Gomeroi Tribal Nation Secretariat

The Department of Environment and Climate Change ("**DECC**") has proposed amendments to the *National Parks and Wildlife Act 1974* ("**NPW Act**") and the *Threatened Species Conservation Act 1995*, in the *National Parks and Wildlife Amendment Bill 2009* ("**the Omnibus Bill**").

In addition, the DECC has proposed the introduction of:

(a) Due Diligence Guidelines for Protection of Aboriginal Objects in NSW; and
(b) Draft Community Consultation Requirements for Proponents.

The Gomeroi Tribal Nation Secretariat wishes to make submissions in relation to the proposed amendments and policies outlined above.

The Gomeroi Nation

Gomeroi[1] Country extends broadly from the Queensland/NSW border region to Tamworth, Aberdeen/Muswellbrook, Coonabarabran and Walgett. Gomeroi People are the Traditional Owners of that Country.

Gomeroi People view people and country (both lands and waterways) as interdependent entities linked through the landscape, through culture and through spiritual significance. As such there is no separation of nature and culture. The wellbeing of Gomeroi People is directly influenced by both the health of the environment and the degree to which Gomeroi People are actively involved in management, ownership and caring for our Country.

As the Traditional Owners of the Gomeroi Nation, Gomeroi People hold inherent rights in our country that were never traded, given or signed away. We the people of the Gomeroi Nation have continued to maintain our cultural identity and practices. As Gomeroi People we recognise our custodianship and ownership rights in country, including our unique responsibility to care for land and water, the ecosystem and places of cultural significance.

Ongoing access to Country and its resources is essential to allow Gomeroi People to continue cultural practices, maintain connection with the land and care for Country. This relationship is a unique relationship where the Gomeroi People belong to the land and the land exists in harmony and in pain with Gomeroi People. Gomeroi People have a wealth of knowledge and experience that can be utilised in regards to land and natural resource management. Gomeroi people can also obtain valuable knowledge and skills through being proactively engaged in environmental management and conservation of our Country.

In 2003 and 2004, Gomeroi People came together to talk about how we could work together to secure better outcomes for our People and our Country. After direction from the Gomeroi Nation, the Gomeroi Nation Project Proposal was prepared in 2005 and 2006. The purpose of the Gomeroi Nation Project is to build the capacity of Gomeroi

[1] Alternative Spellings: Kamilaroi/ Gamilaroi/ Kamilaray/ Gamilaaroy/ Gamilarraay/ Gomilaroi/ Gubilroi/ Comleroy/ Goomeroi/ Komilaroi/ Gomaroi

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People to participate in natural resource management and land use planning, build the self governance structures of Gomeroi People and to negotiate agreements between the government and the People of the Gomeroi Nation.

Various New South Wales government departments have been contacted in order to secure assistance by way of funding and other resources. NTSCORP Limited has agreed to jointly fund the project with those government departments. In April 2007 the joint funding agreement was executed by the Director-General of the Department of Natural Resources and NTSCORP.

Gomeroi People acknowledge that a number of government and non-governmental organisations and structures exist which currently have responsibility for land and water issues in Gomeroi Country. Those structures include Local Aboriginal Land Councils ("LALCs"), Catchment Management Authorities and government advisory groups. Gomeroi People seek to engage with these organisations and structures to ensure that Gomeroi People's rights and interests are respected and protected.

The Gomeroi Nation intends to be a self sustaining structure after the completion of the Project.

The Gomeroi Tribal Nation Secretariat

In order to achieve our objectives Gomeroi People have established a legitimate representational structure of the Gomeroi Nation being the Gomeroi Tribal Nation Secretariat ("GTNS").

Representatives represent and table local community views on issues at Gomeroi Tribal Nation Secretariat meetings. The Representatives work together to consider issues which affect the whole Nation and to negotiate better outcomes for Gomeroi People and Country. Representatives provide feedback to the local community that they each represent on issues discussed and outcomes reached at Gomeroi Tribal Nation Secretariat meetings.

The Gomeroi Tribal Nation Secretariat consists of one elected representative from each of the following communities throughout the Gomeroi Nation:

- Coonabarabran
- Boggabilla
- Toomelah
- Mungindi
- Walgett
- Collarenebri
- Moree
- Terry Hie Hie
- Tamworth
- Narrabri
- Gunnedah
- Quirindi / Werris Creek
- Caroona / Walhollow/Breeza
- Coonamble

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- Inverell/Tingha (currently vacant)
- Ashford (currently vacant)
- South West QLD Vacant

It is in this capacity, as Representatives of the Gomeroi Nation, that we make these submissions.

1. New Offences and Penalties

The GTNS supports DECC's decision to amend the offences and penalties in the **NPW Act**.

However, the GTNS is of the view that "harm" should be more clearly defined in the proposed legislation in order to have the intended effect. It is not considered appropriate that the Minister have the power to create regulations which have the capacity to exclude certain acts or omissions from the definition of "harm". The GTNS also submits that the definition of "harm" should not exclude trivial or negligible acts.

Furthermore, the reference to "desecrates" in the definition of harm is too vague.

The GTNS is in support of the new strict liability offence, as we understand that it may be difficult to prove the intention to destroy in many circumstances.

We also support an increase in penalties for individuals and corporations who cause harm to Aboriginal objects and Aboriginal Places. Notwithstanding this, we submit that affected Aboriginal traditional owners, in our case Gomeroi People, should have the opportunity to elect an alternative or accompanying process to the penalty. In our experience a penalty is often not a deterrent. Furthermore, it may be more appropriate that fines paid by defendants be directed to Aboriginal traditional owners affected rather than directed to the National Parks Fund managed by DECC.

Any punitive process should seek to actively engage affected Aboriginal traditional owners. We envision this process would empower us by ensuring that our needs are adequately met.

Whilst increased penalties and the new proposed offences are welcomed, the GTNS takes the view that DECC should take a more active role in prosecuting offenders in order to affect change. Between 2005 and 2008 DECC only successfully prosecuted seven individuals or companies for 'knowingly' causing or permitting damage to Aboriginal culture and heritage under the NPW Act, with the average penalty being $450.00.

With regard to remedial directions, it is essential that any order for a defendant to take steps to protect, conserve, maintain or repair damage they have caused, be done in consultation and cooperation with the relevant Aboriginal traditional owners, in our case Gomeroi People.

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2. New Defences

The GTNS notes that the proposed legislation provides that if the "harm" was authorised by an Aboriginal Heritage Impact Permit ("**AHIP**") and that all the conditions are complied with, harming an Aboriginal object or an Aboriginal Place will not attract a penalty.

The GTNS does not believe that the AHIP process proposed is an effective scheme for protecting Aboriginal culture and heritage. It is known that approximately 900 AHIPs have been issued by DECC since 1990 under s87 and/or s90 of the NPW Act.

The GTNS submits that unless adequate care is exercised in the determination of the conditions and subsequent granting of AHIPs, the creation of new offences and penalties will be of little help to the protection of Aboriginal culture and heritage in NSW.

The GTNS does not support DECC's proposal that other defences could also be created by regulation.

THE GTNS is of the strong view that new culture and heritage legislation be introduced whereby Aboriginal People determine the future of their Culture and Heritage and the determinant of an AHIP is not also the body charged with protecting Aboriginal culture and heritage.

3. DECC as the Custodians of our Cultural Heritage

The GTNS is of the view that it should be Aboriginal People rather than DECC who are the charged with the responsibility of our Culture and Heritage.

The GTNS believes that separate Cultural Heritage legislation should be introduced in NSW and should be designed, managed and regulated by Aboriginal People.

4. Amendments to AHIPs and Related Processes

4.1. Proposed Changes to AHIPs

AHIPs can be issued to 'classes' of objects, classes of persons or particular types of activities, and for the issue of single permits over larger areas, such as subdivisions.

The current legislation requires two permits for the majority of development activities, one for the initial survey work and the second for the activity itself. The proposed amendments would collapse these requirements into a single regulatory provision. Consent would no longer be required to look for Aboriginal objects. If archaeological excavation is needed then a Code of Practice would guide those excavations. That is, it would be possible that development impact assessment could proceed prior to the lodgment of a development application without the involvement of the regulator.

An Applicant for an AHIP is required to comply with Consultation Requirements. In that regard we refer you to our comments below.

The proposed Part 6 of the NPW Act prescribes the matters which must be considered by the Director General of DECC (or her Delegate) in granting an AHIP. Importantly, the proposed amendment does not provide that the Director General consider any matter

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beyond those factors. The GTNS submits that the Director General should be required to consider any independent representations made by Aboriginal People, in our case Gomeroi People, in relation to the grant of an AHIP. The process currently proposed is too heavily reliant on the enquiries made by a Proponent.

The GTNS notes that the amendments allow for the permit holder or an individual who has the consent of the permit holder to vary the AHIP. The GTNS submits that for a variation to be valid, the individual seeking to vary the AHIP must undertake a consultation process with Aboriginal traditional owners.

The GTNS notes that there is no requirement in the proposed legislation for the Director General to notify interested Aboriginal parties who participated in the consultation process when an AHIP is issued and that there is only a three month period in which to challenge the issue of an AHIP. In this regard, the GTNS submits that the proposed amendments should require that the Director General notify interested Aboriginal parties who participated in the consultation process on the same day that an AHIP is issued and the period in which an appeal can be made should be extended.

4.2. Part 3A of the Environmental Planning and Assessment Act 1979

Under Part 3A of the Environmental Planning and Assessment Act 1979, major projects deemed to be 'critical infrastructure' by the Minister for Planning can be exempted from the Aboriginal culture and heritage requirements under the NPW Act.

The GTNS does not consider that any development should be exempted from the NPW Act.

5. Due diligence guidelines

5.1. Due diligence guidelines overview

Together with the introduction of strict liability offences, DECC has proposed to introduce the defence of 'due diligence'.

The proposed guidelines state that the decision to go ahead with the impact is up to the proponent and that the DECC will not provide advice to proponents on which option to choose as part of their due diligence obligations. The due diligence provisions are clearly not preventive and therefore do not act in the interest of Aboriginal culture and heritage protection but rather focus on liability assessment.

More rigorous requirements are recommended that seek to protect Aboriginal culture and heritage rather than assisting to overcome development barriers.

5.2 The definition of due diligence

The proposed definition of 'due diligence' in the *Due Diligence Guidelines* is the 'taking of reasonable and practicable measures to determine whether [the person's] actions will harm an Aboriginal object and if so, avoiding that harm.'

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The term 'practicable' should be dropped from this definition, as it may lower the standard of diligence that must be exercised. In some cases, it may not be easy or cost-effective to take certain preventative measures and it is therefore arguably not 'practicable'. This should not therefore mean that such objects should not be protected by the DECC.

An additional problem with this definition is that it neglects the importance of historical heritage such as that of massacres.

5.3 Low-impact Activities

The GTNS notes that low-impact activities have not yet been prescribed by regulations. The indications presented in the Guidelines are problematic and as a result, we would have significant concerns should such activities be included in Regulations at a later date.

Activities that have significant potential to affect Aboriginal objects should always be referred to DECC. Activities such as 'revegetation activities (undertaken in such a way that ensures no damage to Aboriginal objects)', 'protection measures such as laying of geotextile materials, fill or sand bags over Aboriginal objects' and 'most in-situ Aboriginal heritage conservation activities' all have the potential to adversely impact upon Aboriginal objects. It should not be left up to developers to ensure that such activities take place in a way that does not harm such objects. DECC should impose protective measures to ensure that any activity that is carried out is done so in a culturally appropriate manner.

5.4 Non-mandatory Guidelines and Alternative Assessment Procedures

The Guidelines state that compliance is not mandatory and rather that due diligence may be met through alternative means of assessment such as the Environmental Impact Assessment Process under the *Environmental Planning and Assessment Act 1979* (NSW) if the process 'includes appropriate Aboriginal cultural heritage assessment'. Industry codes of practice relating to the identification of Aboriginal objects and Regional Aboriginal Cultural Heritage Assessments may also be used to meet the due diligence requirements.

Making available alternative assessment procedures not only undermines the effectiveness of the Act by reducing its ability to control heritage assessment but it also creates complexity whilst lowering diligence standards. The GTNS supports assessment under the one Act, similar to the use of the *Threatened Species Conservation Act 1995* (Cth) whereby only under that act can a Species Impact Statement be obtained. Under this method, not only will consistency be upheld but a concrete standard of required diligence would have to be met for the defence to apply. The alternative institutions that can be used to exercise due diligence are vulnerable to pro-development pressures such as that commonly seen under Pt 3A of the EP & A Act. Finally, performance of assessment not under the one act makes it difficult to account for the cumulative impacts of activities.

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5.5 Surface disturbance

The focus on whether activities will cause additional 'surface disturbance' is misplaced and disregards the contextual nature of the harm. Firstly, this approach fails to acknowledge the importance of the surrounding landscape for sacred sites and objects. A new activity causing similar levels of surface disturbance may nonetheless significantly impede access to the Aboriginal object, and may destroy surrounding areas which contribute to the importance of the object and its location.

To focus on physical disturbance also fails to recognise the importance of spiritual, as opposed to physical, aspects of Aboriginal objects. Further activities may destroy the relationship Aboriginal people have with a particular place or object, notwithstanding the fact that its physical characteristics have already been damaged or destroyed.

5.6 Land condition and prior land uses

The second 'essential issue to consider' of the 'land condition and prior land uses' under the Guidelines is problematic in that determining the impact of an activity does not depend on the nature of previous activities. Rather the crucial concern is the heritage object or place itself and what impact is further to be incurred. It is for this reason that the GTNS disagrees with the 'undisturbed' and 'developed areas or previously disturbed' distinction.

Additionally there is no reason why there needs to be a 'significant increase' in the disturbance for an area that has been previously been disturbed. It is wrong to state that 'where an activity is proposed in an existing developed area it is unlikely that the activity will harm Aboriginal objects'. This presumption is wrong and the guidelines should specify that any disturbance should be sufficient to bring attention to the potential impact on Aboriginal culture and heritage.

5.7 Essential Issues to consider

The Guidelines set out three essential issues to consider when undertaking the due diligence process. None included the consideration of the effect of the activity on the heritage itself. The focus is on the activity and its performance, not how the heritage is affected by it. The GTNS supports the inclusion of a fourth consideration, 'the effect on Aboriginal culture and heritage'. Sources to obtain this information are set out below, primarily through community consultation.

5.8 Consultation and definition

The Due Diligence Guidelines do not set out the importance of consultation with Aboriginal Traditional Owners for determining whether or not an activity will cause harm to an Aboriginal object. The significance and nature of culture and heritage cannot be determined objectively from a landscape, and the importance and potential for damage to Aboriginal objects therefore cannot be properly assessed without the input of Aboriginal Traditional Owners.

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The *National Parks and Wildlife Amendment Bill 2009* ("**Bill**") should include provisions similar to the *Aboriginal Cultural Heritage Act 2003* (Qld) which provide that Aboriginal people are responsible for determining the cultural significance of their heritage.

The GTNS also recommends that the Bill should include a scheme similar to the 'Registered Aboriginal Parties' scheme in the *Aboriginal Heritage Act 2006* (Vic). Aboriginal Parties should have an opportunity to consider and advise on AHIP applications, enter into cultural heritage agreements and apply for the protection of their cultural heritage[2]. This scheme would not be envisaged as a way to impede development but for development to be undertaken in a way which the two parties can work together to achieve the best outcome.

The Guidelines should also set out specific organisations that can assist with the assessment of Aboriginal culture and heritage apart from the DECC website. Specific mechanisms should be put in place to make information more readily available. In our Country, Gomeroi People should be contacted.

5.9 Broader concerns

Even if the Due Diligence Guidelines are amended, there will be little benefit in ensuring compliance if DECC continues to grant large numbers of AHIPs and if prosecutions for breaching the culture and heritage provisions of the Act continue to be minimal.

6. Draft Community Consultation Requirements for Proponents

In our previous submission on the Proposed Aboriginal Land Management Framework, the GTNS suggested that the interim community consultation guidelines be reviewed and revised. Of particular concern was DECC's failure to specify that it was Aboriginal Traditional Owners who were the appropriate People with whom Proponents should engage.

For our part, the Gomeroi Nation have now introduced our own guidelines for Proponents seeking to operate in Gomeroi Country.

6.1 No Legislative right for Aboriginal People to be Consulted

The NPW Act does not recognise the right for Aboriginal People to be consulted about decisions relating to their culture and heritage.

Currently the Director General of DECC has the power to issue an AHIP and in doing so has issued guidelines outlining who should be consulted to assess the cultural significance of an object or place.

In the GTNS's view the right to be consulted should be recognised and protected in legislation rather than as a function of Departmental policy or Ministerial regulation.

We note it is intended that the Draft Community Consultation Requirements for Proponents, following consultation, will be reflected in the Regulations.

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[2] *Aboriginal Heritage Act 2006* (Vic) s148

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6.2 Who Should be Consulted

NTSCORP is currently assisting the GTNS and in that regard it is essential in order for information to be transferred to us that NTSCORP remain one of the organisations to whom Proponents are required to notify.

The GTNS acknowledge that the new requirements at least limit the scope of who should be consulted to "Aboriginal People who hold cultural knowledge relevant to determining the cultural significance of objects and/or places on their traditional lands/Country" and this goes some way to acknowledging that Aboriginal Traditional Owners are the persons who have the right to speak for Country and the obligation to protect it under their traditional systems of law and custom. However, the Guidelines fail to provide proponents with information or a scheme whereby they can identify "knowledge holders".

In Gomeroi Country, proponents should contact the GTNS in order to be referred to the appropriate local Gomeroi Traditional Owner Community.

The GTNS submits, in addition, that the protection of traditional knowledge is not appropriately dealt with by the Guidelines, focussing narrowly on culturally sensitive information. Requirements for how information should be used, managed or stored by a Proponent should be introduced. With regard to secret and sacred information, the requirements provide that it is the Proponent's responsibility to implement appropriate protocols for sourcing and holding cultural information and this is also considered inadequate.

6.3 Reports provided to Interested Aboriginal Parties and Submissions to DECC

The new proposed requirements remove the requirement for Proponents to provide their draft Cultural Heritage Assessment Report to the registered Aboriginal parties, as was required by the previous guidelines, and now requires that the Proponent only be required to provide 'access' to the Report or to 'make available' the final report to registered Aboriginal parties. In the GTNS's view the provision of the draft and final report to registered Aboriginal parties should be mandatory.

We further note that the proposed Part 6 of the NPW Act prescribes the matters which must be considered by the Director General of DECC (or her Delegate) in granting an AHIP. Importantly, the proposed amendment does not provide that the Director General consider any matter beyond those factors. The GTNS submits that the Director General should be required to consider any independent representations made by Aboriginal People, in our case Gomeroi People, in relation to the grant of an AHIP. The process currently proposed is too heavily reliant on the enquiries made by a Proponent.

The GTNS notes that the amendments allow for the permit holder or an individual who has the consent of the permit holder to vary the AHIP. The GTNS submits that for a variation to be valid, the individual seeking to vary the AHIP must undertake a consultation process with Aboriginal traditional owners.

The GTNS notes that there is no requirement in the proposed legislation for the Director General to notify interested Aboriginal parties who participated in the consultation

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process when an AHIP is issued and that there is only a three month period in which to challenge the issue of an AHIP. In this regard, the GTNS submits that the proposed amendments should require that the Director General notify interested Aboriginal parties who participated in the consultation process on the same day that an AHIP is issued and the appeal period should be extended.

6.4 Employment of Aboriginal People by a Proponent

The GTNS considers that 'consultation' is a service provided to a Proponent and as such, that service should be compensated in the same way that other consultants engaged by a proponent are compensated to provide their views.

The new requirement provides that consultation does not include employment. The GTNS would propose that Clause 3.5 be amended as follows:

"Consultation may not necessarily include the employment of Aboriginal community members as specialists to assist in field assessment an/or site monitoring. However, a Proponent may elect to compensate members of the Aboriginal Community for their participation in a consultation process or for the provisions of services such as field assessment and site monitoring as part of the consultation process."

7. Aboriginal Land (Part 4A NPW Act)

The GTNS is generally in support of the minor machinery amendments that are intended to assist the operational efficiency and effectiveness of Boards of Management for Aboriginal-owned reserves under Part 4A of the NPW Act. There are however, several issues of concern that the GTNS wishes to raise in regard to Part 4A.

7.1. Definition of Aboriginal Owners

We draw your attention to the current definition of Aboriginal Owners (as taken from the *Aboriginal Land Rights Act 1984*) and note that the GTNS advocates for the definition to be expanded to include Traditional Owners that are members of the Traditional Owner community by way of incorporation and adoption. This is reflective of our traditional system of law and custom.

7.2. New financial reporting requirements

The GTNS supports the new financial management reporting requirements for Boards of Management to ensure consistency with standard reporting requirements for certain public entities in the *Public Finance and Audit Act 1983*. In practice, however, the GTNS believes that without additional funding, Boards of Management will not be able to fulfil such requirements. Section 71AQ of the NPW Act currently requires that yearly financial statements must be provided to the Auditor-General and the Minister within 6 weeks after the end of the financial year. Additional funding for Boards of Management would enable Boards to hire a financial officer/auditor to assist in the regular and end of year preparation of these reports.

If the reporting standard must be changed, the GTNS suggests that the standards are in line with that required by the *Corporations (Aboriginal and Torres Strait Islander) Act*

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2006. This should include an option for the Board of Management to apply for an extension of time in which they are required to submit the report.

7.3. Plans of Management

The GTNS supports the increased period for a Board to prepare or review an existing plan of management from 2 years to 5 years as the GTNS is aware that sufficient preparation or review of a plan of management takes longer than 2 years.

The new provisions enabling a single Plan of Management to also apply to Part 4A lands, not just Parts 4 and 11 lands have the full support of the GTNS as they would allow for the Boards of Management to care for a greater area in a more efficient and productive manner.

7.4 Leases

The GTNS supports a majority of the changes that clarify the functioning of Part 4A leases. The proposal that Aboriginal owners who are members of Part 4A Boards must agree to any variation of a Part 4A lease is consistent with current provisions in Part 4A regarding review of existing leases. As this provision exists in the leases GTNS regards it as logical to include it in the Act. GTNS also supports the new provision clarifying that upon the expiration of a Part 4A lease the status of Part 4A land as a national park or reserve is unchanged. Additionally, the GTNS agrees with the amendments confirming that Part 4A lands are subject to the same exemptions as other national parks and reserves for contributions to the costs of dividing fences and local government rates.

The GTNS is very concerned in relation to the proposed amendment which provides that it is discretionary for the Government to enter into a Part 4A lease. The Government should be obliged to enter Part 4A lease negotiations where National Parks are on *Schedule 14* or where a claim under *s36A* of the *Aboriginal Land Rights Act 1983* is made and the Local Aboriginal Land Council and Aboriginal Traditional Owners wish to participate in Part 4A lease negotiations. The GTNS believes this was the original intention of the legislation.

For further information please send correspondence to the Gomeroi Tribal Nation Secretariat at the address below.

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