Mr Norman Laing  
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Dear Mr Laing

Roads and Maritime Services (RMS) comments on ‘Aboriginal heritage legislation in NSW: Public consultation on issues for reform’

Thank you for the opportunity to comment on the ‘Aboriginal heritage legislation in NSW: Public consultation on issues for reform’ discussion paper.

RMS supports the proposed legislative reform, subject to a consideration of our detailed comments which are attached.

RMS acknowledges the challenges associated with developing legislation that must balance Aboriginal heritage conservation needs with NSW planning needs. RMS therefore requests ongoing involvement in the reform process. We hope that our comments will assist in this task.

Yours sincerely

[Signature]

Erica Adamson  
General Manager Environment
Roads and Maritime Services review of ‘Aboriginal heritage legislation in NSW: Public consultation on issues for reform’

Overview

Roads and Maritime Services (RMS) acknowledges the need for effective legislation to protect and promote Aboriginal heritage in NSW. RMS appreciates the opportunity to provide comment on the ‘Aboriginal heritage legislation in NSW: Public consultation on issues for reform’ discussion paper.

Comments have been provided in response to the questions in the discussion paper, as outlined below.

1. What specific aspects of Aboriginal culture and heritage do you think should be protected by law?

The law should aim to protect and promote significant cultural values relating to tangible (eg archaeological sites, landforms, natural resources) and intangible (eg songs, stories, dance) Aboriginal heritage. This may be done through strategies that promote broad ranging aspects of Aboriginal culture through education, awareness raising, consultation and conservation.

In terms of tangible heritage conservation, the law should seek to protect items/areas with demonstrated heritage significance. This approach may apply to items modified by human beings (eg stone artefacts, scarred trees, occupation deposits) or to the natural landscape (eg rivers, mountains, natural resource zones). RMS strongly recommends that only items with demonstrated heritage significance to the Aboriginal community and people of NSW receive this statutory protection.

The National Parks and Wildlife Act 1974 (NPW Act) provides all Aboriginal ‘objects’ with equal protection. This was progressive in the context of 1974, and has been successful in raising awareness of the need to conserve Aboriginal objects. However, this approach had proven to be problematic in its application as it fails to distinguish between objects that are significant and objects with little significance, and thereby guide application of scare resources for conservation and promotion.

A ‘significance’ approach would be in line with amendments to the Heritage Act 1977 which changed the ‘blanket’ definition of a relic from being an item older than 50 years, to an item of ‘local or state significance’. The development of robust significance criteria would assist proponents and Aboriginal parties in determining the significance of newly identified heritage items/areas.

This approach would assist with improving the allocation of resources for managing significant items/areas in NSW. It may also assist in reducing red tape by avoiding the need to seek and process approvals for impacts on items/areas with little or no heritage significance. Such impacts could be dealt with through a range of approval exemptions or exceptions, given effect through regulation or, where appropriate, management plans.
2. Who should be responsible for making decisions on the management and protection of Aboriginal cultural heritage? What management structures and processes will effectively manage Aboriginal cultural and heritage protection in NSW?

RMS supports the ongoing involvement of Aboriginal people in decision-making affecting the management, protection and promotion of Aboriginal heritage. One model for achieving this would be through the creation of an independent Aboriginal heritage council, similar to the NSW Heritage Council. This council would be responsible for promoting cultural research, education programs, the conservation of Aboriginal culture, and for approving applications that would impact on Aboriginal heritage. It would also be responsible for ensuring consistent decision making throughout NSW and compliance with the legislation.

RMS also supports the creation of locally or regionally based custodian bodies comprising key Aboriginal people. (See comment 4 for further information.) These bodies would be responsible for promoting and conserving Aboriginal cultural heritage in their region, and in terms of development, they would be the Aboriginal community consultation stakeholders.

Unlike the Victorian system where approvals are issued by regional Aboriginal parties (RAPs), RMS suggests that it would be preferable if the Aboriginal heritage council was the central approvals body. This would ensure consistent decision making across NSW, as well as a better understanding of multi-regional cumulative impacts.

RMS recommends that there is a separation of powers between the decision-making body (Aboriginal heritage council) and the consultation bodies (regional custodian groups). This would ensure that the Aboriginal heritage council objectively considers proposals and mitigation measures, and that the development and approvals process is open and transparent.

3. Should any proposed legislation make a statement about ownership of physical and intangible Aboriginal heritage? If you agree that any proposed legislation should address the issue of ownership, how should any new laws address ownership of physical and intangible Aboriginal heritage?

RMS supports the need for a statement about ownership, and agrees with the existing NPW Act which acknowledges that the Crown is the owner of heritage in NSW on behalf of the people of NSW.

RMS also acknowledges that Aboriginal people are the custodians of their heritage, and recommends that the legislation recognises this.

As the term Aboriginal Owners is adopted by the Aboriginal Land Rights Act 1983, and has a specific meaning relating to the Register of Aboriginal Owners, it is important that any amendment to the NPW Act relating to ownership is consistent with this. Aboriginal Owners have management responsibilities, particularly relating to national parks, conservation reserves and Schedule 14 lands.

4. What are your views about who speaks for country? What do you think are the best ways to ensure that the appropriate people speak for country in public processes, including who resolves conflict? Should these mechanisms be reflected in any proposed legislation or in protocols and guidelines?

RMS agrees that Aboriginal traditional owners are the most appropriate people to ‘speak for country’. However, across NSW, traditional owners may not be present or there may be regional dissension regarding the legitimacy of certain groups. Given this, RMS recommends that
consultation be undertaken with a defined group of Aboriginal heritage custodians at a regional level. Consultative groups should be pre-established, not project-specific or project-generated, and have a defined area of responsibility.

In NSW, the Aboriginal Lands Rights Act 1983 recognises the rights and responsibilities of local Aboriginal land councils and Aboriginal Owners to manage heritage within their jurisdictions. The Native Title Act (NSW) 1994 recognises the cultural associations, rights and responsibilities of Aboriginal native title holders and claimants within their area of claim. Given the established, statutory role of these stakeholders, it is recommended that they be recognised by NSW cultural heritage legislation as the primary regional custodians. RMS recommends that these groups would comprise standing regional consultation bodies that sit under the Aboriginal heritage council.

This approach would ensure the following:

- That Aboriginal parties with established cultural associations with the land would be consistently involved in heritage decision making.
- That the role and function of existing groups is supported by Aboriginal cultural heritage legislation.
- It would reduce uncertainty for both Aboriginal people and proponents as to who would be involved in the consultation and assessment process.
- It would ensure that Aboriginal groups are experienced and empowered to consult with proponents.

The current approach to consultation (given effect by the Aboriginal cultural heritage consultation requirements for proponents 2010) aims to ensure that a broad cross-section of the Aboriginal community has an opportunity to be involved in cultural heritage management decisions.

This approach has been successful in opening up decision making to groups and individuals beyond established community groups and local Aboriginal land councils.

However, this approach has resulted in discord between parties who disagree on who should speak for country. On previous RMS projects, parties have asked RMS not to consult with certain parties because they have little or dubious connection with the land, and/or their interest in registering is related to employment only. This has resulted in disruptive meetings and a strained relationship between RMS and the Aboriginal community, causing potential delays and risks to project development and delivery. Despite recent amendments to the NPWA requiring registered parties to have a cultural association with the subject land, these problems persist.

5. Do you understand how Aboriginal cultural heritage is protected in legislation and planning instruments? How could Aboriginal heritage be better protected through land-use plans and other planning instruments?

RMS understands how Aboriginal cultural heritage is protected in legislation and planning instruments. Further, RMS agrees that Aboriginal heritage needs to be appropriately assessed and managed as part of NSW planning and assessment processes.

Aboriginal heritage could be better protected through the preparation of regionally based heritage studies aimed at broadly identifying significant Aboriginal heritage values within that landscape. This would assist in identifying and minimising cumulative impacts, and proactively assist in conserving areas of greatest significance.

During the roundtable workshop held at Eveleigh on 15 November 2011, representatives from various local councils stated that their council had commissioned such studies, and that they were included on their planning instrument. This approach assisted developers seeking consent.
under Part 4 of the *Environmental Planning and Assessment Act 1979*, in understanding what their likely heritage impacts would be, and whether they were likely to be acceptable. This approach also provided guidance to council staff in determining whether a proposal was likely to have a significant impact on known Aboriginal heritage values.

RMS suggests that this approach, if adopted by all local councils, would be of assistance in identifying and managing Aboriginal cultural values across NSW.

6. **How well do you think current natural resource management processes help protect Aboriginal heritage? How could Aboriginal cultural values and knowledge be better incorporated into natural resource management processes?**

RMS acknowledges that flora and fauna, waterways and other components of the natural environment were, and are, integral to the Aboriginal community. Often, the cultural significance of such things is not drawn out by environmental specialists as part of their specific studies.

In terms of environmental impact assessments prepared to address requirements under Parts 4, 5 and 5.1 of the *Environmental Planning and Assessment Act 1979*, RMS is aware that Aboriginal cultural values are not generally integrated with other specialist studies such as ecological assessments. Instead, matters of cultural significance are generally limited to the Aboriginal cultural heritage assessment report.

RMS maintains that consultation and the preparation of a cultural heritage assessment report has the potential to identify cultural values associated with the natural environment. In terms of the cultural heritage assessment report prepared for the Pacific Highway Bulahdelah Bypass, a number of natural features of heritage significance were identified including, streams, rocks, ochre quarries and plant foods.

7. **Do you have any other comments or suggestions on the reform of Aboriginal culture and heritage legislation in NSW?**

**Timing and delivery**
RMS requests that implementation of proposed reforms allow both sufficient time for the development of supporting guidance material and processes for all parties, including proponents.

**Heritage significance**
As discussed in response 1, it is important that the legislation reform be outcome focused and address the management of Aboriginal heritage based on significance. That is, resources should be directed at conserving and promoting significant cultural values (both tangible and intangible), as opposed to protecting all objects.

In terms of approvals, it is suggested that the review consider the approach adopted under the *Heritage Act 1977*. That is, in order for an item to be considered a 'relic', it must meet a threshold of local or state significance. Further, RMS strongly recommends that the new legislation includes exemptions from the need to apply for an AHIP where a proposal would have a minor impact on heritage values, or have an impact on an item of low heritage significance.

Because the NPW Act protects all Aboriginal objects equally, it has contributed to a culture of holding all objects in high cultural esteem. This is largely absent in other states. In RMS’ experience, some Aboriginal people have stated that all objects are culturally significant and should be conserved or salvaged. However, rarely is such significance clearly articulated or justified through the consultation and assessment process.
Clarity of terms
There needs to be greater clarity of key terms and their implications for the legislative review. These include culture, heritage, tangible and intangible heritage, and archaeology.

The discussion paper describes ‘culture’ and ‘heritage’ as separate entities. While this is correct, greater clarity about their relationship is needed to assist with ongoing debate and decision making. ‘Heritage’ needs to be recognised as those elements of a cultural system (both tangible and intangible) that are recognised as having significance and are worthy of conservation for future generations.

‘Archaeology’ is often described as being the opposite of, or unsympathetic to, cultural values; when in fact it is a method for investigating culture. This misunderstanding is being further entrenched through the ongoing use of ‘cultural assessments’ and ‘archaeological assessments’ as opposing terms. While archaeology is the study of material evidence, it is not to the exclusion of cultural values. The legislation should ensure that Aboriginal people can assist in understanding the material past through consultation, that that archaeological investigations can positively contribute to the understanding of past and present cultural values.

‘Intangible heritage’ is often misused to describe the natural environment and/or cultural values. It needs to be clarified that cultural values apply to both tangible (artefacts, landforms) and intangible (song, stories, dance) heritage.