

Submission
No 26

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

Organisation: Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People
Native Title Applicant

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

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

Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan Applicant - *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 We make this submissions as the Applicant acting on behalf of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People.
- 3 In these submissions we:
 - Provide a short background on Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title determination application, the NNWW Applicant and the Ngemba, Ngiyampaa, Wangaaypuwan, Wayilwan Aboriginal Corporation (**NNWW Aboriginal Corporation**);
 - Outline Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People’s rights in relation to Cultural Heritage;
 - Provide general comments on the Aboriginal Cultural Heritage System in NSW; and
 - Outline the NNWW Applicant’s concerns with the Bill in its current form.

The Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title determination application, the NNWW Applicant, and the NNWW Aboriginal Corporation

Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title determination application

- 6 The Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People filed our native title determination application on 14 March 2012 (NSD38/2019). The Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People’s native title determination application was accepted for registration on 12 April 2012.¹
- 7 The members of the Ngemba, Ngiyampaa, Wangaaypuwan, and Wayilwan native title claim group (**NNWW Claim Group**) are determined by our lineage, as descendants of our Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan ancestors who are the Traditional Owners of our Country both before and after invasion. Those persons are referred to as our *Apical Ancestors*.
- 8 The area that is the subject of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title determination application (**NNWW Claim**) is bounded by the towns of Brewarrina, Bourke, Coonamble, Gulargambone, Warren, Nyngan, Hillston, Mossgiel and Ivanhoe, from the Barwon River in the north, to the Lachlan River in the south, the Castlereagh River in the east and Ivanhoe in the west (**NNWW Claim Area**). A map of the claim area is included at Annexure A.
- 9 The Ngemba, Ngiyampaa, Wangaaypuwan, and Wayilwan People claim a number of rights and interests within the NNWW Claim Area, including:

...

(n) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;

¹ See a copy of the Registration test decision online here:
http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/RegistrationDecisionDocuments/2012/May%202012/NC12_1-1%20%2012042012.pdf

...

(q) the right to speak for and make non-exclusive decisions about the application area in accordance with traditional laws and customs;

(r) the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and

(s) the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.²

NNWW Applicant

- 10 The NNWW Claim Group have nominated 16 Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People to act as the Applicant in the NNWW Claim and do the day to day work, as well as represent the interests of Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People.

NNWW Aboriginal Corporation

- 11 Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People have also established a Corporation, who's membership is open to Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People.
- 12 The NNWW Aboriginal Corporation has more than 140 members. All members of the NNWW Aboriginal Corporation are descendants of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People Apical Ancestors.
- 13 One of the objectives of the NNWW Corporation is to benefit the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People by providing assistance for the protection and preservation of Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People identity, culture and heritage.

General comments

- 14 The NNWW Applicant is of the position that the NSW Aboriginal Cultural Heritage system and legislative structure is in need of reform.
- 15 The current NSW Aboriginal Cultural Heritage system and legislative structure does not adequately ensure that Traditional Owners are able to speak for and protect our Country and cultural heritage. Nor does it provide for the protection of Country or cultural heritage in accordance with cultural protocols for men's and women's business. Any reform must empower Traditional Owners to speak for and manage their cultural heritage in accordance with gender specific protocols.
- 16 Further, any reform to Aboriginal Cultural Heritage legislation or any new introduction of Aboriginal Cultural Heritage legislation must contemplate, recognise and respect the role of Traditional Owners in relation to Aboriginal Cultural Heritage.
- 17 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*

- 18 The NNWW Applicant cannot support the Bill in its current form.

² See the full list of rights claimed on the Extract from Schedule of Native Title Applications, available here:
http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/NTDA%20Extracts/NC2012_001/SNTAExtract_NC2012_001.pdf

- 19 Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People have a deep and abiding connection to the lands and waters of our traditional Country. The Bill directly affects sites of significance to Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People. In its current form the Bill does not adequately empower Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People to protect or develop our cultural heritage and traditional knowledge.
- 20 The NNWW Applicant submits that the Bill fails to recognise the unique and specific role of native title holders and claimants in relation to Aboriginal Cultural Heritage.
- 21 The recognition of native title requires a high evidentiary bar and involves a long and difficult process for Traditional Owners. 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 as well as affidavits from native title claimants. The native title claim group must also participate in an arduous process of “credible evidence assessment” by the State of NSW.
- 22 The NNWW Applicant has been in the process of pursuing the recognition of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People’s native title rights and interests for more than 10 years. The Bill must adequately recognise the rights of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People as the registered native title claimants for the region and once our claim is determined, recognise our rights as the native title holders to exclusively make decisions about our culture and heritage.

Who Speaks for Country

- 23 The NNWW Applicant is of the position that the Bill in its current form does not provide clarity on who speaks for Country.
- 24 We understand that clause 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.

- 25 The NNWW Applicant is concerned that clause 23 of the Bill as it is currently drafted does not include a specific category for native title parties that have had their native title claim registered, but not yet determined. For a native title party to have their claim registered, it must pass the ‘Registration Test,’ which involves satisfying the National Native Title Tribunal that the claim meets a number of merit conditions including a factual basis, a prima facie case and a traditional physical connection.³
- 26 The NNWW Applicant is of the view that it should be afforded status under clause 23 of the Bill to speak for Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan Country in regards to matters of Aboriginal Cultural Heritage, having already met the requirements of the ‘Registration Test’ and being at an advanced stage in our determination application.
- 27 The NNWW Applicant is of the view that if there are no Registered Native Title Body Corporates (PBC) in an area, Traditional Owners must still be consulted on Aboriginal Cultural Heritage. The proposed local Aboriginal Cultural Heritage service must comprise of Traditional Owners, including registered native title claimants, with cultural knowledge and cultural authority to speak for their cultural heritage and for Country.

³ See *Native Title Act 1993* (Cth) ss 190A-190C.

- 28 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.”

- 29 The NNWW Applicant has an expectation that once native title is determined, Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan native title holders will have the exclusive rights to speak on matters of Aboriginal Cultural Heritage within Ngemba, Ngiyampaa, Wangaaypuwan, and Wayilwan Country, in accordance with the current NSW Aboriginal Cultural Heritage system and legislative structure, and our rights and traditional system of law and custom which will be recognised in the determination.
- 30 The Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People have the rights to protect and speak for our Country, and to control access to or use of our Country by other Aboriginal People in accordance with traditional laws and customs, and to manage and protect our native title and to decide on what happens with our culture and heritage in accordance with our traditional law and custom. To allow non-native title holders to speak on matters of Cultural Heritage in Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan Country would be disrespectful and have a discriminatory effect on Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People and would not be in keeping with the traditional laws and customs with *any* Traditional Owner group in NSW.
- 31 The NNWW Applicant is concerned that the Bill does not safeguard the current legal rights native title holders already have in regards to cultural heritage, and, in fact, represents a diminishment of the exclusive consultation rights which recognised native title holders currently have under the Consultation Requirements for Proponents.
- 32 The NNWW Applicant cannot support the Bill in its current form when it would act to diminish the existing legal rights of native title holders.
- 33 The Dhawura Ngilan Report supports that senior Traditional Owners and native title holders have the authority to speak for Country because of their unique role as ‘repositories of knowledge about places’.⁴
- 34 It is the NNWW Applicant’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, and where a native title claim has been registered but not yet determined, the native title claimants should at least be afforded status as a recognised Traditional Owner representative body. Native title holders must have their voices elevated because of the connection between native title rights and Aboriginal Cultural Heritage.
- 35 Simply put, the Bill should be empowering Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People to make decisions about our cultural heritage and protecting our claimed and ultimately determined native title rights and interests, rather than diminishing them.
- 36 In addition, this Bill does not contemplate the existing processes that may be established Indigenous Land Use Agreements (ILUAs) or recognise their role in protecting and preserving Aboriginal Cultural Heritage.
- 37 The Bill also does not contemplate land that has been handed back to Traditional Owners under Part 4A Agreements under the *National Parks and Wildlife Act 1974*. This is of particular concern because the Bill therefore does not consider the land handed back to Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan Traditional Owners at the Mount Grenfell historic site.

⁴ Dhawura Ngilan Vision and Best Practice Standards, The Heritage Chairs of Australia and New Zealand, March 2021, p 9.

- 38 Without recognition and contemplation of these agreements, our role and our native title claim is not recognised or contemplated by the Bill in its current form.
- 39 The lack of clarity regarding who speaks for Country has additional and serious consequences for Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People. The NNWW Applicant is concerned that there would be serious consequences in emergency situations, such as a fire, without clarity on who speaks for Country. The NNWW Applicant is of the view that the Bill does not contemplate these and other aspects of protecting and preserving Aboriginal Cultural Heritage.
- 40 The NNWW Applicant is also concerned that the definition and language of “significant” in the Bill is open to interpretation. The NNWW Applicant is concerned that there is no clarity on who defines what is significant, and what is specifically contemplated in defining “significance”. All Aboriginal Cultural Heritage is significant to Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People.

Administration of ACH Council and local ACH Services

- 41 The Bill should be empowering Traditional Owners and accordingly native title holders and claimants should be afforded their proper status in relation to Aboriginal Cultural Heritage.
- 42 Native title holders and claimants 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 clauses 23, 80, 104 and 107 of the Bill.
- 43 As per the minimum standards of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), the NNWW Applicant expects 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 their cultural heritage and that any protections and controls are of the highest standard.
- 44 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.

Complicated processes of consultation:

- 45 The NNWW Applicant is concerned about the lack of cohesiveness between the consultation requirements contained within the future acts regime of the *Native Title Act 1993* (Cth) (**NTA**) and the processes proposed in the Bill.
- 46 The future acts regime, provided under Part 2, Division 3 of the NTA, sets out the process for validating future acts which may affect native title, including prescribing the relevant notification and consultation requirements for proponents as well as the procedural rights of native title holders and registered native title claimants. For certain future acts, the NTA provides native title parties with the right to negotiate, as set out in Subdivision P.
- 47 The NNWW Applicant, as a registered native title claimant, has the right to negotiate with proponents for future acts within the NNWW Claim Area covered by Subdivision P of the NTA. The NNWW Applicant has extensive experience in negotiating arrangements with proponents for the protection of cultural heritage through the right to negotiate process in the NTA.
- 48 The NNWW Applicant understands that Part 6 of the Bill as currently drafted requires proponents to apply for ACH permits or ACH management plans prior to undertaking activity which may permit harm. The NNWW Applicant understands that clause 107 of the Bill as currently drafted imputes a consultation obligation on proponents seeking ACH management plans:

107 Obligation to consult on ACH management plan

(1) A proponent who intends to carry out an activity under an ACH management plan must consult with each of the following persons about the proposed activity—

- (a) each local ACH service for the area or a part of the area,*
- (b) a Local Aboriginal Land Council for the area,*
- (c) if there is not a local ACH service for the area or a part of the area—*
 - (i) each native title party for the area or the part of the area, and*

(ii) each knowledge holder for the area or the part of the area,
(d) if there is not a local ACH service, a native title party or a knowledge holder for the area or a part of the area—each native title representative body for the area or the part of the area.

(2) Consultation must be carried out within a reasonable time and in accordance with the consultation guidelines.

- 49 The NNWW Applicant reiterates its concerns as to the status of native title parties within clause 107, as outlined above at paragraphs [25]. The Applicant is of the view that native title parties should have the exclusive right of consultation in regards to ACH management plans, as the recognised Traditional Owner representative bodies.
- 50 The NNWW Applicant is concerned that the requirements in the Bill as currently drafted may create situations where proponents engage in two separate processes of negotiation, potentially with two separate negotiating parties, governing the same-subject matter, where one process is triggered by the right to negotiate process outlined in the NTA and another process is triggered by the consultation obligations in the Bill. Such duplication would not only be unnecessarily burdensome for proponents, it also has the potential to cause disputes within Aboriginal communities.
- 51 The NNWW Applicant is of the view that any consultation obligations prescribed by the Bill must be consistent with the right to negotiate process in the NTA. This consultation process must have flexible timeframes which are also consistent with the right to negotiate process in the NTA.
- 52 In addition, the NNWW Applicant notes that currently in NSW there are different pieces of legislation providing for interests in land for Aboriginal People. The NNWW Applicant is of the view that this Bill should be aiming to reconcile the processes contained within the NTA and the *Aboriginal Land Rights Act 1983* (NSW) (ALRA). This Bill in its current form fails to do that.

Lack of consultation with native title holders and claimants

- 53 The NNWW Applicant expresses concern that the Bill and other reforms in this area are continually developed without proper consultation with native title holders and claimants in NSW.
- 54 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.⁵
- 55 Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People have an obligation to protect our Country and cultural heritage. Therefore, the NNWW Applicant, acting on behalf of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People, must be consulted on any reforms to the Aboriginal Cultural Heritage System in NSW.
- 56 The NNWW Applicant has long-held aspirations for Aboriginal Cultural Heritage reform in NSW to include and elevate the voices of native title holders and claimants. The Bill must be amended to reflect this.
- 57 The NNWW Applicant welcomes future consultation on Aboriginal Cultural Heritage reform which can effectively empower Traditional Owners to maintain, protect and develop their cultural heritage.

Penalties

- 58 The NNWW Applicant supports the inclusion of higher penalties as described in the Bill, but has concerns regarding the lack of clarity regarding the evidence of harm required to impose those penalties.
- 59 The NNWW Applicant is of the view that at the very least, penalties must act as a deterrent.

⁵ 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.

- 60 However, the NNWW Applicant notes that the Bill does not provide clarity on what process, including what type of evidence of harm will be required to impose any penalties, specifically whether it will be both scientific evidence and cultural heritage knowledge.
- 61 The NNWW Applicant is of the view that when considering harm in the process of imposing penalties, both scientific and cultural heritage knowledge from Traditional Owners must be engaged.

Sincerely,

Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan Applicant