



fact sheet

ABORIGINAL CULTURE AND HERITAGE



New South Wales
Aboriginal Land Council

Using the law to protect Aboriginal culture and heritage: Consultation

The NSW Government released a new policy in April 2010 outlining the consultation that must be undertaken with Aboriginal communities before a permit authorising damage or destruction to an 'Aboriginal object' or 'Aboriginal Place' is issued.

This Fact Sheet provides an overview of the policy – the *Aboriginal cultural heritage consultation requirements for proponents 2010* (the **Consultation Requirements policy**) - and the relevant sections of the *National Parks and Wildlife Regulation* (the **NPW Regulation**).

As of **1 October 2010**, key parts of the Consultation Requirements have been included in the NPW Regulation making consultation a legislative requirement in many cases.

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

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 this fact sheet is current as of December 2011.

Aboriginal heritage protection in NSW

The *National Parks and Wildlife Act 1974* (**NPW Act**) is the main law which governs the protection of Aboriginal culture and heritage in NSW.

The NSW Office of Environment and Heritage (OEH) is responsible for administering this Act. The NPW Act gives OEH the power to issue Aboriginal Heritage Impact Permits, or AHIPs, authorising damage or destruction to Aboriginal places or objects.

The NPW Act does not recognise *rights* for Aboriginal people to be consulted about decisions

relating to Aboriginal culture and heritage. However, the recent amendments to the NPW Act and the NPW Regulations have created clear steps and requirements to consult with Aboriginal people before a permit is issued. These steps reflect those in the OEH *Consultation Requirements policy*.

This fact sheet summarises the stages of the consultation process that must be followed, before OEH issues a permit, and how the Aboriginal community can have a say at each stage.

Do Aboriginal people have a right to be consulted about *all* developments?

No. Whether consultation is required will depend on the type of development and which laws apply.

The *National Parks and Wildlife Act* does not always apply, even if Aboriginal heritage is to be disturbed. Other laws which may apply include the *Environmental Planning and Assessment Act 1979* (EP&A Act), the *NSW Heritage Act 1977*, and the *Native Title Act 1993* (Cth).

Note that some of these laws provide other rights and processes for Aboriginal people to be notified or consulted about developments.

For more information see the NSWALC **Site Protection** and **Planning** Fact Sheets, available from www.alc.org.au.

What do the NPW Regulations and Consultation Requirements policy say about consultation?

The *National Parks and Wildlife Regulation* and *Consultation Requirements policy* outlines four 'stages' of consultation, and includes details about why it is important to consult with Aboriginal people.

CONSULTATION

December 2011

The NPW Regulations and policy:

- Requires the proponent to consult with **cultural knowledge holders**.
- Is **proponent driven**, meaning that the proponent is responsible for notifying Aboriginal groups about a project, consulting with groups or people who register an interest, organising the consultation, engaging Aboriginal heritage professionals, preparing the Aboriginal heritage report and providing paperwork to OEH on which OEH makes its decision whether or not to issue the permit, and on what conditions.
- **Focuses on consultation not consent**: The role of Aboriginal groups is to provide information about the heritage significance of a place or object. While proponents are strongly encouraged to seek agreement from Aboriginal groups, there is no requirement for Aboriginal groups to endorse the findings of the proponent's report or give their consent before a permit is issued.
- **Identifies LALCs as a key party** to be notified of a project at several stages, and outlines that **LALCs may provide paid cultural services** to proponents.¹
- Contains sections relating to **native title**: the NPW Regulations state that, where native title has been determined to exist it is not a requirement to consult with Aboriginal parties, other than the native title holders.
- Contains some details about the **notice requirements** that must be provided to the community.
- Includes a new section on the **protection of cultural knowledge** including a direction that knowledge should not be used by the proponent for other purposes unless agreed (noted in the *Consultation Requirements* policy only).
- Provides new guidance on the **importance of effective consultation** (noted in the *Consultation Requirements* policy only).

Who must be consulted?

The NPW Regulations and *Consultation Requirements* require proponents to consult with **registered Aboriginal parties**.

An Aboriginal person or organisation may become a registered Aboriginal party if they are a **cultural**

knowledge holder. The proponent is responsible for developing the list of cultural knowledge holders to be contacted about a project (for more details see **STAGE 1** of the *Consultation Requirements* policy).

The NPW Regulations and *Consultation Requirements* policy define cultural knowledge holders as Aboriginal people who hold knowledge relevant to determining the cultural significance of Aboriginal 'objects' and/or 'places'.

A cultural knowledge holder may hold that knowledge as a result of their traditional or historical connection with the land. A definition of 'cultural knowledge' is included in section 3.3.1 of the *Consultation Requirements* policy.

What are the steps in the new consultation process?

There are four defined 'Stages of Consultation', with several steps for each stage. The back of this Fact Sheet outlines each stage in more detail and provides advice about **how to have a say**.

Where applicable, specific sections of the NPW Regulations have been noted, followed by a reference to the related section in the policy.

Who writes the Cultural Heritage Assessment Report?

The Cultural Heritage Assessment Report is written on behalf of the proponent often by an archaeologist or heritage consultant, who is usually also employed to manage the consultations.

How does a person register?

The LALC or another Aboriginal person or organisation can register by writing to the proponent within the timeframe (see Stage 1), and clearly state that they are registering an interest.

LALCs may wish to use the **Template Letter** developed by NSWALC, which is available to download from www.alc.org.au.

What is the role of the Local Aboriginal Land Council?

As outlined in the Stages of the *Consultation Requirements* policy, the LALC must be notified and provided documents from the consultation at several different points of the process.

The *Consultation Requirements* policy also identifies that *where a LALC has not registered*, the LALCs can be commissioned by proponents to provide **paid**

services, such as organising meetings, facilitating consultation or assisting in writing submissions (see section 3.3.2).

Where the LALC has taken on paid work, the LALC itself may not be able to become a registered Aboriginal party – but individual LALC staff or members can, as individuals in their own right.

LALCs who wish to both participate in the consultation as registered Aboriginal parties, and undertake paid work for the proponent should:

- **Provide details to the proponent of the services that LALC staff can provide, and**
- **Identify and register individual LALC staff or members to become registered Aboriginal parties. These individuals must be different people than those who undertake the paid work for the proponent.**

Note – If the LALC has been engaged to undertake paid work by the proponent, the LALCs may wish to request that the person or persons doing the work attend the consultations - but as observers or advisors rather than as registered parties.

Can LALCs be refused from registering?

No. OEH has advised that the purpose of the *Consultation Requirements* policy is not to allow a proponent to refuse to register an interested LALC to participate in consultations.

If any LALC who attempts to register is refused by a proponent, the LALC is urged to immediately contact OEH (details below), and the NSW Aboriginal Land Council Policy and Research Unit on 9689 4444 or policy@alc.org.au.

What happens after OEH receives an AHIP application?

After an AHIP application is received by OEH from a proponent, an OEH officer then makes a decision whether or not to issue an AHIP, and whether to impose conditions.

OEH is not required to undertake its own consultation or check the final cultural heritage assessment report with Aboriginal groups.

OEH have advised that their guarantee of service is that an AHIP will be processed in **6 weeks** if all supporting documentation is included. However, OEH policy states that as a general rule an AHIP should not be issued before development consent for a project has been obtained (for example from the Local Council or the Department of Planning).

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

Cases can sometimes be brought against a decision by OEH to issue an AHIP in the Land and Environment Court, in certain circumstances. However, there is currently no express right for Aboriginal people to appeal the issue of a permit.

The NSW Environmental Defenders Office (EDO) operates a free legal advice line on 1800 626 239 or visit the EDO website www.edo.org.au for more information on appealing an AHIP.

What happens if there is a dispute?

The NPW Regulations or the *Consultation Requirements* do not outline a process for dispute resolution where an issue arises between the proponent and registered Aboriginal parties or between Aboriginal parties.

If there are concerned about aspects of the consultation process of cultural heritage assessment, LALCs are encouraged to write to OEH and the proponent clearly outlining the issues. It may also be appropriate to seek legal advice.



STAGE 1

NOTIFICATION OF PROJECT PROPOSAL AND REGISTRATION OF INTEREST (see Clause 80C(2)-(5) of the NPW Regulations & pages 10-11 of the *Consultation Requirements policy*)

In order to **identify** Aboriginal people who may be cultural knowledge holders, and **notify** them that they can become a registered Aboriginal party to participate in consultations, the proponent must write to a list of groups including:

- The relevant LALC/s;
- The Registrar of the *Aboriginal Land Rights Act*, for a list of Aboriginal Owners;
- The National Native Title Tribunal and NTSCORP;
- OEH and others (see section 4.1.2).

HAVING A SAY – At this stage the LALC can provide the proponent with the details of any people it considers may hold cultural knowledge for an area.

NOTE: If there is an approved **native title determination** the proponent is only required to give notice to, and consult with, the registered native title body corporate or native title holders (see Clause 80C(3) and section 4.1.1).

However, the proponent is not prevented from consulting with a broader group or the LALC if they choose to.

Once the proponent has compiled the list of people who may hold 'cultural knowledge', he or she must **write to the people on the list of 'cultural knowledge holders' and the LALC**, outlining the specifics of the project, and inviting registrations of interest (ie inviting people to become 'registered Aboriginal parties').

Where there are registered native title claimants but a determination has not yet been made, a proponent must notify other groups and consult with cultural knowledge holders as outlined in Clause 80C(2) of the NPW Regulations & 4.1.2 to 4.1.7 of the *Consultation Requirements*.

The proponent must also **advertise the project in a local paper** inviting registration of interest, using the standard format (see section 4.1.3).

HAVING A SAY – As noted above, LALCs should receive an *initial general notice* from the proponent seeking information about people who may hold cultural knowledge and a *specific notice* inviting registrations of interest.

These notices should be received for all projects (except perhaps where there is a native title determination).

LALCs should decide whether they wish to **register an interest** as an organisation or whether individual people will register.

Only one organisational representative from the LALC or other groups can be nominated, but there is no limit any how many individual LALC members, LALC staff or board members may choose to register an interest.

It is important that the LALC or other individuals send a response in writing to the proponent to register, within the specified time frame – at least **14 days**. If a LALC does not register they may not be able to participate in consultations.

At this stage the LALCs may also want to offer the proponent **paid cultural services**, for example a Site Assessment.

NSWALC has developed a **template letter for LALCs** to provide to the proponent: either with contacts for cultural knowledge holders, to register the LALC or LALC members, or to offer paid services. A copy of the letter is available from the NSWALC website at www.alc.org.au.

The proponent must then **compile the list of registered Aboriginal parties** from those who have expressed interest in the project.

IMPORTANT NOTE – OEH has advised that the purpose of the new *Consultation Requirements* is not to allow a proponent to refuse to register a LALC.

If a proponent seeks to exclude the LALC from consultations or from becoming a registered Aboriginal party the LALC is urged to immediately contact the OEH and NSWALC.

The proponent has **28 days** to provide a copy of the list of registered Aboriginal parties to the LALC and the OEH Regional Office (see Clause 80C(5)(b) & section 4.1.6).

HAVING A SAY – At this stage if the LALC has any concerns about the list of registered Aboriginal parties, it should contact the proponent to discuss these within the 28 day period. LALCs should raise their concerns in writing with the proponent, and provide a copy to the OEH Regional Office.

STAGE 2

PRESENTATION OF INFORMATION ABOUT THE PROPOSED PROJECT (see Clause 80C(5)-(6) & page 12 of the *Consultation Requirements*)

The proponent must make arrangements to **present detailed information about the proposed project** to the registered Aboriginal parties (see section 4.2.1).

The proponent should **record any agreed outcomes** or contentious issues that require further discussion, and provide a copy of this record to registered Aboriginal parties (see sections 4.2.2 & 4.2.3).

HAVING A SAY – LALCs should raise any issues or concerns about the process with the proponent. Where possible, concerns or comments should be provided in writing and a copy kept, even if it is an email.

The *Consultation Requirements* policy aims to resolve issues early on, so if at this stage, it looks like there will be problems which will not be resolved by the proponent the LALC should contact the OEH Regional Office in writing, and keep a copy for reference.

It may be also appropriate for the LALC to obtain **independent legal advice** about the planned project.

The Environmental Defenders Office has a free advice line which can be contacted on (NSW only) 1800 626 239.

STAGE 3

GATHERING INFORMATION ABOUT CULTURAL SIGNIFICANCE (Clause 80C(6)-(7) & pages 12-13 of the *Consultation Requirements*)

The proponent must present and/or provide information to the registered Aboriginal parties, so that the Aboriginal parties can provide advice on *how* the cultural heritage assessment should be conducted – the **proposed methodology** (Clause 80C (6) & 4.3.1).

This could include which Aboriginal people or groups should be involved in the site assessment, where meetings should be held, and how sensitive information should be handled or recorded.

Registered Aboriginal parties should have a **minimum of 28 days** to review the plan for how the assessment will be undertaken (the methodology) and provide feedback (Clause 80C (6)(b) & section 4.3.2).

HAVING A SAY - LALCs should review the proposed process (the methodology) and submit comments to the proponents within the time frame. A copy should be provided to OEH and a copy kept for reference.

The proponent must then seek to **collect cultural information** from the registered Aboriginal parties - that is, to undertake the cultural heritage assessment – in line with what has been agreed by the registered Aboriginal parties.

A key part of this stage is advice about:

- What sites are important in the project area;
- What steps can be taken to **avoid or minimise damage** which might be caused by from the project (**management options**); and
- Protocols for how sensitive information will be handled.

Note: even without formal written protocols for sensitive information, section 4.3.5 of the *Consultation Requirements* policy states that the information collected by the proponent must only be used in relation to the AHIP application, and not for any other purpose unless agreed by the registered Aboriginal parties.

HAVING A SAY – LALCs should provide comments and advice in writing where possible, and keep a copy for future reference. The proponent must document all feedback received from registered Aboriginal parties in the final cultural heritage assessment report, including copies of any submissions received (4.3.7).

LALCs may also wish to provide a copy of their comments directly to the OEH, as it is a delegate of the Director-General of OEH who makes a decision about whether or not to issue a permit.

STAGE 4

REVIEW OF DRAFT CULTURAL HERITAGE ASSESSMENT REPORT (Clause 80C(8) & page 14 of the *Consultation Requirements* policy)

The proponent must use the information they have collected to prepare a **draft cultural heritage assessment report** (see section 4.4.1).

The proponent is required to give **at least 28 days** for registered Aboriginal parties to **review and comment** on the draft report (Clause 80C(8)(b) & sections 4.4.2-4.4.3).

HAVING A SAY – Comments on the draft report should be provided in writing to the proponent, a copy sent to the OEH regional office, and a copy kept for reference.

Again, if LALCs have concerns that their advice may not be correctly recorded by the proponent they should provide a copy of their comments in writing to OEH.

The proponent then prepares the **final cultural heritage assessment report** and provides it to OEH with the application for an AHIP (see section 4.4.4).

It will be this report and the other documents provided by the proponent on which OEH makes its decision.

The proponent must provide or **make available copies of the final report** and AHIP application to registered Aboriginal parties and relevant LALCs,

whether or not the LALC registered in Stage 1, within **14 days** of applying for an AHIP (section 4.4.5).

HAVING A SAY - Comments should be provided in writing and a copy kept.

If LALCs have not become registered Aboriginal parties they should regularly check with the proponent or the OEH Regional Office to check if the AHIP application has been made, so as not to miss the opportunity to comment on the final report.

How can I contact the OEH Regional Office?

The Environmental Protection and Regulation Group (EPRG) is the section of OEH responsible for processing and issuing AHIPs.

To find out your nearest EPRG Office, contact:

OEH Head Office

59-61 Goulburn Street, Sydney
PO Box A290, Sydney South NSW 1232
Phone: (02) 9995 5000

Where can I get a copy of the NPW Regulations and policy?

For copies of the new *Consultation Requirements* policy and OEH Fact Sheets visit the OEH website at: <http://www.environment.nsw.gov.au/licences/consultation.htm>.

A copy of the Regulations is available on the OEH website at:

<http://www.environment.nsw.gov.au/legislation/NPWamendmentAct2010.htm> and the NSW legislation website www.legislation.nsw.gov.au.

For more information visit the 'Culture and Heritage' pages of the NSWALC website at www.alc.org.au or contact the NSWALC Policy and Research Unit on 02 9689 444 or by email on policy@alc.org.au.

¹ See section 3.3.2 of the new OEH *consultation requirements* policy and OEH Fact Sheet 4 available at <http://www.environment.nsw.gov.au/licences/consultation.htm>