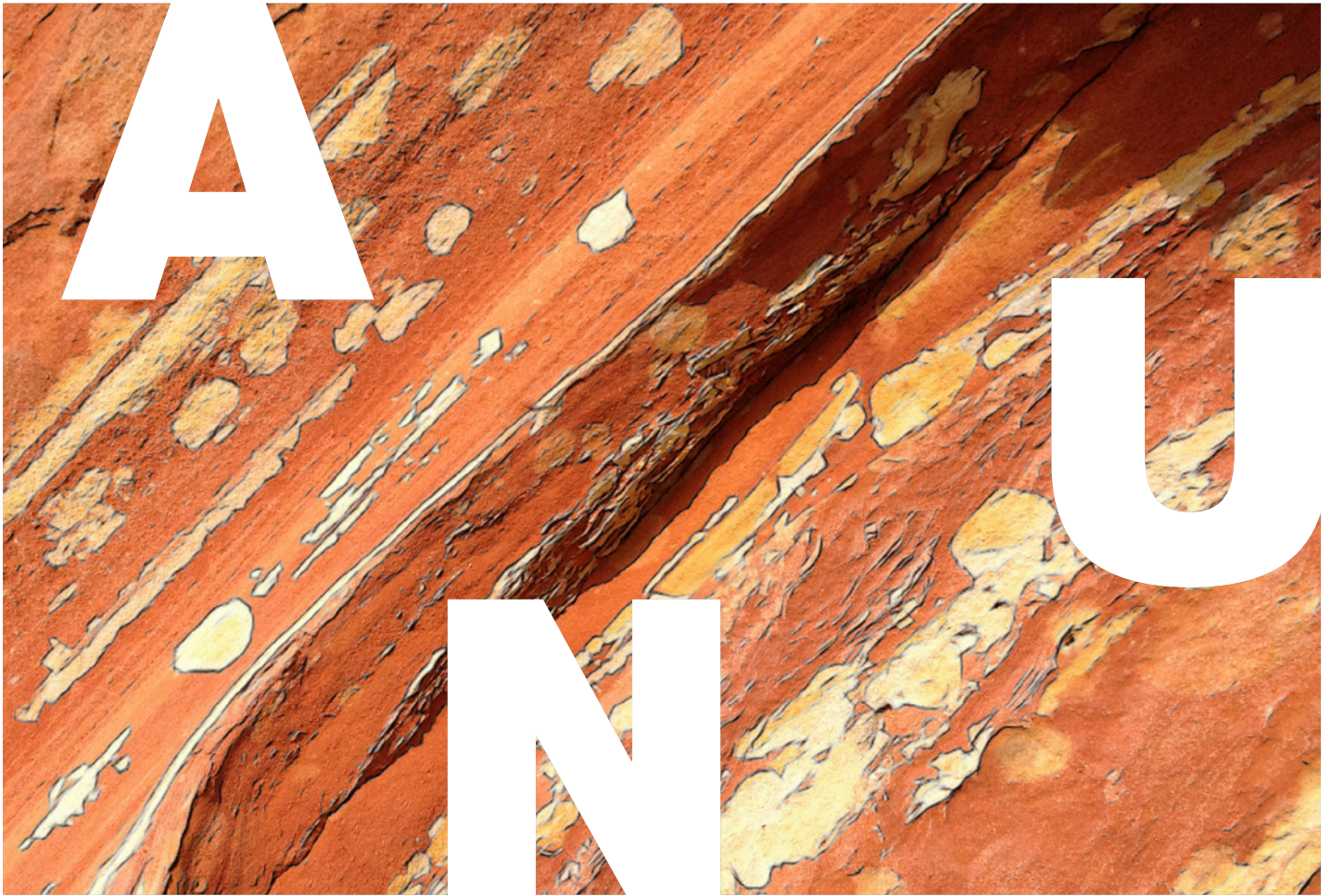




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PROTECTING ABORIGINAL HERITAGE
IN NEW SOUTH WALES

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Centre for
Aboriginal Economic
Policy Research
ANU College of
Arts & Social
Sciences

CAEPR TOPICAL ISSUE NO. 3/2012

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July 2012

Protecting Aboriginal Heritage in New South Wales

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A version of this Topical Issue was submitted as a response to the New South Wales Government's Office of Environment and Heritage consultation paper, 'Aboriginal heritage legislation in NSW: Public consultation on issues for reform' in December 2011.

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Topical Issue No. 3/2012

An electronic publication downloaded from <caepr.anu.edu.au>.

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Background

Reform of Aboriginal heritage legislation in New South Wales (NSW) is well overdue. Thousands of Aboriginal cultural heritage sites have been damaged or destroyed in NSW in recent years. According to the 2011 State of Indigenous Cultural Heritage Report, there were some five instances of regulated cultural heritage destruction a week in NSW throughout the period between 2004 and May 2009. Whilst the rate of permits being issued has slowed slightly since then to just over three per week, the nature of the permits has changed allowing for destruction over a longer period of time (Schnierer, Ellsmore & Schnierer 2011: 57–58). Thus it is hard to know whether the actual level of Aboriginal cultural heritage destruction has really reduced or whether fewer permits are now required for the same level of destruction. This of course only reflects *regulated* destruction. It does not allow for the *unregulated* destruction, which may be just as serious.

These figures do not include destruction caused by, for example, long wall coal mining. In the escarpment behind Wollongong there are registered Aboriginal sites being seriously damaged by cracking and subsidence caused by coal mining. At least some of these sites are meant to be protected as they are on the office of Environment and Heritage (OHE), Aboriginal Heritage Information Management System (AHIMS) Register. There seems to be no effective means of dealing with this rather dramatic destruction—for example, a cave containing ancient paintings which is collapsing due to subsidence; or rock carvings which are being affected by cracking of the surface due to mining activity below.

Nor do these figures allow for the *unregulated* destruction of Aboriginal cultural heritage by agents including government departments themselves. For example, Forests NSW has conducted illegal logging within a designated Aboriginal Place at Biamanga on the NSW South Coast (see State of Indigenous Cultural Heritage 2011 Appendix 2) in breach of its licence conditions. That Aboriginal people themselves had to physically protest and take the Department to court

in order to stop this illegal activity demonstrates the ineffectiveness of the current compliance system. Worse still, the Department of Forests was not prosecuted for this breach while some of the Aboriginal protestors were taken to court by Forests NSW for alleged trespass. This example illustrates the stresses which Aboriginal people have to endure to protect their cultural heritage.

The systems currently in place supposedly to protect Aboriginal cultural heritage in NSW are failing miserably; the legislation is too weak, and compliance, even with what exists, is rarely ensured. Even land & Environment Court orders are ignored by companies, as no-one ensures that they are implemented.

This is the situation facing Aboriginal people in NSW who, even when they pursue every legal means, find that it is impossible to protect their cultural heritage under the current systems.

The impact on Aboriginal people

Within Aboriginal culture, 'country' is a very important concept. It embraces all lands and waters, the earth and rocks underground and the sky above. It is holistic, and a person's relationship to country is central to their identity. Country is not inanimate—it is a spiritual relationship which people have with their country. They talk to it, sing to it, and gain succour from it. Places hold stories which carry important meanings to people of that country, and only certain people are authorised to 'speak' for particular parts of country. Country holds the important cultural heritage; destruction of cultural heritage therefore is destruction of a person's country—it is, in effect, an attack on the persons responsible for that country, who are at one with that country in a kin-like relationship.

The unremitting destruction of Aboriginal cultural heritage in NSW is, I believe, contributing to ill health and sickness among Aboriginal people. The destruction of Cultural heritage can cause enormous stress on affected individuals, and we are all aware that undue and constant stress contributes to ill health, and a number of chronic conditions in particular which are common in the Aboriginal community—especially heart disease. We will not 'close the gap' in Aboriginal health and wellbeing while this destruction—and the disrespect to Aboriginal culture which it implies—continues. As Aboriginal people regularly remind us, 'Healthy country, healthy people'. Whilst important Aboriginal cultural heritage is being destroyed country will not be healthy, and nor will the people.

A point to be emphasised here is that Aboriginal culture is not simply a heritage from the past. It is a living, breathing, contemporary practice of Aboriginal people in NSW today,

whether they live in large urban centres, on the coast, in regional towns or in the outback parts of the State. Their culture is their lived experience, and damage to and destruction of culture is keenly felt by Aboriginal people. Their identity is inextricably bound up in their culture. Thus, protection of cultural heritage contributes to their identity and wellbeing. Currently, some Aboriginal people in NSW do not have access to parts of their country which are significant to them, and this is a source of sadness and depression to them. It also means that they are unable to pass on the stories associated with those places to younger generations, and a tragic loss of Indigenous knowledge is occurring.

By contrast, my research in NSW indicates very clearly that where Aboriginal people have a real role in managing their country, there is a host of socioeconomic as well as cultural and reconciliation benefits (Hunt 2010). These factors can interact, leading to real improvements in Aboriginal lives. Well-devised Aboriginal cultural heritage legislation has the potential to contribute to such positive change among Aboriginal peoples in NSW.

The process of reform

As a matter of principle and respect for Aboriginal people and their culture, Aboriginal people must have a strong say in the nature of this reform. Whilst I appreciate that this reform is long overdue, and that there is some pressure to move forward quickly, I urge that Aboriginal people are given the fullest possible opportunities to participate. This means that timetables for consultation across NSW must be such that Aboriginal people who wish to have a say can do so. Many have limited transport options, especially in regional and far west areas, so it is extremely important that consultations take place in as many locations as possible. At present the whole process is certainly moving too fast for Aboriginal people. They need adequate warning of consultation meetings; these need to be close to where they live, and in venues in which they feel comfortable. Rushing a reform like this will further damage as the issues are critical to many people in these communities.

Objectives of the reform

The reform's overarching objective should be to protect Aboriginal culture and heritage. The second objective stated in the Consultation Paper refers to developing a system 'which *balances* (my italics) the protection of Aboriginal culture and heritage with the economic development needs of Aboriginal communities and NSW generally'. This objective concerns me greatly, as the 'balance' at the moment is all in favour of economic development for NSW, with a number of major companies

being the major beneficiaries of the destruction of Aboriginal heritage. How this balance can be re-adjusted, and the value of intangible and tangible cultural heritage be weighed against economic goals is crucial.

I am not convinced that trying to strike a 'balance' is achievable. Who will determine this? If as a society we are to value Aboriginal cultural heritage then it must be protected, whatever the outcomes. This has occurred at the national level on rare occasions—for example, when Prime Minister Hawke rejected a mine at an important dreaming site in the Northern Territory. It could be achieved far more often with some patient negotiation and a willingness on the part of developers to spend a little more to respect Aboriginal culture. There are good examples where this has occurred to the satisfaction of all concerned. For example, the Lawrence Hargrave Drive north of Wollongong avoided important grinding groove sites after consultation and local Aboriginal advice. It can be done. It just requires respect and a little effort. Thus it is not about a balance between Aboriginal cultural heritage & economic development, but rather about doing economic development in such a way that Aboriginal heritage is protected and preserved. That is a very different approach and the objective of this reform should be couched in these terms.

What is the nature of the culture and heritage to be protected?

As indicated above, culture is holistic, and as the Consultation Paper correctly states good cultural heritage legislation would recognise tangible and intangible cultural heritage, as these are frequently closely related (e.g. Dreaming stories about particular places, pathways, and sites). The current focus on archaeological value should be expanded by concepts of Aboriginal cultural value, and should embrace,

... family campsites, breeding sites, traditional uses (e.g. wood collecting), storylines, trading routes, kinship ties, spiritual connections, dreaming, specific cultural knowledge (e.g. bush medicine), grave sites, birth sites, bush tucker, hunting and gathering grounds, the ground and minerals, gender related material, plants, animals, language, dance, underground water, rock holes, swamps, native wells, artesian bores, soaks, waterholes and creeks (Schnierer 2011: 60).

Cultural landscapes should be recognised and Aboriginal cultural valuation respected. As many coastal Aboriginal people have important cultural sites in marine environments and below the sea, these should be included as well. Similarly, river peoples have important sites within the rivers and wetlands which need protection.

Ownership of Aboriginal culture and heritage and speaking for country

Any new legislation should make clear that Aboriginal cultural heritage is owned by Aboriginal peoples, and that they should control it. Good practice would also ensure that within this system, the traditional owners, the right people to speak for country, have the final say on cultural heritage matters.

As I have explained above, under Aboriginal protocols, only certain people can speak for particular country or places within country. One of the difficulties in NSW has been that local Aboriginal Land Councils (IALCs), which represent all Aboriginal people living within their boundaries, have had legislative responsibility for advising on cultural heritage in their areas. Where the IALC is controlled by a majority of traditional owners, this is not a problem, but in many urban areas the traditional owners may be outnumbered by more recent arrivals and they may not have the major say within the IALC on cultural heritage matters. Equally, there can be contestation about who has the right to speak for country.

At the moment there remain no government programs or support systems to assist Aboriginal people to resolve such conflicts or situations. This is also highly stressful and destructive of Aboriginal communities. Where native title has been recognised, or where 'Aboriginal owners' have been registered (in a small number of locations in NSW where there are jointly-managed National Parks under a *National Parks and Wildlife Act* Section 4A Handback agreement), the identification of the 'right' people to speak for country may be easier. These legal instruments can provide a starting point, but across most of NSW this is not the case. Nor should they be an absolute determination, particularly since the test of proof for native title is exceedingly high and may exclude recognised traditional owners who have been unable to meet the Act's requirements (the Yorta Yorta case in Victoria is a case in point). However, it is imperative that these matters of who has authority to speak for country are resolved so that Aboriginal people who are the right people to speak for country do so in relation to cultural heritage matters. This should be a fundamental principle of the new legislation.

I note that in Victoria, funding is now available through the Victorian Aboriginal Heritage Council for mediation to ensure that matters of who are the right people to speak for country are being resolved. Funding for such a mediation facility should be a part of the new legislation in NSW. Aboriginal people should then be invited to resolve matters in relation to who speaks for country within a clear, inclusive and respectful definition of traditional ownership, and with adequate skillful mediation support.

Victoria does not have a land council system such as in NSW. Rather traditional owner bodies ('Registered Aboriginal Parties') are constituted under the provisions of the *Victorian Aboriginal Heritage Act 2006* to provide developers with certainty in consultation. In NSW, it would be possible to develop a system of inclusive traditional ownership within many of the IACs, and for these bodies to ensure that they involve all the relevant knowledge holders in any cultural heritage matters. Alternatively, recognized traditional owner groups could be given such responsibility.

It would be undesirable, however, for new NSW legislation to further splinter Aboriginal governance over matters to do with country, so a system which appreciates and builds on the existing IAC system while including the principle of right people for country needs to be devised. Discussion with the NSW Aboriginal Land Council, NTSCorp and Aboriginal traditional owners about the details of how this might be pursued is warranted. It should be very clear that Aboriginal people who do not have traditional connections to that country should not speak for it unless authorized by the traditional owners to do so on their behalf.

At the State level, it is essential that an independent Aboriginal Heritage Council or Commission should be established, which would be Aboriginal controlled, through Aboriginal processes of selection of traditional owners with strong cultural heritage knowledge. It would be a stand-alone body with powers equivalent to those of similar non-Indigenous heritage bodies. In recognition of the fact that some Aboriginal heritage is gender-specific there should be an even balance of male and female representation on such a State-wide body, and at local level care must be taken to include female and male traditional owners in heritage arrangements.

Management of Aboriginal culture and heritage

As indicated above, the current systems for managing the protection of Aboriginal cultural heritage in NSW are failing miserably. Major change is required. Clearly, the Crown has not protected the cultural property which it purports to own. The Aboriginal peoples of NSW should become the owners of their cultural heritage in the new legislation and should determine how it is protected and under what conditions it can be destroyed. Local bodies and a State-wide body, all Aboriginal-controlled, are required to give effect to this principle. In my view, the responsible Minister should be the Minister for Aboriginal Affairs, not the Minister responsible for the Environment, despite the obvious link with land and environmental matters. The Ministry which has primary responsibility for the NSW Land Rights Act and overall responsibility for Aboriginal matters in NSW is clearly the most appropriate Ministry to deal with

cultural heritage matters. In particular, its Director is always an Aboriginal person who will have a good understanding of cultural matters. However, options for how Aboriginal peoples of NSW can have recognized ownership of and manage their cultural heritage should be widely canvassed with the Aboriginal peoples of NSW before settling on a final model.

Whatever the details of the model, the legislation for management of this cultural heritage should be based on the rights and principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, which has been endorsed by the Australian government following consultation with all States and territories. This Declaration makes clear that Aboriginal people have the right to control their cultural heritage and this principle should be incorporated into the new NSW legislation:

Article 31: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Resourcing the model will be another important consideration. Traditional owners will need adequate resourcing to fulfil their responsibilities under this legislation. This means familiarizing them with the legislation once it is finalized, making them aware of the new powers they will hopefully be given, and providing resources to enable them to have input into planning processes and to undertake cultural heritage mapping (see below), and if necessary take legal action to enforce compliance with the legislation. If they do not have adequate funds or power to enforce legislation and compliance, there will not be sufficient disincentive to prevent developers or others breaching the legislation.

Land use planning and development processes

Clearly, one of the major ways in which Aboriginal cultural heritage is being destroyed in NSW relates to inadequate protections and arrangements within the land use planning and development applications processes. It is clear that Aboriginal cultural heritage protection should be built into planning laws, and that penalties for destruction of Aboriginal cultural heritage should be significant, and all breaches should be actively prosecuted. It is also important

to stress that damage or destruction of Aboriginal cultural heritage by any means should be penalized. For example, the destruction of Aboriginal cultural heritage by subterranean mining or drilling below should be prosecuted.

NSW cultural heritage legislation remains inadequate, despite the enactment of some recent improvements. Planning laws clearly need amendment to give greater protection to Aboriginal cultural heritage and to give traditional owners much stronger rights within the planning system, consistent with the UN Declaration on the Rights of Indigenous Peoples.

Firstly, traditional owners should be legally required to be involved at the earliest possible stages of any planning proposals and they should have the right to reject any proposed destruction of cultural heritage. There should be a 'cultural heritage duty of care' obligation on planners and developers as well as the general public to protect Aboriginal cultural heritage. This duty of care implies that ignorance is no excuse if cultural heritage is destroyed. The so-called 'site clearance' model should be incorporated into planning laws, so that consultation and site surveys are undertaken by traditional owners before development commences, and agreed cultural heritage management plans are included. Once proposals have been approved, traditional owners should have the power to immediately halt work if there is a breach of agreed conditions to an agreed proposal. At present, it takes too long for Aboriginal people to obtain a court order to cease destructive activities. Local governments need to be far more vigilant about Aboriginal cultural heritage and its protection should be central to their work in the planning arena.

In conjunction with these recommendations, far greater public education is needed about Aboriginal cultural heritage and its protection. I am aware of a number of local councils in North Sydney that have joined together to promote greater awareness and understanding of Aboriginal cultural heritage. Much more such effort is required across the State, in particular with local governments and private development companies, as well as the general public. At the same time, legislation should not allow ignorance as defence. The State government has a responsibility to support an Aboriginal-led education campaign about the value and importance of Aboriginal cultural heritage and its protection. The development of new legislation presents a great opportunity for a major public education campaign on Aboriginal cultural heritage protection and the need for compliance. Such a public education strategy should be ongoing past the initial introduction of the legislation.

Public natural resource management processes

The current arrangements in NSW to enable Aboriginal people to care for country in an integrated way, and thus to care for their cultural heritage, are inadequate. Mechanisms such as Indigenous Protected Areas (IPAs), joint management of National Parks, and Indigenous Land Use Agreements (ILUAs) are all too rare in NSW (see Hunt, Altman & May 2009). The most effective mechanism is currently through IPAs, which are totally Aboriginal controlled. However, at present there are only nine IPAs in NSW, most quite small in area. There are only four ILUAs (three associated with the Bunjalung people of Byron Bay, one with the Githabul nation); and seven joint-managed National Parks (which have majority Aboriginal decision-makers on the boards of management). The remaining 12 joint management agreements are through Memorandums of Understanding, with a variety of different terms and conditions. For the State with the largest number of Aboriginal people in the nation this is clearly inadequate, and much more could be done to strengthen Aboriginal engagement in managing country in an integrated way, so that Aboriginal cultural heritage can be properly cared for and protected. In particular greater Aboriginal control of cultural heritage on public lands of all sorts is required, and this needs to be properly resourced bearing in mind that Aboriginal people are the most disadvantaged in the State.

Similarly, private landholders need to be made aware that the NSW *Aboriginal Land Rights Act 1983* gives Aboriginal people the right to enter private land for cultural purposes, including cultural heritage management. This is a little-exercised right, for a host of reasons. Some Aboriginal people have negotiated Aboriginal Natural Resource Agreements (ANRAs) with landholders to enable them to access properties for cultural purposes. Much more can be done by government to support Aboriginal people to exercise this right.

Cultural heritage mapping is one way to enable Aboriginal traditional owners to better protect their cultural heritage. Some such cultural heritage assessment is taking place in NSW, but to my knowledge it has only been undertaken in some parts of the State, usually in protected areas, and there is no legal requirement to consult these assessments, or those who have undertaken them, in planning processes. Cultural heritage mapping could be a far more widely used tool on public and private lands. It is important to recognise that in undertaking such cultural heritage assessments or maps, Aboriginal peoples may not always wish to make all the information publicly available for reasons of Aboriginal cultural protocols. This should be respected by non-Indigenous actors in this field. There should be protocols in place on the State Heritage Register to protect secret

information from the public, but also to enable the right traditional owners to access it when they wish.

Finally, if Aboriginal people, notably the traditional owners for country, were able to participate fully in natural resource management processes their cultural values and knowledge would have a better chance of being incorporated into natural resource management. But this will also require a cultural shift among non-Indigenous natural resource managers to appreciate the value of this Indigenous knowledge and to be open to incorporating it into their practices (see Hunt, Altman & May 2009 for a discussion of how Aboriginal people in NSW could be more involved in natural resource management).

Concluding comment

In 1983, the Aboriginal Land Rights Act was groundbreaking legislation; yet today the NSW Aboriginal Cultural Heritage regime is stuck in the antiquity of the era when Aboriginal people were classified with the flora and fauna. It is well overdue for a complete rewrite. Once again NSW has the opportunity to lead; it has the experience of other States with their more recent Aboriginal heritage legislation to learn from, and the opportunity to take the best from these to develop a top class independent Aboriginal cultural heritage system in NSW consistent with the United Nations Declaration on the Rights of Indigenous Peoples. I hope the government will grasp this chance.

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