

**Submission
No 24**

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

Organisation: Lock the Gate Alliance

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Submission: Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

27 September 2022

Thank you for the opportunity to make a submission on the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022.

Lock the Gate Alliance acknowledges the leadership of Traditional Owners in the fight to protect Country from destructive practices such as coal and gas mining.

We believe that care, control and custody of heritage and administration of laws to manage heritage should be in the hands of Traditional Owners. NSW is the only jurisdiction without stand-alone Aboriginal cultural heritage legislation. Clearly this must change.

In summary, Lock the Gate Alliance:

- supports the rights of Traditional Owners to make decisions on cultural heritage, including withholding consent. Aboriginal people exercising care, control and custody of heritage should have a right to veto development that would damage or destroy significant cultural heritage
- supports co-design of cultural heritage laws by TOs. Unfortunately, our experience over many years has shown us that the current system that purports to protect Aboriginal cultural heritage from mining is not working. Over the years, a number of TO's and TO groups that we work with have raised serious concerns. We highlight some of those concerns further below
- recommends that additional consultation is required. Based on the submissions from a number of TOs to date, it seems that additional consultation and consideration of the Bill, and of cultural heritage protection in NSW more generally, is required. A process for thorough co-design and culturally appropriate consultation is needed.
- commends the findings of the Juukan Gorge inquiry to the Committee and draws the Committee's attention to the Inquiry's minimum standards for the protection of aboriginal heritage, which we believe provides a guide to the principles that law reform in NSW should consider.

Finally, we consider that TOs should be consulted urgently on interim protection measures for cultural heritage while broader reform is finalised.

MINIMUM STANDARDS FOR THE PROTECTION OF ABORIGINAL HERITAGE IN NSW

The Inquiry into the destruction of Indigenous heritage sites at Juukan Gorge by the Joint Standing Committee on Northern Australia recommended that the Australian Government legislate a new framework for cultural heritage protection at the national level (Recommendation 3). The recommendation was that new legislation should set out the minimum standards for state and territory heritage protections consistent with relevant international law (including the United Nations Declaration on the Rights of Indigenous People UNDRIP) and the Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia.

We commend the findings of the Juukan Gorge inquiry to the Committee and draw the Committee's attention to the Inquiry's minimum standards for the protection of aboriginal heritage. As the Inquiry recommended, these minimum standards should be developed as part of a co-design process but consideration should be given to the inclusion of the following:

1. **a definition of cultural heritage recognising both tangible and intangible heritage**
2. **a process by which cultural heritage sites will be mapped**, which includes a record of past destruction of cultural heritage sites (with adequate safeguards to protect secret information and ensure traditional owner control of their information on any database)
3. **clear processes for identifying the appropriate people** to speak for cultural heritage that are based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist
4. **decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage**
5. a requirement that **site surveys involving traditional owners are conducted on country at the beginning of any decision making process**
6. **an ability for traditional owners to withhold consent** to the destruction of cultural heritage
7. a process for the negotiation of cultural heritage **management plans which reflect the principles of free, prior and informed consent** as set out in the UNDRIP
8. **mechanisms for traditional owners to seek review or appeal** of decisions
9. adequate **compliance, enforcement and transparency** mechanisms

10. **adequate penalties** for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners
11. the provision of adequate **buffer zones around cultural heritage sites**
12. a right of timely **access by Aboriginal and Torres Strait Islander peoples to protected cultural heritage sites**
13. a process by which **decisions can be reconsidered if significant new information** about cultural heritage comes to light.

CASE STUDIES

Wonnarua lands and the Glendell Continued Operations Project

As at 27 September 2022, indigenous cultural heritage of Ravensworth Estate and surrounds in the Hunter Valley is threatened by Glencore's Glendell Continued Operations Project. The NSW Independent Planning Commission is due to make a determination about this Project by 4 November 2022.

If an expansion of Glencore's Glendell coal mine proceeds, Ravensworth Homestead would be uprooted and relocated and the lands of the estate mined. Open cut mining would greatly diminish or destroy what should otherwise become a place of truth-telling and reconciliation.

Robert Lester and Scott Franks from Plains Clan of the Wonnarua People demand that their Country and Cultural Heritage be saved from Glencore's damaging coal mine.

"It is part of Aboriginal lore that everyone, Indigenous and non-Indigenous, should work together to ensure that we look after the land for future generations to come."

A NSW Premier and Cabinet briefing to the Chair of the Heritage Council advised:

"Ravensworth is a rare and exceptionally intact colonial homestead complex and cultural landscape of state heritage significance that tells the story of shared Aboriginal and European heritage in the Hunter Valley, including early conflict, the development of pastoralism and the convict labour system. It meets all seven criteria for assessing state level significance."

"The Ravensworth area has the strongest documentary evidence of any conflict site across the Hunter Valley, including the event known as the Ravensworth massacre. Although the actual site of the massacre may not be in the immediate vicinity of the homestead, the estate and homestead represent that story of settlement and conflict." ¹

¹ NSW Premier and Cabinet, briefing to the Chair of the NSW Heritage Council, 22 Feb 2021. A copy of this Briefing Note - obtained via the GIPA Act - was provided to the Commission by Lock the Gate on 8 March 2022, https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2022/02/glendell-continued-operations-project-ssd-9349/public-submissions/general-public-submissions/220308-lock-the-gate-alliance_redacted.pdf

According to Heritage NSW, Registered Aboriginal Parties consider the Ravensworth area to be of high cultural significance and that Glencore's proposed coal expansion's "*direct and indirect impacts will further contribute to the cumulative impacts and loss of Aboriginal cultural heritage values and sites in the local area and the region.*"² The NSW Heritage Council says it is of "*exceptional importance*".³

Despite pleas from the Native Title Applicants responsible for protecting this country and clear assessments from authorities of the importance of the aboriginal cultural heritage at this location, both aboriginal and colonial heritage is at very real risk of destruction. Despite being assessed as 'state significant' heritage, the heritage at this location enjoys almost no protection from Glencore's coal mine expansion. In stark contrast, the EP&A Act automatically declares any and all coal mine development proposals as 'State Significant' as a starting point (by virtue of them being a coal mining proposal), which then prioritises the economic value of the coal over all development impacts, including aboriginal cultural heritage.

We note in the Shenhua case study (below) that the federal Minister chose to not make a declaration to protect Gomeroi cultural heritage on the grounds that the 'expected social and economic benefits of the mine to the local community outweighed the destruction of these areas of immeasurable cultural values'. A very similar scenario is unfolding now with the Glendell COP assessment. NSW DPE is arguing that the economic benefits of the extraction of the coal resource will outweigh the heritage values of the Ravensworth Homestead complex but this is contested by many, including the Chair of the Heritage Council of NSW Frank Howarth. Mr Howarth made the following comment to Elizabeth Owers, Environment & Heritage, DPE on 13 April 2022 in the margin of a PDF of the IPC's 6 April 2022 letter to DPE:

*"The HC was not party to any view by then DPIE that economic outweighed heritage. Be good to see the Department's methodology and how they valued the loss of heritage, and whether they took into account the lessons of Jukaan Gorge."*⁴

For a detailed account of how the NSW Government's Glendell Continued Operations coal-mine assessment process has prioritised the development of a coal resource over the protection of aboriginal cultural heritage, please see Lock the Gate's submissions to the NSW IPC in April 2022 [here](#) and June 2022 [here](#).

² Dr Samantha Higgs, Senior Team Leader, Aboriginal Heritage Regulation Branch - North, Heritage NSW, 30 October 2020, <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-9349%2020210T225315.374%20GMT>

³ HERITAGE COUNCIL OF NSW, MEETING MINUTES – 498, 2 March 2022, <https://www.heritage.nsw.gov.au/assets/HC-2Mar22-Meeting-Minutes-CONFIRMED-v2.pdf>

⁴ To view the original document, see Lock the Gate's submission to the NSW IPC here: <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2022/02/glendell-continued-operations-project-ssd-9349/comments-on-dpe-heritage-response/220621-lock-the-gate-alliance.pdf>

Gomeroi lands and the Narrabri Gas Project

Aboriginal cultural heritage issues were raised by members of the public and Traditional Owners during the NSW IPC's Public Hearing for Narrabri Gas Project. The IPC summarised these concerns as:

- The Project is detrimental to the spiritual significance of of the Pilliga and the Gomeroi people's cultural values and traditions;
- Inadequate consultation has occurred;
- Government assessment and engagement processes are culturally exclusive; and
- Intergenerational equity issues through loss of culture.

The following additional observations from the NSW IPC will afford Portfolio Committee No. 7 a snapshot of concerns:

284. The Commission heard that there are many sacred places in the Pilliga, including all of the trees and water. The cultural values and traditions are passed from generation to generation and the disturbance posed by The Project significantly impacts on these values and traditions.

285. The submissions also objected to the development assessment process, which is seen to disadvantage Aboriginal groups. The Commission heard how Aboriginal culture is an oral tradition and many of the elders and knowledge holders are prevented from culturally sensitive information in typical engagement processes such as written submissions and in public forums . Additionally, the high significance of the area is based on layers of restricted knowledge, held and Safeguard by different knowledge holders. The Commission heard from one speaker saying *"it is difficult for the Gomeroi elders and knowledge holders to articulate the significance of the sites to our traditions, unless we are on country and in context, which enables us to disclose culturally sensitive information without significantly breaching the cultural protocols, which are central to our tradition and law"*.

286. The submissions stated that water is sacred and is protected in Gomeroi culture by lore and to allow any interference in the Project Area will desecrate important Gomeroi land. The Commission heard how if the water is contaminated or impacted in any way, stories about Dreaming figures will be lost.

Despite these concerns, Santos' gasfield project was approved by the NSW IPC. It has been reported that on March 24, 2022, Gomeroi voted overwhelmingly at a Nation meeting held in Tamworth to reject an indigenous land use agreement offered by Santos for the gas project. This was a historic vote that showed clearly the depth of sentiment amongst Gomeroi to fight to protect the Pilliga. In May 2021, Santos lodged "Future Acts Determination Applications" with the Native Title Tribunal, asking it to exercise its powers to impose the project on Gomeroi land if no agreement can be reached outside of the Tribunal.

For further detail about the impact of Santos' gas project on cultural heritage, see this expert review by Peter Kuskie, South East Archaeology: [Narrabri Gas Project - Aboriginal Cultural Heritage Assessment](#) (May 2017).

Gomeri lands and the Shenhua mine

The following is a case study provided by the *Inquiry into the destruction of Indigenous heritage sites at Juukan Gorge* by the Joint Standing Committee on Northern Australia.

Gomeri lands were under threat of an open-cut mining project in the middle of the Liverpool plains. The project belonged to Shenhua Watermark, a Chinese company. Cultural heritage that was threatened included a mortuary trail, multiple burial sites, multiple grinding grooves and a place of post-colonial massacre. The Gomeri consider this area to be their Gallipoli site, their war memorial.

Poor perceptions of NSW cultural heritage protections led the Gomeri to pursue an ATSIHP application as their only course of action to protect their heritage. An ATSIHP application was made in 2015, with a follow up application made in 2017 at the request of the Department to ensure all relevant evidence was included. In total the application had over 1,000 pages of evidence.

The Minister for the Environment agreed that the mine would irreversibly destroy sacred places and that destruction would cause high levels of emotional and spiritual devastation. It was also agreed that the Gomeri's cultural heritage was of immeasurable value.

Nevertheless, in 2019 the Minister chose to not make a declaration to protect Gomeri cultural heritage. The decision was made on the grounds that the 'expected social and economic benefits of the mine to the local community outweighed the destruction of these areas of immeasurable cultural values'. This was despite accepted doubts about the potential benefits of the mine to State and National economies.

The Gomeri were devastated, they were bewildered that despite the Minister's recognition of the value of their culture it could be destroyed due to economic interests. They said that they felt duped that the ATSIHP Act was disregarded in favour of the interests of a foreign owned company.

In April 2021 the NSW Government reached an agreement with Shenhua to withdraw its mining lease application due to opposition from the local community who feared the mine's impact on the area's fertile food-growing soil. It is not apparent that Gomeri's concerns were taken into account in this decision.

Tharawal land and the Dendrobium coal mine

The Dendrobium mine is situated within the traditional country of the Tharawal people and falls within the Tharawal Local Aboriginal Land Council (LALC) and the Illawarra LALC. This area is also located within the catchments of the Avon and Cordeaux Rivers, which are within the WaterNSW Metropolitan Special Area. In order to protect surface water resources, access to the Metropolitan Special Area has been restricted for approximately 120 years. Despite these restrictions, mining has impacted both water resources and land located within a cultural landscape that is important to the local Aboriginal community historically, socially and spiritually. In June 2022, Heritage NSW advised that there are a "number of rock art

sites that contain a high number of motifs or rare forms indicate the potential for an important and unique cultural landscape not seen in other parts of NSW.”⁵

According to South 32’s consultants, Aboriginal people of the region maintain “a sense of community, traditional customs and practices, cultural knowledge” and continue to care for significant sites and the land in general. “Today there are many thousands of Aboriginal people living in the Illawarra. They continue to be custodians of the land, whilst traditional owners maintain cultural knowledge.”⁶

In February 2021, the New South Wales Independent Planning Commission (IPC) rejected an expansion application by South 32, to extend the life of its Dendrobium mine, near Wollongong.

In refusing consent for the Dendrobium Extension Project SSD 8194, the NSW IPC found:

- There was “considerable risk of irreversible damage to 58 identified Aboriginal cultural heritage sites” (pg 2)
- the consequences of subsidence impacts would be “long term” and that the “severity of damage to the landscape, water resources ..., biodiversity ... and Aboriginal cultural heritage values are potentially irreversible” (pg 92)
- “The Project is likely to harm multiple Aboriginal cultural heritage sites, including a number of sites of high Aboriginal cultural and scientific significance” (pg 93)
- That “in relation to intergenerational equity”, there would be a “significant loss” of aboriginal cultural heritage passed on to future generations (pg 93)
- Overall, the Commission found that the Project’s impact on Aboriginal Cultural Heritage was “a reason for refusal of the present Application” (pg 69).⁷

NSW DPE down-played impacts as unlikely to be significant or widespread

A submission from the Biodiversity & Conservation Division (BCD), Environment, Energy and Science agency found:

“We maintain that the proposed longwall layout is likely to harm multiple Aboriginal cultural heritage sites, including a number of sites of high Aboriginal cultural and scientific significance, due to subsidence from undermining.”⁸

⁵ Aboriginal Cultural Heritage Advice – EIS – State Significant Infrastructure – Dendrobium Mine Extension Project (SSI-33143123), 14 June 2022

⁶ Niche Environment and Heritage . 15 February 2022, Dendrobium Mine Extension Project, Aboriginal Cultural Heritage Assessment Report, pg 16

⁷ NSW IPC, 5 February 2021, SSD 8194 Dendrobium Extension Project, Statement of Reasons, https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/10/dendrobium-extension-project-ssd-8194/determination/210205_ssd-8194-dendrobium-extension-project_statement-of-reasons.pdf

⁸ BCD advice, Dendrobium Mine Extension Project, 9 March 2020, <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=PAE-2097%2120200309T220139.987%20 GMT>

NSW DPIE's Assessment Report (pg 44) describes BCD as the "**only** (our emphasis) agency that expressed significant concerns relating to predicted or potential Aboriginal heritage impacts". It is unclear why DPIE characterised the agency with responsibility for management and protection of Aboriginal objects and declared Aboriginal Places under the National Parks and Wildlife Act 1974 in this way. We note that the agency with responsibility for the management and protection of Aboriginal objects and declared Aboriginal Places expressed concern that the proposed longwall layout was likely to harm multiple Aboriginal cultural heritage sites, including a number of sites of high Aboriginal cultural and scientific significance, due to subsidence from undermining.

The NSW IPC refused consent, partly on impacts to aboriginal cultural heritage. South 32's response was to attempt to overturn this decision in the Land and Environment Court. At the same time, they re-submitted a revised proposal to the NSW Government for approval.

In May 2021, South 32's subsidiary, Illawarra Coal Holdings Pty Ltd, lodged a NSW Land and Environment Court judicial review against the refusal decision.

South 32 / Illawarra Coal Holdings sought praise for reducing impacts to Aboriginal cultural heritage from their revised proposal, whilst simultaneously trying to get the refusal for their original, high-impact proposal overturned. The new proposal promised a "*reduction in the number of Aboriginal heritage sites directly mined beneath from 22 to six sites*", with "*no longwall mining beneath previously identified high archaeological significance Aboriginal heritage sites*".⁹

In pursuing legal action to overturn the IPC's refusal, South 32 demonstrated that they remained committed to longwall mining below previously identified Aboriginal cultural heritage sites of high significance. South 32 have since made a decision not to proceed with the project.

⁹ South 32, Dendrobium Mine Extension Project EIS Executive Summary, 2022, pg ES-5