

OUR SITES, OUR RIGHTS



NEW SOUTH WALES
ABORIGINAL LAND COUNCIL

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RETURNING CONTROL OF ABORIGINAL SITES TO ABORIGINAL COMMUNITIES:
A summary of key recommendations of past Aboriginal heritage reviews in NSW

A note on the use of the terms; 'Culture' and 'Heritage'

In general usage the term 'heritage' refers to physical places or objects, and the history attached to those places, whilst 'culture' refers to practices such as language, dance and song. In respect to Aboriginal culture and heritage such a clear distinction may not be as easy to make.

While the authors respect that different perspectives exist on the use of "culture and heritage" versus "cultural heritage", for the purposes of this report, "culture and heritage" has been used in original text, though without favour.

Additionally, where such distinctions are necessary, the terms "sites" and "objects" have been used.

Feedback Welcome

This report has been prepared by the Policy and Research Unit of the NSW Aboriginal Land Council, with the assistance of student researchers; the efforts of Sam Dutton must specifically be acknowledged.

The information contained in this report has been sourced from the reports of Aboriginal heritage reviews undertaken in NSW from the late 1970s to 1996, as well as from similarly dated archival materials. Where quotations have been used, for accuracy sake, outdated and inappropriate language may at times appear. Any offence caused is unintended and regretted.

Comments and feedback on this report are very welcome, particularly from individuals or groups involved in the original reviews.

Comments should be forwarded to:

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Foreword

The Aboriginal peoples of Australia maintain the oldest living cultures in the world. The protection of our cultural and spiritual landscapes and materials, including sacred and significant sites, and objects is vital to maintaining our cultures. Unfortunately however, in NSW these are not given adequate legal protections.

The NSW Aboriginal Land Council has been advocating for proper legal protections for our culture and heritage from our very beginning in 1977, and have been involved in every attempt at reforming the laws.

With 'Broad Reform' again being discussed, this paper aims to provide a historical context to the current reform process. The NSW Aboriginal Land Council has commissioned this, and the following two research papers, to stimulate discussion and debate around Aboriginal culture and heritage protections:

1. 'Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation'; and
2. 'Caring for Culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia'.

While we know this paper will be of interest to those involved in the current reform process, we hope that the history that it tells will have a broader appeal, particularly for the Aboriginal community.

On behalf of my fellow Councillors, I encourage members of Local Aboriginal Land Councils, Aboriginal communities and the broader community to engage in the reform process, to ensure comprehensive measures are finally established to allow Aboriginal peoples across NSW to continue to practice and protect our culture.



Bev Manton
Chairperson
NSW Aboriginal Land Council

Summary

In NSW, Aboriginal culture and heritage is managed along with the state's flora and fauna under the *National Parks and Wildlife Act 1974*. In recognition of the inadequacy of this arrangement, various governmental inquiries have considered the management of Aboriginal culture and heritage. As a result of these inquiries, since 1980 five papers recommending legislative reforms for Aboriginal culture and heritage management have been released.

With "broad reform"¹ of the state's Aboriginal culture and heritage regime again on the Government's agenda, this paper aims to inform the current inquiry process by providing a summary of the findings and recommendations of the previous reform attempts.

The previous inquiries into Aboriginal culture and heritage management have all recommended the following:

- That the management of Aboriginal culture and heritage be subject to separate legislation.
- That the Aboriginal ownership of, and right to control Aboriginal culture and heritage should be recognised in such legislation.
- That Aboriginal understandings and definitions of Aboriginal culture and heritage should be recognised in such legislation.
- That an independent Aboriginal Heritage Commission should be established, with Aboriginal commissioners, appointed by the Aboriginal communities of NSW.
- That control of Aboriginal culture and heritage should be decentralised, with local Aboriginal people given authority to care for local Aboriginal culture and heritage.

The previous inquiries into Aboriginal culture and heritage management have, to varying extents, supported the following:

- The introduction of culture and heritage management plans with Aboriginal involvement in the development and administration of such plans.
- The management of cultural information in any system should be subject to restrictions, in line with the traditions and customs of Aboriginal communities to which the information is relevant.
- Ministerial responsibility for Aboriginal cultural heritage should be moved from the Minister for the Environment to the Minister for Aboriginal Affairs with the power of the Minister limited to that of a final appeal.
- The establishment of an Aboriginal Heritage Commission with the authority to mediate and arbitrate disputes.
- The establishment of an Aboriginal Heritage Commission with sufficient and separate funding to manage Aboriginal culture and heritage, and to build capacity in Aboriginal communities to manage Aboriginal culture and heritage.

It is worth noting that despite the similarities of these repeated findings and recommendations the much anticipated reform of Aboriginal culture and heritage protection remains at least another Inquiry away.



1. Introduction

The State's flora and fauna legislation, embodied in the *National Parks and Wildlife Act 1974*, has been the primary law for managing Aboriginal culture and heritage in NSW since 1967. In February 2010, the Minister for the Environment made the following commitment in Parliament on behalf of the Keneally Labor Government:

"The Government has committed to a broad reform process and will consider new stand-alone legislation in New South Wales to protect Aboriginal cultural heritage. The proposal for new stand-alone legislation will be developed by a working party comprised of representatives from both government and community groups, within a two-year period. It is important that we move to stand-alone legislation to protect Aboriginal heritage and to remove it from what is really an Act more concerned about the protection of flora and fauna in our national parks".²

This proposed working party is the latest in a line of inquiries instigated and supported by both Labor and Liberal State Governments that have been aimed at reforming the legislative regime for managing Aboriginal culture and heritage in NSW. With significant reforms yet to materialise, and in light of yet another attempt at reforms, it is suggested that the efforts of previous reviews remain relevant.

The Aboriginal community has participated in the previous attempts at reform with the anticipation that reforms will follow and Aboriginal culture and heritage will finally be protected. However, as some community members made it clear to at least one of the past reviews, there has been:

"too many recommendations and NO action"³

It is the aim of this paper to remind stakeholders in the current attempt at reforming the Aboriginal culture and heritage management regime in NSW of the findings and recommendations of the preceding inquiries.

1.1 ABORIGINAL LAND COUNCILS, LAND RIGHTS AND CULTURE AND HERITAGE

NSWALC is the peak Aboriginal representative body in New South Wales. Under the *Aboriginal Land Rights Act 1983* (NSW) both NSWALC and the state-wide network of Local Aboriginal Land Councils (LALCs) have:

- An objective to improve, protect and foster the best interests of Aboriginal persons in NSW; and
- A specific function to take action to **protect and promote Aboriginal culture and heritage.**

As with the interconnectedness of concepts of Aboriginal culture and heritage, and land or “Country”, the struggle for the recognition of Aboriginal culture and heritage rights in NSW, cannot be separated from the struggle for Aboriginal Land Rights.

From its very beginning in 1977, NSWALC had the return of sacred sites, the right to access sites, and the right to undertake cultural hunting and fishing, amongst its founding aims, along with its central platform of seeking the return of Aboriginal land. Since then Aboriginal Land Councils have been consistent advocates for the recognition of Aboriginal rights to own, control, manage, practice and protect their culture and heritage.

The link between Aboriginal land rights and land councils and the need for proper protection of Aboriginal culture and heritage was recognised when the *Aboriginal Land Rights Bill 1983* was introduced into Parliament by the Wran Labor Government. The Minister for Aboriginal Affairs, in proposing legislative recognition of Aboriginal land rights, indicated that it was to be only the first step in recognising and recompensing for past injustices suffered by Aboriginal peoples:

“It is my intention to seek the assistance of the new Aboriginal councils that will be formed under the proposed legislation [The Aboriginal Land Rights Act 1983] before introducing an Aboriginal heritage commission bill for the protection and ownership of sacred and significant sites”⁴

However as outlined in this report, despite this commitment and its reiteration in each of the subsequent reviews, an Aboriginal Heritage Commission is yet to be established, and the management and care of Aboriginal culture and heritage remains beyond the control of Aboriginal peoples in NSW.



2. History of Aboriginal Culture and Heritage Reform

1969

National Parks and Wildlife (Amendment) Act 1969 was passed in NSW.

The Act established the Aboriginal Relics Advisory Committee (ARAC) without Aboriginal representation, vested the Crown with ownership of Aboriginal relics, and gave the Director of National Parks and Wildlife responsibility for the care, control and management of dedicated Aboriginal areas, and for the proper protection of 'relics' that are found in National Parks, State Parks, Historic Sites, Nature Reserves or dedicated Aboriginal Areas.

1974

National Parks and Wildlife Act 1974 was passed in NSW.

1977

NSWALC established with Aboriginal rights to culture and heritage as a stated aim.

1978

The Wran Labor Government established the **NSW Select Committee of the Legislative Assembly upon Aborigines** (the **Keane Committee**).

The Keane Committee was to inquire into:

1. the causes of socio-economic disadvantage of Aboriginal peoples including issues impacting on culture;
2. Aboriginal land rights; and
3. The effectiveness of State and Federal management of Aboriginal Affairs.

1980

The Keane Committee handed down the first of its two reports, covering Aboriginal land rights and the management of Aboriginal culture and heritage. The report departed from the assimilationist approach of previous Government initiatives and recommended that a land rights system and an Aboriginal Heritage Commission be established in NSW.

The Interim Aboriginal Sites Advisory Committee (IASAC) was established with a six to four majority of Aboriginal members, to provide advice to the Minister for the Environment and the National Parks Director on matters relating to Aboriginal sites, replacing the ARAC.

1981

The second report of the Keane Committee was released.

1983

The *Aboriginal Land Rights Act 1983* was passed in NSW.

1986

Aboriginal Heritage Working Party (AHWP) was established with six members representing NSWALC, three from National Parks and Wildlife Service (NPWS), one from the Ministry of Aboriginal Affairs and an independent archaeologist.

1988

The **NSW Ministerial Task Force on Aboriginal Heritage and Culture** (the Ministerial Task Force) was established by the Unsworth Labor Government to replace the AHWP.

The Ministerial Task Force was chaired by Dr. William (Bill) Jonas and included NSWALC and other Aboriginal community representatives, as well as representatives from the then Office of Aboriginal Affairs and the National Parks and Wildlife Service.

1989

After extensive consultation with Aboriginal communities, the Ministerial Task Force released a report of its findings.

1993

The Faye Liberal Government established the **Aboriginal Cultural Heritage Working Group** (ACHWG).

The ACHWG consisted of the Directors-General of Department of Aboriginal Affairs (DAA) and the National Parks and Wildlife Service, as well as the Chairpersons of NSWALC and the **Aboriginal Cultural Heritage (Interim) Advisory Committee** (ACHIAC). The ACHIAC was an advisory body to the NPWS, which included Aboriginal community representation appointed by NSWALC.

The ACHWG was to consider options in relation to the *“overriding objective of achieving Aboriginal control and management of Aboriginal heritage and preservation of cultural and scientific values in Aboriginal heritage”*.⁵

1995

Following extensive community consultation the ACHWG released a discussion paper.

1996

Following a further round of consultation, the ACHWG prepared a NSW Government Green Paper⁶; ***The Future Management of Aboriginal Cultural Heritage in NSW*** (the Green Paper) with recommendations and a set of principles intended to underpin any reforms to Aboriginal culture and heritage legislation.

Part 4A of the *National Parks and Wildlife Act 1974* was amended to allow for the return of culturally significant lands, as National Parks, to Aboriginal Owners.

The Commonwealth Government review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) handed down the **Evatt Report**.

1997

The NSW Cabinet does not support the ACHWG’s suggested reforms and the Green Paper was not released for wider consultation.



2001

National Parks and Wildlife Amendment Act 2001 was passed by Parliament. The provisions of the Act relating to Aboriginal culture and heritage were never commenced by the Labor Government and the strict liability offence it provided for never came into force. The Act was repealed on 1 July 2010.

The **Aboriginal Cultural Heritage Advisory Committee (ACHAC)** established under the *National Parks and Wildlife Act 1974*. ACHAC's membership includes Aboriginal community members appointed by the Minister for the Environment, as well a representative from NSWALC and more recently one from the NSW Native Title representative body, NTSCORP.

2007

The *Heritage Act (NSW)* was reviewed and broader issues relating to heritage management in NSW were considered. The review concluded that an inquiry was needed to look into Aboriginal culture and heritage management in NSW.

2009

Amendments to modernise the Aboriginal culture and heritage provisions of the *National Parks and Wildlife Act 1974* announced; the 'Omnibus Bill'.

2010

Amendments to the Aboriginal culture and heritage provisions of the *National Parks and Wildlife Act 1974* enacted.

Despite these amendments the NSW Government acknowledges that Aboriginal culture and heritage should have its own legislation, and commits itself to the establishment of a **Working Party for Broader Reform** (the Working Party) to develop a new legislative model in NSW.

The inaugural meeting of the Working Party was held on 30 November 2010.



Photo: NSWALC Syron Collection

3. The Approaches of Previous Inquiries

3.1. NSW LEGISLATIVE ASSEMBLY SELECT COMMITTEE UPON ABORIGINES (1978-1981)

As a Parliamentary Committee, the Keane Committee was comprised of twelve Members of the NSW Parliament, none of whom were Aboriginal.⁷ It however rapidly established “a four-member Aboriginal Task Force to establish close contact between the Committee and the Aboriginal people”.⁸

A newsletter was also established, and advertisements were placed in newspapers and journals with state wide distribution, to elicit comment and feedback from Aboriginal communities on matters under consideration by the Committee. In addition specific invitations to provide comment were sent to interested organisations and individuals; “special attention was paid to inviting prominent Aboriginal individuals and as many Aboriginal organisations as possible”.⁹

The Committee made visits of inspection and held informal community discussions at 46 locations and took formal evidence on a further 16 occasions across the state.

3.2. MINISTERIAL TASK FORCE (1988-1989)

The Ministerial Task Force was established with the following characteristics to remedy the shortcomings identified with the earlier Aboriginal Heritage Working Party (1986-1987):

- the status of a Joint Ministerial Task Force, with formal terms of reference;
- A composition of all Aboriginal members, headed by an independent Aboriginal Chairperson;
- An overall independent working budget.

The Task Force comprised:

- An eminent and independent Aboriginal Chairperson and Deputy Chairperson;
- Two representatives of NSWALC;
- Two representatives of the NSW Aboriginal community;
- Two representatives of the then Office of Aboriginal Affairs;
- Two representatives of the NPWS; and
- A representative of the Australian Museum.

The Task Force proceeded with the “guiding principle...that full and proper consultation with Aboriginal people about Aboriginal heritage and culture is essential”.¹⁰

In so proceeding, the Task Force recognised that it had the following responsibilities:

- “to provide communities with sufficient information for them to be able to give us a proper expression of their opinion or advice”; and
- “to provide an opportunity for that opinion or advice to be expressed”.¹¹

The Task Force set about engaging with the Aboriginal communities of NSW by initially distributing over 300 newsletters to communities and other organisations. The newsletters provided an explanation of the purpose and terms of reference of the Task Force and sought the submission of comments.



The Task Force considered any submissions it received, along with its own analysis of the strengths and weaknesses of the current legislation. Principles that should be addressed by new legislation and were then identified, a number of options for the future protection and management of Aboriginal culture and heritage were developed.

These options including their pros and cons were presented at around one 100 community meetings throughout the state. At each meeting community comments were recorded.

Following this consultation phase, the Task Force prepared a preliminary report which “was widely distributed to Aboriginal communities, [and] to those people and organisations who had previously made submissions”.¹² Submissions on the preliminary report were called for, received, and considered by the Task Force. In addition, 23 regional meetings were held across the state to discuss the preliminary report, before the Task Force prepared its final report.

3.3. ABORIGINAL CULTURAL HERITAGE WORKING GROUP (1993-1996)

The ACHWG acknowledged the need for “extensive public debate”¹³ on the possible reform of Aboriginal culture and heritage protections. The ACHWG distributed approximately eight hundred questionnaires containing a comprehensive range of statements and questions about policy issues affecting the management of Aboriginal culture and heritage.

The questionnaires were intended to ensure that the cultural values of Aboriginal people formed the basis of any new culture and heritage laws. To facilitate community input, the majority of questionnaires were distributed and completed at workshop meetings held jointly by NSWALC and NPWS staff.

Evaluation of the consultation process identified a number of problems with the design of the questionnaire which it was thought may have had an impact on the rate of response; for example “valid criticism has been made that the questionnaire was too lengthy and therefore limited in its accessibility”.¹⁴

Despite this, the responses received were seen as an accurate reflection of the community views that had been expressed throughout the consultation process.

These views and those provided by an additional random sampling of Aboriginal people on specific policy options, informed the ACHWG’s development of the 1996 Green Paper.

Unfortunately, the ACHWG 1996 Green Paper did not receive Cabinet approval and the “second stage...[of consultation, involving] extensive debate and review of the Green Paper”¹⁵ never eventuated.

4. Key Findings and Recommendations of Previous Inquiries

The key findings and recommendations of the inquiries into Aboriginal culture and heritage management in NSW are summarised below.

4.1. NATURE OF PROPOSED REFORM

The previous inquiries have been unanimous in recommending that there be:

*“new legislation for the protection and management of Aboriginal heritage and culture in New South Wales, [and that this] legislation should be separate from the National Parks and Wildlife Act 1974”.*¹⁶

4.2. DEFINITIONS OF CULTURE AND HERITAGE

Previous inquiries have also been consistent in calling for the recognition of Aboriginal understandings of culture and heritage in any legislative definition.

The inquiries have recommended specifically that Aboriginal people must determine what is of significance to Aboriginal culture and heritage, and that a static archaeological view of culture and heritage, does not adequately incorporate intangible aspects of culture and heritage nor its existence in a contemporary living context.

4.3. ABORIGINAL CONTROL, MANAGEMENT AND DECISION-MAKING

All inquiries have sought legislative acknowledgement of Aboriginal ownership of Aboriginal culture and heritage. Additionally, all have recommended that the day-to-day management of culture and heritage should be vested in an Aboriginal community based body with representation at the local or regional level.

The ACHWG inquiry and the earlier Ministerial Task Force recommended that such bodies should be vested with decision-making authority in respect to the management of Aboriginal culture and heritage i.e. determination of applications to impact or do harm. The ACHWG’s 1996 Green Paper states that the local Aboriginal heritage bodies will have responsibility for the “[p]rotection and management of Aboriginal cultural heritage in their identified area of responsibility ... [and] determination of ‘heritage impact licence applications’.”¹⁷

4.4. ‘WHO SPEAKS FOR COUNTRY’

While all reports agreed on decentralised control of Aboriginal culture and heritage management, there is considerable divergence when it comes to further specifying who has appropriate knowledge to inform decision making.

The Keane Committee in its first report recommended that Aboriginal Community Councils or **Local Aboriginal Land Councils** as they were to become known in the resulting *Aboriginal Land Rights Act 1983*, should have “responsibility for protection, maintenance and general management of sacred sites and sites of significance”.¹⁸ The Report also recommended that the “Councils be empowered to claim responsibility for any Aboriginal artefact on the basis that the artefact is sacred or significant to the local community”.¹⁹

Somewhat similarly, the 1989 Ministerial Task Force found that a “Local Aboriginal Community” defined as “that group of Aboriginal people residing within or around a nominated town or settlement”, was “ultimately the most appropriate level for decision making concerning [Aboriginal] heritage and culture”.²⁰ The 1995 ACHWG Discussion Paper also recommended that day-to-day responsibilities for protecting and managing Aboriginal culture and heritage should reside with Aboriginal communities.²¹



On the other hand, the **1996 Green Paper** stipulates that representatives of an area’s local ‘Aboriginal Owners’, who are *“those Aboriginal persons who are directly descended from the original Aboriginal inhabitants of a designated ...area, and who have a cultural association with that area that is derived from the customs and traditions of the original Aboriginal inhabitants of that area”*²², shall make decisions regarding the localised management of Aboriginal culture and heritage.

However, there appear to be some inconsistencies with this approach. It would seem that the concept of Aboriginal Owners may exclude *“the cultural rights and responsibilities of local Aboriginal communities”*, broadly speaking and as a result some of an area’s *“contemporary beliefs, values and practices”* may not be given a voice. This would appear to conflict with the Green Paper’s Charter of Principles.²³ Adding to the confusion, despite defining ‘Aboriginal Custodians’ as the Aboriginal Owners with the cultural right to speak for country, the paper does not provide a specific role for such knowledge holders.

With only the two ACHWG papers (the 1996 Green Paper and 1995 Discussion Paper) released after **native title** was recognised in the Mabo decision²⁴, it is not surprising that the consideration given to native title in the inquiry reports as a whole is somewhat limited. The 1996 Green Paper gives it the most extensive consideration with its indication that the proposed *“Commission will manage and protect Aboriginal cultural heritage on the basis of areas of ‘Cultural Country’ which identify cultural rights and responsibilities. These areas will be consistent with native title”*.²⁵

4.5. PROPOSED ADMINISTRATIVE FRAMEWORK

Since the Keane Committee released its first report in 1980, all inquiry reports have recommended that an independent commission to protect and manage Aboriginal culture and heritage be established in NSW. The consensus extends to the view that such a commission must be governed by representatives of the Aboriginal communities of NSW.

The 1996 Federal Evatt Review indicated that the *“minimum standards for State and Territory legislation should include the establishment of Aboriginal cultural heritage bodies...[that] should:*

- *be independent*
- *be controlled by Aboriginal members representative of Aboriginal communities*
- *have gender balance”*.²⁶

The NSW inquiries provide various recommendations in regards to the appointment of these representatives from their local communities; although Aboriginal control of the process is the common theme. It is also a common view that the proposed commission would support and variously delegate authorities to a strata of local or regional administrative bodies.

It should be noted, that none of the inquiries supported the notion of an **Aboriginal Culture and Heritage Advisory Committee** beyond that of an interim arrangement for transitioning authority and control of Aboriginal culture and heritage to an independent Aboriginal Commission. As the Ministerial Task Force stated in 1989, an interim Advisory Committee to be established under the *National Parks and Wildlife Act 1974* *“would function during a period of transition to the eventual establishment of the Commission”*.²⁷

4.6. METHODS OF PROTECTION

As noted, a common theme in all reports was the belief that effective protection of Aboriginal culture and heritage requires Aboriginal people to be given authority for the day-to-day management in any regime. There is however some divergence of thinking on the mechanisms that should be available to provide the sought after protections.

The thinking of all inquiries included provisions for the issuing of permits or licences to harm, damage, remove, study or similarly impact upon Aboriginal culture and heritage upon application. However, it must be noted that as it was unequivocally stated by the Ministerial Task Force in 1989 that *“the issue of permits should not be automatic”* and when issued, permits should be subject to conditions.

It is also a common theme that **interim protection orders** be available to provide immediate protection where there is a threat to Aboriginal culture and heritage. As the Ministerial Task Force put it in 1989 *“There should be interim conservation orders to protect sites deemed significant by Aboriginal people; Interim conservation orders should have an expiry date to establish Aboriginal significance and authenticity.”*²⁸

The concept of **Aboriginal culture and heritage management plans** are also common. The model proposed by the 1996 Green Paper *“seeks to encourage Aboriginal people, nations, and [the local Aboriginal heritage bodies] to enter into heritage management agreements wherever possible, whether it be with individual landholders, local government or state government agencies”*²⁹

The majority of inquiries also made comment on **enforcement provisions** for where the Act or regulations were breached. The 1996 Federal Evatt Review stated that *“Minimum standards for State and Territory laws should include: **Criminal sanctions with adequate penalties; and limited defences**; provision to ensure that criminal sanctions are effectively enforced; provision to enable Aboriginal people to act as inspectors, to monitor compliance and to launch prosecutions”* [emphasis added].³⁰

Significantly the 1996 ACHWG Green Paper also recommends that the local Aboriginal heritage bodies *“will be able to initiate prosecutions for breach of any provisions of the new act”*.³¹

4.7. NEGOTIATION AND CONSULTATION

The Federal Evatt Review recommended that the Aboriginal culture and heritage protection provisions should include an *“effective consultation/negotiation process for reaching agreement between developers and the Aboriginal community facilitated by a responsible Aboriginal heritage body”*.³² It was envisaged that the objective of such negotiations would be to reach agreement on site protection.

The NSW Inquiries came to similar conclusions, as the following statement from the first report of the Keane Committee indicates:

“The legislation establishing the Aboriginal Heritage Commission shall; provide that where other interests are involved in or around places of significance to Aborigines there be close consultation between those interests, the Aboriginal Heritage Commission and the organisation in control of the site”[emphasis added].³³

Somewhat similarly, the ACHWG 1996 Green Paper also provides the proposed Aboriginal Heritage Commission with responsibility for *“Facilitating arbitration and mediation between Aboriginal and other parties”*.³⁴



4.8. PROTECTION OF CULTURAL KNOWLEDGE

The majority of inquiries recommend that a register of information regarding Aboriginal culture and heritage be established. The issues of control and protection of such information was also generally considered at length. The Keane Committee believed *“that recording of sacred and significant sites is an integral part of their protection and preservation and as such should be Aboriginal controlled”*.³⁵

The Federal Evatt Review stated in 1996 that: *“State, Territory and Commonwealth heritage protection should meet standards for protecting restricted information:*

- *Heritage protection laws should respect Aboriginal customary law restrictions on the disclosure and use of information about Aboriginal heritage.*
- *Procedures under heritage protection laws should minimise the amount of information Aboriginal people need to give about significant areas or sites to ensure protection and avoid injury or desecration.*
- *The laws and related procedures must ensure that customary law restrictions on information received for the purpose of administering heritage protection laws or received in related legal proceedings are respected and observed”*.³⁶

The Ministerial Task Force recommended in 1989 that,

“Where the register contained restricted information or Aboriginal sites, heritage items and places, this should not be available to anyone except with written authority from the community from where the information came”.³⁷

4.9. GOVERNMENT OVERSIGHT: REVIEW AND APPEALS PROCESSES

With the common recommendation that Aboriginal culture and heritage legislation be created distinct from that of protecting the environment, it is not surprising that the majority of inquiries recommended that ministerial responsibility for Aboriginal cultural heritage should reside with the Minister for Aboriginal Affairs and not the Minister for the Environment.

However, the majority of reports also recommend that the power of the Minister be limited, and used as a last resort; for example the 1996 Green Paper indicated that the Minister’s powers will be restricted to instances where Aboriginal decision makers

*“have not properly exercised their powers”*³⁸ specifically *“where the Land and Environment Court has determined that the initial [Commission or local heritage body] decision was not made properly within its power”*.³⁹



4.10. FUNDING, TRAINING AND CAPACITY BUILDING

The majority of inquiries make it clear that the proposed Aboriginal Heritage Commission must receive “*separate and adequate funding*”⁴⁰ and recognise that there would be a need for “*adequate and appropriate training*”⁴¹ and capacity building for assuming responsibility for the protection and management of Aboriginal culture and heritage. This view was unequivocally put by the ACHWG in its 1995 Discussion Paper:

*“The Government should undertake to meet all costs of introducing a new Act. These costs will include: training and development of staff”.*⁴²

The ACHWG inquiry also recommended that “*a separate fund to be known as the **Aboriginal Heritage Fund** should be established and administered by the [Aboriginal Heritage] Commission*” [emphasis added].⁴³

The ACHWG envisaged that this fund would be drawn from “*guaranteed funding from the State Government;...any compensation or penalties ordered by the Court in civil or criminal proceedings; compensation for the compulsory acquisition of culturally significant land by government bodies; and any other penalties, levies and charges*”.⁴⁴



End Notes

- ¹ Hon. Frank Sartor, NSW Parliamentary Hansard, Legislative Assembly; 25 February 2010; at 20944
- ² Hon Frank Sartor NSW Parliamentary Hansard; Legislative Assembly; 25 February 2010; at 20944
- ³ Aboriginal Cultural Heritage Working Group, *The Future Management of Aboriginal Cultural Heritage in New South Wales; Discussion Paper*, 1995, at 11
- ⁴ The Hon. Frank Walker NSW Parliament Hansard; Legislative Assembly; 24 March, 1983; at 5090
- ⁵ Aboriginal Cultural Heritage Working Group, *Discussion Paper*, 1995, Note 3, at vi
- ⁶ A Government Green Paper is not an expression of Government intention. However it is a tentative policy position paper designed to promote discussion. By contrast a Government White Paper requires Cabinet endorsement and represents an expression of Government intention.
- ⁷ The NSW Parliament did not get its first Aboriginal member until the election of Lind Burney in 2003.
- ⁸ Second Report from the Select Committee of the Legislative Assembly upon Aborigines, 1981 at 2.
- ⁹ Second Report from the Select Committee of the Legislative Assembly upon Aborigines, 1981 at 2.
- ¹⁰ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989, at 10
- ¹¹ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989, at 10
- ¹² Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989, at 11
- ¹³ Aboriginal Cultural Heritage Working Group, *Discussion Paper*, Note 3 at p 2.
- ¹⁴ Aboriginal Cultural Heritage Working Group, *The Future Management of Aboriginal Cultural heritage in New South Wales; A New South Wales Government Green Paper*, June 1996; “The Consultation”.
- ¹⁵ Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 11 “The Background”
- ¹⁶ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989, at 29
- ¹⁷ Aboriginal Cultural Heritage Working Group, *The Future Management of Aboriginal Cultural heritage in New South Wales; A New South Wales Government Green Paper*, June 1996; Legislative Model; functions and responsibilities: Cultural Country Area Boards.
- ¹⁸ First Report from the Select Committee of the Legislative Assembly upon Aborigines, 1980 at 119.
- ¹⁹ Second Report from the Select Committee of the Legislative Assembly upon Aborigines, 1981 at 321
- ²⁰ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989 at 26 & 62
- ²¹ Aboriginal Cultural Heritage Working Group, *Discussion Paper*, Note 3 at p 147.
- ²² Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 8 “Legislative Model; Definitions”
- ²³ Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 8 “Charter of Principles”
- ²⁴ *Mabo and Ors v Queensland (No2)* (1992) 175 CLR 1
- ²⁵ Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 8 “The Model”
- ²⁶ Hon. Elizabeth Evatt, AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report, August 1996, at p. xxiv; 6.3
- ²⁷ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989. at 50; (1)



- ²⁸ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989, at 33; 3(e)(i, ii)
- ²⁹ Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 8 “Legislative Model”
- ³⁰ Hon. Elizabeth Evatt, AC, Note17, at xxv; 6.9
- ³¹ Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 8 “The Model”
- ³² Hon. Elizabeth Evatt, AC, Note17, at xxiv; 6.5
- ³³ First Report from the Select Committee of the Legislative Assembly upon Aborigines, 1980 at 17; (6)(d)
- ³⁴ Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 8 “Legislative Model; functions and responsibilities: the Commission”
- ³⁵ First Report from the Select Committee of the Legislative Assembly upon Aborigines, 1980 at 118;
- ³⁶ Hon. Elizabeth Evatt, AC, Note17, at xxii, & xxiii; 4.1- 4.4
- ³⁷ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989, at 37
- ³⁸ Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 8 “Legislative Model; functions and responsibilities: the Minister”
- ³⁹ Aboriginal Cultural Heritage Working Group, *Green Paper*, Note 8 “Legislative Model; functions and responsibilities: the Minister”
- ⁴⁰ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989 at 39
- ⁴¹ Report of the NSW Ministerial Task Force on Aboriginal Heritage and Culture 1989 at 39
- ⁴² Aboriginal Cultural Heritage Working Group, *Discussion Paper*, Note 3 at p 161
- ⁴³ Aboriginal Cultural Heritage Working Group, *Discussion Paper*, Note 3 at 160
- ⁴⁴ Aboriginal Cultural Heritage Working Group, *Discussion Paper*, Note 3 at 160-161



