

**Submission  
No 18**

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

**Organisation:** Bundjalung of Byron Bay Aboriginal Corporation (Arakwal)  
**Date Received:** 19 September 2022

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19 September 2022

NSW Legislative Council  
Portfolio Committee No. 7 – Planning and Environment

By email: [portfoliocommittee7@parliament.nsw.gov.au](mailto:portfoliocommittee7@parliament.nsw.gov.au)

**Bundjalung People of Byron Bay Aboriginal Corporation (Arakwal) RNTBC Submission - Aboriginal Cultural Heritage (Culture is Identity) Bill 2022.**

- 1 We thank the Portfolio Committee No. 7 – Planning and Environment for the opportunity to provide submissions for its inquiry into the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (the Bill)*.
- 2 In these submissions we:
  - Provide a short background on Bundjalung People of Byron Bay Aboriginal Corporation (Arakwal) RNTBC;
  - Outline our recognised legal rights in relation to our Cultural Heritage;
  - Provide general comments on the Aboriginal Cultural Heritage System in NSW; and
  - Outline our concerns with the Bill in its current form.

**Bundjalung People of Byron Bay Aboriginal Corporation (Arakwal) RNTBC**

- 3 Bundjalung People of Byron Bay Aboriginal Corporation (Arakwal) RNTBC (**BOBBAC**) is the registered native title body corporate that holds on trust and manages Bundjalung People of Byron Bay's native title rights and interests.
- 4 Bundjalung People of Byron Bay's successful Native Title Determination Applications (Federal Court Proceedings NSD6020/2001) were determined by the Federal Court on 30 April 2019.
- 5 The functions of BOBBAC are provided for in the *Native Title Act 1993 (Cth)* and the *Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)*. In addition to performing the functions of a Registered native Title Body Corporate, BOBBAC's objectives include:
  - To consult with and consider the views of the Bundjalung People of Byron Bay who are the common law holders of native title on matters relating to the native title rights and interests of the Bundjalung People of Byron Bay
  - Addressing their [Bundjalung People of Byron Bay] social disintegration by strengthening and fostering the development of Aboriginal identity and culture and ensuring that all programs and actions are in accordance with their cultural values, customs and practices.
- 6 We also have a large membership of over 100 Bundjalung People of Byron Bay whose interests we represent.

## General Comments

- 7 BOBBAC is supportive of the reform of the NSW Aboriginal Cultural Heritage system and legislative structure however BOBBAC cannot support the Bill in its current form.
- 8 The current NSW Aboriginal Cultural Heritage system and legislative structure, in connection with Native Title Rights, fails to effectively empower Traditional Owners to *have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions*.
- 9 The current Aboriginal Cultural Heritage protection system is also unable to recognise the complexities of the Native Title processes or contemplate the determination of Traditional Owners.
- 10 Native title is the legal recognition of the individual or communal rights and interests which Aboriginal People have in land, waters and seas. It is recognition that Aboriginal People have continued to exercise our rights and interests in accordance with traditional law and custom since before the British asserted sovereignty over Australia.
- 11 Establishing native title is a high bar and a difficult process, and one which it takes many, many years for most native title claim groups to reach. To establish to the Respondent Parties, including the State and Local Governments and an array of other interest holders, that a native title claim group holds native title it is necessary to provide extensive evidence including expert anthropological and historical reports and affidavits from native title claimants and participate in an arduous process of "credible evidence assessment" by the State of NSW, and in our circumstances, the Commonwealth of Australia.
- 12 The Bundjalung People of Byron Bay filed our native title claim in 2001, and did not receive recognition of our native title right and interests until 2019.
- 13 In *Bundjalung People of Byron Bay and Attorney General of New South Wales [2019] FCA 527* the Federal Court recognised Bundjalung People of Byron Bay's native title rights to:
  - (f) *engage in cultural activities, to conduct ceremonies, to hold meetings, and to participate in cultural practices relating to birth and death including burials where permitted by the laws of New South Wales on the land or waters;*
  - (g) *have access to, to maintain and to protect from physical harm sites and places of importance which are of significance to the Bundjalung People of Byron Bay under their traditional laws and customs;*
  - (h) *teach the physical, cultural and spiritual attributes of places and areas of importance;*
- 14 The *Native Title Act 1993 (Cth)* is Commonwealth legislation. Any Aboriginal Cultural Heritage legislation introduced in NSW would be State based legislation.

*Section 109 of the Constitution* provides:

*"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

- 15 Cultural Heritage legislation at a State level which is inconsistent with the Commonwealth *Native Title Act 1993 (Cth)* could be invalid and struck down by the High Court of Australia.

**Concerns regarding the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022***

- 16 BOBBAC cannot support the Bill in its current form.
- 17 Bundjalung People of Byron Bay have a long and deep connection with our country. This Bill deeply affect many places of significance for Bundjalung People of Byron Bay and does not adequately empower Bundjalung People of Byron Bay to develop and protect our cultural heritage and traditional knowledge.
- 18 In the view of BOBBAC, this Bill does not protect native title holders or claimants and does not elevate the voices of native title holders and claimants. Therefore, the Bill does not recognise the unique and specific role of native title holders in relation to Aboriginal Cultural Heritage.

*Who Speaks for Country*

- 19 The Bill in its current form does not provide clarity on who speaks for Country.
- 20 We understand that section 23 of the Bill provides:

**23 Designation of local ACH service**

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

*(2) In this section—*

**Aboriginal owners** has the same meaning as in the *Aboriginal Land Rights Act 1983*.

**interested Aboriginal parties** include the following—

- (a) Aboriginal owners of the land,*
- (b) a Local Aboriginal Land Council,*
- (c) a registered native title body corporate for the area or part of the area.*

- 21 In the current Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010, issued under Part 6 of the National Parks and Wildlife Act 1974 (NSW) (**NPW Act**) as part of the AHIP process, Clause 4.1.1 of the Requirements provides:

*"Proponents are not required to comply with the requirements of steps 4.1.2 to 4.1.7 where there is an approved determination of native title that native title exists in relation to the proposed project area. In this circumstance, proponents need only consult with the native title holders. If a prescribed body corporate has been established to hold native title on behalf the native title holders then proponents should consult with the prescribed body corporate."*

- 22 Section 60(10) of the *National Parks and Wildlife Regulation 2019* currently provides as follows:

*60 Aboriginal heritage impact permit—requirement for consultation process*

*(10) Modified or alternative Aboriginal community consultation process Despite subclause*

*(1), if an agreement of the following kind specifies or identifies a modified or alternative Aboriginal community consultation process for the purposes of Part 6 of the Act, the proposed applicant is to carry out an Aboriginal community consultation process in accordance with that modified or alternative consultation process—*

*(a) a registered Indigenous Land Use Agreement under the Native Title Act 1993 of the Commonwealth entered into between an Aboriginal community and the State,*

*(b) a lease entered into under Part 4A of the Act,*

*(c) an agreement entered into by the Chief Executive and a board of management for land reserved under Part 4A of the Act that has the consent of the Aboriginal owner board members for the land concerned,*

*(d) an agreement entered into between an Aboriginal community and the Department of Planning, Industry and Environment.*

23 This provision was formerly section 80C(10) of the *National Parks and Wildlife Regulation 2009*.

24 We have an agreement under section 60(10) of the *National Parks and Wildlife Regulation 2019* and as such we would be detrimentally affected if the Bill was introduced in its current form. We are strongly of the view that native title holders should be the Aboriginal cultural heritage service for the whole of our determination area.

25 We express our deep concern at the ability for Local Aboriginal Land Councils to speak for country under the proposed Bill. In our experience, Local Aboriginal Land Councils' membership and priorities do not align with those of the Traditional Owners and native title holders.

26 Allowing non-native title holders to have a role in making decisions over Bundjalung People of Byron Bay's cultural heritage is incredibly disrespectful and goes against the law and custom of Bundjalung People of Byron Bay.

27 There also needs to be consideration given as to how the Bill will interact with the native title right to negotiate process under the NTA. Negotiations between native title holders or registered native title claimants and proponents under the NTA invariably include negotiations regarding cultural heritage assessment and mitigation processes, because cultural heritage underpins the traditional law and custom which is the basis of native title.

*Administration of ACH Council and local ACH Services*

28 The Bill should be empowering Traditional Owners and accordingly native title holders and claimants should be afforded our proper status in relation to Aboriginal Cultural Heritage.

29 Native title holders should be prioritised within the proposed Local Aboriginal Cultural Heritage Services and the Bill should provide clarity on a hierarchy that reflects this. We note that this includes in relation to sections 23, 80, 104 and 107 of the Bill.

- 30 As per the minimum standards of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), we are entitled to expect that any Aboriginal Cultural Heritage legislation upholds the norms set out in UNDRIP. This includes that Traditional Owners have the highest level of control over our cultural heritage and that any protections and controls are of the highest standard.
- 31 The UNDRIP standards includes the fundamental principle of self-determination for Traditional Owners and seeks to ensure that measures put in place in any legislative reform promotes that native title holders and claimants, as the affected First Nations communities, are the ultimate authority on management of cultural heritage.

*Lack of Consultation with Native Title holders and claimants*

- 32 BOBBAC expresses concern that this Bill and other reforms in this area are continually developed without proper consultation of native title holders and claimants of NSW.
- 33 Recommendation 3 of the Juukan Gorge Report includes that legislative reform in the area of Aboriginal Cultural Heritage should be developed through a process of co-design with Aboriginal and Torres Strait Islander peoples.<sup>1</sup>
- 34 BOBBAC must protect the native title rights of the Bundjalung People of Byron Bay. Aboriginal Cultural Heritage is directly connected to native title and affects native title holders and therefore we must be consulted on any reforms.
- 35 BOBBAC has long-held aspirations for Aboriginal Cultural Heritage reform in NSW to include and elevate native title holders voices. The Bill must be amended to reflect this.
- 36 BOBBAC welcomes future consultation on Aboriginal Cultural Heritage reform which can address and effectively empower Traditional Owners to *have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions*.
- 37 We would welcome the opportunity to appear before the Committee and address our concerns directly with the Committee members.

Yours sincerely,

Charmaine Roberts  
**Native Title Officer**  
**Bundjalung of Byron Bay Aboriginal Corporation RNTBC (Arakwal)**

Brent Emmons  
**General Manager**  
**Bundjalung of Byron Bay Aboriginal Corporation RNTBC (Arakwal)**

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<sup>1</sup> A Way Forward: Final Report into the destruction of Indigenous heritage sites at Juukan Gorge, Parliament of the Commonwealth of Australia, October 2021, p xxv.

