

16 December 2022

Warragamba Dam Assessment Team  
Planning and Assessment  
Department of Planning and Environment  
Locked Bag 5022  
PARRAMATTA NSW 2 124

By via email: [Warragamba.DamEIS@dpie.nsw.gov.au](mailto:Warragamba.DamEIS@dpie.nsw.gov.au)

To Mr Nick Hearfield,

**Re: Submission - National Trust objection to the Critical State Significant Infrastructure Preferred Infrastructure Report and Response to Submissions Report – Warragamba Dam Wall Raising (Application #SSI-8441)**

The National Trust of Australia (NSW) [the Trust] is the state's peak body for the identification, conservation and protection of built, cultural and natural heritage. We are a community-based organisation representing the interests of more than 22,000 individuals across NSW. The Trust has been advising, supporting and representing its members since 1945.

The National Trust of Australia (NSW) has long advocated for the protection and conservation of the Blue Mountains – indeed, the Jamison & Kedumba Valley Landscape Conservation Area and the Kanimbla and Megalong Valley Landscape Conservation Area were early examples of landscape listings on the National Trust Register in the 1970s, and the Trust strongly supported the World Heritage Listing of the Greater Blue Mountains Area which was inscribed in the year 2000.

## Overview

Following earlier submissions on the proposal to raise the Warragamba Dam Wall, the Trust makes this submission which objects in the strongest way possible to the Preferred Infrastructure Report, the Response to Submissions Report and the Environmental Impact Statement (EIS).

The flood event modelling presented in the exhibited documents shows that the Warragamba Dam proposal has potential to impact an unacceptable number of heritage places and landscapes, including:

- Three places listed on the World Heritage List
- Five places listed on the National Heritage List
- Three places listed on the Commonwealth Heritage List
- 793 places listed on Local Environmental Plans and the State Environmental Planning Policy
- 76 places listed on State Agency section 170 Heritage and Conservation Registers
- 40 items on the NSW Maritime Heritage Database and
- An unknown number of potentially significant heritage items not listed on the statutory registers, both Indigenous and historic.

Our submission focuses on the following key points of objection, which are outlined in further detail in this submission:



- Meaningful consultation vs a predetermined outcome
- UNESCO Decision on Dams in World Heritage Properties
- Ongoing impact of unrecognised Indigenous heritage in the greater Blue Mountains listed values
- Principle of free, prior and informed consent
- Significant community and expert opposition to the proposal
- Cumulative impact of the proposal
- Offsets proposals

### Meaningful consultation vs a predetermined outcome

A number of submissions on the Environmental Impact Statement (EIS) noted concerns that “the decision has already been made and public submissions critical of the Project will be disregarded.” In the proponent’s Response to Submissions report, which was exhibited publicly for comment from Monday 21 November 2022 until midnight Monday 12 December 2022, Water NSW stated:

*The decision to proceed with the Project has not been made at this time. This is subject to NSW Government approval under the NSW EP&A Act, Commonwealth Government approval under the EPBC Act and approval of the final business case for the Project by the NSW Government.*

However more than a month and half earlier on 5 October 2022, the NSW Premier declared he will put “people before plants” and announced the Warragamba Dam had been declared critical state significant infrastructure. He further announced that the dam will be raised 14 metres despite the project not having environmental approval or funding and noted that by deeming the wall raising a critical project, all the environmental and planning processes would be “**streamlined to get to the point where this project is approved as quickly as possible**”.

The Trust is at a loss to understand how the Premier can publicly state the project would go ahead before consultation has concluded, before the Response to Submissions Report has been released, before project approvals have been made, and before UNESCO’s World Heritage Committee has responded to the proposal’s detailed documentation.

### UNESCO Decision on Dams in World Heritage Properties

In 2016, the World Heritage Committee (WHC) made Decision 40 COM 7 relating to the dams in World heritage properties. The Decision reflected the WHC’s significant concern that an increasing number of World heritage properties are facing potential threats from major dam projects and **considered that the construction of dams with large reservoirs within the boundaries of World Heritage properties is incompatible with their World Heritage status.**

Further, the WHC urged States Parties (ie governments) to ensure that the impacts from dams that could affect properties located upstream or downstream within the same river basin are rigorously assessed in **order to avoid impacts on the Outstanding Universal Value (OUV).**

This decision was supported by Recommendation 9 of the Interim Report of the NSW Legislative Council Select Committee on the Proposal to Raise the Warragamba Dam Wall, which recommended that the NSW government:

- **Not proceed with the Warragamba Dam wall raising project**, if the proposal cannot maintain or improve the current and future integrity of the Greater Blue Mountains World Heritage Area, and
- **Pursue alternative floodplain management** strategies instead.

The EIS, Response to Submissions and Preferred Infrastructure Reports give scant weight to these important and fundamental recommendations and the proposed dam raising is inconsistent with them.



### Ongoing impact of unrecognised Indigenous heritage in the greater Blue Mountains listed values

When the Greater Blue Mountains was inscribed on the World Heritage List, it was for its natural values only, despite the Australian government nominating it for both natural and cultural (Indigenous) values. This was compounded in 2007, when the Greater Blue Mountains was listed on Australia's National Heritage List in anomalous circumstances and only for natural heritage values.

At the 2001 launch of the Greater Blue Mountains World Heritage Area, the then Federal Minister for the Environment committed that the Australian Government would subsequently re-nominate the Greater Blue Mountains to the World Heritage List for Indigenous cultural values. In the 20 years since, neither the world heritage inscription nor the National Heritage citation have been amended to include Indigenous values. This has created an undue, significant and inequitable situation because the legislation protecting the area focuses on protecting only the "listed" values. Worse, the project's proponent does not have to give the same weight to the Indigenous values as it does the natural values had this anomaly not occurred or if it had been rectified in the last 20 years.

As stated by Australia ICOMOS in their submission on the EIS and supported by the Trust:

- The discussion of Aboriginal cultural values in the EIS does not adequately consider the implications of the inclusion of some of the affected lands on the National Heritage List nor additional potential National Heritage values.
- More than 300ha of the Project Upstream Impact Area (PUIA) is already on Australia's National Heritage List and other potentially affected areas are currently part of an area that is on the 'Priority Assessment List' which is being evaluated for potential National Heritage values by the Australian Heritage Council.
- This assessment includes potential Indigenous National Heritage values which have been nominated by the Greater Blue Mountains World Heritage Area Advisory Committee. This consideration is directly responsive to a specific requirement of the Australian Heritage Strategy: Progressively review existing World Heritage places that have been listed for natural values only to identify whether the areas may contain internationally significant cultural heritage (Australian Heritage Strategy 2015, Objective 1, Action 8, page 19).
- ***As a matter of due process, the Australian Heritage Council should conclude the current Priority Assessment List process and determine whether Indigenous cultural heritage that is within the PUIA has National Heritage value, before any decision is made to proceed with the Dam Proposal.***

The Aboriginal archaeological record across the Greater Blue Mountains is remarkably diverse; containing sites which are scientifically, culturally and socially important in their own right and as an intact, continuing cultural landscape of immense significance. Six Aboriginal language groups have lived across the Blue Mountains for at least 22,000 years BCE (according to recent scientific evidence).<sup>1</sup> These sites, landscapes, songlines and stories represent a dynamic culture that predates many of remarkable heritage places that constitute the world heritage list, including:

- The great Pyramid of Giza (dated to 2,560 BCE)
- The City of Babylon (dated to 2,300 BCE)
- Stonehenge (dated to 3,000 BCE) and
- The cave paintings of Altamira (dated to 21,000 BCE)

It is unconscionable that they are not adequately protected, are not given due weight in the impact assessment and the EIS recommendations, and are under threat before their significance can be acknowledged in their National and World Heritage listings.

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<sup>1</sup> Mackay, R. 2015. *Contemporary Aboriginal Values*. In Greater Blue Mountains World Heritage Area Advisory Committee. 2015. ***Values for a new generation - Greater Blue Mountains World Heritage Area***, p.82.



## UNDRIP and the principle of free, prior and informed consent

As detailed in many traditional owner submissions on the EIS, and acknowledged in the Supplementary Aboriginal Cultural Heritage Assessment (contained in the Preferred Infrastructure Report's appendices), most of the Traditional owner groups and individuals **do not support the project** and **do not give their free, prior and informed consent to the proposed project** and its destruction of Aboriginal heritage sites and landscapes.

For example, Glenda Chalker (Cubbitch Barta) stated:

***I would like to repeat again, the same thing not only I have stated in many submissions is that all of the sites are of high cultural significance.*** I tire of reading that the majority of the sites in assessments are of low significance.

Further, Kazan Brown stated:

I have resubmitted my original submission because I do not believe our concerns have been addressed adequately in the Draft Supplementary Assessment Document...As previously advised, and reiterated again here, the Traditional Owners and Knowledge Holders of the Burragorang Valley **do not give free and informed consent to the project** and the destruction of our cultural heritage.

We reject the recommendations - they do not mitigate the harm of the project. The supplementary assessment acknowledges that they are indirect mitigation measures because "If the Project proceeds the limitations of the proposed activities mean that there is no capacity for directly applied management measures for the avoidance or minimisation of harm."

The Supplementary Aboriginal cultural heritage assessment clearly outlines the impact to Indigenous heritage sites and values, stating:

The Project **will result in cumulative harm to the intangible values of the cultural landscape** through extension of previously unmitigated impact on cultural values from the construction of the Warragamba Dam and flooding of the Burragorang Valley and its tributary valleys.

The further flooding of the Burragorang Valley will **contribute to harm to the cultural and spiritual connection that Aboriginal people hold to this part of the Country**, their heritage and the cultural landscape and will obscure the tangible aspects of the creation stories associated with the Burragorang such as the Gurrangatch and Mirrigan story.

It notes that its 17 mitigation recommendations are all indirect mitigation measures and that:

***If the Project proceeds*** the limitations of the proposed activities mean that ***there is no capacity for directly applied management measures for the avoidance or minimisation of harm.***

The recommendations relate to consultation, management, access to Country, site recording, cultural values recording and education.

While these recommendations were shaped by feedback received from the RAPs during the consultation process, ***it has been clearly communicated by the RAPs that they do not support the Project.***

***The Project is understood as a continuance of the dispossession and loss of cultural heritage initiated by the original development of the Warragamba Dam in the 1950s.***

The Chair of the Australian Parliament's Joint Standing Committee on Northern Australia, in the "A Way Forward" report on the destruction of Indigenous heritage sites at Juukan Gorge, urged that lawmakers '*consider the relevance of UNDRIP to the social, cultural and economic realities of Aboriginal and Torres Strait Islander peoples*'.<sup>2</sup>

That Report identified 'serious deficiencies' across cultural heritage legislative framework in all jurisdictions. It found '*none of these frameworks adequately encompass the complexity of Indigenous heritage which is living*

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<sup>2</sup> Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), xii.



*and evolving and is connected not just through historical artefacts, but through songlines, storylines, landscape and waters’.*<sup>3</sup>

The rights prescribed in the 2007 United Nations Declaration on the Rights of Indigenous People (UNDRIP), including the right to Free Prior and Informed Consent by Aboriginal people to decisions that affect their heritage, must be given the highest weight possible in the assessment of this project.

We hold extreme concern that the necessary level of broad, open and meaningful consultation with the widest range possible of Aboriginal individuals and communities has not been undertaken in the development of this project.

### **Significant community and expert opposition to the proposal**

Of the 2,586 submissions made when the EIS was exhibited in late 2021, there were 2,475 objections to the proposal. That is, **95.7% of submissions made did not support the proposal to raise the dam wall**, presenting immense community and expert opposition to the project.

We note that several government agencies and departments tabled such detailed and significant concerns that the proponent, in their Response to Submissions and Preferred Infrastructure Report, engaged with the agencies during the post-EIS exhibition stage. The advice from agencies was to undertake further studies and analysis to provide further detail to specific issues raised in submissions. However, due to the way Water NSW is tabling the updates, the response of these agencies to the additional studies they recommended is not yet available publicly. Surely if such complex additional studies were required, those agencies should have a chance to provide new feedback for incorporation before the project was re-exhibited.

The Trust shares concerns with traditional owners, Heritage NSW, the Department of Environment, Australia ICOMOS, IUCN and various Councils regarding the EIS and the unacceptable impact of the proposal on the natural and cultural values of the Greater Blue Mountains area.

In particular, we are in support of the following submissions and reiterate their significant concern:

- **Australia ICOMOS**

Australia ICOMOS objected to the proposal to raise the Warragamba Dam wall and is concerned at inadequacies of the Environmental Impact Statement process and conclusions relating to cultural heritage.

Australia ICOMOS have concluded that “the dam proposal is inconsistent with Australia’s obligations under the World Heritage Convention with respect to the GBMWH and neither the dam proposal itself, nor the EIS comply with specific Decisions of the World Heritage Committee.”

- **International Union for the Conservation of Nature (IUCN)**

IUCN have concluded that: “...the EIS does not comply with the IUCN World Heritage Advice Note on Environmental Assessment, nor does it fully assess all potential impacts on the OUV as recognised in the Statement of Outstanding Universal Value for the GBMWH, as requested by the World Heritage Committee in Decision 44COM 7B.180, nor address the requirements of Convention policy on sustainable development.

The inundation of these sites would, therefore, damage attributes of the OUV of the property, and therefore this reported loss appears clearly at odds with the conclusion of the EIS that the Project ‘would not result in a material loss or degradation of the Outstanding Universal Value of the GBMWH’.

- **Heritage NSW**

Heritage NSW stated that the project would have significant and irreversible impact to a unique cultural landscape, that is not represented elsewhere due to the specific cultural values of the place. The area has already been compromised by the construction of the existing dam and the cumulative impact, were this project to proceed, would be significant.

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<sup>3</sup> Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 2 [1.6].



Heritage NSW notes the Aboriginal community has clearly expressed its concern with this proposal, but it appears the concerns have not been addressed and there has not been a concerted effort to redesign or appropriately mitigate the impacts.

- **Blue Mountains City Council**

Council's view is that the Project will not only result in the loss of a spectacular and extant cultural landscapes, now so rare within close proximity to Sydney and as such an important cultural symbol, but that it will also have a profound impact on the health and well-being of Gundungurra people suffering the resultant cultural loss.

They stated the EIS does adequately assess the impacts on the Greater Blue Mountains World Heritage Area (GBMWHA) and are particularly disappointed the lack of evidence of consultation with the UNESCO World Heritage Committee or acknowledgment of the fact that the proposal is contrary to Objective 1 of the Strategic Plan for the WHA ('maintain, and wherever possible, improve the current and future integrity of the GBMWHA').

### Cumulative Impacts of the Proposal

It cannot be contested that the Aboriginal cultural heritage of the Blue Mountains has had significant negative impacts from pastoral and agricultural land use, the original development of the Warragamba Dam and the flooding and water storage of Lake Burrangorang.

Despite the extremely strong statements made in the Supplementary Aboriginal Cultural Heritage Assessment (appended to the Preferred Infrastructure Report), the EIS does not adequately address the projects impact. Cumulative impacts are the successive, incremental and combined impacts of one or more activities on the environment, including cultural heritage values.

For instance, the Supplementary Aboriginal Cultural Heritage Assessment states that:

Any future proposed impact **must be considered as an additional and cumulative impact** on what has already been lost under the waters of Lake Burrangorang.

Through the aggravation of previous harm and by causing the additional loss of values **the Project will have a cumulative detrimental effect to quality or benefit that the cultural landscape** – and its intangible and tangible contributory values – may provide to the Aboriginal community and will result in a reduction in the inter-generational equity afforded by the cultural landscape of the Project area and its surrounds.

The RAPs have advised through the submission process that the Project area and all sites within and surrounding it have high cultural significance. **The Project is seen by the RAPs as a further accumulation of impacts to Aboriginal cultural heritage that has previously been affected by the original development of the Warragamba Dam.**

The cumulative impact assessment contained in the EIS's Aboriginal Cultural Heritage Assessment and the Supplementary Aboriginal Cultural Heritage Assessment both clearly acknowledge that there will be harm to all sites within the project area and that the degree of harm to those sites is considered to be total. It notes that **"The Project would result in cumulative harm to the intangible values of the cultural landscape** through extension of previously unmitigated impact on cultural values from the construction of the Warragamba Dam and flooding of the Burrangorang Valley and its tributary valleys" and that "the further flooding of the Burrangorang Valley would result in irreversible harm to the cultural and spiritual connection that Aboriginal people hold to this part of the Country, their heritage and the cultural landscape."

Yet, despite this clear assessment of impact, the EIS concluded that the impacts to the Greater Blue Mountains world heritage values and other heritage values would **not be significant and would not result in a material loss or degradation of the OUV, and that the Project is not considered to be inconsistent with the management obligation and principles for World Heritage Properties** (refer Section 13.8 in Chapter 13 of the EIS).



The Preferred Infrastructure Report's assessment of the project's impact against the EPBC Act's Measure of National Environmental Significance amplifies this discordance between the technical study findings and the project proposal. For example, when assessing its impact against the criteria "One or more of the World Heritage values to be notably altered, modified, obscured or diminished" it states:

- The Project could potentially diminish one or more of the World Heritage values, **however, the risk of this is considered low**, and noting that there is already an existing risk associated with the current dam.
- The offset strategy provides for funding of on-park management for the protected lands values offset addressing maintenance and potential enhancement of World Heritage values. The Part 5A EMP would **similarly facilitate maintenance and potential enhancement of World Heritage values**.

The Trust is at a loss to understand how the total, unmitigated destruction of these significant sites and landscapes can be concluded "not significant" or "low" or "not resulting in a material loss or degradation", let alone that it could "enhance values." The EIS and Preferred Infrastructure Report is woefully inadequate at best, and callously dismissive at worst.

### Offsets proposal to mitigate impact

The project offers to mitigate its impacts through an offset system, whereby lands of similar value would be purchased to offset the loss of heritage values the proposal will cause.

As noted by Heritage NSW in their submission on the EIS:

A detailed site recording and a management plan **cannot offset the loss of these values and no impact should be approved** while the significance and number of sites is unknown.

They further note that the mitigation measures and recommendations for Aboriginal heritage presented in the report:

**"... demonstrates a lack of understanding of the value of Aboriginal cultural heritage** and the finite nature of these heritage values. Heritage NSW considers that **the mitigation measures proposed are insufficient to adequately reduce the risk to an acceptable level**. While the exploration of offset areas that include similar Aboriginal cultural heritage values is desirable, the sites specific to the proposal area, cannot by their nature occur elsewhere and consequently offsetting will not adequately address the impacts."

The proposed mitigation measure to "offset" heritage values are fundamentally incompatible with any heritage management principles. The Trust understands that the three-step test for offsets is based on the following order of priority:

1. Avoid
2. Mitigate/Minimise
3. Offset

We emphasise that it must be in that exact order. The single most important step in the test is to **AVOID** and the third step has been described in various literature as the **step of last resort**. The Trust strongly agrees with the order and the emphasis. The offset principle and system is operating in the reverse and in practice, the default seems set at offset. Offsets are a "planning fiction" and it is extraordinary that Water NSW propose to offset heritage values in this way.

Indeed, Australia ICOMOS notes that the concept is an erroneous suggestion. They note the Greater Blue Mountains World Heritage area is inscribed on the World Heritage List and any loss of attributes which support its outstanding universal value, including by periodic inundation, cannot be offset by purchasing alternate land.

The Trust is in full support of the statement by Australia ICOMOS that the proposed offsets are "inappropriate and unacceptable."



## Summary

In summary, the Trust objects in the strongest way possible to the Preferred Infrastructure Report and its findings, the Response to Submissions Report and its findings and the EIS and its findings.

We once again bring attention to the destruction of Jukaan Gorge – which was approved and entirely legal under WA’s legislation. This proposal to raise the Warragamba Dam wall has the potential to become NSW’s Juukan Gorge and we must not make the same mistake. The proposal is fundamentally inconsistent with legislation, strategy, policy, best practice. It will have extraordinary, irreversible and devastating impact on natural and cultural values of the Blue Mountains, and it is inconceivable that this impact could in any way be mitigated.

Yours sincerely,

Jane Alexander  
Advocacy Manager