



**SUBMISSION IN RESPONSE TO
DRAFT COMMUNITY CONSULTATION REQUIREMENTS FOR PROPONENTS
(PART 6 OF THE *NATIONAL PARKS AND WILDLIFE ACT*)**

EXECUTIVE SUMMARY

Date: 31 July 2009

The NSW Aboriginal Land Council (**NSWALC**) is the peak representative body for Aboriginal people in NSW. Aboriginal Land Councils have the responsibility under the *Aboriginal Land Rights Act 1983* for the promotion and protection of Aboriginal culture and heritage.

This submission has been prepared by the Land, Policy and Research Unit of NSWALC in response to the draft Department of Environment and Climate Change (DECC)¹ policy entitled *Aboriginal Cultural Heritage: Draft Community Consultation Requirements for Proponents – Part 6 of the National Parks and Wildlife Act* (the **Draft Community Consultation Requirements**).

The *National Parks and Wildlife Act* (NPWA) is the primary law for the management of Aboriginal culture and heritage in NSW. The Act is administered by DECC. Under Part 6 the Director General is able to issue permits which authorise damage or destruction to Aboriginal objects and places. These permits are known as **section 87** and **section 90 consents**, or Aboriginal Heritage Impact Permits (**AHIPs**).

DECC policy outlines what consultation must take place with the Aboriginal community before such a permit is issued. The *National Parks and Wildlife Act 1974: Part 6 Approvals - Interim Community Consultation Requirements for Applicants* (the **Interim Requirements**) is the current policy which outlines who should be consulted by proponents who are applying for a permit. It is proposed that the Draft Community Consultation Requirements replace the Interim Requirements.

DECC released the Draft Community Consultation Requirements for public comment in May 2009. At the same time, proposed amendments to the *National Parks and Wildlife Act* were released which would also impact on how permits are issued and who is consulted. DECC has advised that aspects of the new Draft Community Consultation Requirements will be adopted into regulations, to be presented to the NSW Parliament with the amendments to the *National Parks and Wildlife Act* in September 2009.

¹ As of 27 July 2009 the Department of Environment and Climate Change became the Department of the Environment, Climate Change and Water (DECCW).

The attached submission outlines in detail NSWALC's response to the Draft Community Consultation Requirements. NSWALC's response to the proposed amendments to the *National Parks and Wildlife Act* is outlined in a separate submission.

Both submissions are available to download from the NSWALC website at www.alc.org.au. Also available from the NSWALC website are six Culture and Heritage Fact Sheets which compare in brief the current law and policies, and the proposed changes.

SUMMARY OF RECOMMENDATIONS

Key Recommendations:

1. NSWALC has serious concerns about the Draft Community Consultation Requirements in their current form. The proposed policy will not address the problems with the existing 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.
2. NSWALC strongly opposes the adoption of all, or part, 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.

3. 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*.

Reform of the current system

4. NSWALC supports urgent reform of the current system for the management of Aboriginal cultural heritage, and calls on the NSW Government to establish an independent inquiry into the protection of Aboriginal cultural heritage in NSW.
5. As the only remaining state without independent legislation to protect Aboriginal cultural heritage, NSWALC joins with a number of other peak Aboriginal and environmental organisations in calling for the urgent establishment of an Aboriginal Cultural Heritage Bill for NSW.

Permits issued through the *National Parks and Wildlife Act*

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

Community input into the Draft Requirements

7. 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 is essential to ensuring that the Draft Community Consultation Requirements are supported by the Aboriginal community.

Who should be consulted

8. NSWALC strongly opposes the 'open consultation' approach of the current Interim Requirements and new Draft Community Consultation Requirements.
9. Consultation on culture and heritage matters should prioritise the views of organisations with statutory and traditional responsibilities for culture and heritage:
 - 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.

10. NTS Corp must continue to be included in the list of organisations to be given notice of a project by the proponent.
11. Additional guidance and clear processes must be included in the Draft 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.'
12. The Draft Community Consultation Requirements must support and encourage engagement and consultation with Land Councils, as the representative bodies for Aboriginal people in NSW established under the *Aboriginal Land Rights Act*.
13. 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.
14. 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.
15. 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).
16. 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.

17. 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.
18. 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.

Resourcing the consultation process and payment for site assessments

19. 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.
20. 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.
21. The Draft Community Consultation Requirements must provide proper recognition of the specialist culture and heritage skills and knowledge offered by Aboriginal people.
22. 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.
23. 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.
24. 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.
25. 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.
26. Proponents should be encouraged to engage Aboriginal service providers using transparent and competitive selection processes.
27. 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.

Protocols for the protection of confidential information and intellectual property

28. NSWALC supports the requirement that proponents must develop and implement appropriate protocols for sourcing and holding cultural information.
29. 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.
30. 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.
31. 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.
32. 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.
33. Additional resources are urgently required to improve the quality of information held by the AHIMS database.
34. 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.
35. 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.
36. 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.

Timelines and notice periods

37. 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.
38. 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.

39. 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.
40. 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.
41. 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.
42. 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.
43. 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.
44. 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.
45. 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.
46. NSWALC strongly supports the new requirement that registered Aboriginal parties be provided with a copy of the *final* Cultural Heritage Assessment Report.
47. A requirement should be inserted that the proponent notes whether their final report is supported by relevant Aboriginal parties.
48. 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.
49. 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.

Methodology

50. 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.
51. 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.

52. 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.
53. 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.

Roles and responsibilities

54. 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.
55. 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.
56. 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.
57. 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.
58. 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'.
59. 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.

DECC policy context

60. 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

Each of the recommendations above are outlined in more detail in the following submission. For more information about this submission contact the Land, Policy and Research Unit of the NSW Aboriginal Land Council on phone 02 9689 4444.