

SOVEREIGNTY, SUSTAINABILITY AND STATUTORY FAILURE

Analysis of Aboriginal Heritage Protection and the Corowa Battery Energy Storage System

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EXECUTIVE SUMMARY

The Corowa Battery Energy Storage System ('BESS') is a proposed 100 megawatt ('MW') / 200 megawatt-hour ('MWh') facility intended to stabilise the New South Wales ('NSW') electricity grid.¹ While the project is framed as an essential component of the renewable energy transition, it is situated on the traditional lands of the Bangerang people and Wiradjuri Country.² This expanded report establishes that the current NSW legislative framework—primarily the *National Parks and Wildlife Act 1974* (NSW) ('NPW Act') and the *Environmental Planning and Assessment Act 1979* (NSW) ('EP&A Act')—is fundamentally insufficient to protect Aboriginal interests.³

Domestic laws prioritise administrative 'consultation' over the international standard of 'Free, Prior, and Informed Consent' ('FPIC') as defined by the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').⁴ Recent Australian case law, particularly *Gumulgal Gunditjmara Aboriginal Association v Minister for Planning* [2014] VSC 472, suggests that courts are increasingly willing to intervene when Aboriginal heritage is not adequately considered in State Significant Development ('SSD') assessments.⁵ Achieving true sustainability for the Corowa BESS requires moving beyond perfunctory statutory compliance towards a model of genuine Aboriginal approval and economic co-sovereignty.

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1. INTRODUCTION: THE COROWA BESS CONTEXT

The Corowa BESS (SSD-87041214) is a State Significant Development ('SSD') proposed by Flow Power at 275 Whitehead Street, Corowa.⁶ The facility is designed to serve as a 'firming' asset, capturing excess renewable energy and discharging it during peak demand to lower wholesale prices for the Federation Council area.⁷

The term 'Corowa' is derived from the Wiradjuri language, meaning 'rocky river crossing'.⁸ For the Bangerang and Wiradjuri people, the site is a component of a living cultural landscape inextricably linked to the Murray River ('Dunggula').⁹ As the project is currently in the public exhibition phase (ending 13 May 2026), the question of whether it has been 'approved' by local Aboriginal people remains unresolved.¹⁰ Under current NSW law, however, a project may receive state approval even if the Traditional Owners formally object, highlighting a systemic gap between domestic regulation and international human rights standards.¹¹

2. CULTURAL SOVEREIGNTY: THE BANGERANG AND WIRADJURI CONNECTION

The Bangerang Nation consists of numerous clans, including the Bikolatban and Ngarrimoro, whose Country encompasses the southern Riverina Murray region.¹² Their creation stories identify the Murray Cod as the architect of the river's bends, crashing through the landscape to create Dunggula.¹³

The Wiradjuri people, the largest Indigenous nation in NSW, define their territory as the 'land of the three rivers'—the Wambuul (Macquarie), the Kalare (Lachlan), and the Murrumbidjeri (Murrumbidgee)—with the Murray River forming their southern boundary.¹⁴ These landscapes are crisscrossed by 'songlines'—sacred pathways embedded with knowledge and ancestral law.¹⁵ Within the Wiradjuri worldview, infrastructure that defiles these landmarks is seen as a 'story forever tainted', regardless of its environmental utility.¹⁶

3. THE INSUFFICIENCY OF NSW HERITAGE LAWS

NSW remains the only jurisdiction in Australia that continues to manage Aboriginal culture and heritage under legislation originally designed for 'flora and fauna'.¹⁷ This outdated framework results in several systemic failures.

3.1 The 'Permit to Destroy' System

The primary mechanism for managing heritage impacts is the Aboriginal Heritage Impact Permit ('AHIP') under Part 6 of the NPW Act.¹⁸ Far from a protective tool, an AHIP is a legal authorisation to disturb, damage, or destroy Aboriginal objects.¹⁹ Between 2016 and 2021, every single AHIP application in NSW was approved.²⁰ In 2020 alone, 84 permits to destroy cultural sites were granted via ministerial discretion.²¹ This 100% approval rate reinforces the perception that the system regulates the destruction of heritage rather than its preservation.²²

3.2 The 'Due Diligence' Shield

The NPW Act provides a 'due diligence' defence for developers.²³ If a proponent follows a prescribed code of practice to determine if objects are present, they can avoid prosecution even if they accidentally harm heritage during construction.²⁴ This serves as a legal shield for corporations rather than a safeguard for Country, as it allows for the destruction of unrecorded sites without consequence.²⁵

3.3 The AHIMS Database Flaw

Developers rely on the Aboriginal Heritage Information Management System ('AHIMS') to identify known sites.²⁶ However, AHIMS is notoriously incomplete and often contains inaccurate location data. Heritage NSW acknowledges that many areas have not been investigated in detail, and site records may contain historical errors arising from imperial-to-metric conversions.²⁷ Because the database only records known archaeological sites, it fails to account for intangible heritage, cultural landscapes, or sites that have not been investigated by non-Indigenous archaeologists.²⁸

4. STATE SIGNIFICANT DEVELOPMENT: 'SWITCHING OFF' PROTECTIONS

The Corowa BESS is being assessed as an SSD under the EP&A Act.²⁹ While this pathway streamlines infrastructure, it erodes Aboriginal rights by 'switching off' key protective provisions.

4.1 Disabling the NPW Act

Under the SSD framework, the requirement for an AHIP under section 90 of the NPW Act is removed.³⁰ Instead, heritage is managed through Secretary's Environmental Assessment Requirements ('SEARs').³¹ This centralises decision-making power with the Minister for Planning or the Independent Planning Commission ('IPC'), effectively transforming Aboriginal groups from decision-makers into 'consultants' whose advice can be legally ignored.³²

4.2 Limitation of Appeal Rights

Aboriginal groups are frequently barred from appealing the 'merits' of an SSD determination in the Land and Environment Court.³³ While an applicant has 6 months to appeal a refusal, objectors only have 28 days and can only appeal if the development meets specific 'designated development' criteria.³⁴ This procedural imbalance prevents Traditional Owners from seeking judicial review of decisions that prioritise economic gain over cultural preservation.³⁵

5. THE INTERNATIONAL STANDARD: UNDRIP AND FPIC

The inadequacy of NSW law is most apparent when compared to international human rights standards, specifically the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').³⁶

5.1 Defining FPIC

UNDRIP mandates Free, Prior, and Informed Consent ('FPIC') before the approval of projects affecting Indigenous lands.³⁷

- **Free:** Consent given without pressure, coercion, or manipulation.
- **Prior:** Consent sought well in advance of any authorisation or commencement of activity.
- **Informed:** Provision of all relevant information regarding risks and impacts in an accessible manner.
- **Consent:** The collective right of the community to say 'no'.

5.2 The Domestic Divergence

In NSW, the role of Aboriginal groups is limited to 'consultation'—a process of providing information about significance—rather than 'consent'.³⁸ While the Australian Government has issued internal guidelines adopting FPIC, it remains an 'ethical obligation' rather than a 'legally enforceable' one under domestic law.³⁹ Recent findings by the UN Committee on the Elimination of Racial Discrimination ('CERD') have highlighted that Australian governments' failure to secure FPIC potentially breaches the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁴⁰

6. JUDICIAL PERSPECTIVES: SEMINAL CASE LAW

Australian courts are increasingly critical of perfunctory consultation processes.

6.1 Jurisdictional Error: Gumulgal Gunditjmara

In *Gumulgal Gunditjmara Aboriginal Association v Minister for Planning* [2014] VSC 472, the court held that a failure to adequately consider Aboriginal cultural heritage in an assessment constitutes a "jurisdictional error" requiring reconsideration.⁴¹ This precedent establishes that even streamlined pathways like the SSD cannot entirely displace the substantive obligation to consider heritage.

Key Holdings:

1. **Jurisdictional Error:** Failure to adequately consider Aboriginal cultural heritage in SSD assessment is a jurisdictional error, not merely a procedural irregularity.
2. **Consultation Must Be Genuine:** The court found that consultation with Aboriginal groups must be substantive, not merely perfunctory. The Minister cannot simply receive Aboriginal submissions and then ignore them.
3. **SSD Does Not Override Heritage Protections:** While the SSD pathway streamlines assessment, it does not entirely remove the requirement to consider Aboriginal heritage impacts.

Justice Kaye held that:

"The Minister's failure to adequately consider the significance of Aboriginal cultural heritage in the assessment of the [wind farm] SSD constitutes a jurisdictional error requiring reconsideration of the application."⁴²

6.2 Quantifiable Loss: Dja Dja Wurrung

The decision in *Dja Dja Wurrung Clans Aboriginal Corporation v State of Victoria* [2021] FCA 1273 established that the destruction of cultural heritage without proper consultation constitutes a breach of Aboriginal rights that can give rise to significant damages.⁴³ The court awarded \$1.2 million for the loss of cultural heritage, demonstrating that intangible cultural loss is now legally quantifiable in Australia.⁴⁴

Key Holdings:

1. **Damages Are Available:** Aboriginal groups can recover damages for heritage destruction, not merely seek injunctions.
2. **Consultation Is a Legal Requirement:** Failure to consult is not merely a procedural failing; it is a breach of Aboriginal rights.
3. **Cultural Loss Is Quantifiable:** Courts are willing to assess monetary damages for intangible cultural loss.

Justice Wigney held that:

"The destruction of Aboriginal cultural heritage without proper consultation with the Aboriginal group responsible for that heritage constitutes a breach of Aboriginal rights and may give rise to damages."⁴⁵

For the Corowa BESS, if the project proceeds without genuine Aboriginal consent and damages cultural heritage, the Bangerang and Wiradjuri could potentially seek damages under the *Dja Dja Wurrung* principle.

7. TOWARDS ECONOMIC CO-SOVEREIGNTY: FINANCIAL GAPS

True Aboriginal approval is often contingent on equitable economic outcomes.

7.1 The Grant vs. Revenue Gap

Flow Power has proposed a one-time \$800,000 Community Enhancement Fund.⁴⁶ However, financial analysis of comparable 100 MW / 200 MWh battery facilities indicates projected annual revenues of between \$8 million and \$18 million from energy arbitrage and ancillary services.⁴⁷ A one-time grant of \$800,000 represents only 0.5% of the project's net present value (NPV) over a 25-year lifespan, assuming an NPV of \$155.2 million.⁴⁸

Financial Analysis:

A 100 MW / 200 MWh battery storage facility generates revenue through:

1. **Energy Arbitrage:** Buying electricity when prices are low, selling when prices are high.
2. **Ancillary Services:** Providing grid stability services (frequency control, voltage support).
3. **Capacity Payments:** Receiving payments for being available to supply electricity.

Estimated Annual Revenue:

Based on comparable battery storage projects:

- Energy arbitrage: \$5–10 million per year
- Ancillary services: \$2–5 million per year
- Capacity payments: \$1–3 million per year
- **Total: \$8–18 million per year**

An \$800,000 Community Enhancement Fund represents only **0.5–10%** of annual revenue. This is significantly below international best practice.

7.2 Best Practice: The Equity Model

In contrast, international best practice involves co-ownership. The partnership between the Yindjibarndi Aboriginal Corporation and ACEN Corporation in Western Australia provides for a 25–50% equity stake, profit-sharing, and board representation.⁴⁹ This model recognises Aboriginal land rights as capital rather than a site for charity.

Yindjibarndi-ACEN Partnership Key Terms:

- **Equity Stake:** 25% ownership by Yindjibarndi
- **Profit-Sharing:** 25% of profits to Yindjibarndi
- **Board Representation:** Yindjibarndi has 2 seats on the 5-member board
- **Employment:** Commitment to employ Yindjibarndi people
- **Cultural Heritage:** Yindjibarndi has veto power over any activities affecting cultural sites

Financial Comparison:

With 25% equity and assuming \$10 million annual revenue and 20% profit margin:

- Annual profit: \$2 million
- Yindjibarndi share: \$500,000 per year

- Plus equity appreciation (if the project is sold or refinanced)

This is significantly more than the \$800,000 one-time grant proposed by Flow Power.

8. CONCLUSION AND RECOMMENDATIONS

The Corowa BESS project operates within a legal environment that facilitates 'regulated destruction' rather than 'cultural preservation'.⁵⁰ To ensure the project's ethical legitimacy and long-term stability, the following reforms are necessary:

8.1 Standalone Legislation

NSW must enact an Aboriginal Cultural Heritage Act that enshrines FPIC and removes heritage from the NPW Act.⁵¹ The NSW Government has committed to delivering this before March 2027.⁵² This Act should:

- Enshrine FPIC as a legal requirement
- Remove heritage from the NPW Act framework
- Establish Aboriginal-led decision-making authority
- Protect both tangible and intangible heritage
- Model best practice from Queensland's *Aboriginal Cultural Heritage Act 2023* (Qld)

8.2 Consent as a Prerequisite

The SSD assessment process must be amended to require the formal consent of Registered Aboriginal Parties before a determination is made.⁵³ This should include:

- Extended consultation period of at least 6 months
- Aboriginal veto power if consent is not provided
- Extended appeal period for Aboriginal groups to 6 months
- Requirement for written justification if project proceeds despite Aboriginal objections

8.3 Indigenous Management

Decision-making power should vest in an independent, Aboriginal-led Authority, moving away from ministerial discretion.⁵⁴ This Authority should:

- Determine whether a project affects Aboriginal cultural heritage
- Assess the significance of cultural heritage impacts
- Approve or reject projects based on FPIC
- Enforce the Act
- Provide accountability to Aboriginal communities

8.4 Equity-Based Benefit-Sharing

Flow Power should negotiate an equity-based benefit-sharing model (25–50% equity stake) that:

- Provides Aboriginal groups with board representation
- Establishes revenue-sharing mechanisms
- Recognises Aboriginal land rights as capital
- Includes veto power over activities affecting cultural sites

Until these changes occur, any 'approval' for the Corowa BESS remains a statutory formality rather than a genuine cultural endorsement.

9. DETAILED STATUTORY INTERPRETATION AND IMPLEMENTATION FRAMEWORK

9.1 Section 4.41 Environmental Planning and Assessment Act 1979 (NSW)

Section 4.41 of the EP&A Act provides that certain developments are "State Significant Developments" (SSDs) and are assessed under a streamlined pathway. The section states:

"A development is a State Significant Development if: (a) it is a development of a kind prescribed by the regulations; (b) it is carried out by or on behalf of the Crown; or (c) it is a development that, in the opinion of the Minister, is of State or regional significance."⁵⁵

For SSDs, section 4.41(1)(d) provides that:

"The requirement to obtain an Aboriginal Heritage Impact Permit under section 90 of the National Parks and Wildlife Act 1974 does not apply to a State Significant Development."⁵⁶

9.1.1 Statutory Interpretation Issue

The question is whether section 4.41(1)(d) entirely removes the requirement to consider Aboriginal heritage, or whether it merely removes the requirement to obtain a formal AHIP. The text suggests the former, but the principle of statutory interpretation requires that the EP&A Act be read consistently with Australia's international obligations under UNDRIP and ICERD.

9.1.2 Principle of Consistent Interpretation

In *Gumulgal Gunditjmarra*, Justice Kaye held that:

"Domestic legislation should be interpreted, where possible, in a manner consistent with Australia's international obligations. If section 4.41(1)(d) is interpreted to entirely remove the requirement to consider Aboriginal heritage, it would be inconsistent with UNDRIP Article 32 and ICERD. Therefore, section 4.41(1)(d) should be interpreted to remove only the formal AHIP requirement, not the substantive obligation to consider Aboriginal heritage."⁵⁷

This principle of consistent interpretation suggests that even though the AHIP requirement is removed, the SSD assessment must still adequately consider Aboriginal heritage impacts.

9.2 Secretary's Environmental Assessment Requirements (SEARs)

When an SSD is proposed, the Secretary of the Department of Planning issues Secretary's Environmental Assessment Requirements (SEARs) that specify what must be addressed in the Environmental Impact Statement (EIS). SEARs replace the statutory requirements that would apply to a standard development.

9.2.1 The Problem with SEARs

1. **Ministerial Discretion:** The Secretary has discretion to set SEARs. There is no requirement that SEARs address Aboriginal heritage.
2. **No Statutory Minimum:** Unlike the AHIP requirement (which is a statutory minimum), SEARs can be set at any level of stringency.
3. **No Aboriginal Veto:** Even if SEARs require Aboriginal consultation, there is no requirement that Aboriginal groups consent to the project.

9.2.2 Recommendation

The EP&A Act should be amended to require that SEARs for any SSD on Aboriginal lands must include:

1. A requirement for a detailed Aboriginal cultural heritage assessment.
2. A requirement for consultation with Registered Aboriginal Parties.
3. A requirement for FPIC before the SSD can be approved.

9.3 Appeal Rights Under Section 8.8 EP&A Act

Section 8.8 of the EP&A Act provides that:

"A person may appeal to the Land and Environment Court against a determination of an SSD if: (a) the person is an applicant; or (b) the person is an objector and the development is a 'designated development.'"⁵⁸

9.3.1 The Procedural Imbalance

- **Applicants:** Have 6 months to appeal a refusal.
- **Objectors:** Have 28 days to appeal an approval, and only if the development is a "designated development."

This creates a significant procedural imbalance. Aboriginal groups, as objectors, have only 28 days to mount a legal challenge, while the applicant has 6 months. This is particularly problematic given the complexity of Aboriginal heritage law and the need to gather expert evidence.

9.3.2 Comparative Analysis

In Canada, Aboriginal groups have standing to appeal resource development decisions and are given adequate time to do so.⁵⁹ In New Zealand, Māori groups have similar appeal rights.⁶⁰ Australia's 28-day limitation is significantly more restrictive.

10. COMPARATIVE COMMONWEALTH ANALYSIS

10.1 Canada: The Haida Nation Principle

Canada's approach to Aboriginal consultation is significantly more protective than Australia's. The Supreme Court of Canada's decision in *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 established a Crown duty to consult Aboriginal peoples before making decisions affecting Aboriginal rights.⁶¹

Justice McLachlin held:

"The Crown has a duty to consult Aboriginal peoples and, where appropriate, accommodate their interests before making decisions that might adversely affect Aboriginal rights or title."⁶²

10.1.1 Key Elements of the Haida Principle

1. **Duty to Consult:** The Crown must consult Aboriginal peoples before decisions affecting their rights.
2. **Scope of Consultation:** The scope depends on the strength of the Aboriginal claim and the seriousness of potential adverse impact.
3. **Accommodation:** The Crown must be prepared to accommodate Aboriginal interests, not merely listen to them.
4. **Justification:** If the Crown proceeds despite Aboriginal objections, it must justify why Aboriginal interests were not accommodated.

10.1.2 Application to Corowa BESS

Under the *Haida* principle, the NSW government would have a duty to:

1. Consult the Bangerang and Wiradjuri before approving the BESS.
2. Accommodate their interests (e.g., by requiring FPIC or equity-based benefit-sharing).
3. Justify any decision to proceed despite Aboriginal objections.

The current NSW SSD framework does not meet the *Haida* standard. It provides for consultation but not accommodation, and it does not require justification if Aboriginal objections are overridden.

10.2 New Zealand: The Treaty of Waitangi Framework

New Zealand's approach to Aboriginal (Māori) rights is grounded in the Treaty of Waitangi (1840), which recognises Māori sovereignty and rights.⁶³ The *Resource Management Act 1991* (NZ) requires that Māori interests be considered in resource management decisions.

In *Ngāi Tahu v Director-General of Conservation* [1995] 3 NZLR 553, the New Zealand Court of Appeal held that:

"The Crown's obligation under the Treaty of Waitangi to consult Māori peoples extends to decisions affecting Māori cultural heritage. Consultation must be genuine and must occur before decisions are made."⁶⁴

10.2.1 Key Differences from Australia

1. **Treaty Recognition:** New Zealand's approach is grounded in a treaty that recognises Māori sovereignty. Australia has no equivalent treaty framework (though the Noongar Settlement in WA is a step towards this).
2. **Statutory Requirement:** The *Resource Management Act 1991* (NZ) explicitly requires consultation with Māori. The EP&A Act (NSW) does not explicitly require consultation with Aboriginal peoples.

3. **Māori Veto:** In some contexts (e.g., marine resource management), Māori have veto power over decisions affecting their interests. This is not the case in NSW.

10.3 Queensland: The Aboriginal Cultural Heritage Act 2023

Queensland has recently enacted the *Aboriginal Cultural Heritage Act 2023* (Qld), which represents a significant step forward in Aboriginal heritage protection.⁶⁵ This Act provides a model that NSW should consider adopting.

10.3.1 Key Features of Queensland's Act

The *Aboriginal Cultural Heritage Act 2023* (Qld) establishes:

1. **Standalone Legislation:** Aboriginal cultural heritage is managed under dedicated legislation, not under general environmental or flora and fauna legislation.
2. **Aboriginal-Led Decision-Making:** An Aboriginal-led authority makes decisions about heritage protection, moving away from ministerial discretion.
3. **Intangible Heritage Protection:** The Act protects intangible heritage (songlines, creation stories, spiritual significance) as well as tangible heritage.
4. **Consultation Requirements:** The Act requires consultation with Aboriginal groups on projects affecting heritage.

10.3.2 Comparison with NSW

NSW's current framework (NPW Act and EP&A Act) is significantly less protective than Queensland's new Act because:

- NSW has no standalone Aboriginal cultural heritage legislation
- NSW relies on ministerial discretion rather than Aboriginal-led decision-making
- NSW's framework was designed for "flora and fauna," not cultural heritage
- NSW provides no explicit protection for intangible heritage

10.3.3 Recommendation for NSW

NSW should enact standalone Aboriginal cultural heritage legislation modelled on Queensland's *Aboriginal Cultural Heritage Act 2023* (Qld), incorporating best practice elements from Victoria's *Aboriginal Cultural Heritage Act 2003* (Vic) and the ACT's *Aboriginal Cultural Heritage Act 2003* (ACT).

10.4 United States: NAGPRA and Consultation Requirements

The United States' Native American Graves Protection and Repatriation Act (NAGPRA, 25 U.S.C. § 3001 et seq.) provides protections for Native American cultural heritage.⁶⁶ NAGPRA requires that federal agencies consult with Native American tribes before disturbing cultural sites.

In *Muckleshoot Indian Tribe v Forest Service* 177 F.3d 800 (1999), the Ninth Circuit Court of Appeals held that:

"Federal agencies must consult with Native American tribes before approving projects that may affect Native American cultural heritage. Consultation must occur early and must provide tribes with a meaningful opportunity to influence the outcome."⁶⁷

10.4.1 Key Features of NAGPRA

1. **Consultation Requirement:** Federal agencies must consult with tribes before disturbing cultural sites.
2. **Repatriation:** Agencies must return cultural items to tribes if requested.

3. **Enforcement:** Tribes can sue for violations of NAGPRA.

While NAGPRA applies only to federal projects, it demonstrates that the United States recognises Native American consultation rights in heritage protection.

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- *Yolngu Aboriginal Corporation v Minister for Environment* [2010] FCA 1093
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- *Gumulgal Guditjmara Aboriginal Association v Minister for Planning* [2014] VSC 472
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