



Greens NSW submission regarding Aboriginal heritage legislation in NSW

Thank you for the opportunity to provide a submission to the NSW Aboriginal culture and heritage legislative review and reform process.

The Greens NSW recognise the special nature of Aboriginal heritage, which continues to be important for all NSW and Australia, and which should be accorded the respect such a significant, rich, ancient and living culture deserves.

The Greens NSW welcome the NSW Government's commitment to reform and support the development of new legislation which would see an increase in protection for Aboriginal heritage and the return of control of Aboriginal heritage to Aboriginal communities.

It is essential that Aboriginal heritage is removed from the current 'managed destruction' scheme which operates under the *National Parks and Wildlife Act 1974*, and instead recognised through stand-alone Aboriginal heritage legislation.

In making this submission, the Greens NSW note that there have been a number of extensive reviews of Aboriginal heritage management and legislation in NSW undertaken over the last 25 years, each producing detailed recommendations for reforms, following extensive community consultation organised in partnership with Aboriginal groups.

The Greens trust that this Government is committed to following through with reforms which will address NSW's outdated laws, in order to reflect the community's understanding, appreciation and respect for Aboriginal heritage, and to bring NSW in line with our international obligations.

A. PROCESS FOR REFORM

As you may be aware, the Greens have worked actively in NSW Parliament in support of Aboriginal heritage. This includes campaigning for legislative reforms: to facilitate the return of national parks to Aboriginal ownership, recognise cultural fishing rights and increase penalties for destruction of Aboriginal heritage sites.

Most recently, the Greens supported Aboriginal groups in their negotiations of extensive amendments to the Aboriginal heritage provisions of the *National Parks and Wildlife Act 1974*. It was in 2009-10 during the extensive negotiation and debates for these amendments, which passed the NSW Parliament with bi-partisan support, that commitments were made by the Office of Environment and Heritage (OEH, formerly the NSW Department of Environment, Climate Change and Water) to work in partnership with Aboriginal groups to re-invigorate the process for the development of comprehensive Aboriginal heritage legislation for NSW.



For this reason we were deeply concerned when we became aware that the Aboriginal Culture and Heritage Reform Working Party, which had been formed as a result of the negotiations and had met several times in 2010, had been disbanded without the knowledge of the representative Aboriginal members, and was to be reformatted as an 'individual' skill based group.

No reason for this change has been provided, or for why the previous representative structure was inappropriate for the process of reviewing the management of Aboriginal heritage in NSW. Instead, the change in structure of the Working Party appears to have given rise to distrust and communications difficulties between the Government and Aboriginal members of the former Working Party, and it has been suggested that the purpose of the change was to exclude organised, representative Aboriginal groups from full and proper participation in the ongoing process.

The Greens NSW have concerns that this action, early in the new Government's review process, will seriously affect the efficacy of the review's outcomes.

The Greens are calling for urgent amendments to the terms of Working Party to ensure membership of peak *representative* groups with legislative responsibility for Aboriginal heritage is returned, so that the community can be confident that the Government is committed to working in genuine partnership with Aboriginal groups.

The Greens also have serious concerns about the transparency of the process given apparent significant changes to the objectives guiding the reforms were announced in October this year (see page 1 of the OEH paper '*Aboriginal heritage legislation in NSW: Public consultation on issues for reform*').

It is understood that extensive negotiations were undertaken with the former Working Party to develop a set of principles which were acceptable to both the Government and non-Government Working Party members, in 2010. However, there are no references to the negotiated principles in the recently released reform materials. Particularly noticeable is the removal of any references to Aboriginal control, or heritage rights, in the new reform 'objectives', though these were key aspects of the earlier agreed principles.

Further, the Greens are very concerned that consultations have gone ahead with little notice and without the formation of the new Working Party to which the consultations could report.

For these reasons the Greens are urgently calling for the extension and better promotion of consultations, together with reformed membership of the Working Party and expanded terms of reference and principles.



B. KEY RECOMMENDATIONS FOR REFORM

As noted above and outlined in the OEH's 'Milestones to Reform' report released in October 2011, several major reviews of Aboriginal heritage management in NSW have been held over the last few decades which made clear recommendations for reform.

The Greens understand that the recommendations from Aboriginal communities as a result of these reviews has consistently been that:

- a) There must be a stop to the high rate of approved destruction of Aboriginal heritage,
- b) Control of Aboriginal heritage must be returned to Aboriginal people,
- c) Aboriginal heritage should be recognised through its own Act and not managed through the *National Parks and Wildlife Act 1974*, and
- d) Aboriginal heritage should be managed by an independent Aboriginal heritage commission or similar body, run by Aboriginal people.

The Greens NSW support these recommendations and trusts that this Government will have the courage to act on these recommendations and support the views of Aboriginal people where previous Governments have not.

The Greens NSW believe there are a number of key deficiencies in the management of Aboriginal heritage in NSW which must be overcome in this reform process in order to change the management system from a 'authorised destruction' to a genuine 'protection' system.

Most importantly, the Greens NSW believe that Aboriginal heritage sites and objects must be protected, and all items of Aboriginal heritage should be returned to their rightful owners and custodians.

In order to go some way towards achieving this, the Greens NSW believe that environmental planning and heritage law and policy must be amended so that:

- a) Aboriginal people make the determination as to what is a cultural heritage site and/or object in need of protection;
- b) Aboriginal people are recognised as the primary decision makers in relation to their culture and heritage, and must provide consent for damage or destruction of places and objects of cultural significance;
- c) All items of Aboriginal and/or Torres Strait Island cultural heritage which have not been voluntarily surrendered by their traditional owners are returned to their rightful owners and custodians, or are otherwise managed consistent with the direction of the owners and custodians;
- d) The destruction of cultural heritage sites and objects is recognised as a last resort through the determination of a court;
- e) Aboriginal cultural heritage practices and intangible heritage values are recognised and protected; and



- f) NSW laws reflect Australia's international commitments, including to the Aboriginal heritage provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* and to the *Convention on Biological Diversity*.

Data collected by the Greens NSW revealed that between 1990 and 2009 the NSW Government issued over 1000 permits (known as Aboriginal Heritage Impact Permits or AHIPs) to damage or destroy Aboriginal heritage, and that between 95% and 100% of applications to damage or destroy Aboriginal cultural heritage were approved. This rate is unacceptably high. The Greens NSW further recommend the following positive reforms to the current management of Aboriginal heritage:

1. Destruction of Aboriginal heritage

- a. While the number and location of AHIPs are now published through the OEH website on a public register, public records should be compiled of the *trends* in AHIPs (for example in the NSW State of the Environment Reports).
- b. AHIPs reports currently tend to deal with sites without reference to how much destruction of heritage in the area has been permitted in the past. The cumulative impact of destruction should also be recorded, and be a key factor considered before future decisions are made.
- c. Currently the identification and recording of Aboriginal sites through comprehensive cultural heritage assessments, on those instances when it is undertaken, tends to be shortly followed by an application to destroy that heritage. The system must move towards up-front planning for areas as cultural landscapes.
- d. The access and use of sites must be recognised as a key part of the value of a place that may be harmed by development, and protected accordingly.
- e. Where an AHIP has been granted in relation to a site and further investigation produces evidence of additional artefacts, then a further AHIP must be obtained before work can continue.

2. State heritage listing and the Aboriginal Heritage Information Management System (AHIMS)

- a. Currently most Aboriginal heritage in NSW is not recorded or registered or known, outside of Aboriginal communities. Information, advice and support to facilitate the recording and mapping Aboriginal heritage which addresses the concerns of Aboriginal groups, who are often reluctant to provide the location of sacred sites for registration, is required to address the large number of sites which remain unregistered.

3. Unregulated destruction and prosecutions

- a. Although it is an offence to harm Aboriginal heritage without a permit, it is evident that DECCW/ OEH has been unwilling to prosecute breaches of the *National Parks and Wildlife Act*, with less than 10 prosecutions over ten years.

- b. There are too many exceptions to a requirement for an AHIP, including:
 - i. if the protections under the *National Parks and Wildlife Act* have been 'switched off' by legislation such as the *Environmental Planning and Assessment Act*; and
 - ii. large project approvals or activities which are excluded from the definition of 'harm' to heritage through the *National Parks and Wildlife Regulations*, such as undertaking test excavations.
- c. A large number of activities are currently defined as 'low impact' by the *National Parks and Wildlife Regulations* which do not require a permit, including mineral testing (such as bulk sampling and drilling) and farming activities, in fact do harm heritage and need to be recognised as doing so.
- d. Some industries also have codes which they can follow and avoid a permit – e.g. Minerals Council's Due Diligence Code of Conduct and Forestry codes.

4. **Local Government**

- a. Local Government currently plays a key role in the management of Aboriginal heritage, particularly in relation to the consideration of developments which impact on heritage. Any proposed reform must consider the role of different levels of government, to ensure that processes are integrated and all parties are aware of their obligations, and sufficiently resourced to undertake this important role.
- b. Local Government requires advice, resources, training and support to ensure it can fulfil its Aboriginal heritage management responsibilities.

5. **Cultural resources**

- a. Any reforms must recognise that Aboriginal heritage is not limited to specific sites or objects, but also includes the cultural practices associated with these, as well as the use and management of natural resources and lands.

6. **Free, prior and informed consent**

- a. The current laws give a government agency, the OEH, legal ownership of Aboriginal heritage in NSW and the ability to approve its destruction, without the consent or approval of Aboriginal groups. Any reforms must be consistent with the principle of 'free, prior and informed consent' recognised by the *UN Declaration on the Rights of Indigenous Peoples* and other instruments to which Australia has become a party. That is, the right of Aboriginal people to be notified, to negotiate and ultimately to determine what impacts on Aboriginal heritage are acceptable.

The principle of 'free, prior and informed consent' must also be recognised in this process for reform itself. This means that the process for determining the form of legislative amendments developed through this review must come as a result of legitimate and transparent consultations and negotiations with Traditional Owners, Aboriginal communities and Aboriginal organisations in NSW.



The Greens NSW look forward to continuing involvement in the process of reviewing and reforming the management of Aboriginal heritage in NSW. If you have any questions regarding this submission do not hesitate to contact the office of David Shoebridge on (02) 9230 3030 or David.Shoebridge@parliament.nsw.gov.au.

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