



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

EXECUTIVE SUMMARY

Date: 27 July 2009

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

The NSW Government is proposing to make significant changes to the primary law for the protection of Aboriginal culture and heritage, the *National Parks and Wildlife Act 1974*. Part 6 of the *National Parks and Wildlife Act* provides for the issuing of permits authorising damage or destruction to Aboriginal cultural heritage (also known as Aboriginal Heritage Impact Permits, or AHIPs).

In April 2009 the NSW Government released the *National Parks and Wildlife Amendment Bill 2009* (also known as the **Omnibus Bill**) which would amend the *National Parks and Wildlife Act* and a range of other legislation including the *Threatened Species Conservation Act 1995*. The Bill is due to be presented to NSW Parliament in September 2009.

Public comments have been invited on the Omnibus Bill through the Department of Environment and Climate Change (**DECC**). Comments have also been invited on two policies which are due to be adopted into the *National Parks and Wildlife Regulations*, at the same time as the Omnibus Bill is introduced. These are:

- *Draft Due Diligence Guidelines for the Protection of Aboriginal Objects in NSW* (the **Due Diligence Guidelines**); and
- *Community Consultation Requirements for Proponents – Part 6 of the National Parks and Wildlife Act* (the **Community Consultation Requirements**), to replace the existing policy entitled *Interim Community Consultation Requirements for Applicants*.

The attached submission outlines in detail NSWALC's response to the proposed culture and heritage reforms. It has been developed following detailed research and consultation. The key recommendations from this submission are outlined in brief in the Executive Summary. NSWALC has prepared a separate submission in response to the changes which are planned to the Community Consultation Requirements.

SUMMARY OF RECOMMENDATIONS

- a. ***New offences, defences and penalties:*** The introduction of reforms to deter individuals and corporations from unauthorised destruction of Aboriginal cultural heritage are very welcome.

NSWALC supports the proposed changes to the *National Parks and Wildlife Act* which would create new offences and stricter penalties for the illegal destruction of Aboriginal cultural heritage.

However, NSWALC does not support the amendments which will allow for new defences against illegal destruction and limit the definition of 'harm' through regulations. Taken as a whole the amendments threaten to undermine any increased protection offered by the new offences.

- b. ***Draft Due Diligence Requirements:*** The proposed Due Diligence Requirements require significant amendment before they can fulfil their aim of providing guidance as to 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 strongly opposes the adoption of the Due Diligence Requirements into regulations in their current form.

- c. ***Remedial directions:*** 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.

Remedial action must be developed in consultation with the Aboriginal community, and the proceeds of any fines raised should go towards compensating the community which has suffered the loss of its cultural heritage.

- d. ***More 'flexible' AHIPs:*** 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. The current system has clearly failed to protect Aboriginal cultural heritage and requires urgent reform.

NSWALC does not support proposed amendments which broaden the scope of AHIPs or further weigh the process of issuing AHIPs in favour of development, at the expense of Aboriginal cultural heritage protection. This includes proposed changes to allow permits to be issued for 'classes' of Aboriginal objects or particular activities, and new powers for the Director General to vary AHIPs without consultation with the Aboriginal community.

- e. ***Factors to be considered when considering the issue of an AHIP:*** NSWALC welcomes clarification as to the factors that the Director General must take into account when deciding whether or not to issue a permit.

However, the proposed factors must include provision for Aboriginal people to make direct, independent representations to the Director General about their cultural heritage, which will be considered.

- f. **Challenges to permits:** 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 appeal the process for issuing an AHIP to the Land and Environment Court. A right for Aboriginal people to be informed when an AHIP is issued, amended or varied should also be adopted into the *National Parks and Wildlife Act*.
- g. **Aboriginal Cultural Heritage Advisory Committee:** NSWALC welcomes the changes that would ensure that all persons on the committee are Aboriginal persons.
- h. **Joint management of National Parks:** NSWALC strongly opposes the proposed amendment 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.

NSWALC also strongly opposes any changes which would undermine the related hand-back provisions under the *Aboriginal Land Rights Act*.

- i. **New Regulations:** The proposed changes include provisions for *National Parks and Wildlife Regulations* to be made which reflect the proposed Due Diligence Requirements and the Draft Community Consultation Requirements.

As outlined in NSWALC's separate submission regarding the Draft Community Consultation Requirements, NSWALC does not support the adoption of the Draft Community Consultation Requirements into regulation in their current form. The proposed new Consultation Requirements do not, overall, represent an improvement on the current policy and their adoption into regulation would only serve to further entrench existing problems with the process.

Recognition of Aboriginal peoples' culture and heritage rights

The recommendations made by NSWALC in this submission are designed to better recognise the culture and heritage rights of Aboriginal people.

In providing comment on the proposed changes in its two submissions, NSWALC recognises that the purpose of the Omnibus Bill is not to make major reforms to the current regime for the protection of Aboriginal culture and heritage.

Unfortunately, as clearly outlined in the body of this submission, the current regime under the *National Parks and Wildlife Act* has **failed to protect Aboriginal culture** and heritage. The current system of issuing permits has led to wide-scale destruction of Aboriginal cultural heritage and **urgent reform is needed**.

The *National Parks and Wildlife Act* does not currently include provisions for Aboriginal people to be *directly* involved in the process for determining the significance of their cultural heritage, or determining what happens to Aboriginal places or objects. It does not include a right for Aboriginal people to be consulted or informed about permits to damage and destroy their cultural heritage.

Instead, the *National Parks and Wildlife Act* places the power to make decisions relating to Aboriginal cultural heritage with the Director General of DECC. The high rate of permits issued to damage or destroy Aboriginal cultural heritage, the lack of

transparency around when and to whom permits are issued and the large number of appeals brought by Aboriginal people against the issue of permits have added to an unfortunate perception in the community that DECC's role has been to facilitate the destruction of Aboriginal cultural heritage, rather than to protect it.

The proposed amendments provide an opportunity for the *National Parks and Wildlife Act* to be amended to better protect Aboriginal cultural heritage, and to increase Aboriginal people's control over that heritage.

Process for adopting the proposed changes

NSWALC has previously stated its commitment to work in partnership with DECC and other key stakeholders in the development and/ or revision of significant law 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 re-state its commitment to working with DECC in relation to the amendments, the Draft Due Diligence Requirements, and the Draft Community Consultation Requirements.

However NSWALC has serious concerns about the short timeframes planned for the adoption of the Omnibus Bill and the related Regulations and policies. The short time frames to date have significantly limited the opportunity for community comment.

NSWALC strongly opposes the making of law and policies relating to Aboriginal cultural heritage without consultation with NSWALC and other bodies with statutory and traditional responsibilities for culture and heritage in NSW, including Local Aboriginal Land Councils, native title claimants and holders, NTS Corp, and Aboriginal Owners.

It is essential that law and regulations related to culture and heritage not be adopted without proper consultation with these groups, which includes allowing the Aboriginal community the opportunity to view the final versions of the documents before they are tabled in Parliament.

More information

For more information about this submission contact the Land, Policy and Research Unit of the NSW Aboriginal Land Council by phone on 02 9689 4444. Copies of NSWALC submissions can be downloaded from www.alc.org.au.