

**Submission to DEWHA Indigenous Heritage Law Reform  
Discussion Paper August 2009.**

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This submission will not deal with the full scope of proposals detailed in the Discussion Paper. It will confine its comments to proposal 5 ‘ Ensuring that, if legally recognised traditional custodians exist, only they can seek Commonwealth protection’.

The intent of this proposal (5) is clearly to better reflect traditional law and custom in Aboriginal and Torres Strait Islander societies in which only certain people with traditional connection to country speak for country. As a general principle, this is something to uphold, but there are many issues which it raises, and which need to be considered in more depth before such a proposal is adopted uncritically.

The paper states that many Indigenous people have gained formal legal recognition of their traditional entitlements to be custodians of their lands. However, what it does not state is that some of these legal processes may be insufficient in relation to Aboriginal law and custom, and in any case, **many Aboriginal people have not gained any legal recognition of what may be quite legitimate claims because there has been no process for them to do so with any likelihood of legal success.** Nor does the Discussion Paper indicate how matters would be dealt with in such situations.

In particular, in many parts of the country, and particularly in south eastern Australia, Native Title has been extinguished, so there is no possible legal process to determine who the native title holders are. In other cases, such as the Yorta Yorta people in Victoria, the current proposal would exclude them, since they are not ‘legally recognised traditional custodians’ under native title law. Their native title claim was unsuccessful, yet their traditional custodianship is well recognised and is acknowledged by the Victorian Government through an agreement relating to co-operative management of certain parts of their lands and waters along the River Murray, notably the Barmah State Park and State Forest (Seidel & Hetey 2004).

Where no successful native title determination has been made or where no land rights legislation which specifically recognises and empowers traditional custodians in relation to their cultural heritage is in place, it is unclear from this proposal how those Indigenous people would be able to protect their cultural heritage.

For example, in the Northern Territory, land rights legislation empowers traditional custodians, but in NSW, it does not. These land rights regimes are quite different, with different consequences; in NSW the land rights regime gives no legal definition of or recognition to traditional owners.

Whilst it may be desirable to work with appropriate legislative determinations of traditional ownership where they exist, the fact is that they are not universal in their coverage across Australia and a legitimate mechanism for establishing the rightful people to speak for country and its cultural heritage is needed in other areas if this proposal is to be effective in protecting cultural heritage across the whole country.

I am currently conducting research relating to the social benefits of Aboriginal engagement in cultural and natural resource management in NSW and have found that

in this state there is a degree of confusion and difficulty about protection of cultural heritage by traditional owners due to a number of factors:

- under the NSW Aboriginal Land Rights Act, Local Aboriginal Land Councils, with their residential qualifications for membership, are legally responsible for land and cultural heritage; traditional owners may not be the decision-makers. Where legitimate traditional owners control a Local Aboriginal Land Council, this generally does not create problems, but it will create conflict, tensions and difficulties where traditional owners are a minority, particularly in large urban areas or coastal areas under development pressure, where Local Aboriginal Land Councils are controlled by Aboriginal or Torres Strait Islander people who reside in the area but do not have traditional connections to it.
- in certain locations there is lack of clarity within the Aboriginal community itself about traditional ownership with more than one group claiming such status and sometimes considerable conflict between them; without adequate resources for the necessary genealogical and conflict resolution work to be undertaken, these conflicts fester and are difficult to resolve. The Discussion Paper gives no insight into how conflicting views by claimants would be handled under this proposal.
- In NSW, there are differences in the legal definitions of Aboriginal Owner under the NSW ALRA and Native Title holder under the Federal Native Title Act, with the latter allowing traditional adoption and the former, not.

Goodall (2001) notes that the concept of ‘traditional owner’ is itself a response to western administrative needs to have a neat definition comparable to ‘owner’ in western law, yet this may present problems for Aboriginal people since it emphasises biological descent over traditional, flexible forms of affiliation with land. Legislation is not always designed to encompass such flexibility.

### **NSW Concept of Aboriginal Owner**

Furthermore in NSW, the Registrar under the NSW Aboriginal Land Rights Act, who is responsible for registration of Aboriginal Owners, appears to only have the resources to carry out this work in relation to the seven existing conservation reserves scheduled for handback to Aboriginal people under the National Parks and Wildlife (Aboriginal Ownership) Amendment Act (NPW) 1996. This 1996 Act established a new Part 4A to the original 1974 NPW Act. It noted the cultural significance of seven existing national parks and gave powers to the Minister to negotiate ‘Uluru’-style joint management arrangements with the Aboriginal owners.

Baird and Lenehan (2004) express concern that the process of identifying Aboriginal Owners in NSW is government-controlled, rather than Aboriginal-controlled, and that it may lead to an incorrect perception that people listed on the register of Aboriginal Owners are traditional owners in Aboriginal law and custom, thereby inadvertently causing difficulty to some people in asserting their rights.

**In all other parts of NSW, there is no such process of determination about who are the traditional custodians** unless Native Title has been established and native title holders are recognised.

## **Native Title in NSW**

There have only been two Native Title consent determinations and eight ILUAs registered in NSW to date. Four of these ILUAs relate to the development of a nature reserve or park, and co-management arrangements over some 12 national parks and 13 State forests have resulted. The Githabul ILUA, covering the largest area of any ILUA in NSW, settled the native title claim of the Githabul people over 112,000 hectares (1,199 square kilometres) of national parks and State forests in the land north of Casino and Tenterfield to the Queensland border (AILRev 2007).

Compared to some other states, the area of NSW covered by Native Title agreements is very small. **Thus in NSW, the state with the largest number of Aboriginal people, there would be only a few areas in which the legal concept of a Native Title holder could be of use in cultural heritage protection.**

And it is clear from a number of locations in Australia that even where legal recognition of Native Title holders exists, there may be continuing claims for inclusion (some of which may be legitimate) after the native title process itself has been completed.

At present there is no mechanism in NSW to resolve the range of complex issues outlined above in relation to the legal recognition of traditional custodians across the State.

## **Conclusion**

Whilst in principle, proposal 5 seems to be a positive direction, in NSW it presents a number of problems and would apply to only very few areas and traditional custodians, essentially those recognised under Native Title, and perhaps those defined as Aboriginal Owners under the Registrar's office, although the latter process may not be deemed adequate in terms of Aboriginal law and custom. The NSW Land Rights Act would not be of use as it does not recognise traditional custodianship.

The protection of Aboriginal cultural heritage – and in this I refer to landscapes and regions, not simply 'sites' and artefacts traditionally considered for protection – will require alternative processes for establishing who is eligible to be considered the traditional custodians of much of the state. There will also need to be an established, appropriate and properly- resourced process of resolving disputes about who can speak for country, and hence cultural heritage, in many of these areas. The Proposal offers no such possibility.

**Until this occurs, any Aboriginal person should be able to seek Commonwealth protection for Aboriginal cultural heritage, since otherwise, genuine traditional custodians who are not recognised under Australian law may be ruled out of being able to speak for their cultural heritage.**

## References

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