

**ABORIGINAL CULTURAL
HERITAGE REFORMS
NSWMC SUBMISSION**

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NSW MINERALS COUNCIL



NSW Minerals Council

PO Box H367
Australia Square NSW 1215
ABN 42 002 500 316
E: information@nswmining.com.au

www.nswmining.com.au



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1 Executive Summary

The NSW Minerals Council (NSWMC) supports the intent behind the Aboriginal Cultural Heritage reforms and the proposed Aboriginal Cultural Heritage Bill (ACH Bill). The minerals industry has an important role in Aboriginal cultural heritage (ACH) in NSW and is committed to appropriate management of cultural heritage while maintaining the industry's ability to operate effectively.

There are many aspects of the proposed model with merit including the commitment to stand-alone legislation; provision of cultural heritage information through the ACH Information System, maps and strategic plans; as well as streamlined consultation processes with defined timeframes.

There is, however, a substantial lack of detail in key aspects of the proposed model with much of the detail to be determined at later stages through regulation and policies. The success of the proposed model as a whole will be determined by the effectiveness of this detail.

Consultation with stakeholders is pivotal in developing the further detail and clarity. This will allow feedback to be taken into account and to ensure transparency. The minerals industry has a wealth of experience it would be able to share to help understand potential challenges and develop an ACH system that is workable, transparent and follows good process.

One of the fundamental challenges in addressing ACH issues in projects is understanding who to consult with. The ACH Bill should spell out clearly whether the representation on the ACH Authority and local ACH Consultation Panels is to be limited to traditional owners or also include other Aboriginal people with a connection to Country. Faith and confidence of Aboriginal people in any system established is vital for it to be successful and functional.

This highlights the need for there to be clarity and sufficient detail in the processes that are established. The local ACH Consultation Panels should represent a one stop shop in consulting with relevant Aboriginal parties on ACH. Where a local ACH Consultation Panel has been consulted, the ACH Bill should be clear that a judicial review of a decision cannot be based on a failure to consult.

There remains a lack of clarity around how the ACH reforms will apply to State significant development (SSD). An ACH Management Plan in the context of SSD would more appropriately be prepared post approval. Management plans in a mining context are highly operational and as such are prepared post approval. OEHL should reconsider the use of the terminology "ACH Management Plan" in the context of major projects and consider whether a "Statement of Commitments" to be provided with the ACH assessment as part of the Environmental Impact Assessment (EIA) process, or similar terminology might be less confusing and better reflect the aim of the reforms. The consent authority should remain the relevant authority for determining SSD approvals. Where the ACH Authority does not agree with the proponent's proposals it may make a submission on the Environmental Impact Statement (EIS) with other government agencies.

The proposed ACH reforms are broad ranging and it is important that the right people are consulted and adequate resources invested in establishing the new system. In order to ensure the system is workable the implementation and ongoing operation of the system has to be properly funded by government. Where appropriate the system should build on what already exists. For example updating the Aboriginal Heritage Information Management System. To the extent that there are opportunities for standardisation, this will create efficiencies and make implementation of the ACH reforms easier.

NSWMC looks forward to continuing our involvement in, and contribution to this important reform process.

2 About the NSW Minerals Council

The NSW Minerals Council (NSWMC) represents the State's \$24.7 billion minerals industry.

NSWMC provides a single, united voice on behalf of our 90 members, ranging from junior exploration companies to international mining companies, as well as associated service providers.

Mining has and will continue to be a key economic driver for NSW. NSWMC works closely with government, industry groups, stakeholders and the community to foster a strong and sustainable minerals industry in NSW.

3 About this submission

This submission considers both the ACH Proposal Paper, *A proposed new legal framework* (OEH, 2017) (Proposal Paper) and the draft ACH Bill. The submission is structured to address the aims set out in the Proposal Paper.

The ACH Bill provides for amendments to section 89J of the *Environmental Planning and Assessment Act 1979* (NSW) providing that State significant development will be exempt from preparing an ACH Management Plan under the ACH Bill. However page 42 of the Proposal Paper states:

However, major projects will continue to be subject to Secretary's Environmental Assessment Requirements (SEAR), created under the EP&A Act, which will be updated to adopt the key features of the ACH Management Plan negotiation process and supporting guidelines.

In many cases, major projects will create equivalent management plans for consideration by the Minister for Planning, Department of Planning and Environment or the Planning Assessment Commission.

There is confusion around how ACH Management Plans will apply to State significant development. This submission covers these concerns.

4 Recommendations

General concerns

1. The ACH Bill should include transitional arrangements to provide clarity for projects that have commenced at the introduction of the new ACH system. Proponents should be able to elect to remain under the previous system.
2. To provide certainty to mine operators it should be clarified in the ACH Bill that the following approvals will be treated as follows:
 - All Aboriginal Heritage Impact Permits (AHIPS) and historic section 87/90 consents will continue until they expire; and
 - All Part 3A approvals and development consents issued to date that do not require AHIPS will also continue to operate for their term.
3. Ensure that adequate government funding is in place to facilitate the ACH reforms.
4. Where appropriate the ACH reforms should build on what already exists in order to reduce costs and minimise the need to reinvent everything. To the extent that standardisation can be used, this will create efficiencies and make implementation easier.

Aim A: Broader recognition of Aboriginal cultural heritage values

5. Section 3 of the ACH Bill should include an object of the Act which acknowledges the interaction of ACH with other land uses such as development and recognises the need for timely and efficient processing of activities that have the potential to harm ACH.
6. The definition of Aboriginal cultural heritage in the ACH Bill should be consistent with definitions used for the protection of important Indigenous areas and objects contained in the Federal legislative framework.
7. The definition of Aboriginal cultural heritage could be made more concise, rather than its present drafting which includes the definitions of Aboriginal ancestral remains, Aboriginal cultural heritage significance, Aboriginal object and intangible Aboriginal cultural heritage as sub parts to its definition.
8. To provide clarity the definition of “intangible Aboriginal cultural heritage” should include “registered” in its definition.
9. The reading of the ACH Bill would make more sense if intangible Aboriginal cultural heritage was noted as being excluded from the definition of Aboriginal cultural heritage unless otherwise stated.
10. The definition of ‘Aboriginal object’ should include an element of cultural value, significance or connection with traditional laws and customs to ensure more targeted protection as resources will be less likely to be diverted to items of lesser or minimal significance.
11. Include a definition of Minister at section 5 of the ACH Bill.
12. The ACH Bill should include provisions to review the ACH Act after 5 years to assess whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Aim B: Decision-making by Aboriginal people

13. The Government should provide clarity with regard to what assistance OEHS will provide the ACH Authority and for what timeframe.

14. Provisions should be included around the timeframes that the ACH Authority provides advice so there is consistency with other processes the Department of Planning and Environment has in place.
15. Development industry and resource industry experience should be added to the list of skills and experience that members of the ACH Authority should collectively possess.
16. The ACH Bill should specifically provide that the ACH Authority may appoint an advisory committee with a specific skill set or familiarity with industry/activities. Such an advisory committee can be drawn upon at the initiative of the ACH Authority or at the request of the proponent.
17. OEH should consult on whether the ACH Authority needs to be geographically representative.
18. In Targeted Question B3 of the Proposal Paper, Example 1 is preferred. Native title claimants should be included as one of the relevant Aboriginal groups consulted by the NSW state agency on the composition of the ACH Authority.
19. Where a local ACH Consultation Panel has been consulted, the ACH Bill should make it clear that the decision by a consent authority to approve a project cannot be judicially reviewed on the basis that the objector has not been consulted.
20. The local ACH Consultation Panels should be provided with appropriate levels of support for dealing with complex planning issues, and to ensure that delays do not result.
21. The ACH Bill should set out clear intentions regarding whether membership to the local ACH Consultation Panels is to be limited to traditional owners or also include other Aboriginal people with a connection to Country.
22. Clarity should be provided on whether a person could be a member of more than one local ACH Consultation Panel.
23. In section 14(2) of the ACH Bill which states “Local ACH Consultation Panels may be established for a particular area of the State or for particular aspects of Aboriginal cultural heritage, or both” delete “or for particular aspects of Aboriginal cultural heritage, or both.”
24. If there is more than one relevant local ACH Consultation Panel the ACH Bill should set out details on the process for the local ACH Consultation Panels to combine their input.
25. Native title holders and claimants should be prescribed as mandatory members to local ACH Consultation Panels and then have responsibility for nominating additional members.
26. The area of the local ACH Consultation Panel should be flexible, capable of change and give consideration to the native title system.
27. The requirement of section 17 of the ACH Bill for consultation with the “Aboriginal community” on the procedures, policies and guidelines with respect to the establishment, membership and operation of local ACH Consultation Panel, would be better placed in the charter of the ACH Authority rather than in the ACH Bill.
28. The reforms should include a clear process for dealing with conflicts of interest and/or corruption in the local ACH Consultation Panels.
29. OEH and the ACH Authority should consider undertaking a trial local ACH Consultation Panel, prior to commencement of the reforms, to identify and resolve complex issues.

Aim C: Better information management

30. Rather than creating a new system, the AHIMS could be reformed and updated.
31. Further detail is required regarding how the ‘NSW Aboriginal Cultural Heritage Map’ will identify risks and how intangible values will be mapped.

32. The ACH Information System should, where possible, interlink with other government registers such as SIX Maps, NSW Titles (Mapping Program), and MinView.
33. Where restricted information is used to make a decision, a process must be in place to manage this information if the decision is judicially challenged. The proponent should be entitled to understand and have access to the information.
34. Land users (including the holder of any authorisation under the *Mining Act 1992* (NSW)) should have access to ACH culturally sensitive information impacting their land even if this information is to be made not generally available to the public.
35. It is critical that the new information system created by the proposed ACH reforms is adequately resourced.

Aim D: Improved protection, management and conservation of Aboriginal cultural heritage

36. Section 18(4) should include the holder of any authorisation under the *Mining Act 1992* (NSW) as a party that the ACH Authority needs to consult so that recommendations for declarations of ACH occur with the knowledge of the holder of any such authorisation.
37. Further details should be provided on the appeal rights with regard to declarations of ACH.
38. Under section 29 of the ACH Bill, holders of any authorisation under the *Mining Act 1992* (NSW) should be included as persons from whom the ACH Authority must obtain consent prior to entering into an ACH conservation agreement.
39. The definition of ‘mining or petroleum authority’ should be included in the ACH Bill by adopting the definition in the *Mining Act 1992* (NSW).
40. Section 38 (Offence to use registered intangible cultural heritage for commercial purposes without agreement) of the ACH Bill should specifically state that it does not include commercial purposes that are making use of non-intangible Aboriginal cultural heritage.
41. There needs to be clarity around how the ACH Fund will be operated and accountability around income and expenditure into and out of the fund. Funds that are provided as part of an ACH Management Plan need to be separated and only applied to the specific purpose provided for.

Aim E: Greater confidence in the regulatory system

42. The Government should provide further detail on how the ACH reforms will impact SSD projects. Specifically the following points should be addressed:
 - What is the ACH Authority’s role in the formation of Secretary’s Environmental Assessment Requirements?
 - At what stage should a proponent engage with the ACH Authority and/or local ACH Consultation Panels?
 - What are the mandatory timeframes and review periods for SSD?
43. OEHL should reconsider the use of the terminology “ACH Management Plan” in the context of major projects and consider whether a “Statement of Commitments” or similar terminology might be less confusing and better reflect the aim of the reforms.
44. An ACH Management Plan in the context of SSD would more appropriately be prepared after development consent. This is consistent with the process for management plans for other impacts of major projects.

45. It should be made clear that the consent authority remains the relevant authority for approving SSD.
46. The ACH Bill needs to include transitional arrangements for SSD modifications to be included under the new ACH system.
47. The ACH Bill should provide for a strategic assessment pathway that would allow for projects in multiple areas to have a set ACH approach agreed.
48. The ACH Bill should include details on the three tiers of ACH Management Plan – basic, standard and complex. The ACH Bill should make specific reference to the fact that mandatory timeframes will be set out in the regulations.
49. The following should be deleted from section 40 of the ACH Bill:

Harm to Aboriginal cultural heritage significance includes any act in relation to the object, remains or other declared heritage (other than the expression of an opinion or belief) that demonstrates disrespect for the significance to Aboriginal people of the object, remains or other declared heritage.
50. Include into the ACH Bill a definition of “trivial and negligible”.
51. The word “all” should be deleted from section 44 of the ACH Bill – it is sufficient if “reasonable steps” were taken to determine whether the act that constitutes the offence would harm Aboriginal cultural heritage rather than “all reasonable steps”.
52. Relevant stakeholders, including the NSWMC should be consulted in the development of the ACHAP Code of Practice.
53. The local ACH Consultation Panel should be empowered to specifically undertake surveys, or an alternative regulatory structure be put in place for the identification of who engagement should occur with as a means of identification of whether activities will impact ‘Aboriginal objects’.
54. The ACH Bill should include statutory criteria on the contents of ACH management plans.
55. In developing the negotiation period and a determination period for ACH management plans relevant considerations to take into account include:
 - Some local ACH Consultation Panels will be potentially very busy which may make these time frames difficult to achieve; and
 - On commencement of the ACH Act, there may be the need for recognition that agreement on the early plans may not be achievable in the prescribed statutory period. To the extent that plans can be standardised, this will significantly reduce time and cost.
56. Section 48(2)(d) of the ACH Bill should be deleted. It provides that negotiations on the terms of a proposed ACH management plan are to ensure that “*the Aboriginal persons whose cultural heritage is to be impacted will benefit from the obligations of the proponent.*”
57. The reference in section 49(4) of the ACH to the public interest should be removed as the ACH Authority should not have to have regard to it in making a determination to approve a draft ACH management plan. Instead reference should be made to compliance with the ACHAP Code of Practice.
58. The activities listed in section 80B of *National Parks and Wildlife Regulation 2009* (NSW) should remain on the list of low impact activities that are exempt from completing the ACH assessment pathway.
59. Exempt development in accordance with the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* and *State Environmental Planning Policy (Mining,*

Petroleum Production and Extractive Industries) 2007 should be included into the list of low impact activities that are exempt from completing the ACH assessment pathway.

Penalties and compliance mechanisms

60. A stop work order should not be able to be made verbally but should be provided in writing.
61. Section 97 of the ACH Bill should be amended so that the ACH Authority may appoint any “officer or employee of the ACH Authority” as an authorised officer for the purposes of Part 8 rather than any “person (including a class of persons)”.
62. Reconsideration should be given to the maximum monetary penalties set out in section 119 of the ACH Bill. The penalties should not exceed penalties that would be payable under other legislation such as the *Protection of the Environment Operations Act 1997* (NSW).
63. Subsections 122(1) and (2) of the ACH Bill should be amended to provide that proceedings may be commenced no later than 1 year after the date on which the offence is alleged to have been committed or the date on which evidence of the alleged offence first came to the attention of any relevant investigating officer.

5 General concerns

5.1 Transitional arrangements

The draft Aboriginal Cultural Heritage Bill (ACH Bill) set up the framework for Aboriginal cultural heritage (ACH) reform. The detail and substance of the operation of the new system will be provided by regulations and policy.

Significant consultation and work is required before the new system is switched on. The NSW Government has set an ambitious target of late 2021 for commencement of the new system.

Schedule 5 to the ACH Bill provides that the regulations may contain saving and transitional provisions. The transitional arrangements should include provisions that provide clarity for projects that are underway during the time the change to the new ACH system occurs.

Transitional arrangements will also be required for mines operating under old development approvals that are not state significant development (SSD) and are working under Aboriginal Heritage Impact Permits (AHIPS). To provide certainty to mine operators it should be clarified in the ACH Bill that the following approvals will be treated as follows:

- All AHIPS and historic section 87/90 consents will continue until they expire; and
- All Part 3A approvals and development consents issued to date that do not require AHIPS will also continue to operate for their term.

Recommendation

1. The ACH Bill should include transitional arrangements to provide clarity for projects that have commenced at the introduction of the new ACH system. Proponents should be able to elect to remain under the previous system.
2. To provide certainty to mine operators it should be clarified in the ACH Bill that the following approvals will be treated as follows:
 - All AHIPS and historic section 87/90 consents will continue until they expire; and
 - All Part 3A approvals and development consents issued to date that do not require AHIPS will also continue to operate for their term.

5.2 Adequate funding

The proposed ACH reforms are broad ranging and involve setting up a new Aboriginal Cultural Heritage Authority (ACH Authority), local ACH Consultation Panels, ACH Information System, ACH mapping products and processes and ACH strategic plans.

It is important that the right people are consulted and adequate resources invested into establishing the new system. In order to ensure the system is workable the implementation and ongoing operation of the system has to be properly funded by government.

Where appropriate the system should build on what already exists in order to reduce costs and minimise the need to reinvent everything. To the extent that standardisation can be used, this will create efficiencies and make implementation easier.

Recommendation

3. Ensure that adequate government funding is in place to facilitate the ACH reforms.

4. Where appropriate the ACH reforms should build on what already exists in order to reduce costs and minimise the need to reinvent everything. To the extent that standardisation can be used, this will create efficiencies and make implementation easier.

6 Aim A: Broader recognition of Aboriginal cultural heritage values

6.1 Objects of Act

The conservation and management of Aboriginal cultural heritage occurs within the context of interaction with other land users. The objects of the Act should acknowledge this. Guidance can be found in the ACH legislation of Victoria and Queensland.

Section 3(g) of the *Aboriginal Heritage Act 2006* (VIC) includes as an objective of the Act:

to establish processes for the timely and efficient assessment of activities that have the potential to harm Aboriginal cultural heritage;

Section 5 of the *Aboriginal Cultural Heritage Act 2003* (QLD) recognises as a fundamental principle underlying the Act:

there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.

The ACH Bill should include a similar provision that recognises the need for timely and efficient processing of activities that have the potential to harm Aboriginal cultural heritage. Section 3(b) of the ACH Bill refers to “*regulating activities that may cause harm to that heritage so as to achieve better outcomes for Aboriginal people and the wider NSW community,*” but this statement lacks clarity as it is hard to assess what constitutes “better outcomes”.

Recommendation

5. Section 3 of the ACH Bill should include an object of the Act which acknowledges the interaction of ACH with other land uses such as development and recognises the need for timely and efficient processing of activities that have the potential to harm ACH.

6.2 Definition of Aboriginal cultural heritage

In defining Aboriginal cultural heritage within the ACH Bill it is relevant to take into account the existing federal legislative framework. The federal legislation sets out clearly understood definitions that should be consistently reflected in the ACH Bill.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (CTH) enables the Australian Government to respond to requests to protect important Indigenous areas and objects that are under threat, if it appears that state or territory laws have not provided effective protection.

The Australian Government can make special orders, called declarations, to protect traditional areas and objects of particular significance to Aboriginals in accordance with Aboriginal tradition from threats of injury or desecration.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (CTH) includes definitions of “*significant Aboriginal area*” and “*significant Aboriginal object*” which are “*of particular significance to Aboriginals in accordance with Aboriginal tradition.*”

Aboriginal tradition is defined as follows:

Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any

such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

The definitions of Aboriginal cultural heritage in the ACH Bill should be consistent with the federal definitions. As presently drafted the definition of Aboriginal cultural heritage includes four definitions of Aboriginal ancestral remains, Aboriginal cultural heritage significance, Aboriginal object and intangible Aboriginal cultural heritage. It would be helpful if the definition was more concise and not so expansive and compartmentalised into multiple different parts.

To provide clarity the definition of “intangible Aboriginal cultural heritage” should include “registered” in its definition. The reading of the ACH Bill would make more sense if intangible Aboriginal cultural heritage was noted as being excluded from the definition of Aboriginal cultural heritage unless otherwise stated. Provisions dealing with intangible Aboriginal cultural heritage are contained within Part 4 Division 3 of the ACH Bill and has its own pathway.

Recommendation

6. The definition of Aboriginal cultural heritage in the ACH Bill should be consistent with definitions used for the protection of important Indigenous areas and objects contained in the Federal legislative framework.
7. The definition of Aboriginal cultural heritage could be made more concise, rather than its present drafting which includes the definitions of Aboriginal ancestral remains, Aboriginal cultural heritage significance, Aboriginal object and intangible Aboriginal cultural heritage as sub parts to its definition.
8. To provide clarity the definition of “intangible Aboriginal cultural heritage” should include “registered” in its definition.
9. The reading of the ACH Bill would make more sense if intangible Aboriginal cultural heritage was noted as being excluded from the definition of Aboriginal cultural heritage unless otherwise stated.

6.3 Definition of Aboriginal object

The definition of ‘Aboriginal object’ does not contain a significance element or a link to traditional laws or customs. Including within the definition an element of cultural value, significance or connection with traditional laws and customs will ensure more targeted protection as resources will be less likely to be diverted to items of lesser or minimal significance.

Recommendation

10. The definition of ‘Aboriginal object’ should include an element of cultural value, significance or connection with traditional laws and customs to ensure more targeted protection as resources will be less likely to be diverted to items of lesser or minimal significance.

6.4 Definition of Minister

Section 5 of the ACH Bill should include a definition of “Minister”, so that it is clear who is the relevant Minister.

Recommendation

11. Include a definition of Minister at section 5 of the ACH Bill.

6.5 Review of the ACH Act

Once the ACH Bill comes into force it will be important to assess whether the objectives of the Act are being achieved. The inclusion of review provisions into the ACH Bill would facilitate this. Section 14.11 of the *Biodiversity Conservation Act 2016* (NSW) provides a useful example of what such provisions look like:

14.11 Review of Act

- (1) *The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.*
- (2) *The Minister is to include public consultation as a part of the review.*
- (3) *The review is to be undertaken as soon as possible after the period of 5 years from the commencement of a majority of the provisions of this Act.*
- (4) *A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.*

Recommendation

12. The ACH Bill should include provisions to review the ACH Act after 5 years to assess whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

7 Aim B: Decision-making by Aboriginal people

7.1 The Aboriginal Cultural Heritage Authority

Part 2 Division 1 of the ACH Bill will establish a new NSW-wide body of Aboriginal people to make decisions about the management and conservation of Aboriginal cultural heritage – the Aboriginal Cultural Heritage Authority (or ACH Authority).

NSWMC is supportive of the proposed governance structure.

It is understood that at least initially the ACH Authority will be supported by OEH in the carrying out of its functions. The Government should provide clarity with regard to what assistance OEH will provide the ACH Authority and for what timeframe.

Provisions should be included around the timeframes that the ACH Authority provides advice so there is consistency with other processes the Department of Planning and Environment has in place.

Recommendation

13. The Government should provide clarity with regard to what assistance OEH will provide the ACH Authority and for what timeframe.
14. Provisions should be included around the timeframes that the ACH Authority provides advice so there is consistency with other processes the Department of Planning and Environment has in place.

7.1.1 Skills and experience of members of Board of ACH Authority

A consultation note in the draft ACH Bill states that the process for nomination of Aboriginal persons as members of the Board of the ACH Authority, and their required collective skills and expertise, has not yet been determined. The skills and experience set out in *A proposed new legal framework – Aboriginal cultural heritage in NSW* (Proposal Paper), are appropriate, but should include experience in the development industry, including the resources industry. Given the importance of ACH in the development of resources projects, there is very significant experience among Aboriginal people relating to the development of mining projects, which would be beneficial to the ACH Authority.

Section 10 of the ACH Bill provides that the Board of the ACH Authority may appoint committees to assist it to exercise its functions. The ACH Bill should specifically provide that the ACH Authority may appoint an advisory committee with a specific skill set or familiarity with industry/activities. Such an advisory committee can be drawn upon at the initiative of the ACH Authority or at the request of the proponent.

The Proposal Paper asks whether members of the ACH Authority should have skills and experience and/or recognised cultural authority from an area of New South Wales. Consultation should also be undertaken on whether members of the ACH Authority need to be geographically representative. This may provide confidence in the decisions of the ACH Authority. Though it is also a relevant consideration that the necessary skills and experience may be difficult to obtain in particular geographic areas.

Recommendation

15. Development industry and resource industry experience should be added to the list of skills and experience that members of the ACH Authority should collectively possess.

16. The ACH Bill should specifically provide that the ACH Authority may appoint an advisory committee with a specific skill set or familiarity with industry/activities. Such an advisory committee can be drawn upon at the initiative of the ACH Authority or at the request of the proponent.
17. OEH should consult on whether the ACH Authority needs to be geographically representative.

7.1.2 Selection process for ACH Authority members

Targeted question B3 in the Proposal Paper includes three examples of how ACH Authority members can be chosen. A voting process is unlikely to result in membership that collectively possesses the necessary skills and experience. Of the three examples, Example 1 is preferred:

A NSW state agency asks Aboriginal groups (including native title holders and registered claimants, LALCs, Aboriginal owners, Elders groups, and other groups) to put forward the names of Aboriginal people who hold the skills and/or experience and/or cultural authority set out in the previous section.

Native title claimants should also be included as one of the relevant Aboriginal groups consulted by the NSW state agency on the composition of the ACH Authority.

Recommendation

18. In Targeted Question B3 of the Proposal Paper, Example 1 is preferred. Native title claimants should be included as one of the relevant Aboriginal groups consulted by the NSW state agency on the composition of the ACH Authority.

7.2 Local ACH Consultation Panels

Part 2 Division 3 of the ACH Bill provides for the creation of local ACH Consultation Panels. NSWMC is supportive of this approach, as it will provide a clear, single point of consultation on ACH matters. The details of how the local ACH Consultation Panels will function are key and we look forward to seeing proposals as the reforms progress. Certainty and finality in the decision-making process will be required. Where a local ACH Consultation Panel has been consulted, the ACH Bill should make it clear decisions cannot be judicially reviewed on the basis that other parties were not consulted.

The local ACH Consultation Panels will be dealing with complex planning issues and will need support to do this. The consultation note at section 13 of the ACH Bill states that the regulations will authorise the delegation of the function of co-ordinating the establishment and supporting the operation of local ACH Consultation Panels to a Local Aboriginal Land Council (LALC) unless the LALC chooses not to exercise that function or does not have the capacity to exercise that function. If this is the option which is chosen, it is vital that the LALCs are given appropriate funding and resourcing and that projects are not delayed by the workload or under resourcing of ACH Consultation Panels.

Recommendation

19. Where a local ACH Consultation Panel has been consulted, the ACH Bill should make it clear that the decision by a consent authority to approve a project cannot be judicially reviewed on the basis that the objector has not been consulted.
20. The local ACH Consultation Panels should be provided with appropriate levels of support for dealing with complex planning issues, and to ensure that delays do not result.

7.2.1 Geographic boundaries and membership of local ACH Consultation Panels

NSWMC welcomes clarification on who can speak for Country and the streamlined consultation process in the proposed model. The geographic boundary of the local ACH Consultation Panels is an issue that should be developed in consultation with Aboriginal people. The ACH Bill should set out clear intentions regarding whether membership to the local ACH Consultation Panels is to be limited to traditional owners or also include other Aboriginal people with a connection to Country.

Clarity should be provided on whether a person could be a member of more than one local ACH Consultation Panel. Aboriginal people should decide who is to be involved and there may be different approaches needed across the state. There should be clarity around how native title rights interact with the ACH system. Consideration needs to be given to how to deal with potential differences in views between the Aboriginal parties and how to streamline who proponents deal with. Otherwise the intent of having a simple process with one point of contact for ACH issues will be undermined.

Section 14(2) of the ACH Bill provides that “*Local ACH Consultation Panels may be established for a particular area of the State or for particular aspects of Aboriginal cultural heritage, or both.*” The existence of local ACH Consultation Panels formed both by area or for a particular aspect of ACH will cause confusion and uncertainty. There needs to be clarity around whose view is taken into account. The reference to “or for particular aspects of Aboriginal cultural heritage, or both” should be deleted.

There may be projects that sit on the boundary of the particular areas covered by local ACH Consultation Panels. If there is more than one relevant local ACH Consultation Panel the ACH Bill should set out details on the process for the local ACH Consultation Panels to combine their input.

Native title holders and claimants should be prescribed as mandatory members of local ACH Consultation Panels and then have responsibility for nominating additional members. The persons who form the local ACH Consultation Panel is linked to the issue of the area of each local ACH Consultation Panel. For example, if the area of a local ACH Consultation Panel crosses more than one Native Title Group’s area or an area which is in dispute, the membership of the local ACH Consultation Panel will need to reflect this.

The area of the local ACH Consultation Panel should be flexible, capable of change and give consideration to the native title system.

Recommendation

21. The ACH Bill should set out clear intentions regarding whether membership to the local ACH Consultation Panels is to be limited to traditional owners or also include other Aboriginal people with a connection to Country.
22. Clarity should be provided on whether a person could be a member of more than one local ACH Consultation Panel.
23. In section 14(2) of the ACH Bill which states “Local ACH Consultation Panels may be established for a particular area of the State or for particular aspects of Aboriginal cultural heritage, or both” delete “or for particular aspects of Aboriginal cultural heritage, or both.”
24. If there is more than one relevant local ACH Consultation Panel the ACH Bill should set out details on the process for the local ACH Consultation Panels to combine their input.
25. Native title holders and claimants should be prescribed as mandatory members to local ACH Consultation Panels and then have responsibility for nominating additional members.
26. The area of the local ACH Consultation Panel should be flexible, capable of change and give consideration to the native title system.

7.2.2 Consultation with the Aboriginal community

Section 17 of the ACH Bill discusses consultation with the Aboriginal community on the procedures, policies and guidelines with respect to the establishment, membership and operation of local ACH Consultation Panel. “Aboriginal community” is a very broad term and this section may potentially be a source of judicial review. The sentiments of section 17 would be better placed in the charter of the ACH Authority.

Recommendation

27. The requirement of section 17 of the ACH Bill for consultation with the “Aboriginal community” on the procedures, policies and guidelines with respect to the establishment, membership and operation of local ACH Consultation Panel, would be better placed in the charter of the ACH Authority rather than in the ACH Bill.

7.2.3 Resolution of conflicts of interest

OEH has indicated that there will be a clear separation between sitting on a local ACH Consultation Panel and being engaged in ACH employment/consultancy by a proponent. Further clarity needs to be provided around this issue and a clear process set out on how conflicts of interest will be dealt with by the local ACH Consultation Panels. For example, if work was being done on site for an Indigenous Land Use Agreement (ILUA) would this impact the ability of a person undertaking work on behalf of a proponent from sitting on a local ACH Consultation Panel. Consideration may be given to the development of a Code of Conduct.

Prior to the commencement of the ACH reforms it may be of benefit to undertake a trial of a local ACH Consultation Panel to work through the many complex issues that will arise.

Recommendation

28. The reforms should include a clear process for dealing with conflicts of interest and/or corruption in the local ACH Consultation Panels.
29. OEH and the ACH Authority should consider undertaking a trial local ACH Consultation Panel, prior to commencement of the reforms, to identify and resolve complex issues.

8 Aim C: Better information management

8.1 A new information management system

NSWMC welcomes the proposed new information management systems and processes that are to be overseen by Aboriginal people including:

- ACH Information System
- ACH mapping products and processes
- ACH strategic plans.

These products will give greater certainty for Aboriginal communities, proponents and decision makers. Public consultation on these products will provide opportunities for broader community input.

Rather than creating a new system, the Aboriginal Heritage Information Management System (AHIMS) could be reformed and updated. From a functionality perspective the AHIMS system works effectively – its issues relate to ensuring the data is accurate and up to date so that errors presently in AHIMS are not carried forward. Access and accuracy should be key drivers of the ACH Information System.

It will be important to ensure that these products are based on sound information. The issues of incorrect and inconsistent information in the current AHIMS are well documented.

Examples of AHIMS data problems

- Site reports conflicted with AHIMS data locations, giving three different locations for the same artefact. This was believed to be due to the multiple methods for determining location over the collection period of the AHIMS data.
- The co-ordinates for an object in the operational area were a coastal location, hundreds of kilometres from the actual site.
- Different archaeological groups failed to find artefacts registered on AHIMS. There was not enough time to wait for their removal from the database, so they were included in the site management plan and managed as if they were present.
- A search of the AHIMS database for a mining project displayed the location of many sites that had been salvaged. These sites were still shown on the AHIMS within an active open cut mining area, despite being salvaged long before. The same search identified incorrect co-ordinates and incorrect site descriptions, resulting in confusion over location and nature of sites. A solution was put to OEH in writing after these errors were discovered.

AHIMS does have the advantage that information is made publicly available. Conversely, the ACH Bill requires the ACH Authority to prepare and publish a 'NSW Aboriginal Cultural Heritage Map' that identifies land with known or likely presence of ACH values, but which does not publicly identify specific locations or details about those values. There are concerns that this will not provide sufficient details on what the risks actually are. More detail also needs to be provided around how intangible values will be mapped.

This ACH Information System will be an important tool for proponents to accurately identify cultural heritage information and areas of Aboriginal cultural heritage. The ACH Information System should,

where possible, interlink with other government registers such as SIX Maps, NSW Titles (Mapping Program), and MinView.

Recommendation

30. Rather than creating a new system, the AHIMS could be reformed and updated.
31. Further detail is required regarding how the 'NSW Aboriginal Cultural Heritage Map' will identify risks and how intangible values will be mapped.
32. The ACH Information System should, where possible, interlink with other government registers such as SIX Maps, NSW Titles (Mapping Program), and MinView.

8.2 Access to culturally sensitive information

Issues relating to culturally sensitive information must also be resolved. This has been an important issue in previous mapping and we understand is critical to Aboriginal communities. NSWMC is supportive of treating information with the appropriate cultural sensitivity, however where restricted information is used to make a decision, a process must be in place to manage this information if the decision is judicially challenged. This will allow parties to understand the reason behind a decision and to properly assess impacts.

Land users need to know all ACH information that will impact on their land use activities so they understand exactly what is affected. Land users should have access to ACH culturally sensitive information impacting their land even if this information is to be made not generally available to the public. Land users include the holder of any authorisation under the *Mining Act 1992* (NSW). Section 19(7) of the ACH Bill provides that the regulations may make provision for or with respect to the persons who may access information on the restricted database.

Recommendation

33. Where restricted information is used to make a decision, a process must be in place to manage this information if the decision is judicially challenged. The proponent should be entitled to understand and have access to the information.
34. Land users (including the holder of any authorisation under the *Mining Act 1992* (NSW)) should have access to ACH culturally sensitive information impacting their land even if this information is to be made not generally available to the public.

8.3 Adequate resourcing of the information system

It is critical that the new system created by the proposed reforms is adequately resourced. If, for example, the mapping is not done thoroughly and consistently, there will be issues during negotiations from the outset. The implementation of the proposed legislative reform will be a very significant investment for government.

Recommendation

35. It is critical that the new information system created by the proposed ACH reforms is adequately resourced.

9 Aim D: Improved protection, management and conservation of Aboriginal cultural heritage

9.1 Declarations of ACH

Section 18 of the ACH Bill provides for a process for nominating and approving declarations of ACH. The Minister may, on the recommendation of the ACH Authority, make declarations of ACH. Before making a recommendation to the Minister, the ACH Authority is required to consult (amongst other persons) the landholders of any land concerned. There is presently no definition of landholder in the ACH Bill. A declaration of ACH could constrain development under a mining title. Section 18(4) should include the holder of any authorisation under the *Mining Act 1992* (NSW) as a party that the ACH Authority needs to consult so that recommendations for declarations of ACH occur with the knowledge of the holder of any authorisation under the *Mining Act 1992* (NSW).

Further details should also be provided on the appeal rights with regard to declarations of ACH.

Recommendation

36. Section 18(4) should include the holder of any authorisation under the *Mining Act 1992* (NSW) as a party that the ACH Authority needs to consult so that recommendations for declarations of ACH occur with the knowledge of the holder of any authorisation under the *Mining Act 1992* (NSW).
37. Further details should be provided on the appeal rights with regard to declarations of ACH.

9.2 ACH Conservation Agreements

Part 4 Division 2 of the ACH Bill provides for ACH conservation agreements. An ACH conservation agreement is an agreement between the ACH Authority and the owner of relevant land. The agreements may, for example, restrict development on the land or require the owner to refrain from specified activities on the land.

Such an agreement requires the consent of the owner of the land. At present, there is no requirement for the ACH Authority to obtain the consent of the holder of an overlapping mining or exploration tenement. Given the potential for conflicting land use, holders of any authorisation under the *Mining Act 1992* (NSW) should be included as persons from whom the ACH Authority must obtain consent.

There is presently no definition of 'mining or petroleum authority' in the ACH Bill. This should be clarified by adopting the definition in the *Mining Act 1992* (NSW).

Recommendation

38. Under section 29 of the ACH Bill, holders of any authorisation under the *Mining Act 1992* (NSW) should be included as persons from whom the ACH Authority must obtain consent prior to entering into an ACH conservation agreement.
39. The definition of 'mining or petroleum authority' should be included in the ACH Bill by adopting the definition in the *Mining Act 1992* (NSW).

9.3 Offence to use registered intangible cultural heritage for commercial purposes without agreement

Section 38 of the ACH Bill provides that it is an offence to use registered intangible cultural heritage for commercial purposes without agreement. The section should specifically state that it does not include commercial purposes that are not making use of intangible Aboriginal cultural heritage.

Recommendation

40. Section 38 (Offence to use registered intangible cultural heritage for commercial purposes without agreement) of the ACH Bill should specifically state that it does not include commercial purposes that are making use of non-intangible Aboriginal cultural heritage.

9.4 Payments into ACH Fund

Section 65(b) of the ACH Bill makes reference to money payable into the ACH Fund under an ACH Management Plan. There needs to be clarity around how the ACH Fund will be operated and accountability around income and expenditure into and out of the fund. Funds that are provided as part of an ACH Management Plan need to be separated and only applied to the specific purpose provided for.

Recommendation

41. There needs to be clarity around how the ACH Fund will be operated and accountability around income and expenditure into and out of the fund. Funds that are provided as part of an ACH Management Plan need to be separated and only applied to the specific purpose provided for.

10 Aim E: Greater confidence in the regulatory system

10.1 Application to SSD

The ACH Bill sets out a new ACH assessment pathway. As noted in the Proposal Paper the obligation to follow the ACH assessment pathway will not apply to State significant development (SSD). The ACH Bill provides for amendments to section 89J of the *Environmental Planning and Assessment Act 1979* (NSW) that mean that State significant development will be exempt from preparing an ACH Management Plan under the ACH Bill. However page 42 of the Proposal Paper states:

However, major projects will continue to be subject to Secretary's Environmental Assessment Requirements (SEAR), created under the EP&A Act, which will be updated to adopt the key features of the ACH Management Plan negotiation process and supporting guidelines.

In many cases, major projects will create equivalent management plans for consideration by the Minister for Planning, Department of Planning and Environment or the Planning Assessment Commission.

Further detail and clarity is required around how the ACH reforms will impact SSD. While this detail does not need to be provided in the ACH Bill. We have addressed it in this submission as a way of having the mining industry's views noted and taken into account in developing the framework for assessment of ACH in SSD projects. Specifically the following points should be addressed:

- What is the ACH Authority's role in the formation of Secretary's Environmental Assessment Requirements (SEARs)?
- At what stage should a proponent engage with the ACH Authority and/or local ACH Consultation Panels?
- What are the mandatory timeframes and review periods for SSD?

An ACH Management Plan in the context of SSD would more appropriately be prepared after development consent. This is consistent with the approach of deferring detailed operational management plans for environment and community impacts to the post approval phase. At the pre-approval stage it is difficult for the required level of detail to be obtained. In the mining context impactful work may occur a long time after the design process. Additionally, changes may be required to be made to the management plan. Post-approval management plans are dynamic and can be updated over time without requiring a modification of the development consent (provided they are otherwise consistent with the consent). Currently ACH Management Plans are often updated following particular salvage programs in identified areas. This 'staged' approach is useful for proponents in giving them flexibility to adapt management measures to different stages of a project.

The use of the terminology "Management Plan" in relation to SSD is confusing, particularly given that the proposed amendments to the *Environmental Planning and Assessment Act 1979* (NSW) will relieve SSD projects from requiring an ACH Management Plan. It is understood that the proposed ACH Management Plan in the context of SSD is more akin to a statement of commitments around the management of ACH, made by the proponent after negotiation with the local ACH Consultation Panel. This aspect of the reforms requires clarity and possibly re-wording. How those commitments are formalised should then be consistent with the approach to conditioning of major projects that is currently being developed by the Department of Planning and Environment through the Environmental Impact Assessment (EIA) Improvement Project.

It should be made clear that the consent authority remains the relevant authority for approving SSD. Where the ACH Authority or local ACH Consultation Panel do not agree with the proponent's proposals these bodies, like all other government agencies, should make a submission on the EIS.

The ACH Bill needs to include transitional arrangements for SSD modifications to be included under the new ACH system. Modifications may occur decades after the initial development approval. Because modifications have no SEARs, another trigger is required to bring them under the new ACH system when it is implemented.

Proponents may be involved in more than one project in a given area or region. It would be useful if the ACH Bill provided for a strategic assessment pathway that would allow for projects in multiple areas to have a set ACH approach agreed. NSWMC is pleased that consideration is being given (consultation note at section 43 of the ACH Bill) as to whether it would be appropriate to enable large-scale strategic ACH assessments and approvals for certain types of activities within an area that may harm ACH.

Recommendation

42. The Government should provide further detail on how the ACH reforms will impact SSD projects. Specifically the following points should be addressed:
 - What is the ACH Authority's role in the formation of Secretary's Environmental Assessment Requirements?
 - At what stage should a proponent engage with the ACH Authority and/or local ACH Consultation Panels?
 - What are the mandatory timeframes and review periods for SSD?
43. OEH should reconsider the use of the terminology "ACH Management Plan" in the context of major projects and consider whether a "Statement of Commitments" or similar terminology might be less confusing and better reflect the aim of the reforms.
44. An ACH Management Plan in the context of SSD would more appropriately be prepared after development consent. This is consistent with the process for management plans for other impacts of major projects.
45. It should be made clear that the consent authority remains the relevant authority for approving SSD.
46. The ACH Bill needs to include transitional arrangements for SSD modifications to be included under the new ACH system.
47. The ACH Bill should provide for a strategic assessment pathway that would allow for projects in multiple areas to have a set ACH approach agreed.

10.2 Tiered assessment

Page 38 of the Proposal Paper states that the draft ACH Bill will provide for three tiers of ACH Management Plan – basic, standard and complex. The different tiers will determine the level of detail and investigation required during the ACH assessment report and will have different mandatory timeframes. Details of the three tiers have not presently been included in the ACH Bill. The ACH Bill should make specific reference to the fact that mandatory timeframes will be set out in the regulations.

Recommendation

48. The ACH Bill should include details on the three tiers of ACH Management Plan – basic,

standard and complex. The ACH Bill should make specific reference to the fact that mandatory timeframes will be set out in the regulations.

10.3 Definition of harm

Section 40 of the ACH Bill contains a definition of harm. The clauses (a)-(d) sets out specific examples of what constitutes harm. The following section can be deleted as it doesn't aid in adding clarity to the definition of harm:

Harm to Aboriginal cultural heritage significance includes any act in relation to the object, remains or other declared heritage (other than the expression of an opinion or belief) that demonstrates disrespect for the significance to Aboriginal people of the object, remains or other declared heritage.

The use of the word “disrespect” sets a subjective standard that is difficult to assess.

Recommendation

49. The following should be deleted from section 40 of the ACH Bill:

Harm to Aboriginal cultural heritage significance includes any act in relation to the object, remains or other declared heritage (other than the expression of an opinion or belief) that demonstrates disrespect for the significance to Aboriginal people of the object, remains or other declared heritage.

10.4 Definition of “trivial or negligible”

Section 41(2)(b) makes reference to “the harm is not trivial or negligible”. The expectation was that the definition of trivial and negligible would be developed by case law. This has not been the case, hence it would be useful if a definition was provided in the ACH Bill.

Recommendation

50. Include into the ACH Bill a definition of “trivial and negligible”.

10.5 Defence – taking all reasonable steps to avoid harm

Section 44 of the ACH Bill establishes a defence to the offence to harm ACH “*if a person charged establishes the person took all reasonable steps to determine, in accordance with the ACHAP Code of Practice, whether the act that constitutes the offence would harm Aboriginal cultural heritage and reasonably determined that no Aboriginal cultural heritage would be harmed.*”

The word “all” should be deleted as the word implies a limitless number of steps. It is sufficient if reasonable steps were taken.

Recommendation

51. The word “all” should be deleted from section 44 of the ACH Bill – it is sufficient if “reasonable steps” were taken to determine whether the act that constitutes the offence would harm Aboriginal cultural heritage rather than “all reasonable steps”.

10.6 ACHAP Code of Practice

The ACH Authority is to prepare and submit a draft Aboriginal Cultural Heritage Assessment Pathway Code of Practice (ACHAP Code of Practice) for the purposes of the assessment of whether proposed activities will harm Aboriginal cultural heritage. The ACHAP Code of Practice will provide a negotiation framework to guide the negotiation process between the proponent and the relevant local ACH Consultation Panel.

Relevant stakeholders, including the NSWMC should be consulted in the development of the ACHAP Code of Practice.

Recommendation

52. Relevant stakeholders, including the NSWMC should be consulted in the development of the ACHAP Code of Practice.

10.7 ACH Management Plan

In general terms, an ACH Management Plan will be required for an activity that causes more than 'trivial or negligible' harm. The concept of a 'survey' will likely continue as a means of identification of whether activities will impact 'Aboriginal objects'. It is not clear who a proponent would use to undertake a survey and at what stage of the assessment process it will occur.

The local ACH Consultation Panel should be empowered to specifically undertake surveys or an alternative regulatory structure be put in place for the identification of who engagement should occur with for such a process. For example, the Queensland system has a statutory mechanism for identifying the correct "Aboriginal party" which is linked to the native title system.

At present, the ACH Bill provides little detail as to the contents of an ACH Management Plan. Given the broad range of potential issues that need to be managed in the context of an ACH Management Plan, statutory criteria will be necessary to minimise disputes and save parties cost.

Section 50 of the ACH Bill contemplates a negotiation period and a determination period for ACH management plans which will be prescribed in the regulations.

Relevant considerations to take into account include:

- Some local ACH Consultation Panels will be potentially very busy which may make these time frames difficult to achieve; and
- On commencement of the ACH Act, there may be the need for recognition that agreement on the early plans may not be achievable in the prescribed statutory period. To the extent that plans can be standardised, this will significantly reduce time and cost.

Section 48(2)(d) of the ACH Bill provides that negotiations on the terms of a proposed ACH management plan are to ensure that "*the Aboriginal persons whose cultural heritage is to be impacted will benefit from the obligations of the proponent.*" The concept of benefit is subjective and should not be included as criteria for the negotiation of an ACH management plan.

Section 49(4) of the ACH Bill provides that in making a determination to approve a draft ACH management plan, the ACH Authority is to have regard to the public interest. There are issues in trying to decide what constitutes the public interest as the term is very broad and undefined. The inclusion of public interest as a relevant consideration would leave the determinations of the ACH Authority open to judicial review. It is recommended the reference to public interest in section 49(4) of the ACH Bill be deleted and instead reference be made to compliance with the ACHAP Code of Practice.

Recommendation

53. The local ACH Consultation Panel should be empowered to specifically undertake surveys, or an alternative regulatory structure be put in place for the identification of who engagement should occur with as a means of identification of whether activities will impact 'Aboriginal objects'.
54. The ACH Bill should include statutory criteria on the contents of ACH management plans.
55. In developing the negotiation period and a determination period for ACH management plans relevant considerations to take into account include:
 - Some local ACH Consultation Panels will be potentially very busy which may make these time frames difficult to achieve; and
 - On commencement of the ACH Act, there may be the need for recognition that agreement on the early plans may not be achievable in the prescribed statutory period. To the extent that plans can be standardised, this will significantly reduce time and cost.
56. Section 48(2)(d) of the ACH Bill should be deleted. It provides that negotiations on the terms of a proposed ACH management plan are to ensure that "*the Aboriginal persons whose cultural heritage is to be impacted will benefit from the obligations of the proponent.*"
57. The reference in section 49(4) of the ACH to the public interest should be removed as the ACH Authority should not have to have regard to it in making a determination to approve a draft ACH management plan. Instead reference should be made to compliance with the ACHAP Code of Practice.

10.8 Exemptions

The Proposal Paper proposes that regulations will include details that proponents who are undertaking low impact activities are exempt from completing the ACH assessment pathway, unless they know the proposed activity will harm ACH values or they make an unexpected discovery of ACH during their activity.

The activities listed in section 80B of *National Parks and Wildlife Regulation 2009* (NSW) should remain on the list of low impact activities exempt from completing the ACH assessment pathway.

Exempt development in accordance with the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* and *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* should be included into the list of low impact activities that are exempt from completing the ACH assessment pathway.

Recommendation

58. The activities listed in section 80B of *National Parks and Wildlife Regulation 2009* (NSW) should remain on the list of low impact activities that are exempt from completing the ACH assessment pathway.
59. Exempt development in accordance with the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* and *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* should be included into the list of low impact activities that are exempt from completing the ACH assessment pathway.

11 Penalties and compliance mechanisms

11.1 Stop work order

Section 74(1) of the ACH Bill allows for stop work orders to be notified verbally but states that an order notified to a person verbally ceases to have effect unless it is confirmed in writing to the person within 72 hours. This situation would create uncertainty. Stop work orders should be notified in writing – it would be sufficient even if the notification was to be sent through via email. The written format would provide certainty and confirmation on the exact details of the stop work order.

Recommendation

60. A stop work order should not be able to be made verbally but should be provided in writing.

11.2 Appointment of authorised officers

Section 97 of the ACH Bill provides that the ACH Authority may appoint any person (including a class of persons) as an authorised officer for the purposes of Part 8. This description is overly broad - “any person (including a class of persons)” should be replaced with “any officer or employee of the ACH Authority”.

Recommendation

61. Section 97 of the ACH Bill should be amended so that the ACH Authority may appoint any “officer or employee of the ACH Authority” as an authorised officer for the purposes of Part 8 rather than any “person (including a class of persons)”.

11.3 Maximum monetary penalty

Section 119 of the ACH Bill sets out maximum monetary penalties. The figures included in section 119 are on the high end without justification as to why this would be so. There should be consistency with penalties that would be payable under other legislation such as the *Protection of the Environment Operations Act 1997* (NSW).

Recommendation

62. Reconsideration should be given to the maximum monetary penalties set out in section 119 of the ACH Bill. The penalties should not exceed penalties that would be payable under other legislation such as the *Protection of the Environment Operations Act 1997* (NSW).

11.4 Time within which proceedings can be commenced

Section 122(1) of the ACH Bill provides that proceedings for an offence against the ACH Bill or its regulations may be commenced not later than 2 years after the date on which the offence is alleged to have been committed.

Section 122(2) of the ACH Bill provides that proceedings for an offence against the ACH Bill or its regulations may be commenced not later than 2 years after the date on which evidence of the alleged offence first came to the attention of any relevant investigating officer.

2 years is a long time period through which an alleged offender is left to wait to see if proceedings are brought against them. It is sufficient if 1 year was allowed for the commencement of proceedings.

Recommendation

63. Subsections 122(1) and (2) of the ACH Bill should be amended to provide that proceedings may be commenced no later than 1 year after the date on which the offence is alleged to have been committed or the date on which evidence of the alleged offence first came to the attention of any relevant investigating officer.