

Submission
No 22

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

Organisation: Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC
Date Received: 22 September 2022

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

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

Ngullingah Jugun (Our Country) 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 Ngullingah Jugun (Our Country) 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.

Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC

- 3 Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC (**NJ(OC)AC RNTBC**) is the registered native title body corporate which holds Western Bundjalung People's native title rights and interests on trust for Western Bundjalung Native Title Holders.
- 4 Western Bundjalung People's Native Title Determination Application (**Federal Court Proceedings NSD2300/2011**) was successfully determined by the Federal Court on 29 August 2017 and 27 June 2018.
- 5 The functions of NJ(OC)AC RNTBC are provided for in the *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). NJ(OC)AC RNTBC is also required to consult with all Western Bundjalung native title holders when it comes to making 'native title decisions'.
- 6 It is the goal of NJ(OC)AC RNTBC to efficiently perform the functions of the registered native title body corporate while also meeting the objectives of our Rule Book, which include:
 - To implement the aspirations and decisions of members;
 - To protect, preserve, and promote Western Bundjalung People's identity, culture and heritage;
 - To advance the culture and customs of Western Bundjalung People; and
 - To advance the quality of life of Western Bundjalung People including advancing the economic development and self-determination of Western Bundjalung People.

General Comments

- 7 NJ(OC)AC RNTBC is supportive of reform to the NSW Aboriginal Cultural Heritage system and legislative structure.
- 8 In NJ(OC)AC RNTBC's view, 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 their rights and interests in accordance with traditional law and custom since before the British asserted sovereignty over Australia.

11 In *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 [Part A] the Federal Court recognised Western Bundjalung People's native title rights to:

5. Subject to paragraphs 7 and 8, the nature and extent of the native title rights and interests in relation to the Native Title Area are the non-exclusive native title rights to:

...

(h) engage in cultural activities including:

- (i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;*
- (ii) conducting and participating in ceremonies and rituals including in relation to birth and death;*
- (iii) holding cultural gatherings; and*
- (iv) passing on knowledge about the physical and spiritual attributes of places of importance;¹*

12 In *Western Bundjalung People v Attorney General of New South Wales* [2018] FCA 970 [Part B] the Federal Court recognised Western Bundjalung People's native title rights to:

6. Subject to paragraphs 8 and 9, the nature and extent of the native title rights and interests in relation to the Part B Native Title Area are the non-exclusive native title rights to:

...

(h) engage in cultural activities including:

- (i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;*
- (ii) conducting and participating in ceremonies and rituals including in relation to birth and death;*
- (iii) holding cultural gatherings; and*

¹ *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 [Part A] at [5(h)].

(iv) passing on knowledge about the physical and spiritual attributes of places of importance;²

- 13 NJ(OC)AC RNTBC submits that any reform to Aboriginal Cultural Heritage legislation or any new introduction of Aboriginal Cultural Heritage legislation must recognise our legal rights as native title holders. Any reforms must also recognise the role of Traditional Owners more generally in relation to Aboriginal Cultural Heritage.
- 14 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*

- 15 NJ(OC)AC RNTBC cannot support the Bill in its current form.
- 16 Western Bundjalung People have a deep and abiding connection to the lands, waters and seas of our traditional Country. This Bill directly effects sites of significance to Western Bundjalung People. This Bill in its current form does not protect or align with the goals or functions of NJ(OC)AC RNTBC, namely, to protect and empower Western Bundjalung People to develop our cultural heritage and traditional knowledge and advance our self-determination.
- 17 In the view of NJ(OC)AC RNTBC, this Bill does not protect native title holders or claimants and does not elevate the voices of native title holders and claimants. The Bill does not recognise the unique and specific role of native title holders in relation to Aboriginal Cultural Heritage.

Who Speaks for Country

- 18 The Bill in its current form does not provide clarity on who speaks for Country.
- 19 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.

- 20 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:

² *Western Bundjalung People v Attorney General of New South Wales* [2018] FCA 970 [Part B] at [6(h)].

“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.”

- 21 Clause 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.

- 22 This provision was formerly section 80C(10) of the *National Parks and Wildlife Regulation 2009*.
- 23 Following our determination, NJ(OC)AC RNTBC entered into a clause 60(10) modified or alternative Aboriginal community consultation process which is contained in the Western Bundjalung Settlement Indigenous Land Use Agreement. This modified Aboriginal community consultation process for Aboriginal Cultural Heritage provides that Western Bundjalung People are the people who determine the significance of their Aboriginal Cultural Heritage and as such should be exclusively consulted in relation to any activities which may impact upon Aboriginal Cultural Heritage within the Native Title Area. The Bill does not provide any recognition or protection for this agreement.
- 24 Given that NJ(OC)AC RNTBC currently has exclusive consultation rights over the entirety of our Traditional Country through the Consultation Requirements for Proponents and through our clause 60(10) modified Aboriginal community consultation process for Aboriginal Cultural Heritage, we are very concerned that the Bill does not ensure the continuation of our current legal rights as native title holders and, in fact, represents a diminishment of the exclusive consultation rights which we currently have.
- 25 We cannot support the Bill in its current form when it is effectively diminishing the existing legal rights of native title holders.

- 26 Western Bundjalung People have the right to manage our sites, places, cultural landscapes, remains, and other aspects of our cultural heritage, because we are the determined native title holders.
- 27 If this Bill truly intends to recognize and protect our rights in regards to cultural heritage, it must be amended to ensure that native title holders have exclusive rights when it comes to our cultural heritage in the whole of our determination area. There cannot be cultural heritage legislation without culture at its centre.
- 28 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'.³
- 29 It is NJ(OC)AC RNTBC'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.
- 30 We have been involved in litigation for decades to be recognised as the right people to speak for Country. This recognition and our tireless work cannot be ignored by the NSW Parliament.
- 31 Simply put, the Bill should be empowering Western Bundjalung People to make decisions about our cultural heritage and protecting the rights that were recognised by the Federal Court, rather than attempting to diminish them.

Administration of ACH Council and local ACH Services

- 32 The Bill should be empowering Traditional Owners, native title holders and claimants proper cultural authority in relation to Aboriginal Cultural Heritage.
- 33 Native title holders must be prioritised within the proposed Local Aboriginal Cultural Heritage Services and the Bill should provide clarity on a hierarchy that reflects this. Specifically, we note this in relation to sections 23, 80, 104 and 107 of the Bill.
- 34 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.
- 35 The UNDRIP standards includes the fundamental principle of self-determination for Traditional Owners. This principle 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.
- 36 According to the UNDRIP standards, Western Bundjalung People must be the ultimate authority on the management of our cultural heritage.

³ Dhawura Ngilan Vision and Best Practice Standards, The Heritage Chairs of Australia and New Zealand, March 2021, p 9.

Mining and Exploration

- 37 We are also concerned that the Bill does not provide adequate protection with respect to exploration or mining activities on our native title lands and waters. Such activities pose a significant threat to cultural heritage and are a source of deep concern for our Corporation and Western Bundjalung People.
- 38 We submit that reform to Aboriginal Cultural Heritage legislation must properly empower Native Title Holders to be able to specifically protect cultural heritage from exploration and mining activities and provide much stronger minimum cultural heritage protection obligations on exploration and mining companies. These obligations and requirements can only be developed in close consultation with Traditional Owners.

Lack of Consultation with Native Title holders and claimants

- 39 NJ(OC)AC RNTBC 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.
- 40 Recommendation 3 of the Juukan Gorge Report includes that legislative reform relating to Aboriginal Cultural Heritage should be developed through a process of co-design with Aboriginal and Torres Strait Islander peoples.⁴ This Bill has not been developed through such a process.
- 41 Aboriginal Cultural Heritage is directly connected to native title and affects native title holders. NJ(OC)AC RNTBC must protect the native title rights of the Western Bundjalung People. In keeping with the objects of our Rule Book, NJ(OC)AC RNTBC must be able to preserve and promote Western Bundjalung People's identity, culture and heritage. In order for NJ(OC)AC RNTBC to do this, we must be consulted on any reforms in this area.
- 42 NJ(OC)AC RNTBC has long-held aspirations for Aboriginal Cultural Heritage reform in NSW to effectively include, elevate and promote native title holders' voices and interests. The Bill must be amended to reflect this.
- 43 NJ(OC)AC RNTBC 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*.
- 44 We would welcome the opportunity to appear before the Committee and address our concerns directly with the Committee members.

Yours sincerely,

Russell Brown
Chairperson
Ngullingah Jugun (Our Country) Aboriginal Corporation RNTBC (ICN 8672)

⁴ 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.