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**Re: National Parks and Wildlife Amendment Act 2009 Submission**

Dear Sir/Madam,

Thank you for the opportunity to comment on the content of the proposed *National Parks and Wildlife Amendment Act 2009* (NPW Amendment Act). The following letter and attachment present my comments on the proposed amendment in addition to two guidelines prepared by the Department of Environment and Climate Change (DECC), which were also advertised for public comment and as supporting documents to the Amendment Act.

I am a consulting archaeologist who is employed by a private firm based predominately in NSW in both Aboriginal and historical archaeology and heritage. Amongst other organisations I hold associate membership of the Australian Association of Consulting Archaeologists Inc. I have worked with members of the Aboriginal community of NSW and in Victoria on a variety of projects and offer the following comments on Part 6 of the draft NPW Amendment Act 2009, the Due Diligence Guidelines (2009) and the Aboriginal Cultural Heritage Draft Community Consultation Requirements for Proponents (May 2009) (Draft Community Consultation Guidelines). While I support the submission made by the AACAI for these matters, I felt it necessary to lend further support to some of these matters. These are summarised below and further points are explained in the attached document:

***NPW Amendment Act 2009***

- Proposed Section 86(1), (2) and (3)
- Proposed Section 86(8) - the definition of the term 'harm'
- Proposed Section 87(2) and (3)
- Proposed Section 90B
- Proposed Section 90D
- Proposed Section 90N

***Due Diligence Guidelines (2009)***

- Lack of Definitions
- Do not require consideration of Cultural Heritage and sensitivities, only focus on the Aboriginal objects.
- Focus on self assessment and rely on the diligence of the proponent to fulfil any statutory requirements in order to avoid the new penalties provided for in the Act.

***Draft Community Consultation Guidelines (May 2009)***

- Definition of Terms
- Trigger for the use of these guidelines is unclear
- Change in the consideration for the payment of Stakeholders in the consultation process

- Protection of traditional knowledge
- Civil law suits possible due to DECC guidelines and disagreement, either with archaeologists and/or the proponent.

Archaeology is a science which is respected the world over, however not every archaeologist works is able to work in a wholly research capacity and the reality is that most work in the commercial industry. Some archaeologists in the realms of both historic and Aboriginal heritage and archaeology can be said to have taken advantage of the existing heritage system which has been in need of an overhaul for some time. However I would argue that archaeological evidence has contributed far more to our understanding of some outstanding and highly significant sites in NSW and in Australia. These sites include (to name a few) Lake Mungo dating to in excess of 50, 000 years ago, occupation by Aboriginal people dating to 30,000 years before present in what is now a highly urban context (Parramatta). In addition to contact occupation in the Sydney CBD on e.g. the Quadrant site in Broadway and Cumberland and Gloucester Street site in the Rocks, Sydney. Landscape archaeology and analysis of existing quarry sites in far north-western NSW (e.g. Tibbooburra) have also provided a greater understanding of how Aboriginal people moved across the landscape. These sites are just a few which outline the importance that Archaeological evidence can contribute to an understanding of the past use of the landscape by Aboriginal people and the length of their occupation here. Clearly archaeological evidence can provide some additional support to the oral history traditions, where they still exist, for Aboriginal people in NSW. The implications for the potential removal of provisions for archaeological investigation and/or the downgrading or marginalisation of this science should be carefully considered by DECC.

In summary, I believe that some of the changes identified by the proposed NPW Amendment Act 2009 have merit, but in this Act and in the supporting guidelines, there is a very real need to ensure appropriate definitions are supplied. Most importantly of all the nexus between the Act and the supporting guidelines should be given proper consideration prior to their finalisation and release and/or adoption by Parliament. At present it is unclear how the Act and the two supporting guidelines inter-relate as this is not specified in any of the documents. I urge the DECC most strongly to consider the above comments prior to finalising the above guidelines as the implications of supporting the proposed guidelines as currently proposed without further refinement is likely to cause confusion and angst amongst the Aboriginal community and leaves the very real potential for the development community to take advantage of the Aboriginal community in NSW.

I strongly urge the DECC to seek comment from the AACAI when preparing the policies that will form the NPW Regulation with particular emphasis on the definitions of 'harm' within the Act.

Should you have any further enquiries please do not hesitate to contact me to discuss these matters further.

Yours sincerely,



Felicity Barry  
(Archaeologist)

APPENDIX: COMMENT ON NPW Amendment Act 2009, Due Diligence Guidelines and  
Community Consultation Guidelines 2009  
*NPW Amendment Act 2009*

| Proposed Changes            | Comment   |
|-----------------------------|---|
| Section 86 (1), (2) and (3) | <p>I support the inclusion of increased penalties and understand that in the case of Due Diligence guidelines this may ensure that Proponents will still seek to ensure that they have appropriately considered Aboriginal heritage issues. However the trigger for 'harm' is again unspecified (see below). This is a matter of concern.</p> <p>The introduction of two levels of protection based on knowledge (or not) of the presence of Aboriginal objects and places means that all members of society must be more careful in considering impacts to Aboriginal cultural heritage.</p>   |
| Section 86(8)               | <p>The definition of 'HARM' is not specified in the Act. There is insufficient information to comment on the definition as it is referred to the Regulation (which is not yet available) and can be changed at any time.</p> <p>The further reference to parts (e) and (f) of this Section are disconcerting as it is unclear what is meant by 'trivial or negligible'</p> <p>Noted that the Heritage Act 1977 makes provision for a less stringent form of approval known as Exceptions. Prior to the very recent change to the Heritage Act, these provisions of the Act under section 139(4) enabled a less rigorous form of approval to prevail for relics to which a minor impact was proposed, e.g. in the case of the NPW Act this may be appropriate for isolated finds and/or sites which have demonstrated disturbance to the archaeological deposit and which the community agrees no further work is warranted on. The advantage of an Exception is that it provides the approvals agency with a form of review of the adequacy or otherwise of the documentation etc and whether a AHIP would be more appropriate, e.g. if culturally sensitive issues are raised which are not dealt with by the Proponent.</p> |
| N/A                         | The Minister will have the power to add any activities he/she considered relevant to the exclusion list for AHIPs as what classifies as a 'negligible' harm or impact   |
| Section 87(2) and (3)       | Due Diligence is undefined in the Amendment Act and no definitions for appropriate codes of practice are provided in the Amendment Act. This means that there is no clear link to either the Regulation and/or any associated supporting guidelines. Provision of definitions could alleviate any mis-construction of the meaning behind these terms  |
| Section 90B                 | The inclusion of a facility to transfer an AHIP permit without having to seek a new permit is supported   |
| Section 90D                 | The provision to seek a variation of an existing permit is supported. However it is unclear under what circumstances a variation could be sought as opposed to seeking a new permit. In the Heritage Act 1977, a variation can be sought if substantially the same impact/scope of works previously approved is proposed. While the Director General of the DECC will essentially decide whether a variation or a new AHIP is warranted or not, it may be prudent to indicate under what circumstances a variation may be sought within the Act.  |
| Section 90N                 | The inclusion of reference to a Regulation with requirements for consultation with the Aboriginal community within the Act itself is at least a start in the process of ensuring the views of the Aboriginal community have been sought when making decisions on how best to manage their heritage. The current system does not have this provision within the Act and the guideline is not specified in either the Legislation or the Regulation.  |
| N/A                         | The NPW Amendment Act 2009 continues to lack a formal mechanism for appeal by members of the Aboriginal community either to the Director General of the DECC or to another appeals Agency or Panel to a decision of the DECC on an AHIP and/or a variation of an AHIP and its suitability.  |

### Due Diligence Guidelines (2009)

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|--|---|
| Definition of Terms  | Definitions of terms are not consistent between the Due Diligence guidelines, the Consultation Guidelines and the NPW Amendment Act. The terms should be common and clearly explained in each document and consistent throughout.   |
| These guidelines do not trigger consultation with the Aboriginal community at any stage of this process. | These guidelines do NOT require a proponent to consider impact to Aboriginal cultural heritage and NO consultation is identified for the due diligence process. This can mean that a developer may propose a 'minor' impact (definition unprovided) to an Aboriginal object, or that the project is likely to represent a minor impact to Aboriginal object(s) but if the Aboriginal community are not consulted, they may not realise that they are causing damage or harm to Aboriginal CULTURAL HERITAGE. However since no members of the Aboriginal Community will be consulted and an AHIP was not required (hence no comment from DECC was required) Aboriginal cultural heritage may be destroyed, not necessarily by malice or ill-intent, but by not knowing as a result of following this guideline. This is unacceptable.  |
| Significance of Archaeological Resource  | At no time in the Due Diligence guidelines is there any consideration that archaeological evidence (in the form of Aboriginal objects - which are defined not just by e.g. stone artefacts and tools but also by the deposits and soils in which they are located). This means that the scientific significance of potential archaeological evidence is not specifically discuss by these guidelines, nor is it raised as a reason to trigger further investigation or not. This is discussed in the next point below.  |
| Section 2 (a) Developed Area or previously disturbed area.   | The presence of archaeological evidence in urban sites such as Parramatta and the Sydney CBD has not been considered in Section 2 (a) Developed Area or previously disturbed area. Yet the 109-113 George Street and Charles and George Street Sites in Parramatta provided clear indications (although previously developed) that the Parramatta sand-sheet was present and clearly intact! The phrasing of this section indicates that the findings at these two sites in Parramatta should be impossible and if followed by those particular developers, no further action would have been taken even IF a due diligence report had been prepared because they could have argued that they had assessed the site had been previously disturbed and it was unlikely Aboriginal objects would be harmed by their development. According to the current reading of the Legislation they would have protection for this decision as a result. I urge DECC to be careful in the phrasing of this section of the Due Diligence guidelines as other sites in the Sydney CBD such as Angel Place and the Quadrant Site at Broadway have revealed evidence of Aboriginal object within intact soil profiles even WHEN they had been previously developed. |
| Section 2(b) undisturbed areas<br>Questions to consider  | The list of landforms and landscape features is likely to suggest to a developer that these are the only types of landforms likely to retain this evidence. In Victoria they at least have maps indicating these areas. This suggests to the developer undertaking a Due Diligence assessment that no other landform type will contain any Aboriginal objects at all.   |
| Section - What do I do with the results of a Due Diligence?  | The disclaimer that the DECC will not provide advice to proponents on which option to choose as part of their due diligence obligations is ironic given that the DECC is the agency which supports the Director General. I would recommend that the DECC reconsiders this position. It might be prudent to include a statement that in the first instance professional heritage advice should be sought.  |
| Overall  | These guidelines essentially place the responsibility for the management of Aboriginal objects etc within a self assessment programme that does not require either consultation with the Aboriginal community and/or the advice of a specialist heritage consultant to be sought when preparing this self assessment. This potentially leaves the process open to exploitation.   |

### Draft Community Consultation Guidelines (May 2009)

| Proposed Changes                    | Comment  |
|-------------------------------------|--|
| Definition of Terms                 | Terms used in the guidelines are not consistent with either the Due Diligence guideline or the NPW Amendment Act 2009.<br>In addition the definitions do not clarify the issue of a knowledge holder vs. another member of the Aboriginal community and what sets a knowledge holder apart.  |
| The trigger to use these guidelines | It is unclear when these guidelines should be used, i.e. they do not appear to be triggered during a Due Diligence Investigation   |
| Clarity if the Guidelines           | There appears to be an assumption that all applications will end up with an AHIP, but that is not always the case and indeed there is no guidance for the use (or otherwise) of these guidelines during Part 3A projects under the Environmental Planning and Assessment Act, 1979.  |
| Payment of Stakeholders             | There is a separation between employment of Aboriginal stakeholders in a project and payment for their time in survey and/or comments on a project. This is a framework which has been established for some time. How does DECC propose to mediate this situation whereby archaeologists are being paid for their time but not the Aboriginal community? Issues of equity in this respect should be considered by the DECC, members of the community are giving their time and not being recompensed for it. |
| Protection of traditional knowledge | Protection of traditional knowledge is not outlined in sufficient detail in the new guidelines - how exactly will the proponents protect this information? DECC should have guidelines/protocols established for the protection of and holding of traditional knowledge by a proponent. This is not outlined in either the Amendment Act or in the Consultation Guidelines   |
| Civil law suits more likely         | Potential for members of the Aboriginal community to disagree with the application of the consultation guidelines and to respond with civil law-suits against archaeologists and/or proponents.  |