

From: Jenna Weston [honestly_java@yahoo.com]
Sent: Monday, 6 July 2009 9:22 PM
To: C&HD NPW Bill Consultation Mailbox
Subject: Response to Proposed Due Diligence Guidelines and National Parks and Wildlife Amendment Bill 2009

Dear Sir/Madam,

Thank you for providing me with the opportunity to make a submission in response to the proposed Due Diligence Guidelines and National Parks and Wildlife Amendment Bill 2009. I am an archaeologist who has been working in heritage consultancy in NSW for the last four years, predominantly undertaking Aboriginal heritage assessments. I provide my response in order of the particular sections of the text provided on the DECC website at <http://www.environment.nsw.gov.au/legislation/DueDiligence.htm> (for Due Diligence) and <http://www.environment.nsw.gov.au/legislation/SummaryNPWActAmendment.htm> (for the NPW Amendment Bill).

Due Diligence

There are several sections in this document (for example, "Defences against prosecution for harming Aboriginal objects" and "How to satisfy due diligence requirements") which refer to codes of practice, which are to be adopted under the Amendment's regulations, and which are to provide due diligence guidance tailored for specific types of activities or industries. It is noted that no such codes have yet been adopted. I request to be consulted (or that the NSW branch of the Australian Association of Consulting Archaeologists Incorporated [AACAI] be consulted) regarding the development and drafting of such codes of practice. I believe that it is important that any such codes refer to the fact that the services of a heritage professional who is experienced/qualified to undertake Aboriginal heritage assessments may be required to fulfil due diligence. As it stands, there is no mention of heritage professionals undertaking due diligence on behalf of those who may impact Aboriginal objects, although we are predominantly the ones who undertake such processes and are qualified to do so.

In the section "Some activities may not constitute 'harm' to Aboriginal objects", there is a reference to "low impact activities", which are yet to be determined. I request to be consulted (or the NSW branch of AACAI be consulted) regarding the development and drafting of what constitutes "low impact activities".

In the section "Advantages of due diligence", it is stated that if a person already knows or believes that an activity they propose to carry out will harm Aboriginal objects, then they do not need to go through the due diligence process; they should apply to the DECC for an AHIP. This seems to imply that any person can search the AHIMS, find registered sites within their proposed development area, and then apply to DECC for an AHIP without any Aboriginal heritage assessment of the area to determine the potential for previously unidentified sites or to determine the significance of the registered sites. I suggest that another sentence should be added here which says that an Aboriginal heritage assessment undertaken by a qualified heritage professional may be necessary for completing an AHIP application.

In the section "How to satisfy due diligence requirements", reference is made to Regional Aboriginal Cultural Heritage Assessments. I would appreciate clarification on the nature of these assessments, as I have not previously heard of them.

In the diagram on the due diligence process, I suggest that the first box should have the wording “Knowledge of Aboriginal objects through Environmental Impact Assessment or *similar* process”, so as not to give the impression that appropriate knowledge of Aboriginal objects can be obtained through just any lay person’s research, rather than through a professional Aboriginal heritage assessment and consultation with the local Aboriginal community. I also suggest that in the two boxes on the bottom of the diagram labelled “Commence investigations for AHIP”, something should be added along the lines of “eg. Aboriginal heritage assessment”. This would again clarify that AHIP applications require an appropriate and professional determination of the potential for previously unidentified sites, and the significance of sites (see above).

In the sections “1. Activities causing no additional surface disturbance” and “2. (a) Developed area or previously disturbed area”, where “use and maintenance” of existing infrastructure, etc is referred to, it may be helpful to specify that this does not include expansion or widening of development footprints (for example, duplication of railway lines or roads). Also, in section “2. (a) Developed area or previously disturbed area” it is stated that “land that has been subject to previous significant disturbance is less likely to contain Aboriginal objects (or objects are less likely to be undisturbed) than largely undisturbed areas”. This seems to imply that objects that have been disturbed are not significant, but in fact they may still be significant, and in any case they are still protected under the NPW Act. I suggest that it should be clarified that even disturbed Aboriginal objects require an AHIP prior to any further disturbance or damage.

In Section “2. (b) Undisturbed area”, it is stated that “Where an AHIMS search indicates that there are objects present, it would be prudent to do further investigation to determine whether an AHIP application is required”. I suggest that it would be helpful to provide some guidance as to what such further investigation might entail, such as engaging the services of a qualified heritage professional to undertake an Aboriginal heritage assessment. Further, this section also states “Note that when an AHIMS search indicates the presence of objects and a person consequently makes an AHIP application, the due diligence process has ended.” This again gives the impression that any person can search the AHIMS, find registered sites within their proposed development area, and then apply to DECC for an AHIP without any Aboriginal heritage assessment of the area to determine the potential for previously unidentified sites or to determine the significance of the registered sites. I suggest that another sentence should be added here which says that an Aboriginal heritage assessment undertaken by a qualified heritage professional may be necessary for completing an AHIP application. It may also be helpful to suggest that a qualified heritage professional may be required to ensure appropriate answers to the “Questions to consider” at the end of this section.

In the section “What do I do with the results of due diligence?”, the options given are somewhat misleading in terms of complying with the NPW Act. For example, option 2 seems to imply that a valid option for a developer is to proceed with their development activity without seeking an Aboriginal heritage impact permit, even if sites may be present (either registered or previously unidentified). This may result in their breaching the Act, and being subject to penalty. I would suggest the following additions to clarify the options, particularly given the subsequent statement that

DECC will not provide advice to proponents on which option to choose as part of their due diligence obligations:

1. Amend the proposed activity to avoid harming Aboriginal objects *or landscape features in which such objects are likely to occur* and then proceed without seeking an Aboriginal heritage impact permit.
2. Proceed with the activity without seeking an Aboriginal heritage impact permit, *if there are no Aboriginal objects or landscape features in which such objects are likely to occur, or if no significant surface impact is to occur.*

Further, in the last paragraph of this section, it may provide further certainty to proponents to clarify that, although DECC will not provide advice to proponents on which option to choose as part of their due diligence obligations, qualified heritage professionals may be able to assist them in making an appropriate decision.

Finally, the section on "Record keeping" states that it is strongly recommended that a person keeps a record of the actions they took and the decisions they made in following the due diligence process. This seems to be misleading, as it implies that people will have a appropriate defence against prosecution, even if their due diligence process is considered inadequate for determining whether impact to Aboriginal objects was likely to occur; for example, if they neglected to have any professional Aboriginal heritage assessment undertaken. For this reason in particular, I would suggest making the clarifications mentioned throughout my letter regarding the necessity of professional heritage services for making an appropriate determination of impact on Aboriginal heritage.

National Parks and Wildlife Amendment Bill 2009

I understand that the Amendment may make regulation for general due diligence guidelines and codes of practice for certain industries or classes of activity. As per my comments above regarding the due diligence guidelines, I request to be consulted (or that the NSW branch of AACAI be consulted) regarding the development and drafting of codes of practice.

I note that AHIPs are to become more flexible under the Amendment. I assume that this will involve some changes to the AHIP application form, and I request to be consulted (or that the NSW branch of AACAI be consulted) regarding any such changes.

It seems that the Amendment will also allow for archaeological excavation work to be undertaken without first obtaining a Section 87 permit, and that any such excavation would be guided by a code of practice. I request to be consulted (or that the NSW branch of AACAI be consulted) regarding the development and drafting of such a code of practice.

I am happy to discuss any of my comments with you, should you find that useful. My contact details are provided below. Thank you again for the opportunity to respond to the proposed Due Diligence Guidelines and National Parks and Wildlife Amendment Bill 2009, and I hope that my comments are helpful and that you will give them due consideration.

Kind regards,

Jenna Weston

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