

"Land in the State of New South Wales was traditionally owned and occupied by Aborigines. Land is of spiritual, social, cultural and economic importance to Aborigines. It is fitting to acknowledge the importance of such land. It has been accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation."

fact sheet



New South Wales
Aboriginal Land Council
www.alc.org.au

Draft Community Consultation Requirements for Aboriginal Culture and Heritage

This Fact Sheet provides general information about the changes being proposed by the NSW Government to the law and policies which govern the protection of Aboriginal culture and heritage.

It is one of a series of Culture and Heritage Fact Sheets which have been developed for Local Aboriginal Land Councils (LALCs) by the NSW Aboriginal Land Council (NSWALC).

Please Note: While all care has been taken in the preparation of these fact sheets, they are not a substitute for legal advice in individual cases.

The information in these fact sheets is current as of May 2009.

What does the current law say about community consultation?

The *National Parks and Wildlife Act*¹ is the main law which governs the protection of Aboriginal culture and heritage in NSW.

The Act does not recognise the right for Aboriginal people to be consulted about decisions relating to their culture and heritage.

The NSW Department of Environment and Climate Change (DECC) has responsibility for administering the *National Parks and Wildlife Act*.

The Director General has the power under this Act to issue consents to damage or destroy Aboriginal culture and heritage. The Director General does this through the issuing of Aboriginal Heritage Impact Permits (AHIPs).

DECC has released policies which outline who should be consulted to assess the cultural significance of an object or place, before an AHIP will be issued. The current main policy is called the *Interim Consultation Requirements*.

What is the NSW Government proposing to change?

DECC has released the *National Parks and Wildlife Amendment Bill 2009*.

The proposed Bill does not include a right for Aboriginal people to be consulted, but does include a new power for the Minister for the Environment and Climate Change to make regulations outlining what consultation must be undertaken and who must be consulted with before an AHIP is issued.

At the same time DECC has released a new policy: *Draft Community Consultation Requirements for Proponents*. This policy would replace the *Interim Consultation Requirements*.

DECC has advised that regulations will be created which reflect the new *Draft Community Consultation Requirements*, once the community has had an opportunity to comment.

For more information about the proposed changes to the *National Parks and Wildlife Act* see the other NSWALC Culture and Heritage Fact Sheets.

How have the new *Draft Community Consultation Requirements* been developed?

In recognition that the current *Interim Consultation Requirements* do not provide much detail and were developed with limited community input DECC began consultations to develop a replacement policy in 2007.

Workshops were held across the state, and DECC has now released a summary of the main feedback from the consultations on its website at <http://www.environment.nsw.gov.au/resources/cultureheritage/09280summmfeedback.pdf>.



What is the process for consulting with the community?

The new *Draft Community Consultation Requirements* propose some changes to the process for consulting with the Aboriginal community and preparing the assessment of Aboriginal cultural heritage which is provided to DECC:

Current process

A person or organisation who wants to apply for an AHIP (a Proponent) is required to **send out a notice** to relevant government agencies and Aboriginal groups of their project.



The Proponent must also advertise the project in a **local paper**.



Interested Aboriginal people and groups are given at least 10 working days to **'register'** their interest in the project.



A **draft Cultural Heritage Assessment Report** is developed by the Proponent and registered Aboriginal parties are given at least 21 days to review and comment on the report. The draft report must be provided to the Local Aboriginal Land Council even if they are not registered for comment.



The Proponent prepares the **final Cultural Heritage Assessment Report** and provides it to DECC with the application for an AHIP, and other relevant information.



DECC makes a decision whether or not to issue an AHIP, and whether to impose conditions.

DECC does not consult directly with the Aboriginal community but relies on the Proponent to provide DECC with the views of Aboriginal people.

DECC is not required to consider any information provided directly by Aboriginal people.

New process proposed by DECC

The Proponent is required to prepare a list of 'Aboriginal cultural knowledge holders' for the project by **telephoning, emailing or writing** to relevant government agencies and Aboriginal groups.



The Proponent must also advertise the project in a **local paper**.

The new process sets out the matters that must be included in the advertisement including an invitation for Aboriginal people to register an interest.



Interested Aboriginal people and groups are given at least 10 days to **'register'** their interest in the project.

The Proponent is required to provide a presentation of the proposed project and the proposed **methodology** for cultural heritage assessment to registered Aboriginal parties.

The new policy states: *"It is the responsibility of the registered Aboriginal parties to attend and participate in all relevant consultation proceedings."*



The Proponent documents all feedback received and prepares a **draft Cultural Heritage Assessment Report**. The Proponent is required to provide registered Aboriginal parties with 'access' to this report and registered Aboriginal parties are given at least 21 days to review and comment on the report.



The Proponent prepares the **final Cultural Heritage Assessment Report** and provides it to DECC with the application for an AHIP, and other relevant information. The Proponent is required to make copies of the final report 'available' to registered Aboriginal parties.



DECC makes a decision whether or not to issue an AHIP, and whether to impose conditions.

Under the proposed changes to *National Parks and Wildlife Act* DECC is only required to consider the matters outlined in the Act before making a decision.

The proposed list does not include a requirement to consider any representations made by Aboriginal people outside of the consultation process.

Who must be consulted?

Under the current *Interim Consultation Requirements* a Proponent must give notice in writing of the project to the following Aboriginal groups:

- Local Aboriginal Land Council(s)
- The Registrar of Aboriginal Owners (the Registrar of the *Aboriginal Land Rights Act*)
- Native Title Services, now NTSCorp.

The new *Draft Community Consultation Requirements*:

- Remove NTS Corp from the list of groups which must be notified, and add the Native Title Tribunal
- Replace the requirement to provide notice in writing to the listed groups with a requirement of notice by telephone, email or writing
- Require the Proponent to develop a list of 'cultural knowledge holders' that must be notified in writing, who may or may not include traditional owners or Aboriginal Elders from the area.

Who writes the Cultural Heritage Assessment Report?

The Cultural Heritage Assessment Report is written on behalf of the Proponent usually by an archaeologist or heritage consultant. It is for the Proponent to document all feedback received from registered Aboriginal parties.

What happens if there is a dispute?

Neither the current *Interim Consultation Requirements* or the proposed *Draft Community Consultation Requirements* outline a process for dispute resolution where an issue arises between the Proponent and registered Aboriginal parties.

What is the role of the Local Aboriginal Land Council?

Under the *Aboriginal Land Rights Act*, LALCs are the representative body for Aboriginal people within their boundaries.

LALCs also have the specific functions of taking action to protect the culture and heritage of

Aboriginal persons in the Council's area and promoting awareness of Aboriginal culture and heritage.

The new *Draft Community Consultation Requirements* note this role, but do not provide guidance about what this might mean in practice.

The *Interim Consultation Requirements* require that notice of the availability of the draft Cultural Heritage Assessment Report be provided to the LALC, even where the LALC has not registered an interest. The new *Draft Community Consultation Requirements* remove this requirement.

Can Aboriginal people be involved in site assessment?

The *Interim Consultation Requirements* state that whilst there is no requirement for Aboriginal people to be engaged for cultural and heritage assessments, it is open for Aboriginal people to offer such expert advisory services. The policy acknowledges that DECC does not have a role in determining fees or other terms of engagement for services, but notes that Proponents 'should expect' offers to engage people with cultural knowledge.

The new *Draft Community Consultation Requirements* state:

"Consultation does not include the employment of Aboriginal community members as specialists to assist in field assessment and/or site monitoring. Aboriginal community members may provide services to proponents in a contractual arrangement with the proponent, however this is separate from consultation."

What do the proposed *Draft Consultation Requirements* say about traditional knowledge?

The current *Interim Consultation Requirements* do not include advice about access to, and use of, traditional knowledge. The issue of the protection of traditional knowledge is addressed in only minor detail in the proposed new *Draft Community Consultation Requirements*, and only in regard to culturally sensitive information.

This means that the new *Draft Requirements* do not offer protections for how information that is used by the Proponent will be managed or stored.

For secret or sacred information, the new *Draft Requirements* state that it is the responsibility of the proponent to implement appropriate protocols for sourcing and holding cultural information. Intellectual property issues are not mentioned.

Can Aboriginal people appeal a decision made by the Director General of DECC?

Cases can be brought against a decision by DECC to issue an AHIP in the Land and Environment Court, in certain circumstances. However, there is no general right for Aboriginal people to appeal the destruction of their culture and heritage.

For more information regarding the issuing of AHIPs refer to Fact Sheet 3: *Proposed Changes to Aboriginal Heritage Impact Permits*.

Where is information about Aboriginal cultural heritage kept?

The Aboriginal Heritage Inventory Management System (AHIMS) is managed by DECC.

It records Aboriginal places and objects and other Aboriginal heritage values in NSW in order for these areas to be identified to assist in their protection and preservation.

However, there have been a number of issues raised regarding access to AHIMS.

These relate both to the difficulty experienced by some Aboriginal people in accessing information contained in AHIMS as well as the type of information developers and other groups can access through AHIMS, for example if a site is a secret or sacred place.

Where can I get more information about the proposed changes?

For more information about the *National Parks and Wildlife Amendment Bill 2009* see the other NSWALC Culture and Heritage Fact Sheets produced by the NSW Aboriginal Land Council at www.alc.org.au.

Visit the DECC website at www.environment.nsw.gov.au

- For the *Omnibus Bill* and the *Draft Due Diligence Requirements* follow the links to 'About DECC', then 'Legislation' and '[NPW Amendment Bill 2009](#)' in the menu bar down the left hand side of the DECC website.
- For the *Draft Community Consultation Requirements* follow the links to 'About DECC', then 'Public Consultation', then 'Documents for Public Consultation' or 'Proposed legislation, policies and guidelines', and then scroll down to '[Interim Community Consultation Requirements for Applicants 2009](#)' in the menu bar on the left hand side of the screen.

Can I have a say about the Draft Community Consultation Requirements?

Yes. DECC has invited submissions from the community on the *Draft Community Consultation Requirements* and the *Omnibus Bill*.

The closing date for written submissions is **Tuesday 7 July 2009**.

Comments can be emailed to

ACHRegulation@environment.nsw.gov.au.

Submissions should include your name, address, contact phone numbers and email address.

Submissions can also be posted or faxed to:

Director Reform and Compliance Branch
Dept of Environment & Climate Change NSW
PO Box A290
Sydney NSW 1232

Fax: (02) 9995 5922

Local Aboriginal Land Councils wanting to discuss the changes and the NSW Aboriginal Land Council's response should contact their local Zone Office or the Land, Policy and Research Unit on 02 9689 4444.

Footnotes

- 1 A current version of the *National Parks and Wildlife Act 1974* can be accessed online at NSW Legislation: <http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22National%20Parks%20and%20Wildlife%20Act%201974%20No%2080%22&nohits=y>