

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

fact sheet



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

Proposed Changes to Aboriginal Heritage Impact Permits

FACT SHEET



Culture and Heritage

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

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

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

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

What are Aboriginal Heritage Impact Permits?

Aboriginal Heritage Impact Permits (AHIPs) are permits that allow a person to move, disturb, excavate, damage, deface or destroy Aboriginal objects or places.

An AHIP may be required for developments including major construction works such as the building of highways, or more small scale works, such as the erection of fences where ground disturbance and/or ground clearance activities are required.

AHIPs are currently issued by the Director General of the NSW Department of Environment and Climate Change (DECC) under sections 87 and/or 90 of the *National Parks and Wildlife Act 1974* (NSW).¹

Who decides whether or not to issue an AHIP?

The Director-General of DECC is responsible for issuing AHIPs after assessing whether a proposed activity will impact on an Aboriginal object or place. In practice, the Director General delegates the processing of AHIP applications to DECC staff working in its Environment Protection and Regulation Group.

How many AHIPs are issued?

State-wide data about the issuing of AHIPs is not publically available.

It is known however that around 900 AHIPs have been issued by DECC since 1990².

This is an average rate of 3 per week.³

What is the NSW Government proposing to change?

DECC has released the *National Parks and Wildlife Amendment Bill* (also known as the **Omnibus Bill**) which proposed a number of changes to the way that AHIPs are issued.

DECC has also released new draft *Community Consultation Requirements for the Issuing of AHIPs*, which provide an outline for persons applying for an AHIP regarding who they are required to consult with in the Aboriginal community.

DECC has advised that the changes will 'streamline' the process and will 'reduce red tape'.

For example, the *Omnibus Bill* removes the reference to s87 and s90 consents, and replaces them with the single Aboriginal Heritage Impact Permit (AHIP).

The changes will also allow for permits to be issued for 'classes' of objects, classes of persons or particular types of activities, and for the issue of single permits over larger areas, such as subdivisions.

Must the Aboriginal community be consulted about damage to culture and heritage?

Currently, DECC policies require that an applicant for an AHIP must consult with the local Aboriginal community and report on the results of the consultation to DECC.

It is proposed that the Minister be given the power to create regulations which outline who should be consulted in relation to AHIPs.

For more information on consultation see the *NSWALC Culture and Heritage Fact Sheet 6: Draft Community Consultation Requirements for Aboriginal Culture and Heritage*.

What must be considered before an AHIP is granted or refused?

Currently, the decision to issue an AHIP is made by the Director General of DECC based on DECC's policies including the *Guide to Determining and Issuing Aboriginal Heritage Impact Permits*⁴ and *Operational Policy: Protecting Aboriginal Cultural Heritage*⁵.

The *Omnibus Bill* proposes to expand Part 6 of the *National Parks and Wildlife Act* to prescribe the matters that the Director General must consider in the Act rather than in DECC policies.

A new list of factors that must be considered by the Director General (or her delegate) is proposed⁶.

The list of factors includes 'the results of any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place that are the subject of the permit'.

Importantly, it is proposed that the Director General is not required to consider any matters other than those in the list of factors.

The proposed list does not include a requirement for the Director General to consider independent representations made by Aboriginal people, for example if they do not agree with the way that the applicant has reported their feedback at the consultations.

Do AHIPs allow for conservation and protection outcomes?

Yes. The Director General may issue an AHIP with certain conditions. Such conditions may include requirements for applicants to undertake certain activities such as developing Heritage Management Plans, salvaging artefacts, or only undertaking development in certain areas.

Do all developments require an Aboriginal Heritage Impact Permit?

No. An AHIP is only required if there will be an impact, or potential impact, on an Aboriginal object or place.

Also, developments under **Part 3A** of the *Environmental Planning and Assessment Act 1979* do not require an AHIP. However, the Director General of the Department of Planning often requires proponents to assess Aboriginal cultural heritage.

The Department of Planning is currently reviewing its draft guidelines for Aboriginal community consultation for Part 3A developments.

Can AHIPs be changed?

The proposed changes to the *National Parks and Wildlife Act* will make it easier for the Minister for the Environment and Climate Change to vary, transfer or suspend an AHIP.

The applicant is provided an opportunity to respond when an application is to be varied.

It is not proposed that the Aboriginal community be notified if an application is to be varied.

Can a person appeal the decision to grant an AHIP?

There is currently a process for a merits appeal⁷ to the Minister for Aboriginal Affairs by a person whose application is refused or by a person who is 'dissatisfied' with any condition of an AHIP.

The proposed changes to the *National Parks and Wildlife Act* will provide that only a person 'aggrieved' can appeal a decision to refuse an AHIP. There is no avenue of merit appeal for Aboriginal people to the Minister or in the Land and Environment Court.

There is no general right for Aboriginal people to appeal the destruction of their culture and heritage.

Cases can be brought against a decision by the Director General to issue an AHIP in the Land and Environment Court, in limited circumstances.

To date only a small number of cases brought by Aboriginal people to stop an AHIP have been successful.

The proposed changes to the *National Parks and Wildlife Act* would introduce a time limit of three months from the date of the issue of the permit for any challenge to the validity of an AHIP, which is a much shorter time frame.

There is no requirement in the Act for DECC to notify Aboriginal people or groups who participated in consultations when the decision is made to issue an AHIP.

Where can I get more information about the proposed changes?

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

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

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

Can I have a say about the *National Parks and Wildlife Amendment Bill 2009*?

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

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

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

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

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

Footnotes

- 1 A current version of the *National Parks and Wildlife Act 1974* can be accessed online at NSW Legislation: <http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22National%20Parks%20and%20Wildlife%20Act%201974%20No%2080%22&nohits=y>
- 2 See Question to Notice (NSW Legislative Council) number 0127, to the Minister representing the Minister for the Environment, answered on 31 July 2007, and printed Questions & Answers Paper No. 16, and Question to Notice (NSW Legislative Council) number 2091, to the Minister representing the Minister for the Environment, answered on 28 October 2008, and printed in Questions & Answers Paper No. 71. Copies are available from www.parliament.nsw.gov.au
- 3 According to the Environmental Defender's Office NSW, 2007, *Caring for Country: A Guide to Environmental Law for Aboriginal Communities*, page 22: "It is very rare for an application for a 'consent to destroy' to be rejected. However, a consent to destroy is often a last resort and follows extensive negotiation."
- 4 Available on the Department of Environment and Climate Change website at: <http://www.environment.nsw.gov.au/resources/cultureheritage/09121AHIPGuide.pdf>
- 5 Available on the Department of Environment and Climate Change website at: <http://www.environment.nsw.gov.au/resources/cultureheritage/09122ACHOPPolicy.pdf>
- 6 Section 90K of the proposed *Omnibus Bill* sets out the factors to be considered in making determinations regarding permits.
- 7 A 'merit appeal' is a fresh decision on the facts of a case.