



NSW ABORIGINAL LAND COUNCIL SUBMISSION IN RESPONSE TO THE NATIONAL PARKS AND WILDLIFE AMENDMENT BILL 2009 (THE OMNIBUS BILL) AND THE DRAFT DUE DILIGENCE GUIDELINES FOR THE PROTECTION OF ABORIGINAL OBJECTS IN NSW

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1. Introduction

In mid-April 2009 the Department of Environment and Climate Change (DECC) released a Consultation Draft of the *National Parks and Wildlife Amendment Bill 2009*, also known as the **Omnibus Bill**.

The Omnibus Bill proposes significant amendments to the Aboriginal culture and heritage provisions of the *National Parks and Wildlife Act 1974*, which is the primary law in NSW for the protection and management of Aboriginal culture and heritage. The Bill also makes amendments to a range of administrative provisions in the *National Parks and Wildlife Act*, the *Threatened Species Conservation Act 1995* and other laws.

The Omnibus Bill proposes new offences for the illegal destruction of Aboriginal culture and heritage, including a strict liability offence which would not require a person to *intend* to have harmed an object to be charged with an offence.

Also released with the Omnibus Bill was the Consultation Draft of the *Due Diligence Guidelines for the Protection of Aboriginal Objects in NSW* (the **Due Diligence Guidelines**). The Due Diligence Guidelines are designed to provide guidance as to the level of care that developers and other persons must take to avoid damage to Aboriginal objects or places and, if they do cause harm to an object, to raise a defence that they met the standard of care required.

At the same time DECC released the *Draft Community Consultation Requirements for Proponents* (the **Draft Community Consultation Requirements**). This proposed policy would replace the existing policy (the *Interim Community Consultation Requirements*) which outlines the process for consulting with the Aboriginal community to determine the significance of Aboriginal cultural heritage, when applying for a permit to authorise damage or destruction to a place or object. Permits are issued by DECC and are known as Aboriginal Heritage Impact Permits (**AHIPs**).

a. This submission

This submission outlines in detail the NSW Aboriginal Land Council's (NSWALC's) response to the culture and heritage reforms proposed through the Omnibus Bill and the Draft Due Diligence Guidelines. NSWALC's response to the Draft Community Consultation Requirements is outlined in a separate submission.

This submission includes:

- An overview of how the current culture and heritage system in NSW is working, and
- Specific recommendations relating to particular sections of the Omnibus Bill and the Draft Due Diligence Guidelines.

For an overview/ summary of NSWALC's recommendations refer to the **Executive Summary** prepared in relation to this submission.

b. Consultation with the community about the proposed reforms

The Omnibus Bill and the Draft Due Diligence Guidelines were released for 'targeted consultation' with particular organisations, including NSWALC¹. While the documents were available online no information sessions or consultations were organised with the broader Aboriginal community to explain or seek feedback on the changes.

DECC invited written submissions on the Bill and policies by 7 July 2009. NSWALC requested an extension for its submissions, which was granted until 31 July 2009.

NSWALC worked to actively promote community comments on the Omnibus Bill and the policies through the production of Fact Sheets, media releases, network messages and its website. However, the consistent feedback from the Aboriginal community was that insufficient time has been given to enable meaningful comment.

NSWALC has received some late comments from Narramine LALC and Grafton Ngerrie LALC. These are attached as an Appendix to this submission. The attached comments represent the views of the respective authors. They have not been endorsed by NSWALC and NSWALC takes no responsibility for any errors contained therein.

¹ For details of the consultation process on the Bill see <http://www.environment.nsw.gov.au/legislation/NPWamendmentBill2009.htm>. Although the consultation was to include the Boards of Management of jointly managed National Parks, Cobar LALC, which is represented on the Mt Grenfell Board of Management, has advised that despite direct requests to DECC it was not contacted in relation to the Bill.

DECC has indicated that it intends to urgently revise the Omnibus Bill and Draft Due Diligence Guidelines based on public comments received by **August 2009**. It is intended that Regulations be drafted to reflect or adopt the Draft Due Diligence Guidelines and the Draft Community Consultation Requirements, and that these be presented for Cabinet approval with the Omnibus Bill in August 2009.

DECC has advised that the Omnibus Bill and new *National Parks and Wildlife Regulations* will be introduced in the **September 2009** session of the NSW Parliament. At this stage there is no intention to release the final Bill or regulations to the community for comments before they are tabled.

As previously indicated to DECC, NSWALC has serious concerns about the short timeframes for the adoption of the Omnibus Bill and the related regulations. The current process seems inconsistent with commitments made by DECC to the cultural rights and self-determination of Aboriginal people, as recognised in the *DECC Corporate Plan 2008-2012*. The process also does not seem consistent with DECC's commitment to community consultation as outlined in existing policies.²

NSWALC does note that consultations were previously undertaken, prior to 2001, in relation to a range of changes which were made to the *National Parks and Wildlife Act*. The 2001 changes included the creation of a strict liability offence and increased penalties for damage to Aboriginal cultural heritage. The NSW Parliament passed the 2001 changes but the Minister for the Environment and Climate Change has never moved to Gazette these changes, so they have not come into force.³

The proposed Omnibus Bill introduces similar offence and penalty amendments to the 2001 changes, but with new defences and a large number of changes to other sections of the *National Parks and Wildlife Act*.

NSWALC also notes that some comments regarding the Omnibus Bill were raised during the Information Sessions held by DECC for the Draft Community Consultation Requirements in May and June 2009. However, it is not known if these comments have been passed onto the relevant section of DECC or are being considered.

NSWALC opposes the introduction of culture and heritage law and policy where it has been developed without proper consultation with the Aboriginal community.

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 introduced or implemented without proper consultation with NSWALC and other relevant bodies.

NSWALC has previously stated its commitment to work in partnership with DECC and other key stakeholders on the development and/ or revision of significant legislation and policies impacting on Aboriginal people. This includes the proposed law and policies in relation to culture and heritage, which are priority issues for Aboriginal communities and the land council network.

NSWALC would like to restate its commitment to working with DECC to finalise amendments in relation to the Bill and draft policies, providing that sufficient time is allowed to ensure informed input from the Aboriginal community.

² See for example *Aboriginal Community Engagement Framework for DECC* (November 2007).

³ For discussion of the 2001 changes see article by Seiver 'Defining the Offence of Unlawfully Destroying Aboriginal Heritage' [2005] *Indigenous Law Bulletin* 11.

2. The Land Council Network

The NSW Aboriginal Land Council (NSWALC) is the largest member based Aboriginal organisation in Australia. NSWALC is governed by a Council of nine Councillors, which is elected every four years. All Aboriginal people in NSW are eligible to join a Land Council and vote in Land Council elections.

NSWALC provides support to the network of 121 Local Aboriginal Land Councils (LALCs). LALCs are autonomous bodies which are governed by boards elected by local Aboriginal community members, every 2 years.

The *Aboriginal Land Rights Act 1983* establishes Land Councils as the elected representatives for Aboriginal people in NSW. This role extends beyond representation of the interests of Land Council members, to all Aboriginal people living in NSW.

As outlined in section 106(7) of the *Aboriginal Land Rights Act*, NSWALC has particular responsibilities in relation to culture and heritage. These include:

- a. to take action to protect the culture and heritage of Aboriginal persons in NSW (and)
- b. to promote awareness in the community of the culture and heritage of Aboriginal persons in NSW.

NSWALC is represented on numerous state-wide committees which provide advice to the NSW Government on land and culture and heritage matters, including the Aboriginal Cultural Heritage Advisory Council.

Under section 52(4) of the *Aboriginal Land Rights Act*, LALCs have similar functions to protect and promote Aboriginal cultural heritage within their boundaries. The obligation to consult with LALCs on cultural heritage matters is recognised through a range of DECC and other government agency policies.

LALCs' culture and heritage activities vary across councils, but include custodianship of culturally significant land, maintenance of Aboriginal sites, management of local site databases, heritage site assessments, management of cultural centres and keeping places, participation in advisory committees and a range of projects in the community to improve awareness and understanding of Aboriginal cultural heritage.

NSWALC recognises and respects the role of traditional owner groups in relation to culture and heritage. As outlined in previous culture and heritage submissions to DECC,⁴ NSWALC's position is that consultation on culture and heritage matters must include those organisations with statutory responsibilities for culture and heritage. These are:

- NSWALC and LALCs,
- Native title claimants and holders, and NTS Corp,
- Aboriginal Owners and the Registrar of the *Aboriginal Land Rights Act*.

NSWALC's commitment to work in partnership with traditional owner groups is reflected in NSWALC policies and strategic documents, including the *NSWALC Corporate Plan 2008-2012*.⁵

⁴ See for example NSWALC's response to the Review of the *Interim Community Consultation Requirements for Applicants*, as forwarded to Director Mark Gifford of DECC in April 2008.

⁵ Priority Five of the *NSWALC Corporate Plan 2008-2012* includes to develop 'guidelines that identify, protect and preserve cultural heritage in accordance with the traditional customs, obligations and responsibilities of individual Traditional Owner groups in NSW.'

3. Overview of the current system in NSW

The ***National Parks and Wildlife Act 1974*** is the primary source of legal protection for Aboriginal cultural heritage in NSW. The *National Parks and Wildlife Act* is administered by the NSW Department of Environment and Climate Change (DECC).

The objects of the *National Parks and Wildlife Act* include:

Section 2A

- (1)(b) *the conservation of objects, places or features (not including biological diversity) of cultural value within the landscape, including, but not limited to: ...*
(i) *places, objects and features of significance to Aboriginal people.*

Section 85 of the *National Parks and Wildlife Act* states that the Director General of DECC has responsibility for the proper care, preservation and protection of Aboriginal objects and places. Aboriginal objects include objects on both public and private lands.

- An Aboriginal object under the *National Parks and Wildlife Act* is defined as ‘any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains’ (Section 5).
- An Aboriginal place is defined as ‘a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture’ (section 84). The Minister establishes an Aboriginal place by order published in the Gazette.

One of the issues with the *National Parks and Wildlife Act* is that the definition of Aboriginal culture and heritage in terms of ‘places’ and ‘objects’ is based on an archaeological understanding which does not accord with Aboriginal peoples’ own concepts of culture.⁶ Aboriginal peoples’ definition of culture is not limited to particular places or physical evidence of Aboriginal existence on the land. It includes both the tangible and intangible things that tell a story about the land, environment, people, family, history, law, community and spirituality.⁷ The limited definition of cultural heritage under the *National Parks and Wildlife Act* has made it difficult to provide adequate protection for some Aboriginal sites.⁸

The *National Parks and Wildlife Act* provides that all Aboriginal objects are considered to be ‘property of the Crown’ (with some exceptions),⁹ and gives the Director General the power to approve damage or destruction to those objects and to

⁶ See Chalk article ‘Exploring Recent Developments in Aboriginal Cultural Heritage Protection in NSW’ (2007) as presented to the Lexis Nexis Environmental Law Conference, Sydney.

⁷ See Seiver [2005] as referenced above and O’Dwyer ‘Aboriginal Heritage Under Threat in NSW’ (March 2007) *Chain Reaction Magazine* #99, as available to download from www.foe.org.au.

⁸ See for example the case study of a ‘Keepara Tree’ (Diamond Tree) which was protected as an Aboriginal area under the *National Parks and Wildlife Act*, but without an appropriate buffer zone, leaving the tree exposed for viewing from the local playing field - as noted in *Caring for Country: A Guide to Environmental Law for Aboriginal Communities* by the Environmental Defenders Office NSW (updated 2009 edition). Other examples include reported massacre sites where no physical remains are present to be ‘impacted’ or protected. For more detail see discussion of case law in relation to the challenge of AHIPs by Aboriginal people, in *Discussion Paper: Reforming New South Wales’ Laws for Protection of Aboriginal Cultural Heritage*, prepared by Neva Collings of the Environmental Defender’s Office for the 28 May 2009 Culture and Heritage Roundtable.

⁹ Exceptions include objects which were located in private collections prior to 13 April 1970 and have not been since abandoned, and objects which are ‘real property’ (i.e. objects such as rock art, rock carvings or scarred trees that are attached to private land and are legally considered part of that land). Aboriginal objects can also be handed back to the ownership of Aboriginal people. See Part 6 of the *National Parks and Wildlife Act*.

Aboriginal places, through the issuing of 'consents' under section 87 and section 90 of the Act.

Aboriginal people do not have a recognised right through the legislation to direct what happens with their cultural heritage or to take action if it is under threat. The inclusion of Aboriginal culture in flora and fauna legislation has also been criticised as outdated and paternalistic.¹⁰

Another essential problem with the *National Parks and Wildlife Act* arises from the fact that the Director General of DECC is both responsible for the protection of Aboriginal cultural heritage and responsible for issuing the permits which authorise damage to and destruction of that heritage. The conflict between these two roles has led to the criticism that the *National Parks and Wildlife Act* does not protect Aboriginal heritage, but merely regulates its destruction.¹¹

b. Illegal destruction of culture and heritage

Currently, if a person disturbs or moves an Aboriginal object, or 'knowingly' damages an Aboriginal object or Aboriginal place *without a permit*, they can be found guilty of an offence under the *National Parks and Wildlife Act*. The standard requires that a person knew that an object was an Aboriginal object.¹² There is also an obligation on someone to notify DECC within a reasonable time if they become aware of the location of an Aboriginal object.¹³

The Director General of DECC has the power to prosecute people who unlawfully destroy or damage Aboriginal objects or places, and can take other action to protect cultural heritage such as issuing a stop work order. The Minister for the Environment and Climate Change can issue an interim protection order.

The current level of penalties is quite low, with a maximum penalty of \$5,500 or imprisonment for six months for an individual, and \$22,000 for a corporation.

In total between 2005 and 2008 there were only seven prosecutions for causing or permitting damage to Aboriginal cultural heritage.¹⁴ In October 2008 it was reported that no stop work orders or interim protections orders had been issued in the previous 12 months.¹⁵

It is generally accepted that the current penalties do not act as a deterrent against damage to Aboriginal cultural heritage. DECC has advised that the current requirement to find that someone 'knowingly' damaged an object has made it difficult to successfully prosecute illegal destruction.

¹⁰ See Kennedy 'Operative Protection or Regulation of Destruction? The Validity of Permits to Destroy Indigenous Cultural Heritage Sites' [2005] ILB 57, as available to download from www.austlii.edu.au.

¹¹ See Ridge and Seiver 'Carriage – An Elder's Journey through the Courts' [2005] ILB 10 and *EDO Discussion Paper* (2009), as noted at footnote 9.

¹² 'Reckless indifference' will not be enough – see *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661, quoted in Chalk (2007), as noted above.

¹³ Section 91 *National Parks and Wildlife Act*.

¹⁴ All prosecutions were successful. See Answer by Attorney General representing the Minister for the Environment and Climate Change to *Question on Notice Number 2384*, NSW Legislative Council (5 January 2009) as available through www.parliament.nsw.gov.au.

¹⁵ Minister for the Environment and Climate Change, *Answer to Questions on Notice 2 and 3*, as asked by Ian Cohen MLC, Legislative Council General Purpose Standing Committee 5, 16 October 2008 (Budget Estimates), transcript available through www.parliament.nsw.gov.au.

However, there have also been concerns raised that DECC is not willing to take action against people who have illegally damaged Aboriginal cultural heritage, and has not provided adequate resources to support prosecutions.¹⁶

*For more information about the current penalties see NSWALC Culture and Heritage **Fact Sheet 2** – ‘New Fines and Offences for the Destruction of Aboriginal Culture and Heritage’ which is available to download from the NSWALC website at www.alc.org.au.*

c. Aboriginal Heritage Impact Permits

Damage or destruction to Aboriginal cultural heritage is authorised through an Aboriginal Heritage Impact Permit, or AHIP. These permits have also previously been referred to as **s87** and **s90** consents.

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 AHIPs to staff working within DECC’s Environmental Protection and Regulatory Group.

It is difficult to get a clear picture about the number of AHIPs issued, as official data is not made available. DECC has advised that it does not systematically record data in relation to the issuing of AHIPs.

The consistent feedback from the Aboriginal community is that there is a high level of ‘approved’ destruction of important Aboriginal cultural heritage through the issuing of AHIPs, and that the AHIP process is not protecting important sites.¹⁷

In response to Questions on Notice in NSW Parliament to the Minister for the Environment and Climate Change it is known that:

- Between 1990 and July 2007 approximately **800** s90 consents (ie permits which authorise destruction) were issued;
- The rate of issue of AHIPs has been increasing over the years, with around half the s90 consents issued in the fourteen years from 1990 to 2004, and the other half issued in the following three years 2005 to 2007;
- Between 2004 and 25 May 2009 approximately **958** s87 permits and s90 consents were issued;
Note – the figures prior to 2004 do not include s87 consents (ie consents to damage or deface cultural heritage). If s87 consents were included the early figures would be much higher.
- In the first five months of 2009 already **103** s87 and s90 permits have been issued. This is a rate of 5 a week; and
- Around a quarter of the permits issued between 2007 and 2009 were issued to Government agencies. Of these the largest number were issued to the Roads and Traffic Authority, with the second largest number to DECC itself.¹⁸

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

¹⁶ See for example Ridge and Seiver [2005], as noted above.

¹⁷ Distress at the current process for the issuing of AHIPs was raised repeatedly during recent consultations held by DECC in 2009 in relation to the Aboriginal Land Management Framework and later the Draft Community Consultation Requirements. See also articles, as referenced above, by Ridge and Seiver [2005], Kennedy [2005], O’Dwyer (2007) and the EDO *Discussion Paper* (2009).

¹⁸ See Answers by the relevant Ministers representing the Minister for the Environment and Climate Change, to *Question on Notice Number 0127* (31 July 2007), *Number 2091* (28 October 2008), *Number 3009* (7 May 2009) and *Number 3120* (17 June 2009), Legislative Council, asked by Ian Cohen MLC, as available to download from the NSW Parliament website at www.parliament.nsw.gov.au.

d. Challenges to permits

Under the *National Parks and Wildlife Act*, a ‘person dissatisfied with any condition or restriction’ in a s87 or s90 consent (a permit) can appeal to the Minister for the Environment and Climate Change.¹⁹ It is not known how many of these appeals are made by Aboriginal people, or how many are successful, as this data is not made available.²⁰

Aboriginal people can also challenge a permit in the Land and Environment Court, but this appeal is only available in limited circumstances. For an appeal to be successful an issue must be found with the *process* of issuing the AHIP. The Court has the power to set aside the Director General’s decision to issue a permit, but this leaves open the opportunity for the Director General to remake the decision and issue another permit for the same site or object.

To date, only a small number of cases brought by Aboriginal people to challenge a permit have been successful.²¹ The *National Parks and Wildlife Act* does not include formal recognition that Aboriginal people have a right to be consulted in relation to the significance of their cultural heritage or the issuing of permits, but recent cases have led to some recognition of the standards for consultation with Aboriginal people in relation to AHIPs.²²

Generally, however, legal challenges have not resulted in preventing damage or destruction of Aboriginal sites or objects. Aboriginal groups who make legal challenges also risk costs being awarded against them.²³

The number of challenges made by Aboriginal people to the issuing of permits, and the low level of success of those challenges, further raises serious concern about the level of protection of Aboriginal cultural heritage being offered by the current system.

Based on the evidence available it is clear that the current system for the management of Aboriginal cultural heritage through the issuing of permits has led to **wide-scale destruction** of Aboriginal cultural heritage.

The *National Parks and Wildlife Act* has failed to protect Aboriginal cultural heritage and requires urgent reform. **NSWALC calls on the NSW Government** to urgently support an independent inquiry into the management and protection of Aboriginal cultural heritage in NSW.

¹⁹ See section 90(3) of the *National Parks and Wildlife Act*.

²⁰ In response to a *Question on Notice Number 2091* (28 October 2008), in the NSW Legislative Assembly, as noted above, the Minister representing the Minister for the Environment and Climate Change advised there were no appeals by dissatisfied *applicants* for permits in 2005-8.

²¹ See case law summaries provided in *EDO Discussion Paper* (2009) as quoted above and Chalk (2007), also as quoted above.

²² See for example *Roy Kennedy v Director General of the Department of Environment and Conservation and Another* [2006] NSWLEC 456, as quoted in *EDO Discussion Paper* (2009).

²³ See for example *Anderson on behalf of Numbahjing Clan within the Bunjalung Nation v Director General of the Department of Environment and Climate Change & Anor* [2008] NSWLEC 299, quoted in *EDO Discussion Paper* (2009).

e. Other culture and heritage legislation

Other NSW and Commonwealth legislation also contain some provisions for the protection of Aboriginal cultural heritage.

This includes the **Heritage Act 1977**, which establishes the Heritage Council and the State Heritage Register, which is administered by the Department of Planning. Items of heritage value can be added to the State Heritage Register by the Minister for Planning with advice from the Heritage Council. Listing on the State Heritage Register provides objects and places with a higher level of protection, because they cannot be demolished, redeveloped or otherwise altered without the approval of the Heritage Council.

There are currently only 9 places listed for their significance for Aboriginal people on the State Heritage Register, from a total of around 1500 listings.²⁴ The Heritage Council has indicated its intention to add more items of Aboriginal heritage significance by identifying Aboriginal heritage as one of its four 'themes' in 2009-2010.²⁵

The **Environmental Planning and Assessment Act 1979** is the main planning law in NSW. It outlines the requirements for State, Regional and Local Environmental Plans.

Recent changes require Local Councils to redraft their Local Environmental Plans (LEPs) to provide for the conservation and management of Aboriginal cultural heritage²⁶. Local Councils have until 2011 to ensure that their LEPs have been revised to include Aboriginal cultural heritage²⁷. Aboriginal Advisory/Consultative committees may be established by a Local Council resolution under section 355 of the *Local Government Act 1993*²⁸.

There is currently a low level of understanding within the Aboriginal community about NSW planning laws, and how they interact with other culture and heritage requirements. LALCs have expressed concerns at recent consultations with DECC that the Aboriginal community is not being informed or properly involved in the process of developing LEPs.

Part 3A of the *Environmental Planning and Assessment Act 1979* allows the Minister for Planning to designate particular developments as 'state significant', and remove the requirements for heritage assessments, including Aboriginal cultural heritage assessments.

A section 87 or section 90 permit is not required for Part 3A developments. However, the Minister for Planning often requires proponents to provide an Aboriginal cultural heritage assessment similar to that required when applying for a permit.

²⁴ See *Report of the Independent Expert Panel: A Review of the NSW Heritage Act 1977* (2009), available to download from the NSW Heritage Council website at http://www.heritage.nsw.gov.au/09_subnav_02.htm.

²⁵ See the Heritage Council website at <http://www.heritage.nsw.gov.au>.

²⁶ See s117 Direction number 2.3, in relation to the *Environmental Planning and Assessment Act*, issued 19 July 2007.

²⁷ NSW Department of Planning, *Local Plan Making*, Last updated Thursday 18 June 2009, accessed 18/6/2009, <http://www.planning.nsw.gov.au/planningsystem/local.asp>.

²⁸ NSW Department of Local Government, *Engaging with Aboriginal Communities: A resource kit for Local Government in NSW* (2007) page 21. Available at the Department of Local Government website www.dlg.nsw.gov.au.

During 2007-08, the Minister for Planning determined 296 projects under Part 3A. Of these, 295 were approved and only 1 was refused²⁹. Data is not currently published as to how Part 3A developments have impacted on Aboriginal cultural heritage.

Urgent action is needed to ensure that Aboriginal culture and heritage outcomes are being monitored in relation to Part 3A approvals, and that the Part 3A approval process has not led to an increase in the rate of destruction of sites.

Other State and Federal legislation which regulates the protection of Aboriginal culture and heritage in NSW includes the:

- ***Aboriginal Torres Strait Islander Heritage Protection Act 1984 (Cth)***, which provides the power for the Federal Minister for the Environment to issue an emergency order where a State has failed to protect a place, area or objects. Historically the Federal Minister has rarely used this power.
- ***Native Title Act 1993 (Cth)***, which provides certain rights to Aboriginal people who become registered native title claimants, and a range of rights if a native title claim is successful. In February 2009 there were 34 active claimant applications in NSW and the ACT, eight registered Indigenous Land Use Agreements (ILUAs) and a number of ILUAs under negotiation.³⁰
- ***Environmental Protection and Biodiversity Act (Cth)***, which establishes the National Heritage List for places that are of 'outstanding' heritage value to the nation and the Commonwealth Heritage List for lands and waters of significance.

It is important to note that legislation discussed in this submission focus on the *National Parks and Wildlife Act*, which has a limited definition of Aboriginal culture and heritage. As outlined above, Aboriginal peoples' concepts of culture and heritage are inherently linked to issues of access to and management of land and natural resources. Unfortunately, it is outside the scope of this submission to discuss in full detail the range of environment and natural resource legislation and policy in NSW which impacts on Aboriginal peoples' ability to access to land for cultural purposes.

²⁹ See NSW Department of Planning, *NSW Major Development Monitor 2007-08*, NSW Government 2008 page 7, accessed 18/6/2009

http://www.planning.nsw.gov.au/corporate_publications/pdf/major_development_monitor_301008.pdf.

³⁰ From the National Native Title Tribunal website <http://www.nntt.gov.au/Pages/default.aspx> (February 2009).

4. Positive reform of the cultural and heritage system

It is clear that the current system for the protection of Aboriginal culture and heritage in NSW is in need of urgent reform. Current law does not recognise Aboriginal people as the owners and primary determiners of their culture and heritage, and has failed to provide protection for Aboriginal sites.

NSWALC demands wide-ranging and urgent reform of the Aboriginal culture and heritage system through the development of an **Aboriginal Cultural Heritage Bill** and an **Aboriginal Cultural Heritage Commission** based on recognition that the ownership of Aboriginal cultural heritage lies with Aboriginal people.

For more than two decades there have been calls for the development of an Aboriginal Cultural Heritage Bill for NSW.

In 1983, when the *Aboriginal Land Rights Act* was introduced, the then Minister for Aboriginal Affairs, Frank Walker, stated the Government's intention to introduce a culture and heritage bill. He stated:

*"... there is one element missing from what could be considered an essential element of land rights legislation – that is, the provision for the protection of sacred sites and sites of significance. ... It is my intention to seek the assistance of the new Aboriginal councils that will be formed under the proposed legislation before introducing an Aboriginal heritage commission bill for the protection and ownership of sacred and significant sites."*³¹

This Act was never developed and NSW remains the only state without separate legislation with the primary aim of protecting Aboriginal cultural heritage.³²

Recently, a review was undertaken of the *NSW Heritage Act 1977*. The review did not deal in detail with the issue of Aboriginal cultural heritage protection as it noted that there was considerable overlap between the different laws relating to Aboriginal cultural heritage. The final report of the Heritage Review noted that the issues were sufficiently complex to require 'a broad, separate investigation into the management of Aboriginal heritage'.³³

No timeline for an Aboriginal heritage review has been announced, and it does not appear that such a review is planned.

At an international level, the Australian Government has recently affirmed its support for Aboriginal cultural rights through the endorsement of the *Declaration on the Rights on Indigenous People*. The Declaration states that:

Indigenous people have the right ... to maintain, protect and develop the past, present and future manifestations of their cultures... (Article 11)

Indigenous people have the right ... to use and control of their ceremonial objects ... (and) States shall seek to enable the access and/ or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous people concerns. (Article 12)

³¹ Former Minister for Aboriginal Affairs Frank Walker, 24 March 1983, Second Reading speech for the *Aboriginal Land Rights Bill*, quoted in Hansard at 5090, Legislative Assembly, NSW Parliament, as available from Hansard archive at www.parliament.nsw.gov.au.

³² See discussion of culture and heritage law in other states and territories in *EDO Discussion Paper* (2009) as noted above.

³³ At page 80, *Report of the Independent Expert Panel: A Review of the NSW Heritage Act 1977* (2009), as noted above.

5. Recommendations in response to the proposed reforms

NSWALC's response to the specific law and policy changes proposed by the Omnibus Bill and Draft Due Diligence Guidelines are outlined by issue below.

Overall, the proposed changes include some positive reforms which are welcomed, particularly the increased penalties and new offences. NSWALC strongly supports these positive amendments.

However, there are considerable problems with the Omnibus Bill and Draft Due Diligence Guidelines in their current form. Without significant amendments there is a real risk that the changes will not lead to increased prosecution of illegal destruction and may facilitate increased destruction of Aboriginal cultural heritage through the issuing of AHIPs.

NSWALC cannot and does not support any changes which would lead to further destruction of Aboriginal culture heritage.

a. Recommendations: *New offences, defences and penalties*

The Omnibus Bill proposes to introduce two tiers of offences for illegal destruction:

1. a '**strict liability**' offence for harm to Aboriginal objects or Aboriginal places; and
2. a '**knowingly**' offence similar that which already exists under the *National Parks and Wildlife Act*.³⁴

The 'strict liability' offence is unique in that it will not require proof that the person knew that the object was an Aboriginal object or place.

As outlined in section 3 of this submission, in 2001 similar changes to the *National Parks and Wildlife Act* were passed through NSW Parliament. These included the creation of a strict liability offence for the destruction of Aboriginal culture and heritage, and increased penalties. Between 2002 and 2006 all changes to the Act which were passed in 2001 were proclaimed – except those relating to the introduction of a strict liability offence.

At the time the NSW Minister for the Environment advised that the delay was due to the need to provide guidance material on the defence of 'due diligence', which was to be introduced at the same time as the new strict liability offence.

The re-introduction of the strict liability offence and increased penalties to create a stronger deterrence against illegal destruction of Aboriginal cultural heritage is strongly supported.

The Omnibus proposes significant changes to the penalties for offences related to the destruction of Aboriginal culture and heritage³⁵.

As previously noted, the current level of fines do not act as an effective deterrent. The Omnibus Bill proposes that the fines and imprisonment terms be significantly increased to match other legislative penalties for environmental destruction.

³⁴ See Schedule 1 [24] of the Omnibus Bill which sets out the proposed section 86.

³⁵ See Schedule 1 [24] of the Omnibus Bill which sets out the proposed section 86.

CURRENT maximum penalty for 'knowingly' damaging an Aboriginal OBJECT OR PLACE
\$5,500 or imprisonment for 6 months for an individual
\$22,000 for a corporation

PROPOSED maximum penalty for 'knowingly' damaging an Aboriginal OBJECT	PROPOSED maximum penalty for <u>strict liability</u> offence of damaging an Aboriginal PLACE	PROPOSED maximum penalty for <u>strict liability</u> offence of damaging an Aboriginal OBJECT
\$550,000 or imprisonment for 2 years for an individual	\$550,000 or imprisonment for 2 years for an individual	\$110,000 or imprisonment for 6 months for an individual
\$1.1 million for a corporation	\$1.1 million for a corporation	\$220,000 for a corporation

NSWALC strongly supports the increase in fines and penalties for destruction of Aboriginal cultural heritage.

Increased resources also need to be allocated by DECC to create awareness in the community about the changes and to ensure that illegal destruction is more effectively investigated and prosecuted.

The offences and penalties outlined above relate to acts or omissions that cause 'harm' to Aboriginal objects or places. Currently the *National Parks and Wildlife Act* includes a broad definition of 'harm'.

The *Omnibus Bill* proposes to introduce a definition of harm that 'does not include any act or omission which is trivial or negligible'.³⁶ There is no definition of what is 'trivial' or 'negligible' harm proposed. In addition, acts can be excluded from the definition of harm by regulation.³⁷ It is not appropriate that this broad power to define certain actions as not causing 'harm' be introduced, particularly without specific consultation with the Aboriginal community.

The ability to exclude particular acts or omissions from the definition of 'harm' by regulation is strongly opposed. The legislation must include a clear definition of harm which effectively captures any damage to sites and objects which affects the cultural heritage values and uses.

In relation to damage to Aboriginal objects, the *Omnibus Bill* proposes a new defence to illegal destruction, being that a person or corporation exercised 'due diligence'.³⁸

According to the proposed Draft Due Diligence Guidelines, due diligence refers to the taking of 'reasonable and practical measures to determine whether your actions are likely to harm an Aboriginal object and, if so, avoid that harm'.³⁹ If a person can prove that they exercised due diligence they will not be guilty of an offence under the *National Parks and Wildlife Act* even if they find they have damaged or destroyed an

³⁶ See Schedule 1 [24] of the *Omnibus Bill* which sets out proposed section 86(8).

³⁷ See Schedule 1 [24] of the *Omnibus Bill* which sets out proposed section 86(8)(f).

³⁸ See Schedule 1 [24] of the *Omnibus Bill* which sets out the proposed section 87.

³⁹ See Draft Due Diligence Guidelines, at page 6.

Aboriginal object. The Draft Due Diligence Guidelines are discussed in detail in the following section.

The Omnibus Bill creates the power to introduce other defences through the making of regulations, including allowing for industry Codes of Practice to be recognised by regulation as meeting the standard of due diligence. DECC has advised that a code of practice is currently being developed by the NSW Minerals Council.⁴⁰

NSWALC has serious concerns about the broad nature of the proposed defences, and the risk that they will substantially undermine the increased protections to be offered by the introduction of the new offences and penalties.

NSWALC strongly opposes the introduction of the power to create additional defences for the damage or destruction of Aboriginal objects or places through regulation. Any new defences must be clearly and specifically defined and included as amendments to the *National Parks and Wildlife Act*.

The introduction of the power to create broad defences covering classes of activities or persons is not supported.

The proposal to allow industry bodies to develop Codes of Practice which will act as a defence if they are adopted into regulation is also strongly opposed as this represents a significant potential loophole.

b. Recommendations: Draft Due Diligence Guidelines

The proposed Due Diligence Guidelines have been developed by DECC to help individuals who are contemplating undertaking activities which could impact on Aboriginal objects. The Due Diligence Guidelines aim to provide 'a process whereby a reasonable determination can be made as to whether or not Aboriginal objects will be impacted by an activity'.⁴¹

If an action is likely to cause harm, the person will need to apply for an AHIP. If the person did not apply for an AHIP but acted with due diligence, if they ultimately harm an object they will not be guilty of an offence.

The proposed Due Diligence Guidelines require significant amendment before they can fulfil their aim of providing guidance of the level of care that developers and other persons must take to avoid damage to Aboriginal objects, or to avoid prosecution if they do unknowingly cause damage.

NSWALC **does not** support the adoption of the Draft Due Diligence Guidelines in their current form. Significant revision, including the inclusion of additional explanatory information to help identify potential Aboriginal sites and objects, is required for the Guidelines to be effective.

DECC has advised that the Draft Due Diligence Guidelines are designed to be 'easily implemented by any person'.⁴² A common issue raised by both developers and Aboriginal community is that people do not know what they are looking for, in terms of evidence of Aboriginal objects in an area. The Draft Due Diligence Guidelines note

⁴⁰ See page 2 of the explanatory information released by DECC: *Summary of Proposed Amendments to the National Parks and Wildlife Act 1974 and the Threatened Species Conservation Act 1995*, released by DECC with the Omnibus Bill in May 2009 and available to download from www.environment.nsw.gov.au.

⁴¹ See Draft Due Diligence Guidelines.

⁴² See page 2 of DECC *Summary*, as noted above.

that examples of Aboriginal objects include middens, carved or scarred trees and hearths, but provide no descriptions, photos or links to resources which could help developers understand what these objects might look like.

Similarly, the Draft Due Diligence Guidelines advise that 'Aboriginal objects are often associated with particular landscape features as a result of Aboriginal people's use of those features... Examples of such landscape features are rock shelters, rock outcrops, sand dunes, sand hills, waterways, waterholes and wetlands.'⁴³ These broad references to geographical features provide little practical assistance.

More useful guidance for people wanting to identify Aboriginal objects and sites can be found in other DECC publications, including on the DECC website, and could be included in the Draft Due Diligence Guidelines. The information about the nature of sites and objects reflected in the Draft Due Diligence Guidelines also provides a limited view of Aboriginal cultural heritage. Other existing DECC policies provide a much more accurate description of the way in which Aboriginal cultural values exist in areas and landscapes, and the ways in which Aboriginal people use sites and areas for cultural practice.

The Draft Due Diligence Guidelines should be revised with the assistance of the Culture and Heritage Division of DECC to include photographs and more detailed explanatory information to assist persons with low levels of knowledge about what Aboriginal objects or sites look like or where they can be found. It is also recommended that case studies be included.

The Draft Due Diligence Guidelines advise that where land has already been 'disturbed or 'developed' a person should assess whether their activity will create 'significant additional surface disturbance'. If the answer is no, then the person is advised to proceed without seeking an AHIP. What constitutes 'significant surface disturbance' is not clearly defined.

In many cases previous development or other activity may have taken place in an area without proper respect for Aboriginal sites. It is wrong to assume that additional disturbance may not have an impact on the site in its present form. Also, surface disturbance in an area near a site may have a significant impact on the way that the site can be used by the Aboriginal community. This approach does not encourage the 'precautionary approach' which the Draft Due Diligence Guidelines are aiming to achieve.

The Draft Due Diligence Guidelines must be revised so that they no longer define already 'disturbed' land as unlikely to include Aboriginal sites or objects.

The Draft Due Diligence Guidelines should be revised to remove the simplistic division between disturbed and undisturbed land.⁴⁴

The Draft Due Diligence Guidelines state that activities which will have no or 'low' impact on the land are also unlikely to require a permit. Although DECC has advised that the range of 'low impact' activities is 'yet to be defined', the suggested activities included on page 5 of the Draft Due Diligence Guidelines raise serious concern. Activities such as revegetation and 'routine farming activities' such as replacing fences have the potential to significantly impact on Aboriginal sites, but are noted as examples of 'low' impact activities that would not require a permit.

⁴³ See Draft Due Diligence Requirements page 12.

⁴⁴ See the Logic Diagram included at page 9 of the Draft Due Diligence Guidelines.

The Draft Due Diligence Requirements also state that 'low impact activities' will include those activities defined as 'not being harm' to Aboriginal objects.⁴⁵ As noted above, NSWALC strongly opposes the proposal to exclude particular activities from the definition of 'harm' under the *National Parks and Wildlife Act*. Blanket exemptions for the activities of certain industries, such as mining, must not be allowed.

The Draft Due Diligence Guidelines must be revised to clearly define 'low' impact activities in consultation with relevant Aboriginal groups, including NSWALC. These definitions must be consistent with the other policies produced by DECC in relation to when an AHIP is required.

The Draft Due Diligence Guidelines encourage developers to check the Aboriginal Heritage Information Management System (AHIMS) database to identify potential Aboriginal places and objects in their area. The AHIMS database has been developed primarily through information presented with applications for an AHIP. It does not represent a complete picture of Aboriginal sites in NSW, and has been criticised for including incorrect information.⁴⁶ The current Draft Due Diligence Guidelines do not include a clear disclaimer as to the limitations of the AHIMS database.

Advice must be included in the Due Diligence Guidelines that explains the limitations of the data currently available through AHIMS, and advises in more detail of other mapping and site databases developers can check, including those held by LALCs and by Local Councils.

The Due Diligence Guidelines must be revised so that checking AHIMS is not defined as a sufficient step by itself to confirm that no sites of significance are likely to exist.

Finally, the Draft Due Diligence Guidelines do not adequately reflect or explain the purpose and benefit of consultation with Aboriginal communities when determining whether an activity is likely to impact on Aboriginal cultural heritage.

The Guidelines do not encourage relationship building between developers and local Aboriginal representatives and organisations, such as the LALC, which would allow sites to be more readily identified and positive heritage outcomes to be achieved in cooperation with Aboriginal communities.

The Due Diligence Guidelines require substantial revision to ensure that they are consistent with other DECC policies in relation to the Aboriginal culture and heritage and consultation with the Aboriginal community to determine the impact of an activity.

The revised Guidelines must be released for comment and consultation before being finalised. NSWALC calls on the NSW Minister for the Environment to commit that no regulations adopting the Due Diligence Guidelines will be introduced or implemented without proper consultation with NSWALC and other relevant bodies.

⁴⁵ See Draft Due Diligence Guidelines at page 5.

⁴⁶ Concern about reliance on AHIMS was raised repeatedly by archaeologists, consultants and Aboriginal community members during recent Information Sessions held by DECC in relation to the Draft Community Consultation Requirements (May-June 2009).

c. Recommendations: Remedial directions

The Omnibus Bill proposes new powers for the Director-General to direct a person who has committed an offence to carry out remediation work to conserve, maintain or restore damage to an Aboriginal object or place.

DECC could choose to issue a remedial direction in addition to, or instead of, taking legal action. Similar powers already exist in other legislation, in relation to repairing damage to the environment.⁴⁷ If a person fails to comply with the direction the Director-General has the power to arrange for the work to be carried out and to seek the costs of the work from that person. When issuing such a direction the Director-General may direct the person to consult with the Aboriginal community.⁴⁸ There is no requirement for the Director-General to make such directions as it is a discretionary power.

NSWALC supports the proposed amendments which give the Director General of DECC the power to issue directions that a person take action to conserve, maintain or restore damage that has been caused to Aboriginal cultural heritage.

When determining what remedial action to take, it should be mandatory that the Director-General consult with the relevant Aboriginal community to determine what action is appropriate.

Currently fines for damage to Aboriginal objects and places go into the National Parks Fund, which is managed by DECC.

NSWALC supports the direction of fines for damage caused to Aboriginal cultural heritage to be directed to restoration and compensation for the community which has suffered the loss of its cultural heritage.

The Omnibus Bill also introduces Part 15, Division 3 of the *National Parks and Wildlife Act*, which broadens the powers of the court to make restoration orders.⁴⁹ Proposed section 194(1)(f) creates an obligation for the court to consider the views of Aboriginal persons when imposing a penalty.

NSWALC supports the amendments which provide more flexibility for the courts to issue penalties designed to compensate the Aboriginal community for damage to their cultural heritage.

d. Recommendations: More 'flexible' AHIPs

The Omnibus Bill proposes a number of changes to the process for issuing AHIPs. DECC has advised that these changes are designed to 'streamline' the process and reduce 'red tape'. These changes are expected to significantly cut 'development lead times'.⁵⁰

The Omnibus Bill broadens the scope of AHIPs to allow for an AHIP to be issued for a specified Aboriginal object, Aboriginal place, land, activity or person or specified classes of Aboriginal objects, Aboriginal places, land, activities or persons.⁵¹ DECC have suggested that: *'This flexibility will benefit major developers within NSW (eg*

⁴⁷ The proposed amendments will bring the enforcement provisions of both the *National Parks and Wildlife Act* and the *Threatened Species Act* in line with other environmental legislation including the *Protection of the Environment Operations Act* 1997 and the *Native Vegetation Act* 2003.

⁴⁸ See Schedule 1 [32] of the Omnibus Bill which sets out the proposed sections 91L, 91M and 91N.

⁴⁹ See Schedule 1 [106] of the Omnibus Bill which sets out the proposed sections 190, 194(1)(f) as 200.

⁵⁰ See explanatory information released by DECC with the Bill, as noted above and below.

⁵¹ See Schedule 1 [28] of the Omnibus Bill which sets out the proposed section 90.

*large residential subdivisions) by allowing for the issue of single permits over larger areas that cover a range of stages in the development process. Currently, such developments often require multiple permits that can frustrate construction timeframes.*⁵²

As outlined in considerable detail in previous sections of this submission, the large number of AHIPs issued is a significant concern to the Aboriginal community. The current AHIP system has led to an unacceptable rate of damage and destruction of Aboriginal cultural heritage and is heavily weighted in favour of development.

No evidence has been provided by DECC as to why increased flexibility for applicants applying for AHIPs is needed or justified. Currently, applications for AHIPs are rarely, if ever, rejected. Answers to Questions on Notice in NSW Parliament have revealed that:

- 72% of s90 consents to destroy were approved in 2005,
- 73% were approved in 2006,
- 92% were approved in 2007 and
- 100% were approved in 2008.⁵³

DECC has advised that AHIPs are not refused because DECC works with applicants to amend their applications to include conditions to mitigate damage where possible, and encourages applicants who have not provided sufficient information to withdraw their AHIP applications before they are officially refused.

However, the number of appeals brought by Aboriginal people against the issue of AHIPs highlights the concern within the Aboriginal community that permits are being issued inappropriately over sites of high significance to Aboriginal people.

Given that the current system for the management of Aboriginal cultural heritage through the issuing of Aboriginal Heritage Impact Permits (AHIPs) has led to wide-scale destruction of Aboriginal cultural heritage, NSWALC **cannot** and **does not** support the proposed amendments which broaden the scope of AHIPs.

The proposal to allow for a single AHIP to be issued for specific 'classes' of Aboriginal objects or Aboriginal places is of particular concern. Permits to approve damage or destruction to Aboriginal culture and heritage must consider the importance of that heritage to the particular Aboriginal community in each case.

The ability of the Director-General to issue a single AHIP for a particular type of activity, such as mining, is absolutely opposed.

The changes would also allow AHIPs to be amended and varied. It is currently a requirement (outlined in DECC policy) that Aboriginal people be consulted when the issue of a permit is being considered. The ability of the Director General to amend an AHIP 'as required' leaves open the possibility that a permit which authorises destruction could be significantly expanded without any community input or a new cultural heritage assessment.

NSWALC strongly opposes new powers for the Director General to amend or expand AHIPs 'as required'. There must be consultations with the Aboriginal community in relation to any amendments and/or expansion of AHIPs.

⁵² See page 3 of DECC's *Summary* of the Omnibus Bill dated 30 April 2009, as emailed to NSWALC. The version was revised before being placed on the DECC website.

⁵³ See *Answer to Question on Notice Number 2091*, as quoted at footnote 22.

e. Recommendations: *Factors to be considered by the Director General*

Another significant change to the issuing of AHIPs proposed by the Omnibus Bill relates to the factors that will be considered by the Director-General in deciding whether to issue an AHIP.

Part 6 of the *National Parks and Wildlife Act* currently provides no express guidance as to the matters to be taken into account by the Director-General of DECC when making her decision. Generally when exercising her functions under the Act, the Director General is to consider the objects of the Act, which include:

Section 2A

- (1)(b) *the conservation of objects, places or features (not including biological diversity) of cultural value within the landscape, including, but not limited to:*
(i) *places, objects and features of significance to Aboriginal people. ...*

DECC has developed policies which outline in more detail the factors which are to be considered by the Director General and the delegated staff working in DECC's Environmental Protection and Regulatory Group, when considering the issue of a permit. These policies include the 'Guide to Determining and Issuing Aboriginal Heritage Impact Permits' and 'Operational Policy: Protecting Aboriginal Cultural Heritage'.

The Omnibus Bill proposes a list of factors that *must* be considered by Director-General or her delegate in deciding whether to grant or refuse an AHIP, and for any decision to vary, transfer, suspend or revoke an AHIP.⁵⁴ The list of factors are set out in the proposed section 90K as follows:

- (1) *In making a decision in relation to an Aboriginal heritage impact permit, the Director-General must consider the following matters:*
(a) *the objects of this Act,*
(b) *actual or likely harm to the Aboriginal objects or Aboriginal place that are the subject of the permit,*
(c) *practical measures that may be taken to protect and conserve the Aboriginal objects or Aboriginal place that are the subject of the permit,*
(d) *practical measures that may be taken to avoid or mitigate any actual or likely harm to the Aboriginal objects or Aboriginal place that are the subject of the permit,*
(e) *the significance of the Aboriginal objects or Aboriginal place that are the subject of the permit,*
(f) *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,*
(g) *the social and economic consequences of making the decision,*
(h) *in connection with a permit application:*
(i) *any other matters prescribed by the regulations.*
(2) *The Director-General, in making a decision in relation to an Aboriginal heritage impact permit, is not required to consider any matter other than the matters referred to in subsection (1).*

The proposed factor s90K(1)(g) 'the social and economic consequences of making the decision' is a new factor not currently required to be considered by the Director General or her delegate, under DECC policy.⁵⁵ It appears that this factor is designed

⁵⁴ See Schedule 1 [28] of the *Omnibus Bill* which sets out the proposed sections 90-, 90A-K.

⁵⁵ The factors to be considered when evaluating an AHIP application are listed at page 16 of the EPRG's 'Guide to Determining and Issuing AHIPs' (February 2009). The factors listed are:

- a. The adequacy of the application and the accompanying information;
- b. The significance of the Aboriginal object or place;
- c. The likely impact of the proposal on the Aboriginal object or place;
- d. Adequacy of any proposed measures to avoid or reduce impacts;
- e. Consultation with registered local Aboriginal groups;
- f. The principles of ESD (economically sustainable development);

to ensure that DECC consider the economic interests of applicants, such as developers, when making a decision. The new proposed list of factors also does not include the requirement that 'the principles of ecologically sustainable development' be considered, as currently required by DECC policy.

The Omnibus Bill does not prescribe what weight should be given by the Director-General to each of these factors, for example there is no requirement that the Director-General prioritise the conservation of Aboriginal places or objects over economic consequences.

NSWALC welcomes clarification in relation to the matters that the Director General must take into consideration when making a decision to issue an AHIP.

The list of proposed factors must prioritise the protection of Aboriginal cultural heritage.

The list of factors does not include a requirement to consider representations by Aboriginal people, only 'the results of any consultation'.⁵⁶ Under the current AHIP process, the results of consultation with the Aboriginal community are included in a cultural heritage assessment prepared and submitted by the person applying for a permit to damage or destroy an Aboriginal site or object. This process is of serious concern for the Aboriginal community, as was repeatedly expressed in the information sessions organised by DECC.⁵⁷

DECC has advised that in practice if a developer or other applicant for an AHIP does not properly represent the results of consultations with the Aboriginal community, any Aboriginal group or person who disagrees with the cultural heritage report can contact DECC to directly raise their concerns. DECC policies reflects that these concerns must be considered by the Director General when making the decision to issue an AHIP.⁵⁸

However, the Omnibus Bill's proposed new section 90K(2) makes it clear that the Director General is *not required* to consider any other matters other than those listed at 90K(1). If section 90K is not amended to include the consideration of independent representations by Aboriginal peoples, it risks further winding back the already limited role Aboriginal people have in the AHIP process.

Proposed section 90K(1)(f) must be amended to include a requirement that the Director-General consider the views of, or any representations made by, Aboriginal people. This includes where representations are made independently of the formal consultation process.

f. Recommendations: *Challenges to AHIPs*

There are currently two separate processes for challenging a decision relating to a AHIP:

- A merits appeal to the Minister for the Environment and Climate Change; and
- Judicial review proceedings in the Land and Environment Court.

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- g. Any applicable statutory planning matters related to the application;
 - h. Any issues raised in the submissions; and
 - i. Any other relevant matters.

⁵⁶ See Schedule 1 [28] of the Omnibus Bill which sets out proposed section 90K(1)(f).

⁵⁷ See also the *Forum Summary*, released by DECC with the Draft Community Consultation Requirements in May 2009, which outlines some of the key issues raised during culture and heritage consultations held by DECC in 2008.

⁵⁸ See DECC Operational Policy, as noted above.

A merits appeal involves a fresh decision made on the facts of the case. Currently a person whose application for a consent under section 90 of the *National Parks and Wildlife Act* is refused or a person who is 'dissatisfied' with any condition of a consent may appeal to the Minister for the Environment and Climate Change.

The changes proposed by the Omnibus Bill will provide that only a person 'aggrieved' can appeal a decision to refuse, suspend or revoke an AHIP or a person aggrieved by any condition placed by the Director-General on the AHIP.⁵⁹ There is no merits appeal available for a person 'aggrieved' by a decision to issue an AHIP.

Judicial review by the Land and Environment Court of a decision relating to an AHIP is only available on limited administrative law grounds. If successful the AHIP will be set aside and it will be open for the Director-General to remake the decision in relation to the AHIP. To date, Aboriginal people seeking to challenge a permit allowing for the destruction of their culture and heritage have had limited success through the Land and Environment Court.⁶⁰

NSWALC supports amendments to the *National Parks and Wildlife Act* to allow merit-based appeals by Aboriginal people against the issuing of an AHIP to the Land and Environment Court.

The Omnibus Bill proposes that a time restriction of 3 months from the date that public notice is given of any decision to issue an AHIP be imposed for any challenge to the validity of the AHIP in the Land and Environment Court.⁶¹

The amendment proposed by the Omnibus Bill will not allow the validity of an AHIP to be questioned in the Land and Environment Court where the conditions are subsequently varied⁶² and the challenge is brought over 3 months after public notice was given of the issuance of the AHIP in its original form.

The rights of Aboriginal people to challenge the issuing of an AHIP must be strengthened rather than wound back. NSWALC does not support the proposed time limit of 3 months to challenge an AHIP in the Land and Environment Court. A time period of 6 months would be more appropriate.

The proposed time limit is particularly problematic given that there is no legislative requirement for Aboriginal people or groups who have registered as Registered Aboriginal Parties and have contributed to the cultural heritage assessment to be advised when an AHIP is issued or varied. DECC has advised however that it is a standard condition of AHIPs that the Registered Aboriginal Parties be notified.

A requirement must be inserted into the *National Parks and Wildlife Act* which requires relevant Aboriginal groups to be notified immediately upon the issue or variation of an AHIP.

The proposed section 90P should be amended to provide that any time period for an appeal runs from the date of notice to the Aboriginal community of the issue of the AHIP or from the date of variation to an AHIP.

⁵⁹ See Schedule 1 [28] of the Omnibus Bill which sets out the proposed section 90L.

⁶⁰ See discussion of case law in Section 3 of this submission: Overview of the current culture and heritage system in NSW.

⁶¹ See Schedule 1 [28] of the Omnibus Bill which sets out the proposed section 90P.

⁶² See Schedule 1 [28] of the Omnibus Bill which sets out the proposed section 90D.

g. Recommendations: *Aboriginal Cultural Heritage Advisory Committee*

The Aboriginal Cultural Heritage Advisory Committee (ACHAC) is a committee established under Part 3 of the *National Parks and Wildlife Act* to advise the Minister and the Director-General about matters relating to the identification, assessment and management of Aboriginal cultural heritage⁶³. ACHAC's role includes advice on the process for assessing Aboriginal heritage and issuing AHIPs.

The Omnibus Bill proposes to alter the constitution of the Committee from 11 to 12 members. NSWALC will retain the power to nominate one member and the Heritage Council of NSW will gain the right to nominate a member. The Director-General will have to the power to appoint a non-voting member. The proposed changes will also require that all members of the Aboriginal Cultural Heritage Advisory Committee be Aboriginal persons.⁶⁴

NSWALC welcomes the proposed changes to the membership of ACHAC.

h. Recommendations: *Joint management of National Parks*

Part 4A of the *National Parks and Wildlife Act* provides a process whereby land can be handed back to the registered Aboriginal Owners but leased to the NSW Government to be run as a national park or other form of reserve.

Joint management can be established over two types of land:

- Reserve land that is of 'cultural significance' and been added to Schedule 14 of the *National Parks and Wildlife Act* by the NSW Parliament, and
- Crown land that is subject to an Aboriginal land claim, for which the Crown Lands Minister is satisfied that the land would be claimable except for the fact that the land 'is needed or likely to be needed for the essential public purpose of nature conservation' (s36A of the *Aboriginal Land Rights Act*).

A Part 4A lease back agreement is negotiated between the Aboriginal owners and the NSW Minister for the Environment and Climate Change. If successful the land is handed back on the condition that the land be run as a park by an Aboriginal Board of Management which includes a majority of registered Aboriginal Owners. The land title is held by the LALC on behalf of the Aboriginal Owners. There are five pieces of land currently under joint management in NSW, with some additional lands under negotiation.

The Omnibus Bill proposes amendments to the operation of Part 4A of the *National Parks and Wildlife Act*. DECC has advised that these amendments as 'minor machinery amendments' to improve the effectiveness of the Act.⁶⁵

The most significant change proposed is that Part 4A be amended to provide that the Minister and the LALC are under no obligation to enter into and conduct negotiations under Part 4A of the *National Parks and Wildlife Act*.⁶⁶

Arguably this amendment would remove an implied obligation on the Minister for the Environment and Climate Change to negotiate a hand-back for lands listed in Schedule 14 or for land that is subject to an Aboriginal land claim. This amendment

⁶³ See Section 28 and Schedule 9 of the *National Parks and Wildlife Act*.

⁶⁴ See Schedule 1 [112] of the Omnibus Bill which sets out the proposed Schedule 9.

⁶⁵ See explanatory information released by DECC with the Bill, as noted above.

⁶⁶ See Schedule 1 [15] of the Omnibus Bill which sets out the proposed amendment to section 71J(3)

has the potential to significantly undermine the park (and reserve) hand- back regime in NSW.

NSWALC strongly opposes the proposed amendment to section 71 which removes the implied obligation for the Minister for the Environment and Climate Change to negotiate the hand-back of culturally significant park or reserve land to the traditional Aboriginal Owners.

*For more information about the proposed changes see NSWALC Culture and Heritage **Fact Sheet 4** – ‘Proposed Changes to the Joint Management of National Parks (Part 4A)’ which is available to download from the NSWALC website at www.alc.org.au.*

i. Recommendations: New Regulations

As noted above the Omnibus Bill will create the power to make a new wide range of regulations under the *National Parks and Wildlife Act*. This includes the power to make regulations prescribing defences, including due diligence, against offences relating to the damage or destruction of Aboriginal objects or places⁶⁷.

The proposed Omnibus Bill would also provide the Minister for the Environment and Climate Change with the power to make regulations relating to **consultation**.

Proposed section 90N of the Omnibus Bill states that:

The regulations may make provision for or with respect to the following:

- (a) consultation that must be undertaken in relation to an application that relates to an Aboriginal heritage impact permit (including the nature, extent and timing of the consultation),*
- (b) the persons, or classes of persons, who must be so consulted (including but not limited to Aboriginal people with a cultural association with the object or land concerned),*
- (c) the opportunity of persons, or classes of persons, so consulted to make submissions as part of the consultation.*

NSWALC supports the adoption into legislation of requirements that Aboriginal people be consulted in relation to their culture and heritage.

DECC has indicated that the regulations in relation to consultation are yet to be drafted. The intent is that the regulations reflect the new Draft Community Consultation Requirements which were released in May 2009 for public comment.

As outlined in NSWALC’s separate submission regarding the Draft Community Consultation Requirements, the draft policy requires significant amendment before it should be adopted.

The proposed regulations must not be based on the Draft Community Consultation Requirements, without significant amendments.

The planned consultation regulations must be released in draft form for consultation with the Aboriginal community before they are finalised and adopted.

NSWALC notes that DECC undertook a review in relation to new *National Parks and Wildlife Regulations* earlier this year, as the existing *National Parks and Wildlife Regulations* are due to expire in September 2009. Public submissions on the regulations were invited as part of this review. However, at no time during the review

⁶⁷ See Schedule 1 [28] of the Omnibus Bill which sets out the proposed amendment to section 87(3) and (4)

did DECC raise the proposed new regulations relating to community consultation, defences against prosecution for destruction of Aboriginal cultural heritage or due diligence. The community therefore did not have an opportunity to comment on the *National Parks and Wildlife Regulations* now being proposed.

6. Recognition of Aboriginal peoples culture and heritage rights

As indicated in the summary of the operation of the *National Parks and Wildlife Act*, included in this submission, the current law is not designed to involve Aboriginal people *directly* in the process for determining the significance of their cultural heritage, or determining what happens to Aboriginal place or objects.

Instead, the *National Parks and Wildlife Act* places the power to make decisions relating to Aboriginal cultural heritage with the Director General of DECC.

NSWALC recognises that the Omnibus Bill is not designed to achieve major reform to the existing cultural heritage system. However, even within the existing system there are opportunities to better recognise that Aboriginal people are the primary decision makers in relation to their culture and heritage. This principle is promoted through numerous DECC and NSW Government policy documents, but is not reflected in the *National Parks and Wildlife Act*.

The recommendations noted in this submission are designed to further the recognition of the rights of Aboriginal people to control their culture and heritage and to increase protection of Aboriginal cultural heritage in NSW for current and future generations.

It is hoped that the NSW Government takes this opportunity to extend the amendments to the *National Parks and Wildlife Act* to create a stronger regime for the protection of Aboriginal cultural heritage, and to increase Aboriginal peoples' control over their cultural heritage.