



Australian Association of Consulting Archaeologists Incorporated

Mr Normal Laing
Country, Culture and Heritage Division
Office of Environment and Heritage
PO Box 1967, Hurstville BC, NSW 1481
Via email: ach.reform@environment.nsw.gov.au

27 December 2011

Re: Aboriginal heritage legislation in NSW: Public consultation on reform issues.

Dear Mr Laing,

Thank you for the opportunity to comment on the Aboriginal heritage legislation reform discussion paper. As one of the peak industry organisations working within the *National Parks and Act 1974* (NSW) framework, AACAI is encouraged by government's commitment and action on legal reform. AACAI is hopeful that the reform process is transparent, collaborative and genuine to achieve a great outcome for NSW's Aboriginal cultural heritage.

AACAI has provided the attached submission for your consideration. In summarising the key elements of the submission AACAI supports the following:

- All aspects of Aboriginal cultural heritage should be protected by law, including both tangible and intangible.
- Definitions of Aboriginal cultural heritage should include a significance threshold, especially with regard to stone tool artefacts and archaeological deposits.
- Aboriginal people should be formally involved in cultural heritage impact decision-making, but not at the removal of a State government heritage regulator.
- Registered Aboriginal parties should be established so that direct and effective consultation can be undertaken during development projects; and so that a formalised and meaningful role of Aboriginal people in decision making processes can be reflective of a genuine community mandate.

In some of the most common and important processes in which Aboriginal cultural heritage legislation is applied in NSW, proponents, Aboriginal communities and government regulators are required to either find common ground or otherwise be working in a system that is at best troubled and at worst failing. Consulting archaeologists, in all their guises including those who are employed as regulators, are the people most squarely placed in between these parties. And AACAI is the body most representative of consulting archaeologists. Our experience in, and commitment to, achieving effective consensus outcomes is something that we would like to make available as a constructive contribution to the reform process.

If you wish to discuss any aspect of our submission or role that AACAI may play in the process, please don't hesitate to make contact.

Yours sincerely,

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Aboriginal heritage legislation in NSW: Public consultation on reform issues.

AACAI Submission

27 December 2011

Q1(a): What specific aspects of Aboriginal culture and heritage do you think should be protected by law?

AACAI encourages any new legislation to protect *all* aspects of Aboriginal cultural heritage, inclusive of tangible and intangible aspects of heritage. The NPWA currently protects both tangible (objects) and intangible (places) elements of Aboriginal cultural heritage, however current definitions of objects and places are problematic.

Gazettal of Aboriginal places is relatively infrequent and unrelated to dwindling or threatened aspects of NSW's Aboriginal cultural heritage resources (such as scarred trees), while Aboriginal objects provides legal protection for every individual object regardless of significance. For example, a single stone artefact can hold up a development for months while Aboriginal consultation and permit applications proceed. While it should be ensured that all objects are considered and assessed, a permit should not be required for isolated find in a disturbed context that has a low archaeological significance. In addition, where there are declared Aboriginal places with a defined curtilage, any new act should consider activity or impact based AHIP *exemptions*, similar to the *Standard Exemption* provisions for items on the State Heritage Register.

More weight should perhaps be given to areas of contemporary social significance to the Aboriginal community. The Aboriginal culture has always been dynamic, and the contemporary aspects of the culture should be taken into account alongside the ancient during cultural heritage management. This contemporary heritage may be tangible as well as intangible and may include sites that are important to a wide range of Aboriginal interest groups. Although there are some sites of historical significance that are listed as Aboriginal Places, many are protected under the Heritage Act. Perhaps these should be protected under one Aboriginal Heritage Act and seen as in continuity with ancient culture instead of separate. It should be noted that archaeology is not just the study of the ancient, but of material objects and things and how they create, and are created by, human society.

The protection of cultural landscapes as outlined in the discussion paper is supported by AACAI in principle but there are issues regarding how this would work in practice, and how this would articulate with the protection of Aboriginal Places.

AACAI would support the development of a stand-alone Act dealing with Aboriginal cultural heritage. It is seen by many Aboriginal people and the archaeology industry as inappropriate that Aboriginal culture and heritage is legislated under the National Parks and Wildlife Act.

Q2(a): Who should be responsible for making decisions on the management and protection of Aboriginal cultural heritage?

AACAI supports a substantial role for Aboriginal people in the decision making process on the management and protection of Aboriginal cultural heritage. Direct consultation rights for pre-registered Aboriginal parties is required for this to work. Empowering pre-registered/listed Aboriginal parties could take the form veto/endorsement powers on heritage impacts prior to permits being submitted to a heritage regulator. AACAI would strongly emphasize that empowering

the Aboriginal community should not be at the expense of having a government heritage regulator who would issue final approval. It is strongly felt that there should be a heritage regulator who is informed of the regional and state wide heritage issues, threatened aspects of that heritage and conservation priorities. It is critical that informed decision-making with regard to intergenerational equity, cumulative impact and other Ecologically Sustainable Development (ESD) objects are met for all approvals that involve environmental harm. This is Government's responsibility.

It is problematic for any group with a vested interest in the cultural heritage management outcome to have a deciding say. If decision-making were to take place independent of a heritage regulator the decisions would fall to the registered Aboriginal party, who would be engaged by an archaeological consultant or proponent to review and process a plan or permit. Approving (as opposed to rejecting) the plan or permit often would benefit all parties (development proceeds, archaeological excavations work can be undertaken, and all parties potentially benefit financially). This *cash nexus* is likely to influence decision-making and no independent controls would exist to stop heritage 'attrition' (e.g. cumulative impact). AACAI strongly warns against such a system.

Q2(b): What management structures and processes will effectively manage Aboriginal culture and heritage protection in NSW?

The current process is generally acceptable, although the timeframes for aspects of heritage management, such as the AHIP application process are seen as detrimental to effective management outcomes. Any streamlining would be a positive, and facilitate proponents seeing Aboriginal heritage issues as opportunities instead of constraints. Any new cultural heritage act should address agency resourcing and funding in provide appropriate/adequate heritage regulator staffing levels; this would address AHIP processing delays.

ACCAI supports greater Aboriginal involvement in the process, but the key question of who speaks for country needs to be addressed beforehand. Having pre-registered/listed Aboriginal parties who have *direct* consultation rights would remove the associated timeframes and combative complications associated with the current *open* consultation process with each new development/AHIP project.

Q3(a): Should any proposed legislation make a statement about ownership of physical and intangible Aboriginal heritage? If yes, how?

In any new cultural heritage legal structure, it would be difficult to see how the law could deal with protecting Aboriginal cultural heritage without addressing or stating ownership.

As described above, AACAI supports a government regulatory system in order to ensure independent decision-making, and to facilitate the conservation and protection of cultural heritage across NSW. Where tangible elements of cultural heritage exist, the government must assert legal ownership to ensure appropriate curation is undertaken or management (eg *Care or Control*) is delegated to another party in a legal way.

AACAI also agrees that the appropriate Aboriginal community is the custodian of their cultural heritage (both tangible and intangible), and has been since the beginning of time. Any new law

should address alongside legal ownership. This would then establish that the relevant Aboriginal party has a clear vested interest in any decision-making.

AACAI suggests that any new reform attempts to establish and define both the 'legal owner' and the 'custodian' of Aboriginal cultural heritage in NSW. Identifying the appropriate custodian (and who speaks for Country) is addressed in Question 4(a).

Q4(a): What are your views about who speaks for Country?

AACAI's *Policy on Consulting with Aboriginal Communities*¹ recognises that Aboriginal archaeological sites are of significance to Aboriginal people as part of their heritage and as part of their continuing culture and identity. AACAI recognises that the relevant Aboriginal community should be involved in decision-making concerning archaeological sites and that their opinions, concerns and management recommendations should be presented alongside those of the archaeological consultant. This policy reflects the long tradition in Australia of archaeological consultancy and research work being undertaken in collaboration with the relevant Aboriginal community, usually Traditional Owners. The Aboriginal community themselves identifies and guides the archaeologist on '*Who Speaks for Country*'. It is never appropriate for a proponent or an archaeological consultant to make this decision alone.

Q4(b): What do you think are the best ways to ensure appropriate people speak for Country in public processes, including who resolves the conflict?

The current NPWA legal and policy framework of open and broad consultation during the preparation of an AHIP has led to a combative environment for cultural heritage decision-making in NSW. Most significantly, it has led to a fragmentation within the Aboriginal community representative groups, all asserting they speak for Country. This concern was expressed in AACAI's submissions on the NPWA amendments during 2009-10, however the final legal amendments and consultation requirements has not resolved this issue. AACAI strongly puts forward a call for the future boarder legal reform to finally address this.

Any such framework would naturally take into account already established parties who have legal rights and/or responsibilities to care for Country, including cultural heritage. These are Native Title holders and Local Aboriginal Land Councils. Where traditional owners exist outside these groups their identification should be a proactive process completed up front for each appropriate region. This identification process must be completely separate from the development/AHIP process. Then when formal AHIP consultation is required the registered parties are contacted directly.

Current consultation process that attempts to identify the same groups in the same area for each new AHIP has served only to reinforce divisions within those communities. Traditional owners should not need to constantly scan the local paper and register for the multiple projects in the fear they might not get a say over their cultural heritage. They should be confident that they have a seat at the consultation table via a pre-registration process.

¹ http://www.aacai.com.au//index.php?option=com_content&task=view&id=19&Itemid=31# AACAI Policy on

The responsibility of this identification process should be either an independent body and/or the heritage regulator. It should not be the responsibility of the proponent or consulting archaeologist. In establishing this consultation list there would be a terms of reference, clear criteria for being on the list, rights afforded to Aboriginal listed parties and dispute resolutions mechanism². As part of dispute resolutions related to identifying Aboriginal parties, a mediator group should also be established. This group may be made up of members from similar dispute resolution groups within other relevant government departments or non-governmental organisations such as Aboriginal Affairs, Native Title Tribunal, Office of Environment & Heritage etc. This dispute resolution group would be required to make a determination within a given time or it be deferred to the relevant Minister.

Q4(c): Should these mechanisms be reflected in legislation or protocols and guidelines?

The mechanisms to proactively identify appropriate Aboriginal parties to consult with needs to be given the highest legal power (legislation) and must be transparent and fair.

The following should be established by law:

- Definition of an Aboriginal Listed Parties
- Establishment of an independent Aboriginal Listed Party Review Committee
- Process for applying to be an Aboriginal Listed Party (including reasonable timeframes for a decision and interim/transitional rights and arrangements while application is being reviewed)
- Decisions making criteria for registering an Aboriginal Listed Party
- Rights afforded to Aboriginal Listed Parties (i.e. consultation rights for AHIPs)
- Review / dispute resolutions mechanisms where an Aboriginal Listed Party disagrees with the Review Committee's determination.

The following (while established in law) can be detailed in protocols and guidelines:

- Terms of reference of the Aboriginal Listed Parties Committee
- Submission requirements for an Aboriginal Listed Party application.
- Detailed expectations and responsibilities of Aboriginal Listed Parties during AHIP consultation.

Q5(a): Do you understand how Aboriginal cultural heritage is protected in legislation and planning instruments?

AACAI members, as well as non-member archaeological consultants, have detailed understanding on how Aboriginal cultural heritage is protected in NSW heritage legislation and planning instruments. It is the framework in which we work every day. Consulting archaeologists are probably the most informed group of people in NSW on how the Aboriginal cultural heritage legislation is implemented and how it functions *in a practical sense*.

Unfortunately it is often the case that Aboriginal community members are the less informed about these legal systems, leaving any explanation of the planning and development processes to the

² Noting this would not be dispute resolutions relating to AHIP decisions. That should be dealt with under heritage regulation/AHIP portions of the legislation.

consulting archaeologist. Awareness-raising and education about the current legal systems should be provided to the Aboriginal community by the heritage regulator as a priority. This would allow the Aboriginal community to be better placed to provide comment in the reform process and then later, feel ownership over the outcomes and be fully informed of their rights under current and future legal systems.

Q5(b): How could Aboriginal heritage be better protected through land-use plans and other planning instruments?

Strategic forward planning is a critical principle of good cultural heritage management. In NSW under the NPWA, this is absent. As a non-renewable resource the heritage regulator should be concentrating on putting systems in place for identifying and conserving significant elements of Aboriginal cultural heritage for the current and future people of NSW. Then heritage impact decisions should be made knowing what the total loss of heritage is and whether further loss is accessible. AACAI offers the following two suggestions to better protect Aboriginal heritage through the reform process:

- Under NPWA the blanket protection for all Aboriginal objects means an assessment of significance is not undertaken until a site is under threat from development impact. With this in place it is hard to see how significance assessments and heritage impact decisions are not influenced by development and political pressures. Any successful heritage legislation must implement *a separation principle*: proactive heritage identification, assessment and listing process separated from heritage impact approvals. Other state heritage legislation (the Heritage Act 1977) is successfully implementing such a separation principle, and getting genuine conservation outcomes (e.g. The State Heritage Register). Currently the gazettal of Aboriginal Places could be seen as a proactive conservation process, however only 77 gazetted places are declared across the whole of NSW, which indicates a dramatic underuse of use a great legislative tool. Significant Aboriginal heritage items such as scarred and carved trees, rock shelters with art, ceremonial stone circles, grinding grooves, massacre sites etc are all good candidates for proactive heritage assessment and listing. This would allow the provision of heritage curtilages to be set and site specific permitted activities and management plans to be developed.
- Strategic mapping and modelling of known or potential Aboriginal archaeological deposits should be more widely undertaken and implemented. Local land-use planning and major developers could then make better zoning and early strategic development decisions. Tools currently exist for such modelling (eg ASDST, *Aboriginal Sites Decision Support Tool*), although currently under utilised, and could be an excellent method for managing the archaeological resource of NSW. While not removing the need to do development site specific assessment, it would allow high level informed planning and to be undertaken.

Q6(a): How well do you think current natural resource management processes help protect Aboriginal heritage?

A recent forum in the latest issue of Australian Archaeology (December 2011), the pre-eminent journal for Australian archaeology, indicates that the use of natural resource management processes and procedures has been detrimental to Aboriginal heritage management. We would strongly urge the reform party to review this forum, which outlines both sides of the argument.

The forum indicates that the lack of archaeological and cultural information in a given area (i.e. the lack of strategic or detailed mapping of cultural heritage), does not allow for the effective implementation of natural resource protocols, such as cumulative impact. In relation to cumulative impact, definitive heritage information (the number and spatial location of sites at the crudest measure) on the catchment in question is generally unknown, and therefore the baseline for cumulative impact is similarly unknown.

Conversely, some elements of natural resource management may be worth exploring further, such as the use of offsets and/or long term conservation zones – investigating/salvaging/protecting one heritage site of greater significance at the detriment of others of lesser significance. Such an approach has been suggested by many archaeologists and Aboriginal people in the past, but has rarely gained State government support. AACAI would be supportive of such an approach, but it would require extensive consultation and procedural development before it could be implemented. For example, what sites are worthy of protection at the expense of others? What is the criteria upon which these decisions are made?

Q6(b): How could Aboriginal cultural values and knowledge be better incorporated into natural resources management processes?

As with flora and fauna and bush fire zones, strategic mapping and modelling of places of known or potential Aboriginal heritage value should be more widely undertaken and implemented. Developing such maps across all of NSW, using known Aboriginal heritage information, landforms of interest and other information, could be used to identify areas of interest for long term conservation/protection and to identify places where potential development may require more detailed Aboriginal heritage assessments or, in some cases, where development should be avoided.