Submission on Aboriginal Cultural Heritage Law Reforms in NSW: Draft Aboriginal Cultural Heritage Bill 2018

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Introduction

Thank you for the opportunity to provide written submissions on the Aboriginal Cultural Heritage Law Reforms in NSW. We are non-Indigenous scholars who have legal expertise in Indigenous heritage law. As legal academics, we seek to raise concerns about the mechanics and technicalities of the legislation. However, there are crucial aspects of the legislation that are not appropriate for us, as non-Indigenous people, to make submissions about. There are significant parts of this legislative reform that must be driven by the Indigenous community.

By way of background, Lauren Butterly has expertise in domestic Indigenous heritage law and Lucas Lixinski has expertise in international Indigenous heritage law (with a particular focus on intangible cultural heritage). As part of the preparation of this submission, Lauren Butterly attended both an information session and one of the consultation workshops.

The current provisions for Aboriginal heritage in the *National Parks and Wildlife Act 1974* (NSW) are inadequate. Standalone Aboriginal cultural heritage legislation gives an opportunity to improve the regulatory system and to ensure that decision making is controlled by Aboriginal people. As can be seen from the length and detail of the draft Aboriginal Cultural Heritage Bill 2018 ('draft ACH Bill'), this area is complex, and the issues must be carefully considered. We have a number of recommendations in relation to the draft ACH Bill that we have presented below. Although each recommendation is of equal importance, we wish to emphasise three themes that relate to multiple recommendations:

1) We welcome and strongly support the inclusion of intangible cultural heritage in the draft ACH Bill. However, the integration of intangible cultural heritage with tangible cultural heritage requires improvement (see recommendations 2 and 11).
2) There are a number of provisions where the Minister, who may be non-Indigenous, has final decision-making powers that currently contain excessive discretion. This is not only concerning generally, but also seems at odds with the aspiration of Aboriginal decision-making expressed in the Consultation Document[4] and presented at the information sessions (see recommendations 6, 7, 15 and 17).

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[4] Office of Environment and Heritage, *A Proposed New Legal Framework: Aboriginal Cultural Heritage in NSW* (2017).

3) Currently, there are only provisions for proponents to access merits review in the Land and Environment Court. There must be equitable access to merits review by the Indigenous community. This includes access to merits review by the Aboriginal Cultural Heritage Authority ('ACH Authority') where the Minister is the final decision-maker, and access to merits review by the Local Aboriginal Cultural Heritage Consultation Panels ('Local ACH Consultation Panels') where the Minister or the ACH Authority is the final decision-maker (see recommendations 9, 12 and 16).

We note in relation to this third point that the EDO NSW has written recommendations to address the imbalance of appeal rights.[5] We agree with their recommendations on this issue, including their recommendations on consulting with the Aboriginal community about the scope of people to whom appeal rights would apply, mandatory mediation or conciliation prior to any review or appeal, and a requirement that matters in the Land and Environment Court are heard by a judge and at least one commissioner with expertise in Aboriginal cultural heritage (similarly to Aboriginal land rights matters).

We invite you to contact us if you have any queries relating to our submission. Please contact the corresponding author, Lauren Butterly at L.Butterly@unsw.edu.au or (02) 9385 2862.

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[5] EDO NSW, 'Submission on the Draft Aboriginal Cultural Heritage Bill 2018' (Submission to NSW Office of Environment and Heritage, April 2018) 40 <https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/5636/attachments/original/1523587574/180413_ACH_Bill_2018_-_EDO_NSW_submission_-_FINAL.pdf?1523587574>.

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Summary of recommendations

We make the following recommendations in response to the draft ACH Bill:

Recommendations relating to Aim A: Broader recognition of Aboriginal cultural heritage values

Recommendation 1: Amend the definition of 'Aboriginal cultural heritage' so that it clearly includes waters and coastal waters.

Recommendation 2: Remove the separate definition of intangible cultural heritage from section 4(2) (as it is already included within 'Aboriginal cultural heritage'). If required, put a separate definition in section 36.

Recommendation 3: Add an objective that outlines the centrality of empowering Aboriginal decision-making.

Recommendation 4: Section 3(b) be amended to replace the words 'conserving and managing Aboriginal cultural heritage' with 'safeguarding of Aboriginal cultural heritage', and the remainder of the Bill be amended throughout to ensure consistency.

Recommendations relating to Aim B: Decision-making by Aboriginal people

Recommendation 5: Provisions should be inserted in section 8 of the draft ACH Bill that provide for how consultation about the ACH Authority and Local ACH Consultation Panel membership will proceed. This includes timing to start the process and some of the minimum requirements of that process.

Recommendation 6: The Minister should not have an absolute power to remove a member from the ACH Authority. If the Minister is going to retain this power, then there needs to be some input from other members of the ACH Authority and some relevant considerations that the Minister must consider.

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

Recommendation 7: The ACH Authority should be given the power to make declarations. If the Minister is to retain that power, then a list of relevant considerations must be included in section 18 so that the Minister's discretion is not absolute.

Recommendation 8: A nomination process for Aboriginal cultural heritage declarations needs to be set out in the draft ACH Bill. We also submit that a form of interim protection be put in place whilst a declaration nomination is being processed.

Recommendation 9: Provision must be made for Land and Environment Court merits appeal by the ACH Authority (if the Minister retains the power) and by Aboriginal peoples and groups more generally against a decision made pursuant to section 18.

Recommendation 10: The purpose and consequence of an Aboriginal cultural heritage declaration needs to be detailed in the legislation. At a minimum, this must include that declared cultural heritage would appear on ACH maps, that any activity that impacts declared cultural heritage would require an ACH management plan, and that the harm offences would apply.

Recommendation 11: The ACH Bill needs to clearly state that intangible heritage can be protected through declarations of Aboriginal cultural heritage, cultural heritage conservation agreements and cultural heritage management plans. If this is not the case, amendments need to be made to Part 4, Division 3 to ensure wider protection of intangible heritage. (This recommendation is linked to Recommendation 2).

Recommendations relating to Aim E: Greater confidence in the regulatory system

Recommendation 12: Provision must be made for Land and Environment Court merits appeal for Local ACH Consultation Panels and other Aboriginal peoples and groups against a decision of the ACH Authority relating to a management plan in Part 5, Division 3.

Recommendation 13: State Significant Development ('SSD') should be subject to the same assessment process as other development applications. However, if a separate regime is to be used then that regime should be set out in the Aboriginal cultural heritage legislation.

Recommendation 14: SSD should still be subject to the offence provisions for unauthorised harm of Aboriginal cultural heritage.

Recommendation 15: The ACH Authority should be given the power to make decisions under section 79, but if the Minister is to retain this power then a list of relevant considerations must be included so that the Minister's discretion is not absolute.

Recommendation 16: Provision must be made for Land and Environment Court merits appeal by the ACH Authority (if the Minister retains the power) and by Aboriginal peoples and groups more generally against a decision made pursuant to section 79.

Recommendation 17: The ACHAP Code of Practice should be determined by the ACH Authority. If the Minister is to retain final decision-making power, then the ACH Bill needs to provide relevant considerations including that it must be recommended by the ACH Authority, and that any proposed amendments must be agreed to by the ACH Authority.

Submissions relating to Aim A: Broader recognition of Aboriginal cultural heritage values

1. Definitions

The definitions of 'Aboriginal cultural heritage' and 'intangible Aboriginal cultural heritage' must be determined by the Indigenous community given they underpin this legislation. However, we seek to make some comments on technical elements of these definitions. We acknowledge that the definition of 'Aboriginal cultural heritage' appears to draw from best international practice, and holistically integrates different aspects of cultural heritage, acknowledging its role as the living culture of Indigenous peoples. It also includes identification by Indigenous communities of their own cultural heritage as a key element in the definition.

We have two major concerns with the definitions. First, and specifically, it is not clear whether the definition of Aboriginal cultural heritage includes waters and coastal waters. Second, and more broadly, we submit that 'intangible Aboriginal cultural heritage' should be integrated with 'Aboriginal cultural heritage'.

a. 'Aboriginal cultural heritage' - waters/coastal waters

It is not clear whether the definition of Aboriginal cultural heritage extends to waters and coastal waters.

Section 4(1) defines Aboriginal cultural heritage as 'the living, traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with their associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity'. The terms environment, landscape or place are not further defined. The term 'land' is defined in s 5(1) to include 'any place', however, 'place' is not defined.

It seems the definition in s 4(1) is attempting to be inclusive, but we submit that it should be made clear that it applies to waters and coastal waters. This would also be in keeping with s 2 of the *Constitution Act 1902* (NSW) which acknowledges that Aboriginal peoples have 'spiritual, social, cultural and economic relationship with their traditional lands and *waters*' (emphasis added).

We note that waters are clearly included in the *Aboriginal Heritage Act 2006* (Vic):

> **5 What is an Aboriginal place?**
> (1) For the purposes of this Act, an Aboriginal place is an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria.
> (2) For the purposes of subsection (1), area includes any one or more of the following—
>
> (a) an area of land;
> (b) an expanse of water; ...

The term coastal waters is then defined in s 4 of the *Aboriginal Heritage Act 2006* (Vic):

> **4 Definitions**
> **…**
> **coastal waters** of Victoria has the same meaning as the expression 'coastal waters of the State' has in relation to Victoria under the Coastal Waters (State Powers) Act 1980 of the Commonwealth.

Recommendation 1: Amend the definition of 'Aboriginal cultural heritage' so that it clearly includes waters and coastal waters.

b. 'Intangible Aboriginal cultural heritage'

The Bill defines intangible Aboriginal cultural heritage as 'any practices, representations, expressions, beliefs, knowledge or skills comprising Aboriginal cultural heritage (including intellectual creation or innovation of Aboriginal people based on or derived from Aboriginal cultural heritage), but does not include Aboriginal objects, Aboriginal ancestral remains or any other tangible materials comprising Aboriginal cultural heritage' (s 4(2)). We note that the s 4(1) definition of 'Aboriginal cultural heritage' also includes the concepts of 'practices, representations, expressions, beliefs, knowledge and skills'.

First, the definition of intangible cultural heritage in the draft ACH Bill seems to cut across the holistic definition of Aboriginal cultural heritage in s 4(1). Section 4(2) imposes a separation between 'general' Aboriginal cultural heritage and intangible Aboriginal cultural heritage that is not supported by the experience of intangible heritage as living culture. It also seems like this was not the intent of the legislative scheme, given the definition in s 4(1) and that tools such as the conservation agreements seem to apply across tangible and intangible heritage (see our comments accompanying recommendation 11).

Secondly, the definition of intangible Aboriginal cultural heritage in the Bill is at odds with best international practice. The 2003 *Convention for the Safeguarding of the Intangible*

Cultural Heritage, ratified by over 175 countries around the world, and considered by Victoria in the reform of their legislation,[6] is clear in connecting intangible heritage to the tangible materials associated with the cultural practice.

We acknowledge that for the purposes of Part 4, Division 3, there may be a need to separately define 'intangible' cultural heritage used for commercial purposes. We suggest that such a separate definition be provided in s 36 only for the purposes of that Division, rather than at the beginning of the Bill. By separating out intangible heritage at the start of the Bill, it creates the illusion of a dichotomy that is not best practice and not actually reflected in the legislative scheme. We will return to this issue when we discuss our recommendations under Aim D.

Recommendation 2: Remove the separate definition of intangible cultural heritage from section 4(2) (as it is already included within 'Aboriginal cultural heritage'). If required, put a separate definition in section 36.

2. Objects of the Act

a. Add an objective about Aboriginal decision-making

Section 3(a) defines the objects of the Bill as being based on the recognition of Aboriginal people and 'establishing a legislative framework that reflects Aboriginal people's responsibility for and authority over Aboriginal cultural heritage'. We submit that the objectives should go further and contain an objective about the centrality of empowering Aboriginal decision-making.

Recommendation 3: Add an objective that outlines the centrality of empowering Aboriginal decision-making.

b. Replace 'Conserve and manage' with 'safeguard'

With respect to conservation and management, the terminology does not reflect best international practice, which, particularly with respect to living cultures such as Aboriginal culture and cultural heritage, has moved away from the idea of conservation and management (which is largely static) to one of safeguarding. The concept of safeguarding is better capable of encompassing the changes to living cultures, and shifts control away from non-Indigenous governmental structures, and more closely to the communities living in, with, or around heritage.[7]

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[6] Victoria, Parliamentary Debates, Legislative Assembly, 11 November 2015, 4312-15 (Natalie Hutchins).
[7] Blake, Janet, 'UNESCO's 2003 Convention on Intangible Cultural Heritage: The Implications of Community Involvement in 'Safeguarding'', in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge, 2009) 45–73.

Recommendation 4: **Section 3(b) be amended to replace the words 'conserving and managing Aboriginal cultural heritage' with 'safeguarding of Aboriginal cultural heritage', and the remainder of the Bill be amended throughout to ensure consistency.**

Submissions relating to Aim B: Decision-making by Aboriginal people

It is vital that the decision-making process is Indigenous designed and Indigenous led. As non-Indigenous legal scholars, we offer the following submissions in relation only to technical issues and concerns.

1. High level of uncertainty as to governance arrangements: ACH Authority and Local ACH Consultation Panels

We acknowledge the consultation note below s 8(3) of the draft ACH Bill:

> The process for the nomination of Aboriginal persons as members of the Board, and their required collective skills and expertise, has not yet been determined and included in the draft Bill, but is intended to be a community-driven process to ensure the Board has cultural legitimacy and the requisite skills and expertise.

We also acknowledge that at the consultation workshop in Nowra (on 28 March 2018), it was stated that it was likely to take approximately four years before the governance arrangements were operational.

We absolutely agree that a community-driven process is required on the formation of the ACH Authority and the Local ACH Consultation Panels. Aboriginal views must take precedence when the consultation about the formation of these bodies occurs. However, as non-Indigenous legal academics, we can raise concerns about the dangers of leaving such a crucial issue to be determined later. The ACH Authority is the body that underpins the draft ACH Bill and the legislative scheme cannot operate until the ACH Authority is formed. Yet, all of the detail as to its composition is left until after the Bill has passed. Other than goodwill and political accountability, there is nothing holding governments of the future to complete this process.

We suggest inserting provisions that provide for the way forward, including timing to start the process and some of the minimum requirements of that process. For example, adding provisions to s 8 along the lines of:

> (3) The Minister must commence a process of consultation about the appointment process for the ACH Authority within 3 months of the commencement of this Act.

(a) The consultation process must …

We submit that before the Bill is put to Parliament, Aboriginal people be consulted about the content of the minimum requirements in this section.

This section can then be subject to a sunset clause.

In relation to the provisions of Schedule 1 (Members and procedure of the Board and of the ACH Authority), we also note our concern that that Minister can 'remove a member from office at any time' (clause 5(2)). This appears to be an absolute discretion. If the Minister is going to have such a power, then there needs to be some input from other members of the ACH Authority and some relevant considerations that the Minister must consider.

Recommendation 5: Provisions should be inserted in section 8 of the draft ACH Bill that provide for how consultation about the ACH Authority and Local ACH Consultation Panel membership will proceed. This includes timing to start the process and some of the minimum requirements of that process.

Recommendation 6: The Minister should not have an absolute power to remove a member from the ACH Authority. If the Minister is going to retain this power then there needs to be some input from other members of the ACH Authority and some relevant considerations that the Minister must consider.

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

1. **The Minister's power to make declarations in section 18**

The Minister's powers with respect to declarations of Aboriginal cultural heritage pursuant to s 18 are unclear. It appears the Minister currently has excessive discretion as to relevant considerations and timing of their decision. Pursuant to s 18(1), the 'Minister *may,* on the recommendation of the ACH Authority, declare an area to be Aboriginal heritage' (emphasis added). Section 18(4) then requires the ACH Authority (not the Minister) to consult the Local ACH Consultation Panel, the landholders, any public or local authority and the owners of the object or material. However, there is no guidance on what the Minister needs to consider. Therefore, the Minister has absolute discretion. Further, we note that this power effectively includes the ability to declare that certain activities can be carried out despite a declaration and are therefore exempt from the harm offence provisions.[8]

We submit that the ACH Authority should be given the power to make declarations and determine whether any activities can be carried out despite the declaration. Giving the

[8] Draft ACH Bill, s 45(a).

Minister, who may be non-Indigenous, the final decision-making power over declarations directly counters the aspirations of the Consultation Document and the draft ACH Bill in relation to Aboriginal decision making. However, if the Minister is to retain this power then, at a minimum, we submit a set of relevant considerations is required and would be beneficial to all parties involved, including the ACH Authority.

We note that the Consultation Document stated that the 'draft Bill will create more transparency around the matters that are to be considered by the Authority in recommending a nomination for the Minister'.[9] However, the Bill does not contain this information. A nomination process needs to be set out in the Bill and we also suggest that a form of interim protection be put in place whilst a declaration nomination is being processed.

Finally, provision must be made for Land and Environment Court merits appeal by the ACH Authority (if the Minister retains the power) and by Aboriginal peoples and groups more generally against a decision made pursuant to s 18.

Recommendation 7: The ACH Authority should be given the power to make declarations. If the Minister is to retain that power, then a list of relevant considerations must be included in section 18 so that the Minister's discretion is not absolute.

Recommendation 8: A nomination process for Aboriginal cultural heritage declarations needs to be set out in the draft ACH Bill. We also submit that a form of interim protection be put in place whilst a declaration nomination is being processed.

Recommendation 9: Provision must be made for Land and Environment Court merits appeal by the ACH Authority (if the Minister retains the power) and by Aboriginal peoples and groups more generally against a decision made pursuant to section 18.

2. The consequences of a declaration of Aboriginal cultural heritage

It is not clear from the draft ACH Bill what the purpose and consequence of a declaration of Aboriginal cultural heritage in s 18 means. We suggest, given the way the Bill is currently formulated, that declared cultural heritage would appear on ACH maps, that any activity that impacts declared cultural heritage would require an ACH management plan (as is suggested in the Consultation Document),[10] and that the harm offences would apply. However, none of this is set out in the Bill.

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[9] Office of Environment and Heritage, *A Proposed New Legal Framework: Aboriginal Cultural Heritage in NSW* (2017), 31.
[10] Ibid 30.

Recommendation 10: The purpose and consequence of an Aboriginal cultural heritage declaration needs to be detailed in the legislation. At a minimum, this must include that declared cultural heritage would appear on ACH maps, that any activity that impacts declared cultural heritage would require an ACH management plan, and that the harm offences would apply.

3. Integrating intangible Aboriginal cultural heritage

It is unclear how intangible Aboriginal cultural heritage relates to s 18 declarations, cultural heritage conservation agreements and cultural heritage management plans. The Consultation Document provides that a declaration 'would be able to permanently protect both tangible and intangible cultural heritage values'.[11] However, s 18 appears to be concentrated on tangible heritage in the sense of land, objects, ancestral remains or other tangible material. Given the expansive definition of 'Aboriginal cultural heritage' in s 4(1) (discussed above in relation to recommendation 2), it appears from the draft ACH Bill that intangible heritage could be included in either a conservation agreement (as is stated in the Consultation Document)[12] or a management plan.

We support the protection of intangible cultural heritage being integrated in this way. As we suggested in recommendation 2, we think that removing the separate definition of intangible Aboriginal cultural heritage from s 4(2) would help to make this clearer. If it is not the case that intangible heritage is integrated into these processes (including declarations), then we submit that it should be. The agreements for use of registered intangible Aboriginal cultural heritage for commercial purposes set out in Part 4, Division 3 are not sufficient to protect intangible cultural heritage.

Section 36 provides for agreements for the use of registered intangible Aboriginal cultural heritage specifically for commercial purposes. We welcome the ability to register intangible cultural heritage pursuant to s 36. However, if intangible cultural heritage cannot be included in the mechanisms outlined in the preceding paragraph, then Part 4, Division 3 needs to be expanded. In particular, at a minimum, it should make provision for registering intangible heritage that is widely known, but that such registrations would not be focused on commercialisation and would not be subject to the relevant criminal offence provision.

Recommendation 11: The Bill needs to clearly state that intangible heritage can be protected through declarations of Aboriginal cultural heritage, cultural heritage conservation agreements and cultural heritage management plans. If this is not the case, amendments need to be made to Part 4, Division 3 to ensure wider protection of intangible heritage. (This recommendation is linked to Recommendation 2).

[11] Ibid 30.
[12] Ibid 31.

Submissions relating to Aim E: Greater confidence in the regulatory system

1. **Management plans and merits appeal**

Part 5, Division 3 provides for management plans. We support that the management plans will be approved by the ACH Authority pursuant to s 46.

The process for assessment and approval of management plans includes negotiations between proponents and Local ACH Consultation Panels (s 48). However, if the proponent and the relevant Local ACH Consultation Panel fail to agree, then the ACH Authority may determine the matter. As it stands, under s 52, only the proponent has an opportunity for merits appeal to the Land and Environment Court against the ACH Authority. However, it may be that the Local ACH Consultation panel, or other Aboriginal peoples and groups, do not agree with the ACH Authority and they should have an equal opportunity to appeal. We submit the Local ACH Consultation Panel and other Aboriginal peoples and groups should also have an opportunity for merits appeal to the Land and Environment Court.

Recommendation 12: Provision must be made for Land and Environment Court merits appeal for Local ACH Consultation Panels and other Aboriginal peoples and groups against the decision of the ACH Authority relating to a management plan in Part 5, Division 3.

2. **Exclusion of State Significant Development from assessment pathway**

Pursuant to s 60 of the draft ACH Bill, SSD has been excluded from the assessment pathway. This is of major concern. The Consultation Document states that: this is 'currently the case not only for Aboriginal cultural heritage, but for other types of assessment' (p. 39). We submit that cultural heritage should be differentiated from 'other types of assessment' given that the Aboriginal community must be consulted about any damage to Aboriginal heritage. We also note that the Consultation Document states that '[c]urrently, SSD and SSI projects are exempt from the need to obtain an AHIP and prosecution for offences relating to the harm of Aboriginal objects'. We do not think this justifies the (continuing) exclusion of SSD.

We further note that the Consultation Document states that:

> …these types of development will continue to be subject to the Secretary's Environmental Assessment Requirements (SEAR), created under the Environmental Planning and Assessment Act 1979 (EP&A Act), *which will be updated to adopt the key features of the assessment pathway.*[13] (emphasis added)

[13] Ibid 39–40.

While we welcome the notion that features of the assessment pathway will be adopted, more information needs to be provided about what ‘key features’ of the assessment pathway are going to be included in the SEARs.

Our overarching submission is that SSD should be subject to the same process as other developments applications under the *Aboriginal Cultural Heritage Act*. However, if a separate regime is to be used for SSD then it should be set out in the *Aboriginal Cultural Heritage Act* itself. At the very least, further information must be provided about what will be included in the SEARs.

We also submit that, at a minimum, SSD should still be subject to the offence provisions for unauthorised harm of Aboriginal cultural heritage. We do not see any reason why it should be exempt from these.

Recommendation 13: State Significant Development (SSD) should be subject to the same assessment process as other development applications. However, if a separate regime is to be used then that regime should be set out in the *Aboriginal Cultural Heritage Act.*

Recommendation 14: SSD should still be subject to the offence provisions for unauthorised harm of Aboriginal cultural heritage.

3. The Minister’s power to make Interim Protection Orders

Pursuant to s 78(1) of the draft ACH Bill, the ACH Authority may recommend to the Minister to make an interim protection order. After considering the recommendation of the ACH Authority, the Minister may then make that order pursuant to s 79(1). The Minister appears to have absolute discretion here and no requirements as to time of decision. Similarly to our comments about s 18 above, we submit that the ACH Authority should be given this power, but if the Minister is to retain this power then a list of relevant considerations must be included in s 79 so that the Minister’s discretion is not absolute.

Pursuant to s 83(1), a landholder can appeal to the Land and Environment Court against the making of an order in s 79. We submit that provision must be made for Land and Environment Court merits appeal by the ACH Authority (if the Minister retains the power) and by Aboriginal peoples and groups more generally against a decision pursuant to s 79.

Recommendation 15: The ACH Authority should be given the power to make decisions under s 79, but if the Minister is to retain this power then a list of relevant considerations must be included so that the Minister’s discretion is not absolute.

Recommendation 16: Provision must be made for Land and Environment Court merits appeal by the ACH Authority (if the Minister retains the power) and by Aboriginal peoples and groups more generally against a decision made pursuant to s 79.

4. Heritage Impact Assessment

Part 5, Divisions 3 and 4 of the draft ACH Bill refer to the importance of impact assessment with respect to Aboriginal cultural heritage. The inclusion of negotiation (s 48) as a key element in this area is important, but the Bill leaves much of the substantive discussion about how this process will happen to a ACHAP Code of Practice to be developed (s 54). We support that the Code of Practice will be developed by the ACH Authority. However, we note that this needs to be submitted to the Minister and that the Minister 'may approve a draft' of the Code of Practice 'with any such modifications (if any) as the Minister considers appropriate' (s54(3)). This gives the Minister absolute discretion, not only in relation to approving the Code of Practice, but also on any amendments to the Code of Practice.

We submit that the ACHAP Code of Practice should be determined by the ACH Authority. If the Minister is to retain final decision-making power, then the Bill needs to provide relevant considerations, including that it must be recommended by the ACH Authority and that any proposed amendments must be agreed to by the ACH Authority.

We also make two general points about the development of the ACHAP Code of Practice. Developing such a code will be complex. We note that the *Akwé: Kon Guidelines* provide for international best practice in relation to cultural impact assessment.[14] We would also suggest that one thing that should be considered is the notion of 'benefit sharing' with respect to cultural heritage impact assessments connected to any development project, whether it affects tangible or intangible heritage.

Recommendation 17: The ACHAP Code of Practice should be determined by the ACH Authority. If the Minister is to retain final decision-making power, then the Bill needs to provide relevant considerations including that it must be recommended by the ACH Authority and that any proposed amendments must be agreed to by the ACH Authority.

[14] Secretariat of the Convention on Biological Diversity, *Akwé: Kon Guidelines* (2004).