



## THE NSW ABORIGINAL LAND COUNCIL'S SUBMISSION IN RESPONSE TO THE *DRAFT COMMUNITY CONSULTATION REQUIREMENTS* (PART 6 OF THE *NATIONAL PARKS AND WILDLIFE ACT*)

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### 1. Introduction

This submission details the NSW Aboriginal Land Council's (NSWALC's) response to the draft policy developed by the NSW Department of Environment and Climate Change (DECC<sup>1</sup>) entitled *Aboriginal Cultural Heritage: Draft Community Consultation Requirements for Proponents – Part 6 of the National Parks and Wildlife Act 1974* (the Draft Community Consultation Requirements).

The proposed policy would replace the existing policy - *The National Parks and Wildlife Act 1974: Part 6 Approvals Interim Community Consultation Requirements for Applicants* (the Interim Requirements) – which outlines the process for consulting with the Aboriginal community to determine the significance of Aboriginal cultural heritage, when applying for a permit to authorise damage or destruction to an Aboriginal place or object.

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<sup>1</sup> As of 27 July 2009 the Department is now the Department of Environment, Climate Change and Water (DECCW).

These permits are known as section 87 and section 90 consents, or Aboriginal Heritage Impact Permits (AHIPs).

The Draft Community Consultation Requirements, as with other policies developed by DECC, operate within the framework established by the *National Parks and Wildlife Act*, which is the primary law for the protection of Aboriginal cultural heritage in NSW. The *National Parks and Wildlife Act* currently contains limited detail in relation to the issuing of permits. Requirements such as what factors the Director General of DECC must consider before issuing a permit, what information applicants for permits must provide, and who should be consulted in the Aboriginal community are outlined in DECC policy.

Policies such as the Draft Community Consultation Requirements will therefore play a vital role in the practical management and protection of Aboriginal cultural heritage. This includes determining who is 'authorised' to advise on culture and heritage issues, what weight is given to the views of particular Aboriginal groups, and what priority the protection of Aboriginal cultural heritage is given compared to the interests of persons or groups seeking a permit to damage or destroy Aboriginal objects or places, such as developers.

In April 2009 DECC released the *National Parks and Wildlife Amendment Bill 2009* (also known as the Omnibus Bill). The draft Bill aims to insert more detail into the *National Parks and Wildlife Act* about the requirements for the issuing of permits.<sup>2</sup>

DECC has advised that **regulations regarding consultation** will be drafted to reflect the Draft Community Consultation Requirements, and are to be introduced at the same time as the Omnibus Bill to the NSW Parliament (September 2009). This will further increase the necessity to ensure that the final version of the Community Consultation Requirements offers effective protection of Aboriginal culture and heritage and has the support of the Aboriginal community.

#### **a. This submission**

NSWALC's response to the Draft Community Consultation Requirements was developed following detailed research and consultation. NSWALC's recommendations in relation to the proposed legislative amendments have been outlined in a separate submission (the NSWALC Omnibus Bill Submission). Both submissions are available from the NSWALC website at [www.alc.org.au](http://www.alc.org.au).

As outlined in detail in the NSWALC Omnibus Bill Submission, the current law and policies in relation to the issue of permits to damage or destroy Aboriginal cultural heritage are a major source of concern and distress for the Aboriginal community and for the Aboriginal Land Council network. The existing permit system has seen the **wide-scale destruction** of significant Aboriginal cultural heritage, with more than 1000 permits to damage or destroy Aboriginal culture and heritage issued by the Director General of DECC since 1990 and the rate has increased in recent years.<sup>3</sup>

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<sup>2</sup> The Omnibus Bill proposes amendments to a broad range of sections of the *National Parks and Wildlife Act*. For details see NSWALC's submission in response to the Omnibus Bill, available from [www.alc.org.au](http://www.alc.org.au).

<sup>3</sup> See data about the number of permits issued summarised in Section 3c (page 7) of the NSWALC Omnibus Bill Submission (July 2009) as compiled from answers by the relevant Ministers representing the Minister for the Environment and Climate Change to *Question on Notice Number 0127* (31 July 2007), *Number 2091* (28 October 2008), *Number 3009* (7 May 2009) and *Number 3120* (17 June 2009), in the

NSWALC supports **urgent reform** of the current permit system and calls on the NSW Government to establish an independent inquiry into the management and protection of Aboriginal cultural heritage in NSW.

As the only remaining state without independent legislation to protect Aboriginal cultural heritage, NSWALC joins with a number of other Aboriginal and environmental organisations in calling for the urgent establishment of an **Aboriginal Cultural Heritage Bill** for NSW.<sup>4</sup>

There are a number of problems with existing DECC policies in relation to consultation with the Aboriginal community. The Interim Requirements have regularly failed to identify the correct people to consult with in the Aboriginal community regarding the significance of an object or place, and the advice from the Aboriginal community about significant sites has failed to lead to the adequate protection of those sites.

Unfortunately, the new Draft Community Consultation Requirements are unlikely to address the problems with the process currently experienced by the Aboriginal community, as well as other proponents. The new Draft Requirements do not appear to address some of the most significant problems identified by DECC following the consultations with the Aboriginal community to develop the final draft of the policy in 2008 and 2009.<sup>5</sup>

#### **b. Key recommendations**

NSWALC has serious concerns about the Draft Community Consultation Requirements in their current form. The proposed policy will not address the problems that exist with the current process for consultation with the Aboriginal community, and are unlikely to lead to improved heritage outcomes. The Draft Community Consultation Requirements **require significant amendment** before they can be supported.

NSWALC strongly opposes the adoption of the current Draft Community Consultation Requirements into regulations in their current form. The **Aboriginal community must be provided with an opportunity to comment** on any draft regulations, including those based on the Draft Community Consultation Requirements.

NSWALC calls on the NSW Minister for the Environment and Climate Change to commit that no new laws or regulations relating to Aboriginal culture and heritage will be adopted without proper consultation with NSWALC and other relevant bodies.

NSWALC is committed to working in **partnership** with DECC on the development and implementation of culture and heritage policy, particularly in relation to ensuring the effective engagement of Local Aboriginal Land Councils on culture and heritage issues, consistent with their responsibilities under the *Aboriginal Land Rights Act*.

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Legislative Council, to questions asked by Ian Cohen MLC, as available to download from the NSW Parliament website at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).

<sup>4</sup> See, for example, July 2009 submission to DECC by in the Environmental Defenders Office, as available from [www.edo.org.au](http://www.edo.org.au). The need for specific Aboriginal Cultural Heritage legislative was also noted as a key issue raised during the consultations on the Interim Requirements, as noted in the DECC *Summary* (noted below).

<sup>5</sup> See *Summary of Feedback from State Wide Forms: March to May 2008*, as available from the DECC website at <http://www.environment.nsw.gov.au/resources/cultureheritage/09280summfeedback.pdf>, last accessed 27 July 2009.

Specific recommendations and responses to the content of the Draft Community Consultation Requirements are outlined in section four (4) of this submission. For an overview of NSWALC's recommendations refer to the **Executive Summary** prepared in relation to this submission.

***c. Improving the protection of Aboriginal cultural heritage***

The recommendations made by NSWALC in this submission are designed to further the protection of Aboriginal culture and heritage in NSW, and to better recognise the rights of Aboriginal people to control and manage their culture and heritage.

The recommendations are also designed to improve the practical processes for identifying who in the Aboriginal community speaks for culture and heritage issues.

In providing comment in its two culture and heritage submissions, NSWALC recognises that the proposed amendments to Part 6 of the *National Parks and Wildlife Act* and related policies are not designed to achieve major reform of the current system. Unfortunately it is very clear that major reform is urgently needed to ensure that significant Aboriginal cultural heritage does not continue to be lost for current and future generations.

Whilst neither the current *National Parks and Wildlife Act* or the proposed amendments through the Omnibus Bill contain provisions for Aboriginal people to be *directly* involved in decisions about Aboriginal culture and heritage, the broad powers provided to the Director General of DECC through the Act allow for policies to be developed which would better prioritise the protection of Aboriginal cultural heritage and give Aboriginal people a stronger role in decision making.

It is hoped that DECC takes this opportunity to revise key policies such as the Draft Community Consultation Requirements to create a stronger regime for the protection of Aboriginal cultural heritage which better recognises and involves Aboriginal people.

***d. Appendixes***

NSWALC has received some late comments from Narromine LALC and Grafton Ngerrie LALC. These were submitted with the NSWALC Omnibus Bill Submission but also contain comments in relation to the Draft Community Consultation Requirements.

The comments from Narromine LALC and Grafton Ngerrie LALC are attached as an Appendix to this submission. The attached comments represent the views of the respective authors. They have not been endorsed by NSWALC and NSWALC takes no responsibility for any errors contained therein.

## 2. The Land Council Network

NSWALC is the largest member based Aboriginal organisation in Australia. NSWALC is governed by a Council of nine Councillors which is elected every four years.

NSWALC provides support to the network of 121 Local Aboriginal Land Councils (LALCs). LALCs are autonomous bodies which are governed by boards elected by local Aboriginal community members, every 2 years. All Aboriginal adults in NSW are eligible to become a member a Land Council and vote in Aboriginal Land Council elections.

The *Aboriginal Land Rights Act 1983* establishes Land Councils as the elected representatives for Aboriginal people in NSW. This role extends beyond representation of the interests of Land Council members, to all Aboriginal people living in NSW in matters relating to Aboriginal culture and heritage.

As outlined in section 106(7) of the *Aboriginal Land Rights Act*, NSWALC has particular responsibilities in relation to culture and heritage. These include:

- a. to take action to protect the culture and heritage of Aboriginal persons in NSW (and)
- b. to promote awareness in the community of the culture and heritage of Aboriginal persons in NSW.

NSWALC is represented on numerous state-wide committees which provide advice to the NSW Government on land, culture and heritage matters, including the Aboriginal Cultural Heritage Advisory Council.

Pursuant to s52(4) of the *Aboriginal Land Rights Act*, LALCs have similar functions to protect and promote Aboriginal cultural heritage within their boundaries. The obligation to consult with LALCs on cultural heritage matters is recognised through a range of DECC and other government agency policies, including the Interim Requirements.

LALCs' culture and heritage activities vary across Aboriginal Land Councils, but include custodianship of culturally significant land, maintenance of Aboriginal sites, management of local site databases, heritage site assessments, management of cultural centres and keeping places, participation in advisory committees and a range of projects in the community to improve awareness and understanding of Aboriginal cultural heritage.

NSWALC recognises and respects the role of traditional owner groups in relation to culture and heritage. NSWALC's position is that consultation on culture and heritage matters must include those organisations with statutory and traditional responsibilities for culture and heritage. These are:

- NSWALC and LALCs,
- Native title claimants and holders, the Native Title Tribunal and NTS Corp,
- Aboriginal Owners and the Registrar of the *Aboriginal Land Rights Act*.

NSWALC's commitment to work in partnership with traditional owner groups is reflected in NSWALC's policies and strategic documents, including the *NSWALC Corporate Plan 2008-2012*.<sup>6</sup>

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<sup>6</sup> Priority Five in the *NSWALC Corporate Plan 2008-2012* includes 'developing guidelines that identify, protect and preserve cultural heritage in accordance with the traditional customs, obligations and

### 3. Permits issued through the *National Parks and Wildlife Act*

#### a. *Protection of Aboriginal objects and places*

The *National Parks and Wildlife Act 1974* is the primary source of legal protection for Aboriginal cultural heritage in NSW. The *National Parks and Wildlife Act* is administered by DECC.

The objects of the *National Parks and Wildlife Act* include:

##### **Section 2A**

(1)(b) *the conservation of objects, places or features (not including biological diversity) of cultural value within the landscape, including, but not limited to: ...*

(i) *places, objects and features of significance to Aboriginal people.*

Section 85 of the *National Parks and Wildlife Act* provides that the Director General of DECC<sup>7</sup> has responsibility for the proper care, preservation and protection of Aboriginal objects, and places on land reserved under that Act.

'Aboriginal object' is a statutory term meaning '*any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains*'.<sup>8</sup>

Data in relation to Aboriginal objects which have been brought to the attention of DECC is recorded by DECC on its Aboriginal Heritage Information Management System (AHIMS) database. As of 2008, AHIMS included more than 55,385 recorded sites and 9,446 Aboriginal heritage reports<sup>9</sup>.

A broader area can be protected through a declaration by the Minister of the Environment and Climate Change that the area is an 'Aboriginal place'. The Minister can make such a declaration where she is of the opinion that the place 'is or was of special significance with respect to Aboriginal culture'.<sup>10</sup> As at June 2008, a total of 64 Aboriginal Places had been declared.<sup>11</sup>

A permit is required where there is likely to be an impact on an *identified* Aboriginal object or place. As outlined in more detail in the NSWALC Omnibus Bill Submission<sup>12</sup>, the definition of Aboriginal culture and heritage under the *National Parks and Wildlife Act* has been criticised for its narrow focus on 'places' and 'objects'. The definitions do not

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responsibilities of individual Traditional Owner groups in NSW.' At page 10 as available from NSWALC website [www.alc.org.au](http://www.alc.org.au).

<sup>7</sup> The *National Parks and Wildlife Act* gives powers to the relevant Minister and Director General of the Department 'administering the Act'. This is currently the Department of Environment and Climate Change, but became the Department of Environment, Climate Change and Water as of 27 July 2009.

<sup>8</sup> See Section 5 of the *National Parks and Wildlife Act*.

<sup>9</sup> NSW Department of Environment and Climate Change, *Annual Report 2007-2008*, page 96 [http://www.environment.nsw.gov.au/resources/whoware/deccar0708sec4\\_08424.pdf](http://www.environment.nsw.gov.au/resources/whoware/deccar0708sec4_08424.pdf)

<sup>10</sup> See section 84 of the *National Parks and Wildlife Act*.

<sup>11</sup> NSW Department of Environment and Climate Change, *Annual Report 2007-2008*, page 93 [http://www.environment.nsw.gov.au/resources/whoware/deccar0708sec4\\_08424.pdf](http://www.environment.nsw.gov.au/resources/whoware/deccar0708sec4_08424.pdf)

<sup>12</sup> See pages 5-6 of the NSWALC Omnibus Bill Submission.

adequately capture why a site or broader area may be significant to Aboriginal people and this has led to inadequate protection of some sites and areas.<sup>13</sup>

Permits which authorise damage or destruction to Aboriginal cultural heritage can be issued by the Director General. There is an inherent tension between these two conflicting roles of the Director General: to both protect Aboriginal culture and heritage, consistent with the objects of the *National Parks and Wildlife Act*, and to manage the destruction of that heritage by issuing permits under Part 6 of the Act.

This tension is a major source of concern to the Aboriginal community, and has led to the unfortunate perception that the role of DECC is to regulate the destruction of Aboriginal cultural heritage, rather than to manage the protection of that heritage.<sup>14</sup>

### **b. Ownership of Aboriginal culture and heritage**

The *National Parks and Wildlife Act* provides that all Aboriginal objects are considered to be 'property of the Crown' (with some exceptions).<sup>15</sup>

Aboriginal people do not have a recognised right through the legislation to direct what happens with their cultural heritage or to take action if it is under threat.

This failure to recognise the right of Aboriginal people to control and manage their cultural heritage is a fundamental flaw in the current system. It undermines the recognition made by NSW Government to Aboriginal self-determination, as outlined in whole of government strategies such as *Two Ways Together*<sup>16</sup>, and the key values of agencies such as DECC, as articulated in documents such as the *DECC Corporate Plan 2008-2012*.<sup>17</sup>

The inclusion of Aboriginal culture in flora and fauna legislation is outdated and paternalistic. As outlined above, NSWALC supports the introduction of specific Aboriginal cultural heritage legislation based on recognition of the right of Aboriginal people to control and manage their cultural heritage.

### **c. Numbers of permits issued**

It is difficult to get a clear picture about when, and to whom AHIPs are issued, as official data is not readily available. The consistent feedback from the Aboriginal community is that there is a high level of 'approved' destruction of important Aboriginal cultural

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<sup>13</sup> See the NSWALC Omnibus Bill Submission, as above.

<sup>14</sup> See for example comments recorded during recent Information Sessions for the Draft Community Consultation Requirements and numerous articles referenced in the NSWALC Omnibus Submission.

<sup>15</sup> Exceptions include objects which were located in private collections prior to 13 April 1970 and have not been since abandoned, and objects which are 'real property' (i.e. objects such as rock art, rock carvings or scarred trees that are attached to private land and are legally considered part of that land). Aboriginal objects can also be handed back to the ownership of Aboriginal people. See Part 6 of the *National Parks and Wildlife Act*.

<sup>16</sup> See NSW Aboriginal Affairs Plan 2003 - 2012, *Two Ways Together*, available from the NSW Department of Aboriginal Affairs website <http://www.daa.nsw.gov.au/data/files/FinalPOLICY.pdf>

<sup>17</sup> Value 2 in the DECC Corporate Plan is '*Recognise the rights and status of Aboriginal people: We respect the unique rights and status of Aboriginal people based on their prior and continuing occupation of the land and waters of NSW, including the right to self-determination in economic, social and cultural development. We also acknowledge the importance of connection to Country for community wellbeing*', at page 4, available from the DECC website, <http://www.environment.nsw.gov.au/resources/whoware/08451CorporatePlan2008to12.pdf>



heritage through the issuing of AHIPs, and that the permit process is not protecting important sites.<sup>18</sup>

This picture seems to be reflected in the information about permits which has been provided in response to Questions on Notice to the Minister, in the NSW Parliament:

- Between 1990 and July 2007 approximately **800** s90 consents (ie permits which authorise destruction under section 90 of the *National Parks and Wildlife Act*) were issued;
- The rate of issue of AHIPs has been increasing over the years, with around half the s90 consents issued in the fourteen years from 1990 to 2004, and the other half issued in the following three years 2005 to 2007;

*Note – these figures do not include s87 consents (ie consents to damage or deface cultural heritage under section 87 of the Act). If s87 consents were included the figures would be much higher.*

- Between 2004 and 25 May 2009 approximately **958** s87 permits and s90 consents were issued in total;
- Between January 2009 and 25 May 2009 a total of **103** s87 and s90 permits have already been issued. This equates to an average of 5 per week; and
- Around a quarter of the permits issued between 2007 and 2009 were issued to NSW Government agencies. Of these permits issued, the largest number (27) were issued to the Roads and Traffic Authority (RTA), with the second largest number (22) being issued to DECC itself.<sup>19</sup>

Note - a permit is also required where a positive management action is required, for example erecting a fence to better protect a known site. Unfortunately the available figures do not differentiate between permits which are required to protect sites and permits which allow damage or destruction due to the planned development on the site.

NSWALC calls for the urgent release of comprehensive data on the approval of AHIPs, including how many are issued and to whom they are issued to.

A number of significant cases have been pursued through litigation by Aboriginal people against the issue of AHIPs. The *National Parks and Wildlife Act* only allows for appeals to the Land and Environment Court based on the 'process' of issuing the AHIP, and the Act currently only recognises limited process rights for Aboriginal people.

The number of challenges raises serious concerns about the level of protection of Aboriginal cultural heritage being offered by the current system. Attempts to protect

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<sup>18</sup> Distress at the current process for the issuing of AHIPs was raised repeatedly during recent consultations held by DECC between January and June 2009, in relation to the Aboriginal Land Management Framework and later in relation to the Draft Community Consultation Requirements. See also discussion of articles and case law regarding challenges to permits, contained in the NSWALC Omnibus Bill Submission.

<sup>19</sup> Data Compiled from answers by the relevant Ministers representing the Minister for the Environment and Climate Change to *Question on Notice Number 0127* (31 July 2007), *Number 2091* (28 October 2008), *Number 3009* (7 May 2009) and *Number 3120* (17 June 2009), in the Legislative Council, asked by Ian Cohen MLC, as available to download from the NSW Parliament website at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)



cultural heritage have also included challenges to development consents. To date, only a small number of challenges to AHIPs have been successful.<sup>20</sup>

For more information about the management of AHIPs, including the case law, refer to NSWALC's Omnibus Bill Submission. See also *NSWALC Culture and Heritage Fact Sheet 3 – 'Proposed Changes to Aboriginal Heritage Impact Permits'*. Both are available to download from the NSWALC website at [www.alc.org.au](http://www.alc.org.au).

#### **4. Recommendations: Proposed reforms**

The Draft Community Consultation Requirements outline a process for how consultation should be undertaken with Aboriginal people by 'proponents', that is individuals or companies seeking a permit (AHIP) to damage or destroy Aboriginal objects or places.

The draft policy does this by sketching out the roles and responsibilities of both the proponent and the Aboriginal community and constructing a four stage consultation process.

The four stages are:

1. Notification of the project and registration of interest by Aboriginal groups and individuals;
2. Presentation of the proposed project to registered groups;
3. Gathering information about cultural significance; and
4. Review of the draft Cultural Heritage Assessment Report.

*For an overview of the stages of consultation in the current, and proposed policies, see NSWALC Culture and Heritage Fact Sheet 6, page 2, as attached as an Appendix.*

The staged process leads to the development of a final report including a Cultural Heritage Assessment Report which is intended to incorporate the advice from the community, and is submitted by the proponent to DECC with their application for a permit to inform DECC's assessment of whether a permit should be issued.

In their current form, the requirements do not offer adequate guidance to proponents about how to engage with the Aboriginal community and negotiate local circumstances. This includes explaining relevant cultural values, engaging Aboriginal people for specific management actions, negotiating timeframes with communities, explaining the role of LALCs, and ensuring that any key management actions involve ongoing consultation and discussion with Aboriginal people.

The current policy which outlines the stages of consultation - the Interim Requirements - was first developed in 2004. The Interim Requirements were developed to 'meet an immediate need' for a policy, without broad input from the Aboriginal community<sup>21</sup>. When

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<sup>20</sup> See case law summaries provided in *the Discussion Paper: Reforming New South Wales' Laws for Protection of Aboriginal Cultural Heritage*, prepared by Neva Collings of the Environmental Defender's Office for the 28 May 2009 Culture and Heritage Roundtable and Andrew Chalk (2007) 'Exploring Recent Developments in Aboriginal Cultural Heritage Protection in NSW' as presented to the Lexis Nexis Environmental Law Conference, Sydney.

<sup>21</sup> See page iv of DECC (2008) *Discussion Paper: Reviewing the Interim Community Consultation Requirements for Aboriginal Heritage Impact Permits*, as available to download from

the Interim Requirements were released DECC (formerly DEC) advised that it was 'committed to developing a more detailed guideline to replace this interim guideline, based on consultation with the Aboriginal community and other stakeholders in 2005.'<sup>22</sup>

A review of the Interim Requirements was undertaken in 2008. As part of the review DECC held 24 forums with the Aboriginal community to gain their feedback on the elements of a new draft of the policy. Aboriginal Land Council representatives actively participated in the forums and NSWALC provided a written response to the review.<sup>23</sup>

In 2008 a new draft of the Requirements which focused on consultation with 'Traditional Knowledge Holders' (TKHs) and 'Historic Knowledge Holders' (HKHs) was discussed in several additional forums convened by DECC, but was not publicly released. This version of the policy did not receive wide community support. A summary of feedback from the Aboriginal community was released by DECC in 2009.<sup>24</sup>

#### **a. Community input into the final draft policy**

In May 2009, a significantly revised and final draft of the Draft Community Consultation Requirements was released to replace the Interim Requirements. DECC held Information Sessions on the Draft Community Consultation Requirements between 7 May and 3 July, and advised that the draft would be finalised by August 2009. At the request of Aboriginal Land Councils, several additional Information Sessions were organised by DECC within this period.

No information sessions or consultations were held about the proposed changes to the *National Parks and Wildlife Act*, which were announced at the same time as the final version of the Draft Community Consultation Requirements.

Written comments on the Draft Community Consultation Requirements were invited by 7 July 2009. NSWALC worked to actively promote feedback from the Aboriginal community and Local Aboriginal Land Councils on the law and policy changes through the production of Culture and Heritage Fact Sheets, media releases, network messages and its website. NSWALC was provided an extension until 31 July 2009 to provide written comments to DECC.

DECC has advised that the Draft Community Consultation Requirements are due to be finalised in August 2009 so that new *National Parks and Wildlife Regulation* can be drafted with respect to what consultation should be undertaken and who should be consulted.<sup>25</sup>

The proposed regulations along with the Bill making amendments to the *National Parks and Wildlife Act* are due to be introduced to the NSW Parliament in **September 2009**. At

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<http://www.environment.nsw.gov.au/resources/parks/ReviewInterimRequirementsForAHIP.pdf>, last accessed 27 July 2009.

<sup>22</sup> See page 1 of the DECC *Discussion Paper* (2008), as noted above.

<sup>23</sup> Refer to correspondence from Geoff Scott, NSWALC CEO, to Mark Gifford, Director Reform and Compliance Branch, Climate Change and Environment Protection Group, DECC (April 2008).

<sup>24</sup> See *Forum Summary*, available from the DECC website at

<http://www.environment.nsw.gov.au/resources/cultureheritage/09280summfedback.pdf>, last accessed 27 July 2009.

<sup>25</sup> See Schedule 1 [28] of the *National Parks and Wildlife Amendment Bill 2009* (the Omnibus Bill) which sets out the proposed amendment to section 90N of the *National Parks and Wildlife Act*.

this stage DECC has advised that there is no intention to release any amended Draft Community Consultation Requirements to the community before they are finalised and approved, and the regulations are tabled in Parliament.

As previously indicated to DECC, NSWALC has serious concerns about the short timeframes for the finalisation and adoption of the Community Consultation Requirements, the Omnibus Bill and the related regulations.

NSWALC staff and/ or Land Council representatives participated in the majority of the Information Sessions held regarding the Draft Community Consultation Requirements.<sup>26</sup> Aboriginal participants in the Information Sessions held between May and July 2009 repeatedly raised concerns that the scope and timeframes for consultation were too condensed.

Many Aboriginal people either did not know that the Information Sessions were being held or they were provided with only very short notice. This was evident from the low level of participation at some sessions. The sessions were held on weekdays during work hours making it difficult for interested people with work commitments to attend. Additionally, many participants had not received copies of the Draft Community Consultation Requirements prior to the Information Sessions. Concerns have also been raised as to why more Information Sessions were not held in more locations across NSW to allow for more people who are involved in the AHIP process to attend.

The proposed changes are both important and complex. Concerns were raised at the consultations that the process was not a meaningful attempt to engage Aboriginal people in the development of a policy that will have far reaching and long term impacts for Aboriginal people and culture.

This approach seems inconsistent with commitments made by DECC to the cultural rights and self-determination of Aboriginal people, as recognised in the *DECC Corporate Plan 2008-2012* and policies such as *Aboriginal Community Engagement Framework for DECC* (November 2007).<sup>27</sup>

Given that the policy must be consistent with the *National Parks and Wildlife Act*, the final changes to the Community Consultation Requirements are dependant on the changes that are passed to the Omnibus Bill. In this context, attempts to finalise the Draft Community Consultation Requirements before the changes to the *National Parks and Wildlife Act* are confirmed are premature.

Once the Draft Community Consultation Requirements are finalised the final version must be provided to Aboriginal communities with enough time to allow meaningful consultation and broad feedback.

Given the concerns raised by many groups on the process to date an effective consultation on the revised draft is essential to ensure that the Draft Community Consultation Requirements are supported by the Aboriginal community.

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<sup>26</sup> NSWALC staff and LALC representatives also participated in the recent consultations held by DECC in relation to the Aboriginal Land Management Framework Discussion Paper, at which issues of who is consulted and who speaks for Country were central.

<sup>27</sup> This policy was provided by NSWALC on request, and is not currently available through the DECC website.

**b. Who should be consulted?**

Under the current Interim Requirements a proponent must give notice in writing of a project which may impact on an Aboriginal object or place to particular groups:

- The Local Aboriginal Land Council(s);
- The Registrar of Aboriginal Owners;
- Native Title Services, now NTS Corp;
- The local council(s), and
- The Department of Environment and Climate Change.

The Interim Requirements also state that a proponent '*must actively seek to identify stakeholder groups or people wishing to be consulted about the project, and invite them to register an interest.*'<sup>28</sup>

The new Draft Community Consultation Requirements amend the list of groups that must be contacted to:

- Remove Native Title Services, now NTS Corp, from the list of groups that must be notified, and add the Native Title Tribunal; and
- Add the local Catchment Management Authority.

In addition, the Draft Community Consultation Requirements includes a particular section (at 3.3) on who to consult, which notes the diversity of Aboriginal organisations which may exist in an area and advises that '*proponents must consult with Aboriginal people who have cultural heritage knowledge relevant to a proposed project area.*'

'Cultural knowledge holders' are not clearly defined, but the Draft Community Consultation Requirements do advise that '*typically, but not always, Aboriginal people with cultural heritage knowledge are referred to as Aboriginal traditional owners or Aboriginal elders. These terms have no fixed definitions: both are used for those who are accepted by their community as being authorised to speak for Country and its heritage. They have the trust of the community, knowledge and understanding of their culture, and permission to speak about it*' (at 3.3).

Section 5.2 of the Draft Community Consultation Requirements also includes a reference to the responsibility of DECC, proponents and service providers to: '*uphold and respect the traditional rights, obligations and responsibilities of Aboriginal cultural knowledge holders in accordance with traditional lore and custom, particularly as these related to the cultural business of men and women.*'

The Aboriginal community has consistently advised DECC that the current process for identifying the 'right' people to speak on culture and heritage matters does not work. As DECC itself identified in the *Summary of Feedback from State Wide Forums (on the Interim Requirements): March to May 2008*, the majority of Aboriginal participants support the need for change from the current open process and have called for a restricted consultation process.<sup>29</sup> This view was echoed in the recent Information Sessions by both consultants and Aboriginal people.

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<sup>28</sup> See page 5, Interim Community Consultation Requirements.

<sup>29</sup> See *Summary* page 1, section 2, as referenced above

The new Draft Community Consultation Requirements intend to continue the existing practice of encouraging all Aboriginal organisations or individuals with a potential interest in an area to 'register', with no guidance as to whether a particular group or an individual has traditional authority or the support of the community. Examples exist of a large number of groups registering for one project, making it impossible to find a clear consensus on the significance of an object or place.<sup>30</sup>

A more effective process would be to prioritise consultation with those organisations which have statutory and traditional responsibilities for culture and heritage. In NSW, these organisations are clearly defined.

NSWALC strongly opposes the current 'open consultation' approach of the Interim Requirements and new Draft Community Consultation Requirements.

Consultation on culture and heritage matters should clearly prioritise the views of organisations with statutory and traditional responsibilities for culture and heritage, namely:

- Land council(s);
- Native title claimants and holders, the National Native Title Tribunal and NTS Corp; and
- Aboriginal Owners and the Registrar of the *Aboriginal Land Rights Act*.

This requirement should exist for all projects, including those in areas where an Indigenous Land Use Agreement (ILUA), co-management agreement or other form of MOU has been established.

While the National Native Title Tribunal holds the current Register of Native Title claims, NTS Corp is a representative body for native title in NSW and the ACT and is responsible for assisting Aboriginal communities who hold or may hold native title. NTS Corp's networks in the Aboriginal community extend to include groups that are preparing, but have not yet put in a native title claim. It is also important to recognise that groups may be the traditional owners of an area or have culture and heritage responsibilities, even where Native Title has been deemed to be 'extinguished'.

NTS Corp must continue to be included in the list of organisations to be given notice of a project by the proponent.

NSWALC recognises that there is a minority view that consultation processes should be kept open to ensure that relevant Aboriginal groups or individuals are not excluded. NSWALC supports the opportunity for individuals or groups outside those with a recognised statutory role to register an interest in a project.

However, guidance and clear processes must be included in the Draft Community Consultation Requirements to assist proponents to assess the sources of information they receive from groups not specifically listed. Examples have been raised during past and recent consultations where individuals or groups from outside a project area have registered an interest in a project because of the opportunity to undertake paid site assessments. Neither the Interim Requirements nor the Draft Requirements include guidance to address this issue.

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<sup>30</sup> See for example, the 35 or more groups which have registered in the Hunter Region.

Examples have also been raised of individuals who may not be Aboriginal registering an interest. This is not an issue for the listed groups because in order to become a member of an Aboriginal Land Council, register a native title claim or join the Register of Aboriginal Owners, a person must establish their Aboriginality. To become a member of an Aboriginal Land Council outside their local area, or become a recognised native title claimant or Aboriginal Owner, a person must also prove their association with particular lands on the basis of family history and cultural association or connection to that area.

Possible options to address the problem of groups without a legitimate interest registering to be consulted include:

- Individuals and groups registering an interest with a project must identify the nature of their interest in the project;
- Proponents must seek the advice of relevant native title holders, Aboriginal Land Councils and/or the Aboriginal owners in relation to which groups or individuals to engage. Resources should be provided to enable these groups, or their relevant state-wide organisation (NTS Corp, NSWALC and LALCs, Registrar of the Aboriginal Land Rights Act) to take on this role; and / or
- Proponents must seek advice from the Culture and Heritage Unit of DECC in relation to less well known groups or individuals who have registered.

As a peak Aboriginal organisation with a statutory role to protect and promote Aboriginal culture and heritage, NSWALC is committed to working with DECC to develop possible processes to address these difficult issues.

However, any options developed must be released in draft form to the community for their support, before they are adopted into policy.

Additional guidance and clear processes must be included in the Draft Community Consultation Requirements in relation to groups or individuals who have registered an interest in a project, but do not have a clear statutory or traditional role. This includes clear definitions of terms such as 'cultural knowledge holders.'

One of the concerns that have previously been raised with NSWALC is that LALCs are not broadly representative of the community in some areas. Through the *Aboriginal Land Rights Act*, Aboriginal Land Councils have been established as the representative bodies for Aboriginal people in NSW for over 25 years. All Aboriginal people in NSW are able to join the Aboriginal Land Council in the area in which they: live; have an association with; or in an area for which they are an Aboriginal Owner.<sup>31</sup> In many cases LALC elected representatives, staff or members are also recognised traditional owners.

The previous Local Aboriginal Land Council elections held in 2007 saw the largest number of members ever registered. In addition, recent amendments to the *Aboriginal Land Rights Act* require that Aboriginal Land Councils focus on increasing the number of land council members by no less than 3% per year over the five years from 2007 until 2011.

As recognised in the DECC *Summary of Feedback from Statewide Forums: March to May 2008*, a main theme which arose was 'that it is good practice to work with and/ or

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<sup>31</sup> See section 54, *Aboriginal Land Rights Act*.

*through a LALC, and while not all stakeholders are going to be members of the LALC, they must be included in the cultural heritage process.*<sup>32</sup>

The Draft Community Consultation Requirements must recognise that LALCs are a resource which can be used by proponents to ensure that the community is aware of a particular project. The new policy should be opportunity to encourage capacity building within LALCs to ensure that they are effectively engaged and are fulfilling their culture and heritage roles under the *Aboriginal Land Rights Act*.

The Draft Community Consultation Requirements must support and encourage engagement and consultation with Aboriginal Land Councils, as the representative bodies for Aboriginal people in NSW established under the *Aboriginal Land Rights Act*.

The NSW Government, and DECC in particular, should work constructively with NSWALC to ensure effective engagement of the land council network around culture and heritage matters.

The feedback from Aboriginal communities and organisations is clear that communities themselves should be the ones to determine who speaks for Country, not the NSW Government or the proponent.<sup>33</sup>

The current Interim Requirements and the new Draft Requirements both rely on the proponent to compile the list of cultural knowledge holders.<sup>34</sup> This is a highly problematic process given that:

- The proponent is not required to explain how or why certain groups have been included or excluded from the list;
- Knowledge about who holds 'cultural knowledge' in a community is held by the Aboriginal community itself;
- Proponents have a potential conflict of interest that arises from the fact they stand to benefit by not including particular groups on the list, who may oppose the project;
- Similarly, there is a risk that legitimate individuals or groups will be excluded from lists because they require costs to support their participation in the process, for example travel to attend consultations, which the proponent may not be willing to pay; and

There must be greater transparency in the process for establishing lists of relevant Aboriginal groups and individuals who are consulted in relation to a project ('cultural knowledge holders'), by the proponent.

DECC must urgently work with peak Aboriginal bodies, such as NSWALC, to develop amendments to the Draft Community Consultation Requirements which establish a clear process for ensuring the Aboriginal community is involved in determining which groups can legitimately be included on the list of cultural knowledge holders for a project (beyond those groups with a statutory role).

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<sup>32</sup> See page 2 of *Summary*, as noted above.

<sup>33</sup> See page 2 of the *Summary of Feedback from State Wide Forums: March to May 2008*, as released by DECC in 2009.

<sup>34</sup> See section 4.1.3 (page 8) of the Draft Community Consultation Requirements.



In relation to the defined list of bodies which proponents must provide notice to, additional guidance is also needed in the policy as to *why* these groups are being contacted. This includes specific advice as to the culture and heritage role of Aboriginal Land Councils, native title holders and Aboriginal Owners.

The information in Section 5 of the Draft Requirements is not particularly helpful. It includes information about DECC and Aboriginal Land Councils, but not native title claimants or holders, or Aboriginal Owners. Section 5 also includes information about *Two Ways Together* Partnership Communities, which are described as including a '*representative Community Governance Body*' which '*will have links to existing Aboriginal community controlled organisations and information networks of decision-making and its membership will reflect the diversity within the Aboriginal community.*'<sup>35</sup>

The various committees established under *Two Ways Together* do not have a statutory role, and are not referred to in the *National Parks and Wildlife Act*. They do not reflect traditional structures and are not elected by the Aboriginal people of NSW. The current wording of the Draft Community Consultation Requirements is inappropriate in that it implies that those committees convened pursuant to *Two Ways Together* includes the correct people who are to be consulted on culture and heritage matters.

It is inappropriate to encourage consultation through government appointed committees that have no statutory or traditional role. Existing references in the draft policy to *Two Ways Together* Partnership Communities must be amended to reflect this.

The reasons why a proponent should notify the LALC, CMA and DECC must also be detailed in the policy. It is not clear in the current Draft Community Consultation Requirements if the proponent is required to contact these bodies because they represent the community, because they may have access to information about the location of culturally significant sites (through locally held site registers or maps), or because they have contact with other Aboriginal groups or individuals who are identified as authorised to speak for Country.

In the case of DECC, it is common for regional offices to keep informal lists of individual and organisations who have previously registered an interest in a project. These lists are not generally available, but are often provided to proponents to be contacted to help to identify the appropriate groups for a project.

The Draft Community Consultation Requirements must include information about why proponents are required to contact listed Aboriginal groups, such as Land Councils, including the culture and heritage role of such groups.

There must be increased transparency around the lists of Aboriginal groups and individuals provided by DECC offices to proponents to contact in relation to projects.

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<sup>35</sup> See page 14 of the Draft Community Consultation Requirements.

**c. Resourcing the consultation process and payment for site assessments**

The current Interim Requirements rely on the proponent to pay for any costs associated with the consultations and the development of the Aboriginal Cultural Heritage Assessment. A proponent will usually engage a consultant or archaeologist to manage the process and produce the final report which outlines the culture and heritage values and significance of an Aboriginal object or place.

The Draft Community Consultation Requirements also place the responsibility of resourcing consultations and undertaking assessment on the proponent, and state (at 4.2.6) that: *'depending on the nature, scale and complexity of the proponent's project, it may be reasonable and necessary for the proponent to:*

- a. *conduct additional project information sessions to ensure that all necessary information about the project is provided and enable registered Aboriginal parties to provide information about the cultural significance of object(s) and/or place(s) that may be present on the proposed project area; and*
- b. *create the opportunity for registered Aboriginal parties to visit the project site.'*

There are few other specific details in the policy about what the costs of consultation might involve. Given that the proponent manages the consultation process, it is important that decisions about who to consult are not made based on cost, particularly where this may lead to key organisations or individuals being effectively excluded from the process.

The Draft Community Consultation Requirements must provide more guidance regarding what are the 'reasonable and necessary' costs to be met by the proponent in relation to consultation. This includes recognition that particular organisations or individuals may require assistance with costs such as travel to be able to attend consultations.

The Interim Requirements currently note (at Part C) that: *'... registered stakeholders may lodge offers to provide Aboriginal assessment and advisory services to the proponent for the cultural assessment and/ or the archaeological assessment.'*

DECC has advised that one of the issues raised during the review of the Interim Requirements was a lack of clear delineation between resourcing the consultation process (for example the proponent organising a meeting) and paid advice from a representative of the Aboriginal community (for example through a site assessment).

To address this, the Draft Community Consultation Requirements emphasise that consultation should not be confused with employment (at 3.5). They clearly state that *'the consultation process involves getting the views of, and information from, the Aboriginal community and reporting on these. ... Consultation does not include the employment of Aboriginal community members as specialists to assess 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.'*<sup>36</sup>

NSWALC supports clarification in the Draft Community Consultation Requirements regarding the distinction between consultation and the employment of Aboriginal people or organisations based on their cultural knowledge to provide services.

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<sup>36</sup> See page 7 of the Draft Community Consultation Requirements.

It is clearly not the aim of the Draft Community Consultation Requirements to disrespect the cultural knowledge held by Aboriginal people or discourage payment for relevant services offered by Aboriginal people to help determine the significance of an Aboriginal object or place. Unfortunately there is a risk that legitimate opportunities for Aboriginal employment will be undermined by the current wording in the Draft Community Consultation Requirements.

The Interim Requirements include a section (at Part 3) entitled 'Provision of Aboriginal assessment and advisory services' which provides guidance to proponents as to the kinds of specialist services that Aboriginal people can provide as part of the archaeological assessment.

The Interim Requirements:

- List the skills and experience that may be provided by an Aboriginal person or organisation who has registered an interest in the project;
- Make it clear that it is the responsibility of the proponent to determine who and how many people to engage; and
- Note that DECC does *'not have or seek a role in the determination of fees or other terms of engagement for service providers'*, but encourages a transparency and competitive selection process.<sup>37</sup>

The Interim Requirements also state that the archaeological assessment *'should provide a balance of field experience and (Aboriginal) cultural knowledge.'*<sup>38</sup>

The Draft Community Consultation Requirements contain no similar guidance, and do not directly recognise the importance of respecting Aboriginal knowledge alongside archaeological knowledge, which is primarily offered through non-Aboriginal individuals or organisations.

It is essential that Aboriginal knowledge is recognised and respected in the new policy. Aboriginal people must not be expected to provide knowledge or services for which non-Aboriginal people would be paid a fee. Site assessments are also often an important source of income for LALCs and for Aboriginal elders.

The Draft Community Consultation Requirements must provide proper recognition of the specialist culture and heritage skills and knowledge offered by Aboriginal people.

The Draft Community Consultation Requirements must encourage fair and equitable payment for cultural and site assessment services by Aboriginal people, relative to specialised service providers offered by archaeologists and consultants.

Detailed guidance must be included in the Draft Community Consultation Requirements as to the kinds of services which Aboriginal people and organisations, such as the Land Council, can provide. This includes details as to what information is likely to be provided from a service such as a site assessment.

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<sup>37</sup> Page 8 of the Interim Requirements.

<sup>38</sup> At page 8 of the Interim Requirements.

The Draft Community Consultations Requirements re-enforce that *'the proponent is not obliged to employ registered Aboriginal parties to provide specialist assessment services'*.<sup>39</sup> (emphasis added)

During the consultations and information sessions on the proposed policy, the Aboriginal community made it clear that their strong preference is for site assessments to be conducted by Aboriginal people who are traditionally connected with an area or have relevant knowledge based on their connection to the community.

Such people are those mostly likely to register an interest in a project. It is important therefore that the Draft Community Consultations Requirements do not discourage employment of those Aboriginal people who have the most relevant knowledge and are most supported by the broader Aboriginal community to offer advice.

Generally, the Draft Community Consultation Requirements include some general information about Aboriginal people and culture, but little practical advice regarding the sorts of issues that may arise for proponents when they seek to engage the services of an Aboriginal organisation or individual who does business differently than a non-Aboriginal consultant or archaeologist.

The Draft Community Consultation Requirements should encourage proponents to prioritise engaging Aboriginal people who are traditional owners or are recognised to speak on culture and heritage issues by the relevant local community, such as LALC site officers.

The Draft Community Consultation Requirements should provide specific guidance for proponents regarding the employment of registered Aboriginal parties who have offered paid services, where those parties are also actively participating in the consultation process.

Proponents should be encouraged to engage Aboriginal service providers using transparent and competitive selection processes.

The Draft Community Consultation Requirements should be amended to include more practical details for proponents to assist them to effectively work with Aboriginal people and Aboriginal organisations.

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<sup>39</sup> At page 7 of the Draft Community Consultation Requirements.

**d. Protocols for the protection of confidential information and intellectual property**

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

The Draft Community Consultation Requirements do state, at 4.3.7, '*some information obtained from Aboriginal parties may be sensitive or have restricted public access. The proponent must, in consultation with registered Aboriginal parties, develop and implement appropriate protocols for sourcing and holding cultural information.*'

NSWALC supports the requirement that proponents must develop and implement appropriate protocols for sourcing and holding cultural information.

The issue of how the information provided by Aboriginal people through the Cultural Heritage Assessment process is used has been raised repeatedly as a major concern by the Aboriginal community.

In the *Summary* of feedback from the 2008 review of the Interim Requirements, DECC notes that '*there needs to (be) some guidance about what happens to knowledge and what knowledge is used for.*'<sup>40</sup> However, it is also noted that such issues are 'outside the scope of the Community Consultation Requirements'.<sup>41</sup>

NSWALC does not agree that protocols regarding the use of traditional knowledge are outside the scope of the Draft Community Consultation Requirements. The key purpose of the policy is to ensure that cultural information is gathered from Aboriginal people, and therefore it is essential that the Draft Community Consultation Requirements contain sufficient detail to ensure minimum standards are met by proponents regarding the handling of that knowledge, particularly where it relates to sensitive or confidential information.

The Aboriginal community must be fully informed about how their information will be used, and protected from the risk that their traditional knowledge will be used inappropriately or for a future purpose unrelated to the particular AHIP application to which the community has responded. The AHIP process must provide for positive local outcomes for Aboriginal culture and heritage and processes that do not cause conflict, disrespect or shame in communities.

The Draft Community Consultation Requirements must include clear and sufficient detail regarding access to, and use of, traditional knowledge provided by the Aboriginal community to the proponent and DECC.

In consultation with NSWALC and other stakeholders, a standard confidentiality agreement should be developed for use by proponents and consultants which addresses the purpose for which the registered Aboriginal parties have provided cultural information, and which make it clear on what terms the Aboriginal parties have consented that their information be used and stored.

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<sup>40</sup> At page 3 of the *Forum Summary*, available through the DECC website, as previously noted.

<sup>41</sup> See page 3 of the *Forum Summary*, as noted above.

Similarly, no direction is provided in the Interim Requirements or the Draft Community Consultation Requirements in relation to the intellectual property of the cultural information provided by Aboriginal people.

For example, there is no guidance as to what happens to the rights to use traditional knowledge where the information provided by the community has been included in the final report authored by a consultant or archaeologist, and paid for by the proponent.

Aboriginal people are required to provide their cultural information to prove the significance of a site, in the hope that it will be protected from damage. The Draft Community Consultation Requirements must not facilitate a process where the Aboriginal community is at risk of losing control of intellectual property over that knowledge as a result.

The Draft Community Consultation Requirements must make it clear that cultural heritage information provided by Aboriginal people to proponents, archaeologists or consultants in relation to an AHIP application remains the intellectual property of the relevant Aboriginal community or individual.

There may be examples where the Aboriginal community does not want to provide information about particular sites because this information is secret or sacred. Feedback from the consultations on the draft policy to date have raised concerns that the AHIP process places an unreasonable obligation on Aboriginal parties to reveal information that may be sensitive or secret.

Aboriginal parties should not be obliged to participate in a process that does not recognise and respect proper protocols regarding the knowledge they hold. It is important that proponents are made aware that a lack of willingness by the community to provide specific information about the location or features of particular sites does not indicate that the site is insignificant to that particular community.

Specific advice for proponents should be included in the Draft Community Consultation Requirements regarding how to proceed when the community is unable or unwilling to provide information about a particular site, on the basis that it is confidential or sensitive.

Once the information provided by the community is compiled into the final Cultural Heritage Assessment Report it is submitted to DECC by the proponent with the application for an AHIP.

DECC stores information about Aboriginal objects and places on the Aboriginal Heritage Information Management System (AHIMS). The AHIMS database has been developed primarily through information presented with applications for an AHIP. It does not represent a complete picture of Aboriginal sites in NSW, and has been criticised for including incorrect information.<sup>42</sup>

Additional resources are urgently required to improve the quality of information held by the AHIMS database.

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<sup>42</sup> Concern about reliance on AHIMS was raised repeatedly by archaeologists, consultants and Aboriginal community members during recent Information Sessions held by DECC in relation to the Draft Community Consultation Requirements (May-July 2009).

Information from AHIMS is available on request. While DECC has advised that there are detailed protocols around the access and use of information contained in AHIMS, these protocols are not easily accessible or well understood in the community.

At more than one of the recently held DECC Information Sessions (May – July 2009) Aboriginal people advised that they had chosen not to give DECC information about particular sites, because they did not want them recorded on the AHIMS database. Various Aboriginal groups also cited examples of being unable to readily access their cultural information which is currently held in AHIMS.

Part of the problem is that DECC has not developed guides regarding the consultation process or AHIPs specifically for the Aboriginal community. Guides tailored for the Aboriginal community are needed to identify potential issues and give advice as to what the community can do. The policies that do exist have been developed for proponents and DECC staff processing applications.

Urgent advice must be provided to the Aboriginal community regarding the storage and use of Aboriginal cultural information provided through the AHIP process by DECC, and the information stored on the AHIMS database.

Specific materials must be developed for the Aboriginal community which provide advice and guidance about how to engage with the AHIP consultation process, including how to ensure that traditional knowledge and cultural heritage is respected. These documents should be developed as a matter of urgency, so that they can be implemented at the same time as the final Community Consultation Requirements.

Concerns were also raised about the use of AHIMS by proponents at the initial stages of developing the Cultural Heritage Assessment. As indicated in the NSWALC Omnibus Submission, there is a concern that developers are being encouraged to undertake a limited 'desk top' style study of culture and heritage which relies on the information on AHIMS to determine whether any sites of significance exist.

It is essential that clear disclaimers are provided to proponents in relation to the use of AHIMS, which recognise the limitations noted above. Proponents should also be directed to other site or mapping databases which may be held locally by other bodies.

Advice must be included in the Draft Community Consultation Requirements that explains the limitations of the data currently available through AHIMS, and advises in more detail of other mapping and site databases proponents can refer to, including those held by LALCs and by Local Councils.

NSWALC is committed to reform of the current system which would return control of sites, and information about those sites, to Aboriginal people. NSWALC supports the development of an Aboriginal Cultural Heritage Bill (as discussed in Section 4 of the NSWALC Omnibus Bill Submission) which would address these issues.

In the meantime, NSWALC is committed to working with DECC to discuss options for better access for the Aboriginal community to the information held in the AHIMS database.



DECC has advised that it is committed to improving the quality and comprehensiveness of information contained in AHIMS. This includes the development of 'cultural landscape mapping', which focuses on recording the cultural heritage values of an area rather than just particular sites or objects.

NSWALC supports this initiative and is committed to working with DECC to better identify areas of significance to Aboriginal people for the purpose of improving their protection.

**e. Timelines and notice periods**

Stage 1 of the Interim Requirements and the Draft Community Consultation Requirements is to provide notice to the Aboriginal community about the planned project for which the proponent requires an AHIP application.

The Interim Requirements State that the proponent must provide notice in writing to the defined list of Aboriginal groups (as discussed above) and place a notice in the local paper. The new draft policy includes the same requirement (at 4.1). The Draft Community Consultation Requirements introduce a minimum description of the project to be included in the notification (at 4.2.3).

NSWALC supports the introduction of details into the Draft Community Consultation Requirements regarding the minimum information to be included in the notice of the project.

The Draft Community Consultation Requirements replace the obligation to provide notice in writing to the list of listed Aboriginal groups (LALCs, native title holders, Aboriginal Owners) to notice by telephone, email or writing (at 4.1.2). Only those groups which the proponent has determined are 'cultural knowledge holders' must be notified in writing.

NSWALC strongly opposes this change to the notice requirements. The Draft Community Consultation Requirements leave open the possibility that notice will be served on listed Aboriginal groups through a phone message or email that is not regularly accessed. The feedback from the Aboriginal community has been clear that there is support for increasing the requirements for notice, rather than reducing them.<sup>43</sup>

The listed Aboriginal groups, including LALCs, Aboriginal Owners and native title claimants and holders, must be advised in writing of projects. Telephone and email correspondence should be encouraged *in addition* to written notice.

DECC notes in the *Summary* of feedback from the review of the Interim Requirements (2008) that it was recommended by Aboriginal participants that notices be placed in the Indigenous press, as well as the local paper.<sup>44</sup> This recommendation is not reflected in the Draft Community Consultation Requirements.

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<sup>43</sup> See, for example, *Summary of Feedback from State Wide Forums*, at page 2: 'traditional owners should be automatically directly notified ... by mail... this should be posted and emailed (recognising that email is limited in regional areas). LALCs need to be resourced to do mail outs, to cover all costs of postage and administration'.

<sup>44</sup> See at page 2, *Summary*, as above.

The Draft Community Consultation Requirements should be revised to encourage proponents to place notices in the Indigenous press, in addition to the local paper of that particular area.

DECC should develop a centralised notice system, such as through its website, on which notices of all projects are included. This should operate in addition to the requirement for written notice and notice in the local paper by proponents.

The current process requires Aboriginal people not included in the list of recognised Aboriginal groups to search through various newspapers to ensure they have not missed a project notice, and then to register their interest within ten days.<sup>45</sup> (Note - the Interim Requirements note that it is ten *working* days, but the Draft Community Consultation Requirements only refer to ten days. DECC has advised that this is an oversight which will be amended in the final policy.)

Even for those groups which receive direct written notice, ten days is too short a period to ensure that the project can be discussed at an Aboriginal Land Council members' meeting. Ten days is also too short a period to allow for a mail-out to those members or relevant traditional owners, so that they can consider registering an interest for the project.

The period to register an interest in a project must be extended to allow for groups to contact their members or other Aboriginal people who may have an interest in the project.

Advice must be included in the Draft Community Consultation Requirements to ensure that proponents are aware of culturally appropriate consultation processes, including allowing enough time for the appropriate individuals who have knowledge of the area but do not live locally to be contacted by the listed Aboriginal organisations.

Following the registration of interest, the Interim Requirements state that the draft Cultural Heritage Assessment should be developed and provided to registered Aboriginal parties with at least 21 days to comment (at page 6).

The Draft Community Consultation Requirements also include the minimum 21 day period for the draft report, and also state that: '*the time allowed for comment on the draft report should reflect a consideration of the project's size and complexity*' (at 4.4.3).

NSWALC supports the inclusion of advice that the period provided for Aboriginal parties to comment on the draft Cultural Heritage Assessment Report should be longer than the minimum for larger and more complex projects.

The draft Cultural Heritage Assessment Report must be provided to listed Aboriginal groups, including LALCs, regardless of whether they have specifically registered an interest in the project.

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<sup>45</sup> See Ridge and Seiver 'Carriage – An Elder's Journey through the Courts' [2005] ILB 10, and Kennedy 'Operative Protection or Regulation of Destruction? The Validity of Permits to Destroy Indigenous Cultural Heritage Sites' [2005] ILB 57, both as available through [www.austlii.edu.au](http://www.austlii.edu.au).

However, NSWALC does not agree that 21 days is sufficient time to allow the community to review the draft Cultural Heritage Assessment Report.

At least 30 days must be provided to allow the Report to be considered at a Local Aboriginal Land Council meeting, and longer to ensure a written response.

The *Summary* of feedback from State Wide Forums provided by DECC<sup>46</sup> highlights the general concern about the current 21 day timeframe. The Summary states (at page 3): *'There needs to be mechanisms to enable longer timeframes for more complex activities, times and seasons when Aboriginal people are not as available for consultation, or for unforeseen circumstances that would affect a community's ability to respond, e.g. sorry business. Others felt that Aboriginal people need 8–9 weeks were needed to comment on the heritage assessment report. Stakeholders felt that consultants have up to 12 months to write a report, and then Aboriginal people have to respond straight away.'*

The 21 day period for comment on the draft Cultural Heritage Assessment Report must be extended to ensure the Aboriginal parties have sufficient time to respond.

Once feedback has been received on the draft Cultural Heritage Assessment Report, the Interim Requirements state that the proponent will finalise the report and submit it to DECC. The Draft Community Consultation Requirements introduce the obligation that the proponent provides the *final* Cultural Heritage Assessment Report to the community for comment.

This is an important positive change. One of the key problems with the current policy is that a proponent may develop a final report which does not reflect the views of the Aboriginal community. There is no formal process for an Aboriginal group to submit a 'dissenting report' to DECC. The community must contact DECC directly to find out when the final report has been submitted and to put their views forward, hopefully before the Director General of DECC or her delegate has made the decision to issue the AHIP.

NSWALC strongly supports the new requirement that registered Aboriginal parties be provided with a copy of the *final* Cultural Heritage Assessment Report.

The Draft Community Consultation Requirements make it clear that consultation is not a 'sign off' process. The Aboriginal community is not required to approve the final Cultural Heritage Assessment Report or verify that it actually reflects the advice that was provided about the significance of a site or area.

A requirement should be inserted that the proponent notes whether their final report is supported by relevant Aboriginal parties.

The proponent or DECC must be required to advise the Aboriginal community when the final report has been submitted, to enable the Aboriginal community to make separate representations to DECC about the content of the report, as required.

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<sup>46</sup> Available on the DECC website  
<http://www.environment.nsw.gov.au/resources/cultureheritage/09280summfeedback.pdf>

The Draft Community Consultation Requirements replace the obligation on the proponent to provide a copy of the report to registered Aboriginal parties and listed groups, such as the Local Aboriginal Land Council, with an obligation that the proponent provide 'access' to the reports (at 4.4.2).

The amendment is very concerning as it is not clear what would qualify as 'access'. Would placing the reports on an organisation's website or making a copy available from an office, for example, be considered access? DECC must ensure that access includes providing hard copies of the report to each of the registered Aboriginal parties and listed groups.

The Draft Community Consultation Requirements must be clear that providing 'access' to the draft and final Cultural Heritage Assessment Reports means providing a hard copy of the report directly to all Aboriginal parties.

#### **f. Methodology**

Both the current Interim Requirements and the Draft Community Consultation Requirements direct the proponent to provide an opportunity for the registered Aboriginal parties to influence how the Cultural Heritage Assessment will be undertaken (the methodology).

The Interim Requirements state (at page 6) that after notice has been provided of the project, the next stage is preparation for the Cultural Heritage Assessment. As part of this stage: *'The (registered) stakeholders are provided with a reasonable time (at least 21 days) to review and provide feedback (on the proposed methodology for the cultural and archaeological assessment), including identification of issues/ areas of cultural significance that might affect, inform or refine the methodology. Comments should be provided in writing, or may be sought verbally in a meeting with registered respondents.'*

The Draft Community Consultation Requirements have replaced this one stage with two: 'Stage 2- Presentation of proposed project information' and 'Stage 3 – Gathering information about cultural significance'. For Stage 3 the Draft Requirements state (at 4.3.2 and 4.3.3) that the: *'proponent must present/ and or provide the proposed methodology for the cultural heritage assessment to the registered Aboriginal parties (and) the registered Aboriginal parties have the opportunity to review and provide feedback to the proponent.'*

Time allowed for comments is not mentioned.

NSWALC strongly opposes the removal of the 21 day period for registered Aboriginal parties to provide feedback on how the Cultural Heritage Assessment will be undertaken. The Draft Community Consultation Requirements must specify a minimum time period for the Aboriginal community to comment on the proposed methodology for assessing the significance of an Aboriginal object or place.

Also of serious concern is the removal of the reference in the Interim Requirements to holding meetings with registered Aboriginal parties. Instead the Draft Community Consultation Requirements refer to the responsibility of the proponent to 'present' the information. There is no guidance as to what may constitute an effective presentation, or any requirement that the presentation be delivered directly.

Although the Draft Community Consultation Requirements are designed to enable effective consultation (see for example the 'Consultation Guiding Principles' at 1.3), the practical advice as to how this should be undertaken in Stages 2 and 3 implies one way communication, and risks encouraging consultation which does not effectively engage the Aboriginal parties.

Information about the process for presenting information and gaining feedback on the proposed methodology at Stages 2 and 3 of the Draft Community Consultation Requirements must be revised to make it clear that proponents must engage in genuine discussion with Aboriginal parties to develop and secure their support regarding the process for undertaking the Cultural Heritage Assessment Report.

The presentation of project information must be undertaken as a two way dialogue which respects the role of Aboriginal people and focuses on negotiation to develop agreed outcomes.

It is also essential that the Draft Community Consultation Requirements place the obligation on proponents to present information to registered Aboriginal parties in a culturally appropriate manner. This is most likely to include holding face-to-face meeting, in a location that is readily accessible to the relevant Aboriginal groups, in which they feel comfortable to discuss the issues freely, and which allows interactive discussion.

The Draft Community Consultation Requirements do state (at 4.2.6): *'Depending on the nature, scale and complexity of the proponent's project it may be reasonable and necessary for the proponent to conduct additional project information sessions... and create the opportunity for registered Aboriginal parties to visit the project site.'*

This insertion into the proposed policy is positive as it recognises the importance of providing opportunities for Aboriginal parties to discuss issues regarding sites 'on Country'. However, this section needs to be considered in light of the limitations implied by the other wording noted above.

The Draft Community Consultation Requirements must provide clearer guidance as to how to effectively and appropriately present information to the Aboriginal parties. In nearly all cases this will include face-to-face meetings, and may include the opportunity to discuss the project at a meeting held on Country.

#### ***g. Roles and responsibilities***

The current Interim Requirements and the Draft Community Consultation Requirements place the obligation on the proponent of managing the consultation process and developing the Cultural Heritage Assessment.

The Interim Requirements also outline in brief the roles of the other parties (at page 4):

- ***'Aboriginal community:*** *Members of the Aboriginal community are the primary determinants of the significance of their heritage. They may participate in the process through comment on the assessment methodology, contributing cultural knowledge and commenting on cultural significance ....*
- ***DEC (now DECC):*** *Is the decision-maker; reviews information from the proponent ... and makes a decision ...*
- ***Service providers:*** *Various parties with specialist skills or knowledge can be engaged by the proponent to help them with their responsibilities.'*

The Draft Community Consultation Requirements also outline the roles of the parties (at Part 5) including:

- Noting that the Director General's decision making power regarding AHIPs is, in practice, delegated to staff working in DECC's Environmental, Protection and Regulatory Group; and
- Providing additional detail about Aboriginal culture and history.

However, the statements which have been inserted regarding respect for Aboriginal people and their culture are undermined by other new provisions in the policy which imply that it is Aboriginal peoples' responsibility to actively accommodate the interests of the proponent. This is highly problematic given the proponent is seeking a permit to damage or destroy an Aboriginal object or place.

The Draft Community Consultation Requirements state (at 5.2): *'Aboriginal people should develop an awareness of the commercial environment and constraints in which proponents operate, including an appreciation and awareness of the priorities and challenges in project planning, financial and management issues.'*

The role of Aboriginal people is not to accommodate the economic interests of the proponent. The role of Aboriginal parties is to work with the proponent and other stakeholders such as DECC to ensure that the significance of Aboriginal places and objects is understood and protected or, in the case of unavoidable impact, any harm to that heritage is effectively mitigated.

All references in the Draft Community Consultation Requirements to obligations on Aboriginal people to accommodate the commercial and planning interests of the proponent must immediately be removed.

The Draft Community Consultation Requirements must be redrafted to recognise that the interests and obligations of the Aboriginal parties relate to the protection of Aboriginal cultural heritage.

Also highly problematic is the statement in the Draft Community Consultation Requirements (at 4.2.5) that: *'It is the responsibility of the registered Aboriginal parties to attend and participate in all relevant consultation proceedings.'*

Read with those sections discussed above, this also risks reducing the consultation to a 'tick a box' exercise. The section could be read to imply, for example, that a proponent has fulfilled their role by organising a meeting, even if no Aboriginal people attend.

It is important that the draft policy recognises that the goal is not just to give Aboriginal people the opportunity to comment about the impact of a project - it is to gain information to assess the cultural heritage significance of places and objects. To do this, proponents must succeed in effectively engaging the relevant Aboriginal parties.

Revisions to the Draft Community Consultation Requirements are required to ensure that the role of proponents is to *successfully* engage relevant Aboriginal parties in the consultation process.

Finally, an overarching and common criticism with the current consultation process is that it is driven by, and for, proponents. The current and proposed Requirements provide

no power for Aboriginal people to control the process, as they rely on the proponent to determine what to do with the advice or information he or she receives from the community.

There is no requirement, for example, for Aboriginal people to *consent* to the proposed methodology or to approve that the final Cultural Heritage Assessment Report adequately captures their views on the cultural significance of a site.

Once the final reports and the AHIP application have been submitted to DECC there are no formal processes for Aboriginal people to make representations and no requirement for Aboriginal people to be involved in determining the terms on which a permit is issued.

The Draft Community Consultation Requirements do require the proponent to discuss options to mitigate any potential damage to a site with the Aboriginal community, as part of the consultation process. Also, DECC Operational Policy requires staff working in the Environmental Protection and Regulatory Group to seek to mitigate damage to Aboriginal objects and places where possible through the imposition of conditions on a permit.<sup>47</sup>

However, there is no requirement for DECC to consult directly with the Aboriginal parties to confirm that the conditions they plan to impose will effectively mitigate or reduce the planned damage.

The processes outlined in the current Interim Requirements, the Draft Community Consultation Requirements and related operational policies therefore undermine the principle that 'Aboriginal people are the primary determinants of the culture and heritage' which the Draft Community Consultation Requirements and a range of other DECC policies including the *DECC Corporate Plan* state that DECC is trying to uphold.<sup>48</sup>

The Draft Community Consultation Requirements and related DECC operational policies must be generally revised to recognise a more active role for Aboriginal people in the decision making process. This includes ensuring direct input into the conditions on which a permit is to be issued, to ensure that any unavoidable damage to an Aboriginal site or object is mitigated.

As noted above, these comments provided by NSWALC in response to the Draft Community Consultation Requirements are designed to improve the recognition of Aboriginal peoples' culture and heritage rights and the protection of Aboriginal cultural heritage.

While the *National Parks and Wildlife Act* places an obligation on the Director General to protect Aboriginal culture and heritage (as noted at 2.2.1 of the Draft Requirements) it also provides the mechanism for the Director General to manage damage or destruction to identified Aboriginal objects and places through the issuing of permits.

NSWALC supports the development of clear policies which outline how the Director General, and her delegates, exercise the power to issue permits under the Act.

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<sup>47</sup> See page 16, DECC *Operational Policy – Protecting Aboriginal Cultural Heritage* (February 2009) available at <http://www.environment.nsw.gov.au/resources/cultureheritage/09122ACHOpPolicy.pdf>

<sup>48</sup> See pages 3-4 of DECC Corporate Plan, as noted above



There is much scope however, for DECC to develop policies which better prioritise the protection of Aboriginal cultural heritage through the permit process, within the framework of the *National Parks and Wildlife Act*.

This includes amending the Draft Community Consultation Requirements and related operational policies to reflect that the goal is to protect Aboriginal cultural heritage, and that damage or destruction to places and objects should only be permitted where it is unavoidable.

The purpose and intended outcomes of the Draft Community Consultation Requirements must be amended to reflect that the aim is to afford the highest possible protection to Aboriginal culture and heritage, rather than only to 'facilitate positive Aboriginal cultural heritage outcomes'.

The aim of the draft policy must also be amended to recognise and respect that Aboriginal people are the primary determinants of their culture and heritage, rather than merely to 'involve' Aboriginal people in the heritage impact assessment process.

#### ***h. DECC policy context***

The current legislative and policy context in NSW addresses Aboriginal culture and heritage in a complex, inefficient and often unintegrated manner.

DECC itself has more than twenty policies, guidelines and regulatory tools relating to Aboriginal cultural heritage. Many of these are mapped out in DECC's *Operational Policy – Protecting Aboriginal Cultural Heritage*.<sup>49</sup> The various culture and heritage policies are managed by different units of DECC, including the Culture and Heritage Division, the Environment Protection and Regulation Group and the Parks and Wildlife Group.

Although some DECC policies acknowledge that a holistic approach to Aboriginal cultural heritage is needed, in practice this is not often reflected in the policy making process.

Importantly, many of the policy documents are not made publically available. More clarity and transparency is needed about the policies which guide how DECC manages, assesses and protects Aboriginal cultural heritage and how DECC policies relate to and interact with other agencies' policies and relevant legislation.

All DECC policies and guidelines addressing Aboriginal culture and heritage is should be made publically available and readily accessible through the DECC website.

#### **More information**

For more information about this submission and a copy of the related NSWALC Omnibus Submission, which discusses the operation of culture and heritage provisions in the *National Parks and Wildlife Act* in more detail, visit [ww.alc.org.au](http://ww.alc.org.au) or call 9689 4444.

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<sup>49</sup> See page 22 DECC *Operational Policy – Protecting Aboriginal Cultural Heritage*, last accessed 31/07/2009, available at: <http://www.environment.nsw.gov.au/resources/cultureheritage/09122ACHOpPolicy.pdf>.