Environmental Defender's Office

Submission to the Aboriginal Culture and Heritage Reform Working Party on Aboriginal Culture and Heritage Legislative Review and Reform

19 December 2011

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

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Introduction

The Environmental Defender's Office (NSW) (**EDO**) is a community legal centre specialising in public interest environmental law and policy. Through its litigation and policy and law reform work, the EDO has had a long association with endeavours to protect the cultural heritage of Aboriginal people in Australia. For example, the EDO has acted in a number of cases for Aboriginal clients seeking to challenge consents to destroy Aboriginal cultural heritage.[1]

The EDO has also been highly engaged in the process of reform of Aboriginal culture and heritage laws. In 2009 and 2010, the EDO convened roundtables of Traditional Owners, Indigenous experts and organisations to discuss reform of cultural heritage laws.[2] The EDO has also published a discussion paper entitled *Reforming New South Wales' Laws for the Protection of Aboriginal Cultural Heritage*[3](2009) and has been part of the Office of Environment and Heritage Aboriginal Cultural Heritage Law Reform Working Party. This submission has been prepared with the assistance of the EDO's Aboriginal Solicitor.

The EDO welcomes the opportunity to contribute to the public consultation process on reform of Aboriginal heritage legislation in NSW, specifically responding to the Office of Environment and Heritage (**OEH**)'s *Aboriginal Heritage Legislation in NSW: Public Consultation on Issues for Reform*[4] (**Issues Paper**). The present review of Aboriginal culture and heritage protection laws is by no means the first. The first review body, the NSW Select Committee of the Legislative Assembly upon Aborigines (the **Keane Committee**), handed down its first report in 1980.

We note at the outset that certain stated aims of the present reforms are concerning in their current form and should be revised. We refer in particular to one of the objectives set out at p. 1 of the OEH Issues Paper, being to:

> *protect and manage NSW Aboriginal culture and heritage through a streamlined and flexible regulatory system which balances the protection of Aboriginal culture and heritage with economic development needs of Aboriginal communities and NSW generally*[5]

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1 *Anderson v Director-General, Department of Environment and Climate Change* [2008] NSWLEC 182; *Munro & Nean v Minister for Planning & Moree Plains Shire Council.*

2 Referred to below as the 2009 and 2010 **EDO Roundtables**.

3 www.edo.org.au/edonsw/site/pdf/subs/090000reforming_aboriginal_cultural_heritage_laws_discussion%20paper.pdf.

4 http://www.environment.nsw.gov.au/resources/cultureheritage/110391issues.pdf.

5 In general, the objectives seem to refer to procedural, rather than substantive reforms. With the limited exception of the final objective, which contemplates the enactment of 'effective mechanisms' for 'protection of Aboriginal culture and heritage', the objectives are not in their terms directed at development of a robust structure for managing culture and heritage protection in NSW. For example, the third objective, to 'link Aboriginal culture and heritage protection with NSW natural resource management and planning processes' should be stronger. In the EDO's view, planning and resource management processes should *integrate* the explicit aims of improving Aboriginal culture and heritage protection.

The EDO submits that the primary and fundamental role of the legislation should be to protect culture and heritage. It is inappropriate to promulgate legislation which 'streamlines' culture and heritage protection with other ends in a 'flexible' process, especially where the interests being balanced against those of culture and heritage protection may not be the interests of Aboriginal persons. Allowing the protection of Aboriginal culture and heritage to be balanced or traded off for certain paths of 'economic development [for] NSW generally' is a surprising and concerning objective; particularly given recent cohesive efforts to improve heritage protection, social inclusion and reconciliation. Furthermore, the relationship between heritage protection and *Aboriginal* economic development should be framed by Aboriginal communities themselves, as further discussed below. We also note that neither the *Heritage Act 1977* (NSW),[6] nor the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)[7] provide in their objectives for any 'balancing' of heritage protection endeavours against other interests. This tends to support a conclusion that such 'balancing' is not an appropriate objective – either for this reform process or legislation resulting from it.

Our comments on the substance of the Issues Paper will address four issues in particular:

A. The need for an appropriate legislative framework for culture and heritage protection
B. Definitions of 'culture' and 'heritage
C. Ownership of Aboriginal culture and heritage
D. Rights to speak on the relevant issues.

In summary, the EDO's recommendations for reform are that:

1. Independent legislation be enacted for the protection of Aboriginal culture and heritage in NSW.
2. This legislation be administered by an independent commission, governed by representatives of NSW Aboriginal communities.
3. Appropriate resourcing be provided for the prosecution of offences relating to Aboriginal culture and heritage.
4. The goal of protecting Aboriginal culture and heritage be made a consistent theme of all relevant legislation, especially in NSW.
5. Definitions of the kind of culture and heritage that are protected be based on the significance of that culture and heritage for present and future Aboriginal people and communities.
6. Culture and heritage protection extend to protection of all sites and resources necessary to ensure that the significance of particular objects, places or other items of heritage to Aboriginal people is maintained.
7. Ownership of Aboriginal objects be vested in appropriate Aboriginal people, not the NSW Government.

6 See s 3.
7 See s 4.

8. Appropriate Aboriginal people be given the right to determine what use is made of their culture and heritage. Accordingly, their free, prior informed consent must be sought in granting any application for an Aboriginal Heritage Impact Permit, with compensation payable where appropriate.
9. Aboriginal people be given appropriate enforcement rights in relation to the law for protection of their culture and heritage.
10. Aboriginal people be given control over the use of their knowledge of culture and heritage issues and sites of significance, including where such information is listed in publicly-accessible databases.
11. Determination of processes for identifying persons culturally authorised to speak on culture and heritage issues be undertaken through broad consultation with Aboriginal people.

Relevant international and state-based developments

The importance of culture and heritage protection to Australia's Aboriginal peoples cannot be understated. The centrality of culture to the continued flourishing of Aboriginal people and their communities is recognised in a number of international instruments. For instance, the *International Covenant on Civil and Political Rights,* which Australia has ratified, states that persons belonging to ethnic, religious or linguistic minorities 'shall not be denied the right, in community with the other members of the group, to enjoy their own culture'.[8] The *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) states, among other relevant provisions, that:

> *Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*[9]

As the Issues Paper itself notes, the agreement of the Australian Government to the UNDRIP makes it now core business for Australian governments to guarantee basic rights of Aboriginal groups to 'cultural self-determination', a fundamental part of which is the conservation of cultural heritage, both historic and contemporary.[10]

There have been further positive developments at the state level. In 2010, the Constitution of NSW was amended to provide explicitly for the acknowledgment of Aboriginal people as the State's first people and nations; and the recognition of Aboriginal people as the traditional custodians of the land in NSW, having a spiritual, social, cultural and economic relationship with their traditional lands and waters.[11]

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8 Article 27.
9 Article 11(1).
10 Issues Paper, p 7.
11 *Constitution Act 1902* (NSW), s 2.

The protection of Aboriginal culture and heritage is regulated primarily under the *National Parks and Wildlife Act 1974* (**NPW Act**). In 2010, a number of amendments were made to the Aboriginal culture and heritage provisions of the NPW Act. These included new offences and increased penalties for harm to Aboriginal places and objects; a range of new defences; and a requirement to maintain an Aboriginal heritage register.

At the same time the NSW Coalition, then in Opposition, also noted an intention to establish 'a separate framework' for Aboriginal heritage protection 'that stands in its own right', independent of the NPW Act:

> *The Liberal and Nationals parties certainly recognise the indignity of the current situation; we are dismayed the Government has failed to act on this modest request. We pledge our support for this aspiration. To this end, a future O'Farrell Government would remove all references to Aboriginal heritage in the National Parks and Wildlife Act and relocate these laws and regulations into a new Aboriginal Heritage Act. The Act would not be administered by the director general of the environment department, but rather by the new Heritage portfolio relocated out of planning, and reporting to a newly created position of Minister for Heritage.*[12]

In September 2011, the NSW Government released its *NSW 2021* State Plan, which contains a goal to 'support Aboriginal culture, country and identity' recognising that a 'strong sense of Aboriginal culture, country and identity is critical to building strong, sustainable Aboriginal communities'. A target set out in the plan is to increase the number of Aboriginal culturally significant objects and places protected.[13]

In the context of these developments, the next section examines the type of legislative framework necessary for Aboriginal culture and heritage protection in New South Wales.

A. The need for an appropriate legislative framework

The EDO submits that the legislative framework for protection of Aboriginal culture and heritage in NSW must incorporate three essential features:

1. there must be stand-alone legislation for culture and heritage protection;
2. the body administering the legislation must be independent; and
3. the goal of enhancing the protection of Aboriginal culture and heritage must be consistent across NSW, and preferably federal laws.

We explore these in turn.

1. The need for stand-alone legislation

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12 Hansard, NSW Legislative Council, Second reading debate, National Parks and Wildlife Amendment Bill 2010, 1 June 2010, available at http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20100601055.

13 Goal 26 – see www.2021.nsw.gov.au/sites/default/files/NSW2021_Local%20Environment%20and%20Communities_0.pdf.

New South Wales is the only Australian State that does not have independent legislation for Aboriginal culture and heritage protection. This is an anachronism with detrimental impacts extending beyond mere symbolism, and presents a clear case for reform. Locating the protection provisions in the NPW Act is inappropriate for the following four reasons.

i. Responsibility for protecting and authorising destruction of culture and heritage is concentrated in a single body

Under the NPW Act, the Director-General (of the Department of Environment, Climate Change and Water – now OEH) is the authority for the protection of Aboriginal objects and Aboriginal places in NSW. The Director-General is responsible for the proper care, preservation and protection of any Aboriginal object or Aboriginal place on any land reserved under the NPW Act.[14] In practice, the responsibilities of the Director-General may be exercised by the CEO of OEH.[15] References to the term 'Director-General', below, should be understood in this context.

Section 90 of the NPW Act permits the Director-General to issue an Aboriginal heritage impact permit (**AHIP**), which can authorise the destruction of an Aboriginal object or place.

In the 2009 EDO Roundtable (noted above), there was general consensus that:

- the legal framework around culture and heritage protection had failed, and
- this situation would not improve unless stand-alone cultural heritage legislation was created, with powers over protection and destruction assigned to separate entities.

Maintaining the provisions in their current form means that, rather than the Act being used proactively to protect culture and heritage, it functions instead as a tool to regulate the means by which objects and places are destroyed.[16]

ii. The NPW Act does not impose proactive responsibility for the protection of culture and heritage

The NPW Act contains no obligation on the part of the Director General to work actively with Aboriginal people to seek out cultural heritage for the purposes of protecting it. The Act instead relies on those knowledgeable of the location of Aboriginal objects to notify them to the Department (s 89A); or on Aboriginal people objecting to grants of development consent. Although the failure to notify the location of an object is a criminal offence under s 89A, there is nonetheless a risk of developers destroying objects without a permit, either because they are not aware of their location,[17] or because notifying the Department would impede their plans for development of the area.

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14 Section 85.

15 Pursuant to a restructuring which has transferred the bulk of the responsibilities of the Department of Environment, Climate Change and Water to the Office of Environment and Heritage.

16 Joseph Kennedy 'Operative Protection or Regulation of Destruction? The Validity of Permits to Destroy Indigenous Cultural Heritage Sites' (2005) 6(14) *Indigenous Law Bulletin* 20.

17 See, eg, EDO NSW, *Ticking the Box: Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (Nov 2011), Case Study 2, pp 12-13. A heritage study to inform the 'review of

While OEH's *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales*[18] provides some positive impetus for the identification and protection of Aboriginal culture and heritage, we note that the broad exemptions it contemplates allow significant scope for destruction of this culture and heritage.[19]

The 2010 reforms to the NPW Act (which, as noted above, substantially increased the penalties for harming Aboriginal objects and created offences of strict liability in this area) may go some way toward addressing under-reporting, although the low rate of prosecution for these offences remains a concern. This is explored below.

iii. Resources are insufficient to ensure both the processing of AHIPs and prosecution of offences relating to Aboriginal culture and heritage.

Under the NPW Act, OEH is responsible both for issuing AHIPs, and for prosecution of breaches of the culture and heritage protection provisions of the Act.[20] It is questionable whether sufficient resources are being allocated to enforcement functions. Prosecution for breaches of the Aboriginal culture and heritage provisions of the NPW Act are infrequent. Examination of annual reports[21] of the relevant Departments since 2005/06 reveals only four distinct prosecutions in Local Courts and the Land and Environment Court over five years, with fines totalling $6150. This is despite amendments to the NPW Act in October 2010 mentioned above, which introduced strict liability offences of damaging Aboriginal places and objects.[22]

By comparison, in 2007 the Department of Environment, Climate Change and Water received 157 requests for consents to destroy or damage Aboriginal objects or places, and 92% of these were granted. In 2008, to 9 October of that year, 69 consents had been requested, and 100% of these were granted.[23] Between 25 May 2009 and 23 February 2010, the Department received 101 applications for permits;[24] and recent OEH data indicates that since around October 2010, there have been some 91 AHIPs issued.[25] Data on the proportion of approvals is not readily available for these later years. The

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environmental factors' (REF) for coal seam gas exploration relied on databases, as opposed to the heritage values of the area. A search of the OEH Aboriginal Heritage Information Management System (AHIMS) did not identify any known indigenous heritage items recorded near the proposed core hole site. "There are, however, significant heritage items in the area. … The location of many Aboriginal cave paintings in the Putty Valley and the Wollemi National Park are known to property owners, scientists and rangers."

18 www.environment.nsw.gov.au/resources/cultureheritage/ddcop/10798ddcop.pdf.

19 The statutory basis of these exemptions should also be considered - see, for example, *National Parks and Wildlife Regulation 2009*, cl 80B.

20 See sections 86, 90J.

21 See www.environment.nsw.gov.au/whoweare/reports.htm.

22 Section 86(2), (4) and (5).

23 Parliament of NSW, response to question on notice, 28 October 2008 www.parliament.nsw.gov.au/prod/lc/lcpaper.nsf/0/09F4FF74402ADD00CA2574F0002AA69F/$file/Q081028.71.pdf.

24 Under the then sections 87 and 90 of the NPW Act. Parliament of NSW response to question on notice asked 23 February 2011 - www.parliament.nsw.gov.au/prod/lc/qalc.nsf/search/0AB8BABE5C7CAD3DCA2576D30026C04D.

25 See www.environment.nsw.gov.au/licences/ahipregister.htm.

relative lack of prosecutions contrasts markedly, however, with the number of permits granted for destruction in the same period.

Reform of the Aboriginal culture and heritage protection system must therefore ensure that there is adequate resourcing for the effective and timely prosecution of offences relating to Aboriginal culture and heritage items.

iv. The enactment of stand-alone legislation would better encapsulate the significance of Aboriginal culture and heritage not only to Aboriginal people, but also to the State.

It has been widely argued that the inclusion of culture and heritage protection in legislation that primarily concerns itself with flora and fauna protection is out-dated and paternalistic.[26] The NSW Government acknowledged this from Opposition in 2010:

> *…the main purpose of the principal Act we are amending, the National Parks and Wildlife Act 1974, is the protection of native flora and fauna. This means the Government is asking the Parliament to continue to regulate Aboriginal cultural heritage under an Act that was made to protect plants and animals. Understandably, this approach is grossly offensive to Aboriginal people.*[27]

The EDO welcomes this acknowledgement. We submit that, in addition to the practical benefits it provides, the creation of separate legislation is an important symbolic step in recognising the significance of culture and heritage protection to Aboriginal peoples' dignity. At the 2009 EDO Roundtable, participants considered that the cultural heritage provisions of the UNDRIP should be incorporated into the NSW legislative regime, and that heritage protection provisions should be benchmarked against minimum standards set out in the UNDRIP.

Notable among the provisions of the UNDRIP is the following:

> *States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*[28]

As discussed further below, it is imperative that cultural heritage protection legislation allows for Aboriginal people to take ownership of their culture and heritage. This includes having a right to control the use made of Aboriginal culture and heritage; it also includes the ability to enforce breaches more effectively.

The UNDRIP further provides that indigenous peoples have "the right to … have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects."[29] Other relevant provisions include those giving Indigenous peoples

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26 Kennedy, above n 15.

27 Hansard, NSW Legislative Council, Second reading debate, National Parks and Wildlife Amendment Bill 2010, 1 June 2010, available at http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20100601055

28 Article 11(2).

29 Article 12(1).

the right to participate in decision-making in matters affecting their rights,[30] and requiring States to consult and cooperate in good faith with Indigenous peoples prior to the approval of any project affecting their lands, territories and other resources.[31]

The enactment of independent legislation that includes provisions such as the above will help to demonstrate a commitment on the part of the State of New South Wales to respecting the history and living cultural tradition of Aboriginal people.

2. **The need for an independent body to administer culture and heritage protection legislation.**

We submit that cultural and heritage should be protected and managed by an independent body. Since the Keane Committee released its report in 1980, each review into Aboriginal culture and heritage protection has recommended that there be an independent commission, governed by representatives of NSW Aboriginal communities, to fulfil this protection and management role. The commission should support and delegate authority to various local or regional bodies.[32] We note that there is presently provision for an Aboriginal Cultural Heritage Advisory Committee (**ACHAC**) in the NPW Act,[33] however this body has advisory functions only. Consistently with the findings of previous reviews into Aboriginal culture and heritage protection, we submit that this body should, at most, have an interim role while the transition is made to management of Aboriginal culture and heritage by an independent Aboriginal Commission.[34] The Aboriginal Commission should be removed from direct ministerial oversight and discretion.

To the extent that ministerial control is exercised over protection of culture and heritage, we submit that further consultation be undertaken with Aboriginal groups to determine the appropriate Department to exercise this control. We note that previous reviews have recommended that responsibility vest in the Department of Aboriginal Affairs.[35]

3. **The need for consistent enactment of cultural heritage protection across different laws**

In order for a scheme protecting Aboriginal culture and heritage in NSW to be effective, recognition and protection of this culture and heritage must be a consistent theme of all relevant legislation in NSW. In addition, this consistency should ideally be expressed across all corresponding legislation in Australia.

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30 Article 18.

31 Article 32.

32 See New South Wales Aboriginal Land Council, 'Our Sites, Our Rights' www.alc.org.au/media/69360/our%20sites%20our%20rights%20final.pdf, p 13.

33 Sections 27 and 28.

34 See New South Wales Aboriginal Land Council, above n 29, p 13.

35 See New South Wales Aboriginal Land Council, above n 29, p 15. We note that the functions of the former Department of Aboriginal Affairs are now exercised by Aboriginal Affairs NSW, part of the Department of Education and Communities.

The operation of land-use planning and development processes can have a significant impact on the continued vitality of Aboriginal culture and heritage sites. The EDO has provided a submission to the review of NSW planning law, in which we raised concerns at the overriding of integrated agency approval requirements in favour of fast-track planning approvals.[36]

In this context, it is of concern that the *Environmental Planning and Assessment Act 1979* (NSW) expressly stipulates that an AHIP is not required for State significant development and State significant infrastructure that has obtained development consent.[37] Exempting the State's most significant projects from such checks and safeguards is highly inappropriate. The role of planning law should be to implement measures to protect Aboriginal culture and heritage, rather than override them.

Recommendations

1. Independent legislation be enacted for the protection of Aboriginal culture and heritage in NSW.
2. This legislation be administered by an independent commission, governed by representatives of NSW Aboriginal communities.
3. Appropriate resourcing be provided for the prosecution of offences relating to Aboriginal culture and heritage.
4. The goal of protecting Aboriginal culture and heritage be made a consistent theme of all relevant legislation, especially in NSW.

B. Definitions of 'culture' and 'heritage'

We agree with the Issues Paper that

> *One of the issues with the [NPW Act] is that the definition of Aboriginal culture and heritage in terms of 'places' and 'objects' is based on an archaeological understanding which does not accord with Aboriginal peoples' own concepts of culture.*[38]

The NPW Act fails to address adequately the significance of objects, places and other aspects of Aboriginal culture and heritage for Aboriginal Traditional Owners themselves.

Under the NPW Act, 'Aboriginal object' is defined as

> *any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or*

36 See www.edo.org.au/edonsw/site/pdf/subs/111104review_nsw_planning_stage_1.pdf, pp 28-30.

37 Sections 89J(1)(d) and 115ZG(1)(d), though we note that there are some provisions for the Minister to consider the concerns of other agencies or authorities – see, eg. s 115ZA.

38 Issues Paper, p 2.

concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.[39]

An 'Aboriginal place' must be declared as such under s 84 of the NPW Act.

At the 2010 EDO Roundtable, participants emphasised that it was necessary to recognise a distinction between culture and heritage. Culture belongs to Aboriginal people, and the government has a role in supporting Aboriginal people freely to express it. 'Heritage' refers to the choices a tribal culture chooses to share.

Drawing on the recommendations of that Roundtable, the EDO submits that the following factors should be incorporated into determinations of what culture and heritage deserves protection:

- Broaden the definition of 'place' to reflect the importance of accessing places to maintain connection, including places with contemporary significance;
- Link 'culture' with the protection of fauna, since many species have totemic significance;
- Provide for protection of and access to places that are not formally recognised, such as places of contemporary significance, to enable the recognition and acceptance of ongoing connection.

Examination of legislation in other States and Territories is instructive. In Victoria, for example, the definition of 'Aboriginal place' extends Aboriginal heritage beyond individual artefacts or sites to include surrounds or context; while the definition of 'Aboriginal object' emphasises whether the object is of cultural heritage significance to the Aboriginal people of Victoria, rather than whether it presents archaeological evidence of prior habitation of the area.[40] In the ACT, Aboriginal places and objects are described as places and objects of significance to Aboriginal people, because of either or both Aboriginal tradition, or the history (including contemporary history) of Aboriginal people.[41]

Any amendment to Aboriginal culture and heritage protection legislation must also take into account that protection of areas *surrounding* a sacred site may be just as necessary to preserving the values of the site as protection of the site itself. This is well illustrated by the example of a carved tree at Bellwood, near Nambucca Heads. The tree was known as the 'Keepara Tree' (Diamond Tree), and was an extremely significant site for local Aboriginal men. Only certain men were permitted to see or be near the site. Although the site was protected as an 'Aboriginal Area' under the NPW Act,[42] the surrounding area was not. One adjacent area was cleared and levelled for a playing field, and the tree was visible from the field. The lack of visual protection for the tree rendered meaningless its physical protection.[43]

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39 NPW Act, s 5.

40 *Aboriginal Heritage Act 2006* (Vic), ss 4 and 5; and see EDO Discussion Paper, above n 3, pp. 13-14.

41 *Heritage Act 2004* (ACT), s 9.

42 See s 62.

43 Environmental Defender's Office (NSW) *Caring for Country: a Guide to Environmental Law for Aboriginal Communities,* 2007, pp 20-21. www.edo.org.au/edonsw/site/pdf/pubs/caring_for_country.pdf.

The EDO accordingly recommends that the definitions of the kinds of culture and heritage that are protected be based on the significance of that culture and heritage to present and future Aboriginal people and communities. Culture and heritage protection should be premised on facilitating Aboriginal peoples' ongoing practice of their cultural rights and maintenance of their unique identity. It is important that culture and heritage protection be holistic, based not only on the identification and protection of particular items, but also on allowing ongoing protection of the cultural and spiritual values attaching to those items.

Recommendations

5. Definitions of the kind of culture and heritage that are protected be based on the significance of that culture and heritage for present and future Aboriginal people and communities.
6. Culture and heritage protection extend to protection of all sites and resources necessary to ensure that the significance of particular objects, places or other items of heritage to Aboriginal people is maintained.

C. Ownership of Aboriginal culture and heritage

Pursuant to s 83 of the NPW Act, almost all Aboriginal objects are the property of the Crown.

Many of the shortfalls in conservation of Aboriginal heritage in NSW can be attributed directly to this provision. The negative consequences of the vesting of Aboriginal objects in the Crown include:

- Excessive destruction of Aboriginal objects for commercial imperatives. There are indications that approval levels of destruction of Aboriginal culture and heritage are high, and important sites are not being protected;[44]
- The removal from Aboriginal people of control over how their culture and heritage is managed;
- The removal from Aboriginal people of appropriate options to enforce their rights in relation to their culture and heritage.

Ensuring that Aboriginal people have the right to decide how their culture and heritage is managed is an integral part of comprehensively recognising their entitlement to robust protection of their culture and heritage. Aboriginal people, rather than the government, should have the right to make decisions on whether cultural items can be destroyed. Consistently with the provisions of the UNDRIP cited above, they must be given rights to compensation for this destruction. Giving Aboriginal people ownership of objects of significance to them will assist in ensuring that these objectives are met.

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44 New South Wales Aboriginal Land Council, *More than Flora and Fauna* www.alc.org.au/media/9790/More%20Than%20Flora%20and%20Fauna%20(2009).pdf pp 16-17.

The *National Parks and Wildlife Regulation 2009* (NSW) sets out the requirements for consultation that must be undertaken with Aboriginal people before a proponent applies for an AHIP.[45] Even if ownership of objects is not vested in Aboriginal owners, the EDO submits that consultation requirements should mandate not only that such consultation be undertaken, but that relevant Aboriginal peoples' free, prior informed consent be required as set out in the UNDRIP. For example, in Victoria, cultural heritage permit applications are referred to registered Aboriginal parties, and these parties have rights of veto over the grant of permits.[46]

The law also fails to provide Aboriginal people with adequate enforcement rights in relation to their culture and heritage. They are forced to resort to expensive litigation to challenge the issuing of AHIPs and development consents in relation to sites of significance to them. This may lead to adverse costs orders as illustrated below. Legal aid is often unavailable for culture and heritage matters. The Appendix to the EDO's 2009 discussion paper[47] contains further details on relevant cases in this regard.

***Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 299**

Background

This case was part of a series of cases relating to an application for judicial review of a permit and consent in relation to the removal, damage or destruction of Aboriginal objects, issued by the Director General under the NPW Act. The permit and consent related to land at Angel's Beach, Ballina.[48] The Andersons were unsuccessful in their challenge to the issuing of the consent.

In response to the Department's claim for costs, the Andersons sought to rely on a rule of the Land and Environment Court that permits the Court to depart from the ordinary 'loser pays' costs order, when proceedings are brought in the public interest.

Outcome

The Court refused to exercise the available discretion in relation to costs, and made an order that the Andersons were to pay the costs of the Department. While accepting that the proceedings were brought in the public interest, the Court stated that there was required to be some 'special circumstances' beyond the public interest, which could justify departing from the usual costs order. In this case, countervailing considerations to the public interest were the facts that:

- there was disagreement within the local Aboriginal community, as there was some indication that not all members (in particular, the Local Aboriginal Land Council) were against the granting of the consent;
- despite raising the question of intergenerational equity, the case did not involve any real or substantial consideration of legal questions of general significance;

45 Clause 80C, and see s 90K of the NPW Act.

46 *Aboriginal Heritage Act 2006* (Vic) ss 38-40.

47 See above, n 3.

48 See *Anderson & Anor v Director-General of the Department of Environment and Climate Change & Anor* [2008] NSWLEC 182.

- the case was not a particularly strong one – as the decision-maker had gone to such lengths 'to ensure that every conceivable consideration was taken into account including affording the Andersons themselves the fullest opportunity of making submissions and having them taken into account before any determination was made'.

The EDO submits that if the power to issue AHIPs remains vested in the Minister, Aboriginal peoples must be given *merits* appeal rights. The judicial review rights they are currently afforded are expensive to exercise and limited in scope, and are therefore not an appropriate recourse.

Aboriginal people's knowledge of culture and heritage, including the requirements of confidentiality attaching to that knowledge, must also be given appropriate recognition and respect. One of the few options available for the protection in NSW of Aboriginal culture and heritage is the listing of Aboriginal places or objects on the State Heritage Register[49] or the Aboriginal Heritage Information Management System (**AHIMS**).[50] For each of these registers to be effective, Aboriginal people must be able to exercise appropriate control over who can make use of the knowledge contained in them.[51] The EDO's 2010 Roundtable considered that access to knowledge must be negotiated; and free, prior, informed consent must be given by Aboriginal people. The Roundtable considered that knowledge belongs with local Aboriginal groups, rather than in a centralised database.

Recommendations

7. Ownership of Aboriginal objects be vested in appropriate Aboriginal people, not the NSW Government;
8. Appropriate Aboriginal people be given the right to determine what use is made of their culture and heritage. Accordingly, their free, prior informed consent must be sought in granting any application for an AHIP, with compensation payable where appropriate.
9. Aboriginal people be given appropriate enforcement rights in relation to the law for protection of their culture and heritage.
10. Aboriginal people be given control over the use of their knowledge of culture and heritage issues and sites of significance, including where such information is listed in publicly-accessible databases.

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49 *Heritage Act 1977* (NSW) Part 3A.

50 See www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSyste m .htm and note that this is not a comprehensive register of Aboriginal sites.

51 See the findings of previous reviews in relation to management of information in such registers: New South Wales Aboriginal Land Council, 'Our Sites, Our Rights' www.alc.org.au/media/69360/our%20sites%20our%20rights%20final.pdf, p 15.

D. Rights to speak on culture and heritage issues

Identification of culturally authorised persons or parties for consultation on culture and heritage issues can be difficult. Failure to provide appropriate mechanisms for identifying such persons can create conflict within Aboriginal communities. For example, an EDO client reported that over 30 groups registered for consultation in relation to a mine in the Upper Hunter Valley, creating difficulties within the community.[52]

At the EDO's 2010 Roundtable, participants suggested that there was a need to define who had a right to speak for country, and how this is recognised at law. The aim of reform to processes of identifying who can speak for country is to ensure that kinship law prevails.

While it is clear that it is Traditional Owners who have the right to speak for country, the difficulty lies in identifying the appropriate Traditional Owners. Participants at the EDO's 2010 Roundtable also emphasised the importance of recognising the rights of those who are not Traditional Owners to speak *about* country, but not *for* country.

OEH has set out in its *Aboriginal cultural heritage consultation requirements for proponents 2010*, mechanisms for identifying appropriate persons to speak on culture and heritage issues.[53] We note that these mechanisms may yield incomplete or contested results. We also note the provisions in Victorian legislation, for the establishment of registered Aboriginal parties acting as a primary source of advice and knowledge in relation to cultural heritage for a particular area.[54]

This submission does not purport to present a definitive answer on the optimal process for determining the identity of culturally authorised persons. Rather, we highlight the importance of undertaking extensive consultation on these issues, including with Aboriginal members of the Aboriginal Culture and Heritage Reform Working Party.

Recommendation

11. Determination of processes for identifying persons culturally authorised to speak on culture and heritage issues be undertaken through broad consultation with Aboriginal people.

52 Discussion paper, p 10.

53 See www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09781ACH consult req.pdf, 4.1.

54 *Aboriginal Heritage Act 2006* (Vic), s 148.