

**Submission
No 15**

**INQUIRY INTO ABORIGINAL CULTURAL HERITAGE
(CULTURE IS IDENTITY) BILL 2022**

Organisation: NSW Minerals Council

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Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

NSW Minerals Council Submission – September 2022

The NSW Minerals Council (NSWMC) appreciates the opportunity to comment on the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022* which was referred to Portfolio Committee No. 7 for inquiry and report.

NSWMC represents the State's \$26 billion minerals industry, with around 75 member companies ranging from small exploration companies to large international mining companies, as well as associated service providers.

The NSW mining industry respects the strong connection that Aboriginal people have to the land. The industry works closely with local Indigenous stakeholders in regional NSW, and we understand our responsibility to properly manage Indigenous cultural heritage matters in areas where mining occurs.

Consistent with the State's assessment framework, the industry works closely with communities who assist in identifying important cultural and heritage information so that a full understanding of the values and history can be obtained, and appropriate responses identified before projects are approved and mining can commence.

During the operational life of a mine, companies will work closely with communities over years to ensure Aboriginal Cultural Heritage impacts are managed consistent with the conditions of consent.

The NSW mining industry also works alongside local Indigenous Community groups to help close the employment gap and support Aboriginal-owned businesses.

The industry directly employs around 34,000 people in NSW¹ according to the ABS, and supports the jobs of many thousands more people indirectly. According to analysis of Census data by the ABC in late 2020, Indigenous Australians account for 3.8% of the mining workforce, well above the average 1.7% Indigenous employment rate for all industries².

In the Hunter Valley 7.5% of employed Indigenous Australians work directly for coal mining in 2016, making it the most common industry of employment³ for Indigenous Australians in that region. In the same region 3.86% of all employees in coal mining were indigenous Australians, which is above the National average of 1.7% Indigenous employment rate for all industries.

¹ Table 05. Employed persons by State, Territory and Industry division of main job (ANZSIC) [Labour Force, Australia, Detailed, June 2022 | Australian Bureau of Statistics](#)

² [Matt Canavan says mining employs Indigenous people at a greater rate than any other industry. Is he correct? - ABC News](#)

³ [2016 Hunter Valley exc Newcastle. Census Aboriginal and/or Torres Strait Islander people QuickStats | Australian Bureau of Statistics](#)

For example, Whitehaven is the largest private sector employer of Indigenous Australians in regional NSW, and around “9% of its workforce identifies as First Nations people and at Maules Creek, our largest mine, the proportion is around 20%”⁴. Similarly, Iluka resources is committed to an 8% Aboriginal participation in the workforce by 31 December 2023 - at the end of 2019, Aboriginal participation was 7%⁵.

Glencore has also implemented its Indigenous Employment Pathways program, to provide participants with the experience and job-readiness skills for Indigenous Australians who live in or have connection to the areas where we operate in Queensland and the New South Wales Upper Hunter areas⁶. BHP also achieved its national Indigenous employment target of 8% across its Australian operations three years ahead of schedule⁷.

The NSW mining industry also supports a range of local businesses such as Blackrock Industries, demonstrating what can be achieved to provide employment opportunities, particularly to Indigenous Australians⁸. The company contracts workers to MACH Energy Australia, Thiess, BHP and Malabar among other NSWMC member companies.

In addition to employment opportunities, the NSW mining industry supports a range of Indigenous community initiatives. Examples include Yancoals (and other mining companies) support of the Clontarf Foundation⁹, Mach Energys Aboriginal Community Development Fund¹⁰, Evolutions Indigenous Business Development funding program¹¹, Cultural Awareness Camps contributed to by Malabar Resources, Idemitsu Australia Resources’ educational resource that can be used to improve cultural awareness and understanding of the Kamilaroi Nation¹², Newcrest Tertiary Scholarship program¹³ to name a few.

Cultural Heritage Reform in NSW

Substantive reforms to Aboriginal Cultural Heritage (ACH) protection in NSW have been proposed since at least 2010. Over the last decade there have been various discussion papers and stakeholder engagement processes, culminating in a draft Bill being put forward by the NSW Government in 2018.

Reforms to ACH protection in NSW are long overdue. Deficiencies of the NSW ACH framework were brought into sharp focus by the Joint Standing Committee on Northern Australia inquiry into *the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*¹⁴.

The NSW mining industry supports the modernisation of NSW cultural heritage protections laws through the development of stand-alone legislation.

Despite the delays around ACH reforms, 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.

⁴ [Indigenous engagement - Whitehaven Coal](#)

⁵ <https://iluka.com/2019-sustainability-report/people/diversity-and-inclusion>

⁶ <https://www.glencore.com.au/operations-and-projects/coal/careers/indigenous-employment-pathways-program>

⁷ <https://www.bhp.com/news/articles/2022/04/indigenous-employment-target-reached-ahead-of-schedule>

⁸ [Indigenous Jobs Program Driving ‘Real, Lasting Change’ in Community](#)

⁹ [Community - Yancoal](#)

¹⁰ [ACDF - MACH Energy Australia](#)

¹¹ <https://evolutionmining.com.au/indigenous-business-development/>

¹² [Idemitsu Backed Documentary Project ‘The Kamilaroi’ Wins Award at NSW Mining HSEC Awards Dinner](#)

¹³ <https://www.cadiavalley.com.au/site/scholarships>

¹⁴ [A Way Forward – Parliament of Australia](#)

The NSW Government has a crucial role in both supporting a high standard of protection for cultural heritage, as well as establishing a stable, predictable and clear framework for investment in the State.

In this context, NSWMC and its members urge the NSW Government to complete the Aboriginal Cultural Heritage reform program previously commenced, which should include consultation.

Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

The objective of the *Aboriginal Cultural Heritage (Culture is Identity Bill) 2022 (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.’

The Bill follows a previous draft *Aboriginal Cultural Heritage Bill 2018* that was published for consultation in early 2018 by the NSW Government following extensive engagement with various stakeholders.

NSWMC submits the following comments to assist the Committee in its deliberations on the Bill.

The broader objectives of the Bill are commendable including modernisation and strengthening of the NSW AHC protection framework, and removing ACH from the *National Parks and Wildlife Act 1974* and creating stand alone legislation

However, there are concerns around the process of the Bill’s development, and concerns regarding some elements of the Bill itself.

Policy Implementation : NSW Better Regulation Guidelines

The Bill defers substantial powers to subordinate legislation and other policy guidelines, none of which are available for comment.

New regulation should be developed and implemented consistently with the seven better regulation principles as outlined in the NSW Guide to Better Regulation¹⁵. The primary purpose of regulatory impact statements is to ensure that the economic and social costs and benefits of regulatory proposals are examined fully so those proposing the regulations and members of the community can be satisfied that the benefits of the regulations exceed the costs¹⁶. This includes open and transparent consultation with industries, business and the community, as well as a robust evaluation of costs and benefits of any new regulation.

It’s acknowledged this is a Private Members Bill. Nonetheless, the Bill proposes to implement a new comprehensive ACH management framework that involves the establishment of an ACH Council, and numerous new local ACH Services. Substantial powers are delegated to subordinate legislation and other policy guidelines. The ACH Council and local ACH services would be tasked with a wide range of administrative, regulatory, compliance and approvals functions, effectively overseeing and administering the new ACH framework to support the objectives of the legislation.

¹⁵ [NSW Government Guide to Better Regulation](#)

¹⁶ [Regulatory Impact Statements](#)

The proposed ACH protection framework would require a comprehensive governance, support and administrative framework to support its functions.

While the broader objective of modernising ACH protection is supported, there are numerous questions which don't appear to have been addressed. Issues include:

- An assessment of costs and benefits, and the potential impacts of the proposed ACH framework (see Table 1 of the Better Regulation Guideline)
- Identification of all groups affected by the proposed framework, and the extent to which they are affected (cost, time, benefit)
- An analysis of financial, economic, social and environmental impacts including both direct and indirect costs and benefits
- An understanding of cumulative regulatory burden, risk and uncertainty associated with the new ACH framework
- Details of the implementation strategy setting out how the proposal would be implemented (e.g timing, transition arrangements, capacity building) and enforced, and defining roles and responsibilities (e.g. between the public service and the ACH)
- An understanding of the level of compliance impact associated with the new ACH framework, and are the burdens applied equally/consistently across different groups

This version of an ACH protection framework has not been subject to any broader community and stakeholder consultation (that NSWMC is aware of), or opportunity for affected stakeholders to meaningfully engage on proposed reform options and impacts before preparing legislation. Furthermore, substantial powers are deferred to subordinate legislation and other policy guidelines, none of which have been made available for consultation. Without access to these enabling components, it's not possible to understand the actual impacts of the Bill and provide meaningful feedback.

A detailed implementation plan has not been made available for comment. For such a comprehensive regulatory system, including the creation of new authorities/entities with wide ranging regulatory powers, at a minimum there should be an implementation framework that outlines funding, resourcing, timing, transition arrangements etc.

Regulatory impact matters (particularly costs / benefits) would typically be investigated by the Government as part of a comprehensive and transparent package, including consultation with all stakeholders, so all impacts of the proposed new framework would be understood and planned for as part of a coordinated implementation program. Regulations (and other subordinate legislation) would typically be reported on through a Regulatory Impact Statement prepared by the Government.

Despite the delays around ACH reforms that have occurred to date, the Government is realistically best placed to deliver the reforms, and therefore must maintain responsibility for developing any new ACH framework if it is to be effective and practical, and achieve timely implementation.

NSWMC and its members urge the NSW Government to complete the Aboriginal Cultural Heritage reform program previously commenced, which should include consultation.

Lack of Integration with the Development Assessment Process

Clause 11 of the Bill requires that any development (whether or not it requires development consent) must not be carried out unless it is carried out in accordance with the requirements of the Act. This includes development for which consent has already been granted, or for which consent is not required. There is no guidance or explanation as to how, or the extent of application of the legislation to existing approved development.

Clause 11(2) of the Bill proposes to install a “gateway” process for all new development across NSW, including State Significant Development (SSD) and State Significant Infrastructure (SSI), if an ACH permit or ACH management plan is required. Where an ACH permit or ACH management plan is required, a proponent is not allowed to lodge a development application or planning proposal with a consent authority unless the ACH permit or ACH management plan is approved by the ACH Council.

The Bill does not include any independent review or appeal mechanism if the ACH Council refuses to grant an ACH permit or ACH management plan, meaning a proponent would not be able to lodge an application with a consent authority. This means that for any new development or rezoning proposal, the ACH Council would be able to unilaterally veto development, without any appeal rights.

The proposed ACH framework would operate outside of the NSW development assessment process, but directly impacts the ability of developments to even be considered. The right of veto decision by the ACH Council based on the ACH grounds outlined in the Bill, doesn't provide any opportunity to account for other broader benefits or costs as part of the decision making process (e.g jobs, other social and economic benefits, other public interest matters).

The practical implication of this approach is that for the affected projects, the Government would cede all control over development to the ACH Council and decisions would be based entirely on ACH grounds, without any ability to consider broader environmental, social and economic factors associated with a project. For development projects, and particularly more complex projects (e.g SSD & SSI), these broader matters are typically weighed up and resolved through a holistic development assessment process.

The proposed ACH framework shares similarities to the Victorian, Queensland and recently enacted Western Australia Cultural Heritage legislative frameworks. However, there are important differences, particularly where it relates to ACH decisions being integrated with the assessment process and the ability to appeal or review decisions.

Integration with the assessment process - Development applications are allowed to proceed to assessment before a CHMP is finalised. In Victoria and Queensland, the cultural heritage legislation only prohibits the consent authority from granting development approval if an approved CHMP has not been obtained. In Western Australia, a project can be determined prior to a CHMP being finalised.

Decisions on CHMPs can be appealed - If an application for a CHMP is refused a proponent can, after a failed mediation or assistance to reach agreement, appeal the matter to the relevant Court (VCAT in Victoria¹⁷, Land Court in Queensland¹⁸), or the Minister in Western Australia.¹⁹

¹⁷<https://www.vcat.vic.gov.au/case-types/traditional-owners-and-aboriginal-heritage/cultural-heritage-management-disputes>

¹⁸ [Jurisdiction | Queensland Courts](#)

¹⁹ [Aboriginal Cultural Heritage Act 2021](#)

Comparison of ACH Legislation Provisions Between States*

Assumes a CHMP is required for a project	NSW Bill	WA Legislation	QLD Legislation	VIC Legislation
Right of Veto over development (based on ability to appeal/review decisions)	✓	✗	✗	✗
Development application can be lodged before CHMP approval obtained	✗ S.11 - Approved CHMP required before lodgement	✓ S.134 - Required before commencement (after approval)	✓ S.87,88 - Does not prevent lodgement of application	✓ S.52 - Does not prevent lodgement of application
Appeal/Review Rights where CHMP is refused refusal by the ACH Council	✗ No appeal right for ACHC refusal of CHMP	✓ S.155,157 - Can refer to Minister for decision	✓ S.111 - Appeal rights to Land Court	✓ S.116 - Appeal rights to VCAT
Independent mediation if CHMP cannot be agreed	✓ S. 126 - ACHC can appoint(or acts as) a mediator	✓ S.160 - ACHC can appoint (or act as) a mediator	✓ S.106 - Consultation party can refer to Land Court for mediation	✓ S.113 - ACHC can appoint a mediator
CHMP suspension / cancellation powers by <u>Minister only</u>	✗ S.122, s.133 - ACHC has power to suspend or cancel CHMP - No minister involvement	✓ S.154, s.168 - Only Minister has power to suspend or cancel CHMP	No suspension or cancellation powers	No suspension or cancellation powers s.86(3) Minister has power to amend a CHMP after an Audit is undertaken
Review / appeal Rights of cancellation or suspension of CHMP	✓ S.236 - Limited to Review to NCAT for CHMP suspension/ cancellation.	✓ S.277 - Review of CHMP suspended or canceled by the Minister. Review to SAT	N/A	N/A
Minister only has Power to Approve/ Refuse Protected Areas	✗ S.60 - ACH Council has power to make Protected Areas	✓ S.81- Minister makes decision based on recommendation of ACH Council	No Protected Area Provision	No Protected Area Provision
Review or Appeal Rights if Protected Area approved	✗ S.236 only allows review by NCAT if Protected Area is refused by ACHC	✗ Note - Minister only makes decision	N/A	N/A

Note: Northern Territory legislation has not been reviewed/benchmarked because of differences in structure of legislation. It's noted NT Land Councils have a "right of veto" for exploration activities over land that is owned by NT Land Councils which is approximately 50% of the State.

As noted by the Commonwealth Productivity Commission report into Resources Sector Regulation in its detailed consideration on ACH relating to resource projects, "while the aim should be to achieve

*agreement about measures to protect heritage, this may not always occur. It is important that both traditional owners and project proponents are able to seek a resolution on whether or how a project can proceed from an independent decision maker*²⁰.

Decisions should generally be able to be appealed or reviewed, particularly where the decision is made on a single issue by an administrator who is responsible for the regulatory framework. In such circumstances appeal or review provisions add the necessary checks and balances.

For planning decisions, most states support integrating the assessment of the broad range of issues/impacts, and implementing a system where decision makers can weigh up all issues, and make balanced decisions. This is particularly the case for larger scale projects such as infrastructure, renewable energy projects, land rezoning/release for housing development, resource projects, large scale agriculture etc.

Any new ACH protection framework should be integrated into the development assessment process - not separated out as a stand alone or isolated gateway process that can stop a project, leaving no opportunity to consider all costs and benefits in an integrated manner.

Cwth Productivity Report : Resources Sector Regulation (p.250)

LEADING PRACTICE 8.2

Leading-practice heritage regimes:

- embed heritage engagement in the project assessment process, so that heritage is considered in the earliest stages of, and throughout the life of, a project, rather than being a 'final box to check' when other approvals have been obtained
- centre traditional owners in decision making about their heritage. This means, in the first instance, that project proponents seek agreement from traditional owners on how heritage impacts will be managed
- provide a process where both traditional owners and project proponents can seek dispute resolution or appeal a heritage decision.

Leading-practice examples include:

- the Victorian *Aboriginal Heritage Act 2006*, under which a cultural heritage management plan must be approved by the Registered Aboriginal Party before planning approval can be given
- the Queensland *Aboriginal Cultural Heritage Act 2003* which requires a negotiated agreement on heritage issues before a project can go ahead.

Integration does not preclude the ability to implement stand alone legislation, nor does it diminish the need for a comprehensive and rigorous assessment of impacts on ACH commenced early in the process. Strengthened and modernised requirements for early ACH assessment and engagement with the relevant Aboriginal parties under any new stand alone legislation can be readily incorporated in the existing planning framework, including for SSD and SSI projects.

The primary objective should be to reach agreement on cultural heritage impacts and management. Such an objective - including the ability for Aboriginal parties to freely disagree with the impacts of a project and express non-support for a project, could be similarly incorporated into the assessment process. After this process is completed, it should be integrated into the holistic assessment and

²⁰ P.249 - 250 www.pc.gov.au/inquiries/completed/resources/report/resources.pdf

decision making process where all the issues are balanced against each other in terms of costs and benefits.

An integrated approach is consistent with how ACH is dealt with in Victoria, Queensland and Western Australia. It is noted that in its final report - “A Way Forward”, by the Joint Standing Committee on Northern Australia, Victoria’s Aboriginal cultural heritage legislation was considered by many submitters as “the best in the country”²¹, while noting some criticisms remain.

Assessment of Cultural Heritage Undertaken in SSD & SSI Projects

SSD & SSI projects are complex and large scale, with a wide range of issues investigated as part of the assessment and balanced decision making process. Assessment requirements are listed in the Secretary's Environmental Assessment Requirements (SEARs). For cultural heritage, SEARs reference a full range of consultation and assessment requirements to be addressed in the EIS.

The table below provides a summary of ACH assessment requirements typically listed in SEARs.

Key Issues required to be assessed:		
Heritage: including: an assessment of the potential impacts of the development on Aboriginal heritage (cultural and archaeological), including consultation with relevant Aboriginal communities/parties and documentation of the views of these stakeholders regarding the likely impact of the development on their cultural heritage		
Land Resources	Noise & Blasting	Hazards
Air Quality	Visual	Social
Air Quality	Waste	Economic
Rehabilitation Final Landform	Water	Cumulative
Biodiversity	Traffic & Transport	
Consultation Requirements (Cultural Heritage Specific)		
During the preparation of the EIS, you must consult with relevant local, State and Commonwealth Government authorities, service providers, Aboriginal stakeholders, community groups and affected landowners.		
The EIS must: describe the consultation process used and demonstrate that effective consultation has occurred; describe the issues raised; identify where the design of the development has been amended and/or mitigation proposed to address issues raised; and otherwise demonstrate that issues raised have been appropriately addressed in the assessment.		
Environmental Planning Instruments, Policies, Guidelines & Plans (Cultural Heritage Specific)		
The Burra Charter (The Australia ICOMOS charter for places of cultural significance)	Aboriginal Cultural Heritage Consultation Requirements for Proponents (OEH)	Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW 2010(DECW)
Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW 2010(DECW)	Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW (OEH)	Assessing Significance for Historical Archaeological Sites and Relics 2009 (OEH)

source: [Typical SEARs for Resources Project](#)

Each of the issues, whether it relates to impacts on local communities, economic benefits, water, air, Aboriginal cultural heritage, European heritage, social and economic issues, transport, agricultural

²¹ Section 5.39 [A Way Forward](#)

land, or others, are subject to a lengthy and detailed investigation and analysis process by the proponent. This includes stringent consultation requirements with stakeholders, including multiple registered Aboriginal parties, which typically take place over years prior to the lodgement of the application for approval.

Any modernised and strengthened ACH assessment and consultation requirements can be integrated into the existing assessment framework. This is consistent with the approach taken in other States.

The formal assessment by the Planning Department is rigorous and transparent, and includes further consultation and engagement with stakeholders and Government Agencies, as well as public consultation. Once the Planning Department completes its assessment, SSD projects are typically referred to the NSW Independent Planning Commission (IPC) for its determination, and SSI projects are determined by the Minister for Planning.

The IPC *“is a standalone decision-making body. It operates independently of the Department of Planning and Environment (DPE) and other government departments and is not subject to the direction or control of the Minister for Planning, except in relation to procedural matters”*²². In exercising its functions, there are certain things they don't do such as: make policy; undertake whole-of-government assessments or enforce conditions of consent. In this regard the IPC is an independent decision making body.

For the assessment and determination of SSD and SSI projects, the process involves detailed technical studies on multiple issues, involves years of preparation, including engagement with stakeholders, and involves significant resources and cost. For large scale projects like resources and infrastructure, it's not uncommon for the process (conception to operation) to take over 10+ years to achieve a final determination.

If a project is approved, it is subject to a significant number of conditions. For ACH on resources projects, this includes specific requirements around cultural heritage protection, including long term management, and ongoing consultation with Registered Aboriginal Parties.

Based on the comprehensive and rigorous assessment of projects and independent decision making under the SSD and SSI assessment process, the right of veto before a project can even enter the assessment process is incongruous to good and balanced decision making. This is further exacerbated given the lack of power to have these decisions reviewed.

As noted, the ACH Council deliberations would be limited to cultural heritage impacts alone, without consideration of the full range of issues, costs and benefits associated with a development. Such an approach would introduce significant uncertainty, placing an inordinate emphasis on the 'gateway' process, relative to the established development assessment processes.

For complex projects governments are best placed to make balanced and informed decisions on whether or not development is allowed after weighing up all aspects of a project through a comprehensive assessment process. This is consistent with the approach taken in other states.^{23,24,25}

²² [Independent Planning Commission - About our agency](#)

²³ QLD EIS Process [About the EIS process | Environment, land and water | Queensland Government](#)

²⁴ VIC EES Process [What is the EES process in Victoria?](#)

²⁵ WA EPA Process [EPA Environmental Impact Assessment](#)

Other Matters

The following outlines a range of other issues identified in the Bill for the Committees consideration.

Appeal Rights & Approval Uncertainty - As noted, there are no appeal rights for proponents of applications for ACH permits or CHMPs if those applications are refused. However there is an appeal right for persons required to be consulted in respect of an ACH management plan if the CHMP is approved. The appeal rights therefore give proponents no avenue for appeal should an application for approval be refused, whilst at the same time provide Aboriginal parties rights to appeal any plan that is approved. Such limited and unbalanced appeal rights would introduce significant uncertainty for proponents.

Use of NSW Civil & Administrative Tribunal for Reviews - Clause 236 of the Bill contains very limited administrative review rights to NCAT, which extend only to a small sub-set of decisions and apply only to limited affected persons. These reviews can only be brought to NCAT who are not experienced with dealing with matters of this kind. Typically environmental matters are heard by the Land and Environment Court where matters are heard by commissioners and judges who have experience in environmental laws, including ACH. NCAT is not an appropriate appeal body for this type of legislation.

Designation of local ACH services - The Bill provides for the designation of a local ACH service for areas of the State, however it is unclear as to the basis on which an entity would be selected. Clause 23(1) provides:

(1) The ACH Council may determine the entity to be designated as the local ACH service for an area subject to the Commonwealth law, cultural rights and legal rights of interested Aboriginal parties to Aboriginal cultural heritage on or of the land.

'Interested Aboriginal parties' includes Aboriginal owners of the land, a Local Aboriginal Land Council and a registered native title body corporate for the area. In circumstances where there may be multiple interested Aboriginal parties, with potentially different interests and priorities, it is unclear how a local ACH service would be designated, which could create significant uncertainty, stability and delays in the implementation of the legislation.

Confirmation process to confirm type of approval required - Clause 79 requires a proponent to seek confirmation about a proposed activity before it submits an application for an ACH permit or ACH management plan. The ACH Council may then confirm that the activity is either 'tier 1' (no to low levels of ground disturbance) or 'tier 2' (moderate to high level of ground disturbance) and must then direct a person to apply for an ACH permit or a ACH management plan as the ACH Council considers appropriate for the proposed activity.

The power in the Bill mirrors the Western Australian ACH legislation. However, the WA legislation notes a proponent 'may' seek this advice²⁶ - it is not compulsory.

It is unclear as to why this initial assessment is required by the ACH Council, and the considerations that will be applied by the ACH Council in determining whether an ACH permit or ACH management plan is required for certain activities.

²⁶ Western Australian Legislation (S.104) [Aboriginal Cultural Heritage Act 2021](#)

Whilst the concept of an authorisation from the ACH Council for activities that may impact ACH is supported, the legislation should make it clear as to when an ACH permit or an ACH management plan will be required without this being something that is determined on a case by case basis by the ACH Council.

Criteria for Approval or authorisation of ACH permit and ACH management plans - Clauses 90, 199 and 129 set out when the ACH Council may approve or authorise a ACH permit or ACH management plan. However each of these provisions contains different matters for which the ACH is to be satisfied, which creates confusion and uncertainty in the process.

For example, a ACH management plan that has not been agreed by each interested Aboriginal party can only be authorised (as opposed to 'approved') by the ACH Authority, and the criteria for authorisation are different to the criteria for approval of a ACH management plan that has been agreed by each interested Aboriginal party, including that an authorisation may only be granted if the likely impact on ACH will be minimal. These differences create confusion and uncertainty for all stakeholders, and also significant risk for proponents given development cannot be undertaken without one of these approvals being in place.

Uncertainty for proponents who hold ACH permits or approved ACH management plans - It is important that any planning or environmental permit or approval granted by any authority can be relied on by a proponent in carrying out an activity, subject to any actions taken (or not taken) by the proponent that may justify suspension or cancellation of the approval such as a breach of the approval. However the Bill includes provisions that would allow the ACH Council to suspend or cancel an approved/ authorised ACH permit or ACH management plan if it is no longer satisfied about a matter that it was satisfied of when it granted the approval initially (clauses 100, 122 and 133).

It's noted that the Suspension/Cancelation powers in the Bill have been copied from the Western Australian ACH legislation. However, there are important differences being in WA only the Minister has the power to Suspend or Cancel an approved CHMP or Permit.²⁷

The ability for the ACH Council to unilaterally suspend or cancel approvals based on a change in its satisfaction of various matters provides significant uncertainty to persons seeking to rely on those approvals (who may for example be part way through a development and have their approval cancelled). It is also inconsistent with other environmental laws which provide very limited and clear circumstances in which approvals may be cancelled/ suspended.

Identification of offences, penalties and defences - Part 5 of the Bill relates to Offences about harming Aboriginal cultural heritage. Division 2 contains numerous offences, including for 'serious', 'material' or any harm to ACH. These offences are criminal offences that carry significant penalties (discussed further below). The definitions of 'serious' and 'material' and each of the offence provisions are highly ambiguous in their current form and inconsistent with other environmental legislation in NSW.

The drafting of the offence provisions raises questions about the elements of each offence (including the level of knowledge or intention required to be held by the person alleged to have committed the offence), and whether or not they are strict liability offences – these are critical aspects of any criminal offence provisions in legislation.

²⁷ Western Australian Legislation (S.154,s.168) [Aboriginal Cultural Heritage Act 2021](#)

The definitions in this section are unclear and potentially capable of widely differing interpretations. In particular 'serious' includes harm of a 'high impact' which is very subjective. 'Material' harm is defined as harm 'that is not trivial or negligible' however there is also a separate offence for harm to ACH that is neither serious or material which could result in criminal liability for harm that is only trivial or negligible, with a maximum penalty of \$550,000 for a body corporate (clause 72).

Clause 70 of the Bill refers to an offence of serious harm to ACH, including by 'accident'. The term 'By accident' is not recognised in criminal law in NSW, and would result in ambiguous and potentially unjust outcomes as the ACH Council and the court sought to interpret this element of the offence.

Finally, the maximum penalties that are proposed to be applied to the offences of serious or material harm to ACH are significantly higher than any other environmental legislation in NSW. The penalties in clause 69 (serious harm to ACH) include 180,000 penalty units for a body corporate, which applying the current penalty unit in NSW would equate to \$19,800,000. For 'accidental' serious harm to ACH, the maximum penalty is \$11,000,000. By way of comparison, typically the maximum penalties for offences under environmental legislation in NSW range from \$1M to \$5M.

Importantly, there are no defences in Part 5, Division 4 for persons who have conducted due diligence or taken 'reasonable steps' to determine whether ACH would be harmed by the activity and reasonably determined that no such harm would occur. This defence is currently included in the National Parks and Wildlife Act 1974 and formed part of the Government Bill. This defence is essential as without it, any person proposing to carry out any ground disturbance would need to obtain an ACH permit or an ACH management plan to avoid potential prosecution should their activity result in harm to ACH (even if the existence of ACH was not known to the person at time of carrying out the activity).

If a person has conducted sufficient due diligence in accordance with a prescribed code of practice or the like, and determined that no ACH is present, they should not then be required to obtain an ACH permit or management plan in order to protect themselves against a potential offence should harm to ACH unknowingly occur in carrying out the activity. This is a fundamental aspect of ACH regulation that is missing from the Bill. Additionally, there are no activities that are exempt from these provisions such as emergency works.

Investigations and enforcement / Inconsistencies with other environmental legislation in NSW -

Part 10 of the Bill contains provisions relating to compliance. The powers contained in these provisions generally extend far beyond equivalent provisions contained in existing NSW environmental legislation including the Protection of the Environment Operations Act 1997. The compliance powers, including inspections (particularly clauses 204 and 205) in their current form provide very broad powers to nominated persons, and should be consistent with other NSW environmental legislation. Similarly Part 11 relating to legal proceedings is inconsistent with other environmental legislation in form or content.

Governance/ accountability of the ACH Council - The Bill provides for the constitution of the Aboriginal Cultural Heritage Council (ACH Council) which will have a broad range of functions including making decisions in relation to ACH permits and ACH management plans, issuing stop work and other orders and providing advice to the Minister in relation to certain matters. Clause 13(2) provides that the ACH Council is a body corporate and clause 13(3) that the ACH Council is not subject to the direction or control of the Minister. The composition and procedures of the ACH Council are set out in Schedule 1.

Schedule 1 of the Bill provides very little detail about the governance or accountability of the ACH Council. For example, there is no provision for the ACH Council to be managed by a Board nor any details of how any issues of pecuniary interests or other potential conflicts of interest may be dealt with. Whilst a number of regulators and other bodies exist within NSW who perform regulatory functions and who are not subject to the direction or control of the Minister, such as the Natural Resources Access Regulator and the Biodiversity Conservation Trust, these bodies are NSW government agencies or statutory bodies representing the Crown and are required to have a Board. Given the significance of this legislation, it is important that the ACH Council be governed in an appropriate manner consistent with other similar authorities in NSW.

Legislative Review Committee

The Culture is Identity Bill was reviewed by the Legislative Review Committee, which reported on 9 August 2022²⁸. The Legislation Review Committee reports on impacts on personal rights and liberties.

The Committee's review raised a number of issues around trespassing on personal rights and liberties, makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, and inappropriately delegates legislative powers. All of the issues raised by the Legislative Review Committee should be comprehensively addressed in a transparent manner.

Examples of issues raised by the Committee include:

- Limitations on review of decisions made by the ACH Council - *In a number of circumstances, ACH Council decisions are not subject to review. Removing the right to administrative review of Council decisions may limit procedural fairness and the right of persons to have decisions independently reviewed....the right to review administrative decisions provides additional protection for individuals impacted by a decision of the ACH Council.*
- Matters deferred to the regulations - *The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny particularly where the rights or obligations of individuals may be affected. The Committee notes that the Bill provides that the regulation may proscribe offences with a maximum penalty not exceeding \$22 000, which is a significant penalty to impose on an individual.*
- Delegation powers - *the ACH Council may delegate its powers or duties in relation to a number of provisions to a member or staff member of the ACH Council, a committee of the ACH Council or a Aboriginal Land Council (section 15). The Committee notes that the ACH Council is provided with significant powers and functions, particularly regarding enforcement powers. The Committee usually prefers that provisions about delegations are drafted with a higher level of specificity.*
- Incorporation of extrinsic material - *The ACH Council have powers in the Bill to make and issue Guidelines and policies and procedures. The Guidelines and policies and procedures may have an impact on the rights of individuals to access the services of the ACH Council and Local Services, as well as their responsibilities in regards to Aboriginal cultural heritage. Therefore, the Committee notes that the rights and responsibilities of individuals may be subject to these documents, which are not legislative instruments that are subject to Parliamentary scrutiny or disallowance.*

²⁸ [Legislation Review Digest No. 46/57 - 9 August 2022](#)