

**Submission
No 20**

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

Organisation: Yaegl Traditional Owners Aboriginal Corporation RNTBC

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

By email: portfoliocommittee7@parliament.nsw.gov.au

Yaegl Traditional Owners Aboriginal Corporation 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 Yaegl Traditional Owners Aboriginal Corporation 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.

Yaegl Traditional Owners Aboriginal Corporation RNTBC

- 3 Yaegl Traditional Owners Aboriginal Corporation RNTBC (**YTOAC**) is the registered native title body corporate that holds Yaegl People's native title rights and interests on trust for Yaegl native title holders.
- 4 Yaegl People's successful Native Title Determination Applications (Federal Court Proceedings NSD6052/1998 and NSD168/2011) were determined by the Federal Court on 25 June 2015 and 31 August 2017.



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- 5 The functions of YTOAC are provided for in the *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). YTOAC is also required to consult with all Yaegl native title holders when it comes to making 'native title decisions'.
- 6 It is the goal of YTOAC to efficiently perform the functions of the registered native title body corporate while also meeting the objectives of our Rule Book, which include:
- To protect, preserve, and promote Yaegl culture and heritage;
 - To promote, support, enhance and develop the education, employment, health, social and economic benefits of Yaegl People as determined by the members; and
 - To support, encourage and promote sporting and cultural activities as determined by the members.
- 7 We also have a large membership of over 200 Yaegl People whose interests we represent.

General Comments

- 8 YTOAC is supportive of reform of the NSW Aboriginal Cultural Heritage system and legislative structure.
- 9 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*.
- 10 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.
- 11 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 their rights and interests in accordance with traditional law and custom since before the British asserted sovereignty over Australia.
- 12 In *Yaegl People #1 v Attorney General of New South Wales* [2015] FCA 647 the Federal Court recognised Yaegl People have the following legal rights in our lands and inland waters:
- the right to have access to, maintain and protect from physical harm, sites and places of importance in the Determination Area which are of significance to Yaegl People under their traditional laws and customs*



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13 In *Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993 the Federal Court recognised Yaegl People have the following legal rights in our sea country:

the right to maintain and to protect places, objects and areas of importance or significance under traditional laws and customs on those areas

14 Any reform to Aboriginal Cultural Heritage legislation or any new introduction of Aboriginal Cultural Heritage legislation must contemplate, recognise and respect our legal rights as native title holders and must recognise the role of Traditional Owners more generally in relation to Aboriginal Cultural Heritage.

15 Reforms in this area must also follow the Dhawura Ngilan Vision and Best Practice Standards (**Dhawura Ngilan Report**), as well as the recommendations of the A Way Forward: Final Report into the destruction of Indigenous heritage sites at Juukan Gorge (**Juukan Gorge Report**). This includes that cultural heritage is managed according to community ownership.

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

16 YTOAC cannot support the Bill in its current form.

17 Yaegl People have a deep and abiding connection to the lands, waters and seas of our traditional Country. This Bill directly affects sites of significance to Yaegl People and in its current form does not adequately protect or empower Yaegl People to develop our cultural heritage and traditional knowledge.

18 In the view of YTOAC, 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.



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(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 YTOAC is concerned that the Bill does not safeguard our current legal rights as native title holders and, in fact, represents a diminishment of the exclusive consultation rights which we currently have under the Consultation Requirements for Proponents.
- 23 We cannot support the Bill in its current form when it would act to diminish the existing legal rights of native title holders.
- 24 The Dhawura Ngilan Report supports that senior Traditional Owners and Native Title Holders have the authority to speak for country because of our unique role as ‘repositories of knowledge about places’.¹
- 25 It is YTOAC’s view that where native title is determined, native title holders are the right authority and should be the voices elevated and speaking for Country exclusively. Native title holders must have their voices elevated because of the connection between native title rights and Aboriginal cultural heritage. We have been involved in litigation over 2 decades to be recognised as the right people to speak for Country. This cannot be ignored by the NSW Parliament. Simply put, the Bill should be empowering Yaegl People to make decisions about our cultural heritage and protecting the rights we have had recognised by the Federal Court, rather than diminishing them.

¹ Dhawura Ngilan Vision and Best Practice Standards, The Heritage Chairs of Australia and New Zealand, March 2021, p 9.



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Administration of ACH Council and local ACH Services

- 26 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.
- 27 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.
- 28 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.
- 29 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

- 30 YTOAC 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.
- 31 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.²
- 32 YTOAC must protect the native title rights of the Yaegl People. Aboriginal Cultural Heritage is directly connected to native title and affects native title holders and therefore we must be consulted on any reforms.
- 33 YTOAC 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.

² 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.



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34 YTOAC 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.*

35 We would welcome the opportunity to appear before the Committee and address our concerns directly with the Committee members.

Yours sincerely,

William Walker

Chief Executive Officer

Yaegl Traditional Owners Aboriginal Corporation RNTBC (ICN 8254)



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