

<sup>310</sup> Submission 21, NTSCORP Limited, p 40.

<sup>311</sup> Submission 21, NTSCORP Limited, p 41; Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), p 5; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 5; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, p 5.

NTSCORP's position is that:

- A Registered Native Title Body Corporate (RNTBC or PBC) should be the Local Aboriginal Cultural Heritage Service for the whole of their native title determination area;
- Native Title Holders will comprise all of the members of a Local Aboriginal Cultural Heritage Service for the whole of their native title determination area;
- Where there is no native title determination, that the Local Aboriginal Cultural Heritage Service should comprise Aboriginal Traditional Owners with cultural knowledge and cultural authority to speak for their cultural heritage and for Country, including registered native title claimants; and
- There be a transition provision in any legislation enacted to provide for PBCs to assume the functions of the Local Aboriginal Cultural Heritage Service once native title has been determined.<sup>312</sup>

**3.96** The submission from the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant additionally argued that clause 23 of the bill should include a specific category for Registered Native Title Claimants.<sup>313</sup>

**3.97** Providing another perspective on the issue, the Dharriwaa Elders Group (DEG) called for Local ACH Services to be delivered by local Aboriginal entities that have local cultural knowledge:

DEG's core offering to this inquiry is the conviction that ACH custodianship and management must be held at the local level by properly resourced non profit, Aboriginal controlled companies that support cultural knowledge holders—usually Elders—for that area, including knowledgeable Elders who have bloodline connections to this country but may live elsewhere ... DEG proposes that the ACH services described in the bill would be delivered by these local Aboriginal companies, supported by contractor or staff professionals and registered training organisations. These local services would hold the local knowledge, and protect and promote living ACH. Each community is unique and the knowledge holders for each local place would ideally be supported to control an independent ACCO because ACH maintenance is a daily and constant activity.<sup>314</sup>

<sup>312</sup> Submission 21, NTSCORP Limited, p 41. See also Submission 18, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), p 5; Submission 20, Yaegl Traditional Owners Aboriginal Corporation RNTBC, p 5; Submission 22, Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC, p 5.

<sup>313</sup> Submission 26, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People's Native Title Applicant, p 3.

<sup>314</sup> Evidence, Ms Robinson, 4 October 2022, p 42.

## Committee comment

- 3.98** The committee welcomes the introduction of the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 into the Legislative Council. We acknowledge the work of Reverend the Hon Fred Nile MLC, and the other co-sponsors, in developing this bill.
- 3.99** First and foremost, the committee believes that this bill and the evidence obtained through this inquiry will positively contribute to the inevitable establishment of standalone Aboriginal cultural heritage laws that will provide strengthened protection against harm and destruction for Aboriginal cultural heritage in New South Wales.
- 3.100** The evidence to this inquiry puts several points beyond doubt in the committee's mind. First, new, modernised and standalone legislation for the recognition, protection, conservation and preservation of Aboriginal cultural heritage is both necessary and long overdue. Second, best practice and international standards demand that Aboriginal people be responsible for making decisions about Aboriginal cultural heritage. And third, the current Aboriginal cultural heritage system is failing to adequately protect Aboriginal cultural heritage, both tangible and intangible, with cultural heritage matters treated as an ancillary consideration.

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### Finding 1

That:

- new, modernised and standalone legislation for the recognition, protection, conservation and preservation of Aboriginal cultural heritage is both necessary and long overdue
- best practice and international standards demand that Aboriginal people be responsible for making decisions about Aboriginal cultural heritage
- the current Aboriginal cultural heritage system is failing to adequately protect Aboriginal cultural heritage, both tangible and intangible, with cultural heritage matters treated as an ancillary consideration.

- 
- 3.101** The committee recognises that this bill has been developed and introduced in response to the delay by the NSW Government in translating its decade-long reform process into a bill which is laid before the Parliament. It is clear that the NSW Government's process has been iterative as a result of comprehensive and staggered consultation. However, the process to introduce and implement reforms has stalled, particularly since 2018 when the NSW Government consulted on its draft bill. Despite the committee's investigations as to the reasons for this, it remains unclear exactly why the NSW Government has not introduced its own standalone legislation to reform Aboriginal cultural heritage laws.
- 3.102** The committee recognises the community's frustration and angst, not only about the Government's delay, but also about the consultation process on this bill. We acknowledge that the short timeframe set by the Legislative Council for the committee to examine this bill has meant that our consultation process simply has not been able to be as effective, comprehensive and culturally safe as it could have been if the committee had longer to conduct its inquiry.
- 3.103** The committee has had a very short time in which to examine and form views and recommendations on a detailed bill that addresses an incredibly complex matter which is deeply important to Aboriginal people in New South Wales. The importance of connection to Country

and culture cannot be understated and the committee thanks all inquiry participants for their generosity in informing and educating the committee about this.

- 3.104** In the time available, the committee makes the following comments on key aspects of the bill examined in the report. The evidence is clear that the bill significantly improves on the status quo in two key ways: first, it encompasses intangible Aboriginal cultural heritage, which stakeholders told us was fundamentally important; and second, the bill would give Aboriginal people decision-making power and control over Aboriginal cultural heritage, reflecting the principle of self-determination. However, it was also clear that establishing any Aboriginal cultural heritage scheme that facilitates Aboriginal decision-making about, control over and custodianship of Aboriginal cultural heritage matters comes with the challenge of having, and being seen to have, cultural legitimacy. In other words, fundamental to the success of any Aboriginal cultural heritage framework is that it gives these responsibilities to individuals and entities who can be said to have cultural authority to speak for Country in accordance with traditional lore, custom and community expectation.
- 3.105** In looking at the mechanics and details of the bill, the committee has concerns that, as currently drafted, the bill falls short when it comes to this incredibly complex aspect of Aboriginal cultural heritage laws – especially in light of the reality that, as highlighted by stakeholders, the success of any Aboriginal cultural heritage framework depends on community acceptance of and confidence in its operation. In this regard, the committee notes suggestions put forward by stakeholders as to potential amendments to the bill, particularly around the composition of the ACH Council and the designation of Local ACH Services.
- 3.106** The evidence was also persuasive on the need for strengthened protection of Aboriginal cultural heritage relating to all projects that may cause harm or destruction of Aboriginal cultural heritage. The committee notes that key aspects of the bill in this regard include that State significant development and State significant infrastructure projects are subject to the statutory protective mechanisms, and the so-called 'right of veto' for the ACH Council over proposed development. These are clearly issues that are contested among different stakeholders and will be the subject of debate.
- 3.107** With respect to concerns expressed about the ACH Council's independence from government, the committee notes that there is precedent for independent decision-making that is free from ministerial direction and control in the planning and development process. For instance, the Independent Planning Commission is an existing, standalone decision-making body that operates independently of the Department of Planning and Environment and is not subject to the direction and control of the Minister for Planning, except in relation to procedural matters.
- 3.108** The committee believes the bill has merit, however, the limited time frame for consultation and the issues raised by those who were able to participate mean that amendments will be required and ideally further consultation should be undertaken on the drafting of those amendments. The committee recommends that the bill be referred back to the House and the debate and development of further amendments be informed by committee comments and stakeholders' views expressed in this report.

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**Recommendation 1**

The committee believes the bill has merit and should be referred back to the House. The committee recommends that debate on the bill is informed by committee comments, stakeholders' views expressed in this report and that any amendments include further consultation with stakeholders.

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- 3.109** We recognise that this report is being tabled in the last sitting period of the 57th Parliament. Taking careful note of the evidence to this inquiry about the nuances, complexities and sensitivities of the matters addressed by the bill, there is the possibility that time may simply run out to debate the bill and any amendments with the consideration and time it deserves before the dissolution of this Parliament ahead of the election in March 2023.
- 3.110** If debate on this bill is not able to be concluded before the dissolution of the 57th Parliament, we recommend that early in the next term of Parliament, a bill is introduced to enact standalone Aboriginal cultural heritage legislation that takes into account committee comments and stakeholders' views expressed in this report, particularly around the importance of:
- including statutory protections for intangible Aboriginal cultural heritage
  - moving decision-making responsibility for the recognition, protection, conservation and preservation of Aboriginal cultural heritage from the NSW Government to Aboriginal people
  - the Aboriginal decision-making entity appropriately recognising cultural authority
  - State significant development and State significant infrastructure projects being subject to Aboriginal cultural heritage protections.
- 

**Recommendation 2**

That if debate on the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 is not able to be concluded before the dissolution of the 57th Parliament, a bill to enact standalone Aboriginal cultural heritage legislation in New South Wales be introduced early in the 58th Parliament. This bill should take into account the committee comments and stakeholders' views expressed in this report, particularly around the importance of:

- including statutory protections for intangible Aboriginal cultural heritage
  - moving decision-making responsibility for the recognition, protection, conservation and preservation of Aboriginal cultural heritage from the NSW Government to Aboriginal people
  - the Aboriginal decision-making entity appropriately recognising cultural authority
  - State significant development and State significant infrastructure projects being subject to Aboriginal cultural heritage protections.
- 

- 3.111** It is also incumbent on the NSW Government that, in progressing its reforms to Aboriginal cultural heritage laws, it considers and engages with the committee comments and stakeholders' views expressed in this report. Further, the NSW Government's reforms to Aboriginal cultural heritage laws must be supported by the funding necessary to ensure their success.
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**Recommendation 3**

That the NSW Government:

- consider and engage with the committee comments and stakeholders' views expressed in this report, particularly the matters listed in Recommendation 2, in progressing its own reforms to Aboriginal cultural heritage laws in New South Wales
  - support its reforms to Aboriginal cultural heritage laws with the funding necessary to ensure their success.
-



## Appendix 1 Submissions

No.	Author
1	Mr Robert Syron
2	Mr Scott Franks
3	Name suppressed
4	Name suppressed
5	Ms Patricia Johnson
6	Dr Janet Hunt
7	Mr Michael Young
8	Aboriginal Cultural Heritage Advisory Committee (ACHAC)
9	Environmental Defenders Office
10	Christian Voice Australia (CVA)
11	Ms Kazan Brown
12	Aboriginal Affairs NSW
13	Darकिनjung Local Aboriginal Land Council
13a	Darकिनjung Local Aboriginal Land Council
14	NSW Council for Civil Liberties
15	NSW Minerals Council
16	The National Trust of Australia (New South Wales)
17	NSW Aboriginal Land Council
17a	NSW Aboriginal Land Council
18	Bundjalung of Byron Bay Aboriginal Corporation (Arakwal)
19	Confidential
20	Yaegl Traditional Owners Aboriginal Corporation RNTBC
21	NTSCORP Limited
22	Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC
23	Dharriwaa Elders Group
24	Lock the Gate Alliance
25	NSW Farmers Association
26	Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People Native Title Applicant
27	The Law Society of New South Wales

## Appendix 2 Witnesses at hearing

Date	Name	Position and Organisation
Friday 23 September 2022 Room 814/815 Parliament House, Sydney	Mr Michael Bell	Chairperson, NTSCORP Limited
	Ms Natalie Rotumah	Chief Executive Officer, NTSCORP Limited
	Ms Mishka Holt	Principal Solicitor, NTSCORP Limited
	Mrs Dianne Chapman	Manager, Office and Administration, Yaegl Traditional Owners Aboriginal Corporation Registered Native Title Body Corporate
	Mrs Yvonne Stewart	Bundjalung of Byron Bay (Arakwal) Elder and Member, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) Registered Native Title Body Corporate
	Ms Tara Mercy	Business Manager, Bandjalang Aboriginal Corporation Prescribed Body Corporate Registered Native Title Body Corporate
	Mr Warlpa Thompson	Director, Barkandji Native Title Group Aboriginal Corporation Registered Native Title Body Corporate
	Mr Terrence Robinson	Director, Ngullingah Jugun (Our Country) Aboriginal Corporation Registered Native Title Body Corporate
	Councillor Leeanne Hampton ( <i>via videoconference</i> )	Councillor for the Wiradjuri Region, NSW Aboriginal Land Council
Councillor Dallas Donnelly	Councillor for the North Coast Region, NSW Aboriginal Land Council	

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Mr Brendan Moyle	Chief Executive Officer, Darkinjung Local Aboriginal Land Council
	Mr Nathan Moran <i>(via videoconference)</i>	Chief Executive Officer, Metropolitan Local Aboriginal Land Council
	Mr Paul Carr <i>(via videoconference)</i>	Chairperson, Three Rivers Regional Assembly, NSW Coalition of Aboriginal Regional Alliances
	Mr Geoff Maher <i>(via videoconference)</i>	Member, Criminal Law Committee, New South Wales Bar Association
	Mr Paul Knight <i>(via videoconference)</i>	Representative, Aboriginal Cultural Heritage Advisory Committee
	Ms Kazan Brown <i>(via videoconference)</i>	Gundungurra woman, client of the Environmental Defenders Office
	Mr Scott Franks	Wonnarua man, client of the Environmental Defenders Office
	Ms Rachael Chick	Senior Solicitor, Environmental Defenders Office
	Mr Roy Ah-See <i>(via videoconference)</i>	Co-Chair, Uluru Dialogue
	Mr Josh Pallas	President, New South Wales Council of Civil Liberties
<b>Tuesday 4 October 2022 Macquarie Room Parliament House, Sydney</b>	Mr Geoffrey Winters	Chief Executive Officer, Just Reinvest NSW
	Mr Shane Hamilton	Deputy Secretary, Aboriginal Affairs NSW
	Mr Andrew Abbey <i>(via videoconference)</i>	Policy Director, NSW Minerals Council

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Mr Nic Clyde <i>(via videoconference)</i>	NSW Coordinator, Lock the Gate Alliance
	Ms Karra Kinchela <i>(via videoconference)</i>	Narrabri Community Outreach Coordinator, Lock the Gate Alliance
	Yinnaar Burrim Jane Delaney-John <i>(via videoconference)</i>	Representative, Gomeroi Traditional Custodians
	Mr Dalliss Ramage <i>(via videoconference)</i>	Director, One Connection Aboriginal Disability Services
	Mrs Rose Lovelock <i>(via videoconference)</i>	Elder / Director, Armidale Aboriginal Cultural Centre and Keeping Place
	Ms Mavis Ahoy <i>(via videoconference)</i>	Elder / Panel member, Armidale Aboriginal Cultural Centre and Keeping Place
	Mr Reece Sheumack <i>(via videoconference)</i>	Aboriginal Community Engagement & Culture Officer, Armidale Community Corrections
	Mr Robert Syron <i>(via teleconference)</i>	Registered Aboriginal Owner through the Office of the Registrar and Australian War Veteran
	Mr Michael Young <i>(via videoconference)</i>	Community member
	Ms Virginia Robinson <i>(via videoconference)</i>	Secretary, Dharriwaa Elders Group
	Ms Wendy Spencer <i>(via videoconference)</i>	Project Manager, Dharriwaa Elders Group
	Mr Greg Bondar	Private individual ( <i>Public forum</i> )
	Mr Kevin Duncan	Private individual ( <i>Public forum</i> )
	Dr Tim Owen	Private individual ( <i>Public forum</i> )

## Appendix 3 Minutes

### Minutes No. 81

Thursday 11 August 2022

Portfolio Committee No. 7 – Planning and Environment

Room 1043, Parliament House, Sydney at 2.31 pm

#### 1. Members present

Ms Higginson, *Chair*

Mr Pearson, *Deputy Chair*

Mr Barrett

Ms Jackson

Ms Sharpe

#### 2. Apologies

Mr Mallard

#### 3. Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

##### 3.1 Terms of reference

The committee noted the following terms of reference referred by the House on 9 August 2022:

That:

- (a) the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, be referred to Portfolio Committee No. 7 – Planning and Environment for inquiry and report,
- (b) the bill be referred to the committee at the conclusion of the mover's second reading speech in the Council, and
- (c) the committee report by 8 November 2022.

##### 3.2 Provision of documents to participating member

Resolved, on the motion of Mr Barrett: That Revd Nile, who has advised the committee that he intends to participate for the duration of the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, be provided with copies of inquiry related documents.

##### 3.3 Proposed timeline

Resolved, on the motion of Ms Sharpe: That the committee adopt the following timeline for the administration of the inquiry:

- Thursday 15 September 2022 – closing date for submissions (5 weeks)
- Friday 23 September 2022 – first hearing
- Friday 30 September 2022 – closing date for online questionnaire (7 weeks)
- Tuesday 4 October 2022 – second hearing
- Thursday 3 November 2022 – report deliberative
- Tuesday 8 November 2022 – report tabling.

##### 3.4 Stakeholder list

Resolved, on the motion of Ms Sharpe: That the following stakeholders be invited to make a submission:

- Aboriginal Affairs NSW
- Heritage NSW
- NSW Aboriginal Cultural Heritage Advisory Committee
- NSW Aboriginal Land Council
- NTSCORP (Native Title Services Corporation)
- NSW Coalition of Aboriginal Peak Organisations (CAPO)

- Aboriginal Legal Service (NSW/ACT)
- Metropolitan Local Aboriginal Land Council
- Darkinjung Local Aboriginal Land Council
- Grafton Local Aboriginal Land Council
- Uluru Dialogue
- Black Pages
- Southern Cross Ministries
- Professor Berice Anning from the University of Technology Sydney
- Christian Fellowship
- Greening the Gaps
- Moree Local Aboriginal Education Consultative Group
- Professor Megan Davis from the Indigenous Law Centre, University of New South Wales
- Just Reinvest NSW
- Emeritus Professor Lyndall Ryan from the University of Newcastle
- Dr Grant Saunders from the Wollotuka Institute
- Public Interest Advocacy Centre
- Greg Bondar, former CEO of the Tharawal Local Aboriginal Land Council
- Scott Franks
- Robert Lester
- Maria Polly Cutmore
- Dolly Talbot
- Uncle Neil Ingram
- Aunty Patricia Laurie
- Jason Kelly
- Dharriwaa Elders Group
- Uncle Rob and Aunty Gloria Williams
- Githabul Rangers
- Noel King

Resolved, on the motion of Mr Pearson: That members have until 4.00 pm on Monday 15 August 2022 to nominate additional stakeholders to make submissions, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement.

### **3.5 Online questionnaire**

Resolved, on the motion of Ms Jackson: That the committee conduct an online questionnaire to capture individuals' views with the following questions and preamble, as amended:

On 9 August 2022, the NSW Legislative Council's Portfolio Committee No. 7 – Planning and Environment commenced an inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 [hyperlink].

The object of this Bill is to provide a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage and recognise the fundamental importance of Aboriginal cultural heritage to Aboriginal people.

Further information about the inquiry, including the terms of reference, can be found on the committee's website [hyperlink].

As part of the inquiry, the committee is seeking public comment on the bill through the following questions. Responses are due by 30 September 2022.

Responses may be used in the committee's report. Names and contact details of respondents will not be published. The questionnaire will take approximately 5 minutes to complete.

1. Please enter your contact details.

Name:

Email address:

Postcode:

2. Are you a resident of NSW? Select one of these options:

- a. Yes
- b. No

3. Position on the bill:

The object of this Bill [hyperlink] is to provide a modern framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage and recognise the fundamental importance of Aboriginal cultural heritage to Aboriginal people.

Based on your own understanding and the description above, please explain your position on the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022. For example, why do you support the bill, partially support the bill, support the bill but with amendments, or oppose the bill? (max 300 words)

4. Do you have any other comments (max 300 words)

Resolved, on the motion of Mr Pearson: That the committee not accept pro formas.

### 3.6 Online questionnaire

Resolved, on the motion of Ms Sharpe: That the secretariat prepare a summary report of responses to the online questionnaire for publication on the website and use in the report, and that:

- the committee authorises the secretariat to publish the questionnaire report on the inquiry website unless any member raises an objection to publication via email
- individual responses be kept confidential on tabling.

### 3.7 Advertising

The committee noted that all inquiries are to be advertised via Twitter, Facebook, stakeholder emails and a media release distributed to all media outlets in New South Wales.

### 3.8 Approach to submissions

Resolved, on the motion of Mr Barrett: That, to enable significant efficiencies for members and the secretariat while maintaining the integrity of how submissions are treated, in the event that 200 or more individual submissions are received, the committee may adopt the following approach to processing short submissions:

- All submissions from individuals 250 words or less in length will:
  - have an individual submission number, and be published with the author's name or as name suppressed, or kept confidential, according to the author's request
  - be reviewed by the secretariat for adverse mention and sensitive/identifying information, in accordance with practice
  - be channelled into one single document to be published on the inquiry website
- All other submissions will be processed and published as normal.

## 4. Adjournment

The committee adjourned at 2.49 pm, until Tuesday 23 August 2022, 9.15 am, Jubilee Room, Parliament House (Budget Estimates).

Emily Treeby  
Committee Clerk

**Minutes no. 85**

Monday 19 September 2022

Portfolio Committee No. 7 – Planning and Environment

McKell Room, Parliament House, Sydney at 11.01 am

**1. Members present**Ms Higginson, *Chair*Mr Pearson, *Deputy Chair*

Ms Jackson

Mrs MacDonald (from 11.07 am)

Mr Mallard

Revd Nile (participating)

Ms Sharpe

**2. Apologies**

Mr Barrett

**3. Draft minutes**

Resolved, on the motion of Ms Sharpe: That draft minutes nos. 78 and 81 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 29 August 2022 – Email from Tanya Eldridge, Principal Policy Manager, Aboriginal Cultural Heritage Reforms, Aboriginal Affairs NSW Department of Premier and Cabinet to secretariat, regarding community feedback on the inquiry into the Aboriginal Cultural Heritage (Culture is Identity Bill) 2022
- 5 September 2022 – Email from Tanya Eldridge, Principal Policy Manager, Aboriginal Cultural Heritage Reforms, Aboriginal Affairs NSW Department of Premier and Cabinet to secretariat, requesting that Aboriginal Affairs NSW appear at hearing on 4 October 2022 due to staff
- 13 September 2022 – Email from Sharon Close, Senior Policy Officer, NSW Aboriginal Land Council to secretariat, regarding extension request to provide a submission to the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 14 September 2022 – Email from Renee Austin, Senior Policy Advisor – Environment, NSW Farmers to secretariat, regarding extension request to provide a submission to the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 14 September 2022 – Email from Tanya Eldridge, Principal Policy Manager, Aboriginal Cultural Heritage Reforms, Aboriginal Affairs NSW Department of Premier and Cabinet to secretariat, regarding extension request to provide a submission to the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 14 September 2022 – Email from Conor Wakefield, Solicitor, NTS Corp to secretariat, regarding extension request to provide a submission to the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 15 September 2022 – Email from Wendy Spencer, Dharriwaa Elders Group to secretariat, regarding extension request to provide a submission to the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

***Sent:***

- 29 August 2022 – Email from secretariat to Dave Widders, Widders Consultancy, confirming quote for Aboriginal cultural awareness training on 19 September 2022
- 31 August 2022 – Email from secretariat, to Tanya Eldridge, Principal Policy Manager, Aboriginal Cultural Heritage Reforms, Aboriginal Affairs NSW Department of Premier and Cabinet, regarding community feedback on the inquiry into the Aboriginal Cultural Heritage (Culture is Identity Bill) 2022

- 5 September 2022 – Email from secretariat, to Tanya Eldridge, Principal Policy Manager, Aboriginal Cultural Heritage Reforms, Aboriginal Affairs NSW Department of Premier and Cabinet, distributing inquiry information video and media release

## 5. Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

### 5.1 Recording the cultural awareness training

Resolved, on the motion of Mr Mallard: That the committee agree to record the Aboriginal cultural awareness training provided by Mr David Widders of Widders Consultancy on 19 September 2022 for the sole purpose of providing the recording to any committee members unable to attend the training.

### 5.2 Cultural awareness training

The committee noted that it previously agreed via email for Dave Widders, Widders Consultancy, to provide Aboriginal cultural awareness training to members for half a day on 19 September 2022, at a cost of \$3,300.

Dave Widders delivered this training to members from 11.15 am to 2.15 pm. Also present, as agreed to by members via email, were the following members' staff: Louise Callaway (Mr Pearson's office), William Jennings and Kaliopi Diamantis (Reverend Nile's office), Phoebe Fuller and Peta Waller-Bryant (Ms Sharpe's office), Dan Reid and Lucy Small (Ms Higginson's office), and Cloe Brown (Mrs MacDonald's office).

Steven Collins and Lauren Davies, Parliament's Aboriginal Liaison Officers, were also present for the training.

### 5.3 Effective communication with Aboriginal stakeholders

The committee noted the Committee Office "Guide to engaging effectively with Aboriginal and Torres Strait Islander stakeholders in parliamentary inquiries".

## 6. Adjournment

The committee adjourned at 2.15 pm, until Friday 23 September 2022 (9.00 am), Room 814/815, Parliament House (Aboriginal Cultural Heritage Bill inquiry public hearing).

Emily Treeby

**Committee Clerk**

### Minutes no. 86

Friday 23 September 2022

Portfolio Committee No. 7 – Planning and Environment

Room 814/815, Parliament House, Sydney at 9.04 am

### 1. Members present

Ms Higginson, *Chair*

Mr Barrett (via videoconference)

Ms Jackson

Mr Mallard (until 12.40 pm and from 2.50 pm)

Mrs MacDonald (until 3.25 pm)

Revd Nile (*participating*) (from 10.30 am to 12.00 pm)

Ms Sharpe (until 12.40 pm and from 3.12 pm)

### 2. Apologies

Mr Pearson, *Deputy Chair*

### 3. Correspondence

The committee noted the following items of correspondence:

**Received:**

- 15 September 2022 – Email from Eloise Givney, Solicitor, NTSCORP to secretariat, regarding request to make a submission to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 15 September 2022 – Email from Mishka Holt, Principal Solicitor, NTSCORP to secretariat, regarding request to make a submission to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 15 September 2022 – Email from Clare Barcham, Solicitor, NTSCORP to secretariat, regarding request to make a submission to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 19 September 2022 – Email from Mishka Holt, Principal Solicitor, NTSCORP to secretariat, regarding request to make a submission to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 19 September 2022 – Email from Eloise Givney, Solicitor, NTSCORP to secretariat, regarding request to lodge a late submission to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 19 September 2022 – Email from Rachael Chick, Senior Solicitor, Environmental Defenders Office to secretariat, regarding request to appear at hearing on 23 September for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 20 September 2022 – Email from Denise Wireko-Brobby, Policy and Advocacy Manager, Aboriginal Legal Service (NSW/ACT) Limited to secretariat, regarding decline of the invitation to appear at the hearing on 23 September for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 20 September 2022 – Email from Kate Aubrey-Poiner Acting Executive Director, Land, Legal and Strategy, NSW Aboriginal Land Council to secretariat, regarding submission from the Aboriginal Cultural Heritage Advisory Council to inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

**Sent:**

- 20 September 2022 – Email from secretariat to Kate Aubrey-Poiner Acting Executive Director, Land, Legal and Strategy, NSW Aboriginal Land Council, regarding submission from the Aboriginal Cultural Heritage Advisory Council to inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022.

**4. Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022****4.1 Public submissions**

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1, 2, 5, 6, 7, 8, 9 10, 11, 12, 13, 14, 15.

Resolved, on the motion of Ms Sharpe: That the committee authorise the publication of submission nos. 16, 17, 17a, 18, 20 and 21.

**4.2 Partially confidential submissions**

Resolved, on the motion of Mr Mallard: That the committee keep the following information confidential, as per the request of the author: names and/or identifying and sensitive information in submissions no. 3.

Resolved, on the motion of Mr Mallard: That the committee authorise the publication of submission no. 4 with the exception of identifying and/or sensitive information which is to remain confidential, as per the request of the author.

**4.3 Confidential submissions**

Resolved, on the motion of Mr Mallard: That the committee keep submission no. 19 confidential, as per the request of the author.

**4.4 Attachments to submissions**

Resolved, on the motion of Ms Sharpe: That the committee authorise the publication of attachments to submission no. 21.

#### 4.5 Answers to questions and supplementary questions

Resolved, on the motion of Ms Sharpe: That:

- witnesses appearing at the hearings on 23 September 2022 and 4 October 2022 have seven days from the receipt of the transcript to return answers to questions on notice.
- there be no supplementary questions from members.

#### 4.6 Live streaming and recording of hearing

Resolved, on the motion of Ms Jackson: That the committee authorise publication of the video recordings for all hearings of the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 on the Parliament's YouTube channel.

#### 4.7 Public hearing

Resolved, on the motion of Ms Jackson: That the sequence of questions to be asked at hearings for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 be left in the hands of the Chair.

The committee proceeded to take evidence in public.

Witnesses were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings, virtual participation etiquette and other matters.

The following witnesses were sworn and examined:

- Mr Michael Bell, Chairperson, NTSCORP Limited
- Ms Natalie Rotumah, Chief Executive Officer, NTSCORP Limited
- Ms Mishka Holt, Principal Solicitor, NTSCORP Limited
- Mrs Dianne Chapman, Manager, Office and Administration, Yaegl Traditional Owners Aboriginal Corporation Registered Native Title Body Corporate
- Mrs Yvonne Stewart, Bundjalung of Byron Bay (Arakwal) Elder and Member, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) Registered Native Title Body Corporate
- Ms Tara Mercy, Business Manager, Bandjalang Aboriginal Corporation Prescribed Body Corporate Registered Native Title Body Corporate
- Mr Warlpa Thompson, Director, Barkandji Native Title Group Aboriginal Corporation Registered Native Title Body Corporate
- Mr Terrence Robinson, Director, Ngullingah Jugun (Our Country) Aboriginal Corporation Registered Native Title Body Corporate

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Councillor Leanne Hampton, Councillor for the Wiradjuri Region, NSW Aboriginal Land Council (via videoconference)
- Councillor Dallas Donnelly, Councillor for the North Coast Region, NSW Aboriginal Land Council
- Mr Brendan Moyle, Chief Executive Officer, Darkinjung Local Aboriginal Land Council
- Mr Nathan Moran, Chief Executive Officer, Metropolitan Local Aboriginal Land Council (via videoconference)

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Paul Carr, Chairperson, Three Rivers Regional Assembly, NSW Coalition of Aboriginal Regional Alliances (via videoconference)
- Mr Geoff Maher, Deputy Chairperson, Illawarra Wingecarribee Alliance Aboriginal Corporation, NSW Coalition of Aboriginal Regional Alliances (via videoconference)

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Paul Knight, Representative, Aboriginal Cultural Heritage Advisory Committee (via videoconference)

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Kazan Brown, Gundungurra woman, client of the Environmental Defenders Office (via videoconference)
- Mr Scott Franks, Wonnarua man, client of the Environmental Defenders Office
- Ms Rachael Chick, Senior Solicitor, Environmental Defenders Office

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined

- Mr Roy Ah-See, Co-Chair, Uluru Dialogue (via videoconference)

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Josh Pallas, President, New South Wales Council of Civil Liberties

The evidence concluded and the witness withdrew.

The public hearing concluded at 4.40 pm.

#### **4.8 Hearing schedule for 4 October 2022**

Resolved, on the motion of Ms Sharpe: That the committee agree to the Chair's draft hearing schedule for the hearing on 4 October 2022.

### **5. Adjournment**

The committee adjourned at 4.46 pm, until Tuesday 4 October 2022, 9.00 am, Macquarie Room (second hearing for the Aboriginal Cultural Heritage Bill inquiry).

Emily Treeby

**Committee Clerk**

#### **Minutes no. 87**

Tuesday 4 October 2022

Portfolio Committee No. 7 – Planning and Environment

Macquarie Room, Parliament House, Sydney at 9.15 am

#### **1. Members present**

Ms Higginson, *Chair*

Mr Barrett

Ms Jackson (until 5.25 pm)

Mrs MacDonald (from 9.28 am)

Mr Mallard (from 1.30 pm)

Revd Nile (participating)

Ms Sharpe (via videoconference)

#### **2. Apologies**

Mr Pearson, *Deputy Chair*

#### **3. Minutes**

Resolved, on the motion of Sharpe: That draft minutes no. 85 and 86 be confirmed.

#### 4. Correspondence

The committee noted the following items of correspondence:

##### *Received:*

- 15 September 2022 – Email from Greg Bondar, National Director, Christian Voice Australia, requesting to appear at hearing on 4 October 2022 for the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 26 September 2022 – Email from Vicky Kuek, Principal Policy Lawyer, Policy and Practice, The Law Society of New South Wales to secretariat, regarding late submission to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 27 September 2022 – Email from Mia Garrido, A/Executive Director, Governance, Strategy and Coordination, Environment and Heritage Group, Department of Planning and Environment, decline on behalf of Heritage NSW and Department of Planning and Environment to appear at public hearing on 4 October 2022 for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 27 September 2022 – Email from Mr Robert Syron, regarding matters relating to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, including attachment
- 28 September 2022 – Email from Mr Robert Syron to secretariat, regarding matters relating to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, including attachments
- 4 October 2022 – Email from Renee Austin NSW Farmers, Senior Policy Advisor – Environment, NSW Farmers' Association, regarding withdrawal of appearance at public hearing on 4 October 2022 for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022.

##### *Sent:*

- 27 September 2022 – Email to Mr Greg Bondar, National Director, Christian Voice Australia from secretariat, regarding invitation to public forum on 4 October 2022 for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, including attachments
- 29 September 2022 – Email to Dr Stuart Barlore, Dean and Head, Gribi College of Indigenous Australian Peoples from secretariat, regarding invitation to public forum on 4 October 2022 for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, including attachments.

Resolved, on the motion of Mr Barrett: That the committee keep the correspondence from Mr Robert Syron, regarding matters relating to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, dated 27 September 2022 and 28 September 2022 confidential, as it contains potential adverse mention.

#### 5. Inquiry into Budget Estimates 2022-2023 – supplementary hearings

##### 5.1 Supplementary hearings

Resolved, on the motion of Ms Sharpe: That the committee hold no further hearings to consider matters relating to the portfolios of Environment and Heritage / Local Government / Planning, Homes.

#### 6. Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

##### 6.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 22, 23, 24 and 25.

##### 6.2 Report deliberative

The report deliberative on 3 November 2022 is to commence at 9.00 am.

##### 6.3 Public hearing

The committee proceeded to take evidence in public.

Witnesses were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings, virtual participation etiquette and other matters.

The following witness was sworn and examined:

- Mr Geoffrey Winters, Chief Executive Officer, Just Reinvest NSW

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Andrew Abbey, Policy Director, NSW Minerals Council (via videoconference)

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Nic Clyde, NSW Coordinator, Lock the Gate Alliance (via videoconference)
- Ms Karra Kinchela, Narrabri Community Outreach Coordinator, Lock the Gate Alliance (via videoconference)
- Yinnaar Burrim Jane Delaney-John, Representative, Gomeroi Traditional Custodians (via teleconference)

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Dalliss Ramage, Director, One Connection Aboriginal Disability Services (via videoconference)
- Mrs Rose Lovelock, Elder / Director, Armidale Aboriginal Cultural Centre and Keeping Place (via videoconference)
- Ms Mavis Ahoy, Elder / Panel member, Armidale Aboriginal Cultural Centre and Keeping Place (via videoconference)
- Mr Reece Sheumack, Aboriginal Community Engagement & Culture Officer, Armidale Community Corrections (via videoconference)

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined

- Mr Robert Syron, Registered Aboriginal Owner through the Office of the Registrar and Australian War Veteran (via teleconference)
- Mr Michael Young, Community member (via videoconference)

Mr Young tendered the following documents:

- Map of Nations in Broken Hill area
- Biography on Nellie Johnston

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Virginia Robinson, Secretary, Dharriwaa Elders Group (via videoconference)
- Ms Wendy Spencer, Project Manager, Dharriwaa Elders Group (via videoconference)

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.40 pm.

#### 6.4 Public forum

The Chair made an opening statement regarding the broadcasting of proceedings, guidelines for the public forum and other matters.

The following witness was sworn and addressed the committee.

- Mr Greg Bondar
- Mr Kevin Duncan
- Dr Tim Owen

The evidence concluded and the speakers withdrew.

The public forum concluded at 5.40 pm.

#### 6.5 Tended documents

Resolved, on the motion of Mr Barrett: That the committee accept and publish the following documents tendered during the public hearing:

- Map of Nations in Broken Hill area, tendered by Mr Michael Young
- Biography on Nellie Johnston, tendered by Mr Michael Young

### 7. Adjournment

The committee adjourned at 5.43 pm, until Thursday 3 November 2022, 9.00 am, Room 1136 (report deliberative for the Aboriginal Cultural Heritage Bill inquiry).

Emily Treeby

**Committee Clerk**

#### Draft minutes no. 88

Thursday 3 November 2022

Portfolio Committee No. 7 – Planning and Environment

Room 1136, Parliament House, Sydney, 9.03 am

#### 1. Members present

Ms Higginson, *Chair*  
 Mr Pearson, *Deputy Chair* (via videoconference)  
 Mr Barrett (via videoconference)  
 Ms Jackson (via videoconference)  
 Mrs MacDonald  
 Mr Mallard (via videoconference)  
 Revd Nile (participating)  
 Ms Sharpe (via videoconference)

#### 2. Previous minutes

Resolved, on the motion of Mrs MacDonald: That draft minutes no. 87 be confirmed.

#### 3. Correspondence

The committee noted the following items of correspondence:

##### **Received:**

- 15 September 2022 – Email from Mr Nic Clyde, NSW Coordinator, Lock the Gate Alliance, to secretariat, regarding extension request to provide a submission to the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 13 October 2022 – Email from Ms Mishka Holt, Principal Solicitor, NTSCORP Limited, regarding answers to supplementary questions for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

- 17 October 2022 – Email from Ms Mishka Holt, Principal Solicitor, NTSCORP Limited, regarding answers to supplementary questions for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022.

***Sent:***

- 12 October 2022 – Email from secretariat, to Mr Michael Bell, Chairperson, NTSCORP Limited, regarding answers to supplementary questions for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022
- 14 October 2022 – Email from secretariat, to Ms Mishka Holt, Principal Solicitor, NTSCORP Limited, regarding answers to supplementary questions for the inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022.

#### **4. Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022**

##### **4.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 13a, 26 and 27.

##### **4.2 Answers to questions on notice**

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Mr Paul Knight, Representative, Aboriginal Cultural Heritage Advisory Committee, received on 30 September 2022 (previously circulated).
- answers to questions on notice from Mr Josh Pallas, President, New South Wales Council of Civil Liberties, received on 3 October 2022 (previously circulated).
- answers to questions on notice from Mr Shane Hamilton, Deputy Secretary, Aboriginal Affairs NSW, received on 11 October 2022 (previously circulated).

##### **4.3 Report on the online questionnaire**

The committee noted that the online questionnaire report was circulated to members on 11 October 2022. As there were no objections to the report's publication, it was published on the committee's webpage in accordance with the committee's resolution on 11 August 2022.

##### **4.4 Consideration of Chair's draft report**

The Chair submitted her draft report entitled *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022*, which, having been previously circulated, was taken as being read.

Resolved, on the motion of Ms Sharpe: That paragraph 3.108 be omitted: 'The committee believes the bill has merit and should proceed to debate, while recognising that amendments may be needed. The committee recommends that debate on the bill is informed by committee comments and stakeholders' views expressed in this report', and the following new paragraph be inserted instead:

'The committee believes the bill has merit, however, the limited time frame for consultation and the issues raised by those who were able to participate mean that amendments will be required and ideally further consultation should be undertaken on the drafting of those amendments. The committee recommends that the bill be referred back to the House and the debate and development of further amendments be informed by committee comments and stakeholders' views expressed in this report.'

Resolved, on the motion of Ms Sharpe: That Recommendation 1 be omitted: 'That the Legislative Council proceed to debate the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022, and that the committee comments and stakeholders' views expressed in this report be taken into account during debate in the House', and the following new recommendation be inserted instead:

'The committee believes the bill has merit and should be referred back to the House. The committee recommends that debate on the bill is informed by committee comments, stakeholders' views expressed in this report and that any amendments include further consultation with stakeholders'.

Resolved, on the motion of Mr Pearson: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, tabled documents, answers to questions on notice, summary report of the online questionnaire and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions and individual responses to the online questionnaire be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- The report to be tabled in the House on Tuesday 8 November 2022;

**5. Adjournment**

The committee adjourned at 9.19 am, until Friday 18 November 2022, 10.00 am, Room 1136, Parliament House (Biodiversity Offsets inquiry report deliberative).

Emily Treeby  
**Committee Clerk**



