

"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. The Aborigines justly need to be recognised as the original owners. It is 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

Proposed Guidelines for Due Diligence for the Protection of Aboriginal Culture and Heritage

FACT SHEET



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 is the proposed new offence for damaging cultural heritage?

The NSW Government is proposing to amend the *National Parks and Wildlife Act*¹, which is the main Act for managing the protection of Aboriginal cultural heritage, to include a new 'strict liability' offence for damaging an Aboriginal object or place.

The proposed new offence would not require a person to *know* that they were causing damage to an Aboriginal place or object, or know that the object was an Aboriginal object, to be found guilty of illegally damaging the object or place.

Along with the new offence the NSW Government is proposing to introduce a defence of 'due diligence'.

For more information see NSWALC Culture and Heritage Fact Sheet 2: *New Fines and Offences for the Destruction of Aboriginal Culture and Heritage*.

What is Due Diligence?

Due diligence refers to the taking of *reasonable and practical measures to avoid harm* to an Aboriginal object (as outlined in DECC policies and/ or regulation).

If a person can prove they did this, they will not be guilty of the new offence.

However, due diligence will not be a defence if the person knew that the object or place was of significance to Aboriginal people.

To exercise due diligence a person must turn their mind to the *likely risks* of the planned actions.

It will not be enough to perform activities carefully.

Due diligence will require consideration of the obligations under the *National Parks and Wildlife Act*, so that a person takes the steps needed to ensure they have met their obligations under the Act.

What are the Due Diligence Guidelines?

The Department of Environment and Climate Change (DECC) has developed draft guidelines to help individuals and organisations to meet the standard of due diligence required.

These are called the *Draft Due Diligence Guidelines for Protection of Aboriginal Objects in NSW*.

When should Due Diligence be exercised?

Currently under the *National Parks and Wildlife Act* a person must obtain the permission of the Director-General of DECC if their actions are likely to destroy, damage or deface an Aboriginal object of place.

The Director-General can give permission to damage or destroy an Aboriginal place or object through the issuing of an Aboriginal Heritage Impact Permit, or AHIP.

The draft *Due Diligence Guidelines* state that a person should exercise due diligence when determining how likely it is that their actions will cause harm, and therefore whether or not they need an AHIP.

The person should assess, for example, whether the site they are planning to develop has 'site features' which make it likely that there will be Aboriginal objects in the area or if there were sites previously recognised in the area.

If there are likely to be objects in the area, then the person should apply for an AHIP.

The draft *Due Diligence Guidelines* state that activities which will have no or 'low' impact on the land are unlikely to require a permit.

If a person decides to go ahead without a permit, but finds that they have harmed an Aboriginal object, it will be a defence if they exercised due diligence.

This defence will only be available for Aboriginal objects, but not Aboriginal places.

Will the standard of due diligence be the same for all activities?

Yes, the basic standard will apply to all activities.

However, DECC has indicated that Codes of Practice for certain industries or classes of activity can be outlined or adopted by regulation and, if they are followed, would satisfy the due diligence requirements (ie; act as a defence).

For example, a code of practice for minerals exploration is being developed by the Department of Primary Industries, with input from the NSW Minerals Council.

Can I have a say about the draft Due Diligence Guidelines?

Yes. DECC has invited submissions from the community on the *Omnibus Bill* and the draft policies.

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

Comments can be emailed to consultation.npwbill2009@environment.nsw.gov.au.

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

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.

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 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.

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>