

# **SUBMISSION ON REFORMING THE ABORIGINAL CULTURAL HERITAGE SYSTEM IN NSW**

BY

## **TWEED SHIRE COUNCIL**

PO Box 816  
Murwillumbah 2484

### **PREFACE**

Thank you for the opportunity to review and comment on the *Reforming the Aboriginal Cultural Heritage System in NSW* documents and recommendations.

Tweed Shire Council (TSC) supports the reform of Aboriginal Cultural heritage legislation to ensure more appropriate understanding and recognition of the wider range of Aboriginal cultural heritage and to incorporate that into stand-alone legislation.

TSC is well advanced in the preparation of a draft Aboriginal Cultural Heritage Management Plan (ACHMP) with the assistance of heritage consultants Converge Heritage + Community and the Aboriginal community. This project has been ongoing for 18 months and has incorporated extensive consultation with the Aboriginal community.

In the context of our understanding through this process, TSC fully acknowledges and supports that the Aboriginal people who hold local knowledge are the appropriate people to identify their Aboriginal cultural heritage, what is significant, and how potential impact on this cultural heritage should be managed. However, a point of difference is that the TSC project has been a collaborative process bringing together the leadership and skills of the consultants and Council, the local knowledge and information of the Aboriginal community, the input of other State agencies, and the support and financial resources of both TSC and Office of Environment and Heritage (OEH). The support and co-operation of all involved has been critical to the process and has resulted in the development of draft mapping, a draft management plan and relationship building between the Council and the Aboriginal community.

Notwithstanding our support for the broader initiative, TSC has significant concerns about a number of the administrative and operational aspects of the proposed legislation, as further detailed below.

### **GENERAL**

The recommendations and proposed reform for stand-alone legislation are supported in that they seek to reflect appropriate respect and protection for Aboriginal cultural heritage.

Similarly, expansion of the objects of the legislation beyond 'objects' and 'places' to include both tangible and intangible cultural heritage is also supported. The Tweed Shire Council draft ACHMP currently being prepared is landscape based and seeks to ensure the understanding that an 'object' or 'place' is almost always part of a wider cultural landscape and belief systems incorporating cultural, ceremonial or spiritual associations with places. The use of 'point-based' ACH identification often does not reflect the wider cultural significance, nor does it fully protect this significance.

With regards to the definition of Aboriginal cultural heritage, the intent to acknowledge both tangible and intangible heritage is supported however, it is noted the definition does not contain a clear reference to the belief systems incorporating cultural, ceremonial or spiritual associations with places. Notwithstanding, the suitability of the wording is more appropriately deferred to the Aboriginal community.

The recommendation of the working party report to incorporate a definition for 'harm' is also supported, though this does not appear to be included in the proposed reforms.

Maintaining the NPW Act offences and penalties is also supported.

## **ADMINISTRATIVE STRUCTURE AND RESPONSIBILITY FOR PREPARATION OF ACH MAPS AND MANAGEMENT PLANS**

Whilst the intent of the administrative structure appears to support the protection of ACH, the information provided in the reform documents is insufficiently detailed to provide clarity to the processes, certainty to the outcomes, and therefore the implications for both local government and the Aboriginal community.

### ACH Maps and Plans of Management

A number of NSW Councils are currently preparing ACH mapping for inclusion in their LEPs as required; however, the process of identification varies significantly as does the mapping outcome and how this is then incorporated into a management plan and/or mapping within the standard instrument LEP.

The mapping developed for TSC, based on extensive consultation with the local Aboriginal community, nominates “known” and “predictive” mapping layers. Known incorporates confirmed sites and landscapes, damaged, destroyed and AHIMs sites. Predictive is a composite mapping layer based on assessment against ten criteria, whereby three or more of these criteria need to be met for an area to be mapped as “predictive”. This rigorous landscaped based approach, in consultation with the community, expands on the standard AHIMs search and appears to correlate relatively well with the directions of the proposed reforms.

Consistency in the approach by Aboriginal groups across the State to the identification and mapping of ACH significance and the structure of the Plans of Management will be critical to the understanding of how mapping has been developed and how it is being used across the State.

Consistency will also be a critical factor in providing resourcing and skills development to enable Aboriginal communities to develop the required Maps and Plans of Management with the leadership and resourcing they will require within the required timeframes.

### **Recommendation:**

A standardised methodology for the assessment, identification and mapping of Aboriginal cultural heritage, be developed prior to the commencement of the legislation.

A standardised template for the Plans of Management for ACH be developed prior to the commencement of the legislation.

Information on these methodologies and templates is important for understanding the resource implications of the processes and must be outlined for consultation prior to the commencement of legislation which places the responsibility for Mapping and Plans of Management onto the Local ACH Committees.

### Resourcing of Land Councils and the local ACH committees

The administrative structure of setting up local ACH committees is in general supported, in that this enables Aboriginal people to manage their cultural heritage. However, it would appear appropriate that membership should also include the LALC representatives. Notwithstanding, comments on the membership structure and area of such a committee is best left to the Aboriginal community.

Identification of who may speak for Country will provide a clearer path of consultation for local government and the development industry. Notwithstanding, the resource implications on the Local ACH Committee will be extensive and the administrative structure outlined does not provide confidence that the processes will be effective or successful in protecting ACH.

The reform documents state that the Local ACH Committee will have sole responsibility for all decision making processes for ACH for the local area, including development of the mapping, plans of management, and negotiation of project agreements. In principle this is

supported yet practice will likely demand a significant resourcing and up-skilling to undertake this extensive body of work, including management of the committee itself. Mapping and plans of management are resource extensive projects that require strong leadership, champions with appropriate legislative and planning skills and significant community resourcing and funding. It is not realistic to rely on the Aboriginal community to **volunteer** extensive time, and forego business, employment and personal endeavours, to develop the required mapping and plans of management. The TSC experience demonstrates that in order to truly consult with the local Aboriginal community development of mapping and a management plan will likely require two years of extensive involvement. This is also only the first step in their role as they will then be required to undertake ongoing management and negotiation with the development industry.

The ongoing management of ACH, including committee management and importantly strong negotiation skills to enable the local ACH committee to come to the development table on an even platform for negotiation with developers, will need essential skill requirements and/or training.

Page 16 notes that *“it will be necessary for the Local ACH Committee members to have existing knowledge of cultural values for their area in order to execute their duties effectively”*; however, the process fails to outline that it is possible that constituent members of the Local ACH Committee may not be in agreement regarding the identification and mapping of ACH. It does not address how such matters would be mediated and delay managed. It proceeds on the false presumption that such issues either will not arise or would be readily addressed amongst committee members without such external impact.

The proposed reforms indicate that flexible project agreements may be sought by Local ACH Committees, private, or public land owners; however, the reforms also state on page 23 that they can be sought *“...using the ACH Maps and Plans of Management to develop mutually agreeable outcomes.”* In effect, the Maps and Plans of Management have been completed first. However, the funding arrangements discussed with the proposed reforms (page 24 and 25) are focussed on the development of flexible project agreements and how these agreements may be resourced without any mention of how the Local ACH Committees will be resourced to initially develop the Maps and Plans of Management. This is a critical issue of concern.

The significant tasks and responsibilities falling to the Local ACH Committee are likely to require full time paid employment for the members of the committee, particularly in high growth coastal areas such as TSC and especially if the area of responsibility covers more than one local government area (LGA).

It is essential to the success of the proposed reforms and the outcomes for the Aboriginal community that the Local ACH Committees are also appropriately resourced.

TSC is concerned that without a significant level of resourcing and training, this process is being set up to fail. Without significant resources and training the timeframes will not be able to be met, and development will be deemed to comply, thereby resulting in the negative impact on ACH rather than the protection.

**Recommendation:**

The administrative process of resourcing (including financial, management and skills/training) the Local ACH Committees be developed for consultation prior to the commencement of any legislation.

The proposed reforms note the creation of the Local ACH Committees through the *NSW Aboriginal Land Rights Act 1983*; however, it appears the role and activities of the Local ACH Committees will be developed through the stand-alone ACH legislation.

**Recommendation:**

Clarity is sought with regard to the relationship of the legislation, timeframes for commencement and requirements for the administration of the Local ACH Committees and how this is to be addressed in the two pieces of legislation.

**Timeframes for development of Mapping and Plans of Management**

The Reform documents state (page 13), that the Local ACH committees will be required to map the ACH values of their area including the Plan of Management, prior to the Act commencing. This is of significant concern given that the Act and supporting templates and methodologies and the framework for this process to occur, as stated on page 18 under *Tools to support ACH conservation and strategic planning* will be introduced through the new legislation. This appears to be a contradiction in intent and it is considered that the tools will need to be fully developed up-front to enable the Local ACH committees to prepare the ACH Maps and Plans of Management or that the Maps and Plans of Management are prepared following commencement of the legislation.

It is anticipated that a timeframe will be placed on the process of preparing the ACH Maps and Plans of Management and this should be clarified. The TSC process has to date taken 18-24 months and this is considered the minimum required to adequately consult on and prepare the Maps and Plans of Management.

**Recommendation:**

The ACH Maps and Plans of Management critically rely on adequate timeframes for consultation and preparation on the tools to support their development.

It is critical that these tools and timeframes be developed and consulted on prior to commencement of any legislation.

**Security and process of updating information**

It is acknowledged that the Local ACH Committee will be responsible for development of the maps and plans of management whilst the OEHL Heritage Division will manage the ACH register (page 20) and therefore the appropriate storage of the sensitive information.

Notwithstanding, the process for updating the mapping and ACH Plans of Management as new information is revealed, including the need for LEP/Local Plan amendments, is not clearly outlined. At best the Mapping and Plans of Management are a snapshot in time of sensitive knowledge offered through the process and this may change over time.

**Recommendation:**

The process for updating of ACH information should be clearly outlined and consulted on prior to the commencement of any legislation.

The process of managing security of sensitive information should be clearly developed and consulted on prior to the commencement of any legislation.

**INTEGRATION WITH PLANNING PROCESSES**

The approach of structuring the Aboriginal cultural heritage legislation to correlate with planning legislation is supported; however, the proposed reforms are unclear about the distinction between strategic planning processes and statutory planning processes (i.e. development applications). The discussion paper frequently uses the term “planning” interchangeably between higher order strategic planning and development assessment.

Whilst it is acknowledged that a Project Planning Agreement may be made at any stage of the planning process it is unclear if a Project Planning Agreement will be required for every process, whether a planning proposal (rezoning), a development application, or a complying development application, where a property is subject to the ACH Map.

At a local government level, councils will need to have a clear direction about what process is to be followed where there is no Project Planning Agreement and where, under the LEP/Local Plan, works are:

- prohibited
- permitted as exempt development
- permitted as complying development or
- permitted with development consent

Similarly there is no clarity provided in the discussion paper as to the relationship with either exempt or complying development under the State Environmental Planning Policy (Exempt and Complying Development Codes) (Code SEPP). It is essential that this is clear as are the areas that are to be excluded from the application of the Code SEPP, whether by current definitions of “Environmentally sensitive area”, “High Aboriginal Cultural Significance” or by other means.

For ease of interpretation and legibility it would be desirable to correlate the same types of works or development within the above categories for all identified Aboriginal heritage.

#### **Recommendations:**

Definitions, requirements for identification, mapping, conservation plans/Plans of Management and processes should be consistent and translatable between the new ACH legislation, the Code of Practice Archaeological Investigations (CoPAI) Assessments, the new planning legislation, the State Environmental Planning Policy (Exempt and Complying Development Codes) (Code SEPP) and Council’s LEP/Local Plan.

Consistent with the Australian Government's approach NSW should be striving to ensure that the definition is workable with the *Evidence Act 1995* (NSW) & (Cth), which had its definition of “*traditional laws and customs*” updated in recent times. The terminology must be consistent with its purpose.

Clarity is also sought on the process for development assessment where there is no Project Agreement.

#### Relationship with a Council LEP

The role of local government in the processes is unclear. The intent of the discussion paper appears to be structured such that the Minister for Heritage “approve” ACH Maps and Plans of Management, which are then managed by the Heritage Division and publicly available through the ACH register (managed by the OEH) to be used and to inform planning at both a strategic level by both state and local government and for the statutory development application process. It also appears that the local ACH committee is the key point of contact for consultation in regard to the identification and management of ACH.

Notwithstanding, on page 26 of the document it states “*The ACH information in the maps will be considered when developing regional growth plans and subregional delivery plans, and local councils will consult the Local ACH Committee to include the ACH Maps within their local land-use plans.*” It is unclear if this statement refers to the inclusion of ACH Maps within a councils' local environmental plan (LEP) and translated into the proposed planning legislation reforms as a “Local Plan”. The term “*local land-use plan*” is not used in the *Planning Administration Bill 2013* and it is not clear if this reference means the LEP/Local Plan or more generically other strategic planning.

The standard LEP template has been structured to address ACH together with European heritage within Clause 5.10, as listed in Schedule 5 Environmental Heritage, and as mapped on the ‘Heritage Map’. This is supported by the *S117 Direction*:

2.3 *Heritage Conservation* which applies when Council prepares a planning proposal (LEP or LEP amendment) and requires the protection of Aboriginal cultural heritage via:

(4) *A planning proposal must contain provisions that facilitate the conservation of:*

(c) *Aboriginal areas, Aboriginal objects, Aboriginal places or landscapes identified by an Aboriginal heritage survey prepared by or on behalf of an Aboriginal Land Council, Aboriginal body or public authority and provided to the relevant planning authority, which identifies the area, object, place or landscape as being of heritage significance to Aboriginal culture and people.*

This Direction also notes that:

*Heritage conservation is covered by a compulsory clause in the Standard Instrument (Local Environmental Plans) Order 2006. A LEP that adopts the Standard Instrument should identify such items, areas, objects or places of environmental heritage significance or indigenous heritage significance as are relevant to the terms of this direction on the Heritage Map and relevant Schedule of the LEP.*

TSC has been actively working towards meeting these objectives through the development of the Aboriginal Cultural Heritage Management Plan, which includes mapping layers, a thematic history and a comprehensive management plan, with the mapping to be included in the Tweed Shire LEPs and the management plan to guide “what happens” where subject land is mapped. Therefore, clarification is sought in the process of the relationship between the ACH Maps, Plans of Management and a Council LEP (or Local Plan) and what is implied by a “local land-use plan”.

#### **Recommendation:**

The administrative process clarifies the relationship between the ACH Maps, Plans of Management and a Council LEP (or Local Plan) and a “local land-use plan”.

#### **Project Agreements**

The proposed reforms seek to match the level of consultation to the ACH value that may be impacted (page 31) which is supported; however, it fails to mention the scale and extent of significance of the development proposed as a factor. This appears to be a significant oversight as its omission elevates the risk of mismanaging more complex issues.

The mandatory timeframe for the development of a “planned ACH assessment” under the CoPAI assessment will be 10 days (page 31). The mandatory timeframe for completion of a Project Agreement will be 20 days (page 32) with the negotiated assessment outside of this timeframe. However, it is noted that these timeframes are static whether the assessment is for small scale development on a single lot or large scale, for example; greenfield residential subdivision works.

This requires the Local ACH Committee, a body of representatives of a minimum of 10 cultural families, organisations or interests and opinions to reach agreement on a Project Agreement within 10 days (step 3). If the timeframe is not met a “*proponent could proceed with caution*” (page 32) i.e. the proposal is “deemed to satisfy”.

If this committee relies on volunteer members rather than employed members, which is unclear at this stage, this is most likely to be effectively unworkable. Each member is also required to consult with those people they represent within the community and there may be divergent views from constituent members. Should the timeframe not be met an applicant may proceed with caution and without a Project Agreement. This includes proceeding without the agreement of the Local ACH Committee on what values and significance exist and should be protected and respected.

As previously stated, the Local ACH Committee needs to be appropriately resourced and skilled to be able to carry out the responsibilities being divested to this committee.

**Recommendations:**

The timeframe for Project Agreements should also factor in the scale of the development proposal.

The project Agreements should include a “stop the clock” provision similar to DA processes where information is incomplete or requires further clarification.

**Managing unexpected finds**

It is well documented and accepted that unexpected finds have and continue to cause significant cost and delay for new projects. Reforms aimed at mitigating extensive impacts on new development that also operate to provide an appropriate level of protection or conservation for the find is therefore supported.

The reforms proposed seek to manage unexpected finds through the Plan of Management (PoM) and in cases where there is a Project Agreement either directly through the Agreement or by default to the PoM. In principle, this presents as a logical way to proceed, and with limited exception, is supported.

The key concern is twofold. Firstly, mandatory maximum timeframes of 10 days for determining (managing) the processes for proceeding, at least during the first 2 years of the new Act's operation, is not likely to be a realistic target. It assumes that correspondence between key stakeholders will be effected electronically and that relevant personnel will be ready and waiting. Undoubtedly the new Act and the significant resourcing that the State Government is committing to assist the new councils and committees will result in turnaround times that are much more expedient than the current, but it is dubious that such gains in efficiency will prove likely within the first 1-2 years of operation.

Extending the timeframe to 25 days will still represent a much quicker turnaround for a resolution and would more likely be achievable.

Secondly, why leave open rather than mandate that the proponent contact the Local ACH Committee (LACHC) in the event of an unexpected find? If the matter is significant, surely the aims and objectives of the legislation would demand that notification be given and if the matter is negligible or less significant (and who should determine this?) there should be no cause for concern in giving notification. Two issues with the proposed reform arise. Firstly, the level of expertise of the LACHC in drafting agreements may vary widely and matters such as this, particularly during complex negotiations, could readily be overlooked. The new Act or Regulation could readily overcome this and obviate potential issues by mandating notification. Secondly, the timeframe within which the unexpected find is managed should commence once notification is duly given and should be subject to stop-the-clock provisions.

The timeframes proposed in the reforms are noticeably much tighter than other legislative timeframes within the planning system, particularly those applying to state significant development. By contrast the new ACH councils and committees will possess much less resourcing and expertise. Drawing a comparison, it could readily be perceived that the proposed ACH reforms favour new economic activity over cultural heritage protection and that the system has been purposely designed to that effect. This is neither in the interest of the Aboriginal people nor that of the heritage of the State.

**Recommendations:**

The approach for managing unexpected finds either through the PoM or on a site specific basis is supported in principle.

The timeframe for managing unexpected finds will require calibration over time and should be set at a realistic threshold to begin with. 25 days would be more appropriate.

Notification of unexpected finds should not be discretionary; that should be left to how the find will be managed by the Local ACH Committee, as the notification itself should be

mandatory. This will assist in aligning the running of maximum timeframe for managing the find (say 25 days) with a fixed point in time (the date notification is duly given).

### **LOCAL ACH BOUNDARIES**

Whilst there is benefit in having fewer Local ACH Committees requiring less resourcing, the larger the area a Local ACH Committee applies to, the greater the number of divergent interests and views.

As noted on a number of other issues, this matter is best left to the Aboriginal Community to provide feedback on what best reflects their needs. Notwithstanding, from a local government perspective correlation with local government areas (LGAs), whether they be multiple LGAs, so that a Council is working with a single Local ACH Committee is preferred. This would alleviate potential cross 'border' issue and provide for a streamlined model of governance.

### **SUMMARY**

In summary the intent of developing standalone ACH legislation is supported, as is the right of Aboriginal people who hold local knowledge to be the appropriate people to identify their Aboriginal cultural heritage, what is significant and how potential impact on this cultural heritage should be managed.

Whilst the intent of the administrative structure appears to support the protection of ACH, the information provided in the reform documents is insufficiently detailed to provide clarity to the processes, certainty to the outcomes, and therefore the implications for both local government and the Aboriginal community.

Tweed Shire Council raises significant concern that unless the Local Aboriginal Cultural Heritage Committee is suitably resourced and trained and the timeframes place on this committee to undertake what will be a significant and ongoing body of work are realistic, then the process is likely to fail. In failing, or not reaching agreements within a set period of time, the intent of the legislation to better protect and manage Aboriginal cultural heritage, may not be realised as envisaged.