

# fact sheet



New South Wales  
Aboriginal Land Council  
[www.alc.org.au](http://www.alc.org.au)

## New Aboriginal cultural heritage *Consultation Requirements* for proponents 2010

The NSW Government has recently released a new policy outlining the consultation that must be undertaken with the Aboriginal community, before a permit authorising damage or destruction to an Aboriginal object or place is issued.

This Fact Sheet provides an overview of the new policy – the *Aboriginal cultural heritage consultation requirements for proponents 2010* (the *Consultation Requirements*).

It is one of a series of Culture and Heritage Fact Sheets which have been developed for Local Aboriginal Land Councils (LALCs) and the Aboriginal community by the NSW Aboriginal Land Council (NSWALC).

**Note:** While all care has been taken in the preparation of these fact sheets, they are not a substitute for legal advice in individual cases. This information has been prepared as urgent advice for LALCs, and may be subject to further revision. The information in this fact sheet is current as of May 2010.

### What does the current law say about Aboriginal community consultation?

The *National Parks and Wildlife Act 1974* (NSW) is the main law which governs the protection of Aboriginal culture and heritage in NSW.

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

However, obligations to consult with Aboriginal people before certain decisions are made about Aboriginal heritage have been created through policy.

The NSW Department of Environment, Climate Change and Water (DECCW) is responsible for administering the *National Parks and Wildlife Act 1974* (NSW). The Act gives DECCW the power to

issue permits (known as Aboriginal heritage impact permits or AHIPs) authorising damage or destruction to Aboriginal places or objects.

Before these permits are issued, DECCW requires the person applying for the permit (known as the 'proponent') to consult with Aboriginal people and create a Cultural Heritage Assessment Report.

Until recently the steps for consultation were outlined in the DECCW policy called the *Interim Consultation Requirements* (2005). This policy has now been replaced by *Consultation Requirements* (2010) – effective as of 12 April 2010.

DECCW is also seeking to adopt key aspects of the *Consultation Requirements* into the *National Parks and Wildlife Regulations*. The proposed changes to the Regulations are available for comment until July 2010.

A copy of the Draft Regulations, along with other NSWALC Fact Sheets about how the laws regarding Aboriginal cultural heritage operate in NSW, are available from the NSWALC website at [www.alc.org.au](http://www.alc.org.au).

### What does the new consultation policy say?

The new *Consultation Requirements* policy outlines the 'stages' of consultation, and includes details about why it is important to consult with Aboriginal people.

The new policy:

- Requires the proponent to consult with **cultural knowledge holders**.
- Is **proponent driven**, meaning that the proponent is responsible for notifying Aboriginal groups about a project, consulting with groups or people who register an interest, organising the consultation, engaging heritage professionals,



preparing the heritage report and providing the paperwork to DECCW on which DECCW makes its decision whether or not to issue the permit, and on what conditions.

- ***Focuses on consultation not consent:*** The role of Aboriginal groups is to provide information as to the heritage significance of a place or object. While proponents are strongly encouraged to seek agreement from Aboriginal groups, there is no requirement for Aboriginal groups to endorse the findings of the proponent's report or give their consent before a permit is issued.
- ***Identifies LALCs as a key party*** to be notified of a project at several stages, and outlines that ***LALCs may provide paid cultural services*** to proponents.<sup>1</sup>
- Contains new sections relating to ***native title***. The *Consultation Requirements* state that, where native title has been determined to exist it is not a requirement to consult with Aboriginal parties, other than the native title holders.
- Contains more detail about the ***notice requirements*** that must be provided.
- Inserts a new section on the ***protection of cultural knowledge*** including a direction that knowledge should not be used by the proponent for other purposes unless agreed.
- Provides new guidance on the ***importance of effective consultation***.

#### Who must be consulted?

The new *Consultation Requirements* require the proponent to consult with ***registered Aboriginal parties***.

An Aboriginal person or organisation may become a registered Aboriginal party if they are a ***cultural knowledge holder***. The proponent is responsible for developing the list of cultural knowledge holders to be contacted about a project (for more details see **STAGE 1**).

The *Consultation Requirements* define cultural knowledge holders as Aboriginal people who hold knowledge relevant to determining the cultural significance of Aboriginal 'objects' and/or 'places'.

A cultural knowledge holder may hold that knowledge as a result of their traditional or historical connection with the land. A definition of

'cultural knowledge' is included in section 3.3.1 of the *Consultation Requirements*.

**What are the steps in the new consultation process?** There are four defined 'Stages of Consultation', with several steps for each stage.

Note – the *Consultation Requirements* refer to the different steps that the proponents must take. In many cases the proponents will employ a consultant or archaeologist to manage the consultations and write the final report.

### **STAGE 1: NOTIFICATION OF PROJECT PROPOSAL AND REGISTRATION OF INTEREST** (see pages 10-11 of the *Consultation Requirements*)

In order to **identify** Aboriginal people who may be cultural knowledge holders, and **notify** them that they can become a registered Aboriginal party to participate in consultations, the proponent must write to a list of groups including:

- The LALC/s;
- The Registrar of the *Aboriginal Land Rights Act*, for a list of Aboriginal Owners;
- The National Native Title Tribunal and NTSCORP;
- DECCW and others (see section 4.1.2).

**HAVING A SAY** – At this stage the LALC can provide the proponent with the details of any people it considers may hold cultural knowledge for an area.

NOTE: If there is an approved **native title determination** the proponent is only required to give notice to, and consult with, the registered native title body corporate or native title holders (see section 4.1.1).

However, the proponent is not prevented from consulting with a broader group or the LALC if they choose to.

Once the proponent has compiled the list of people who may hold 'cultural knowledge', he or she must **write to the people on the list of 'cultural knowledge holders' and the LALC**, outlining the specifics of the project, and inviting registrations of interest (ie inviting people to become registered Aboriginal parties).

The proponent must also advertise the project in a **local paper** inviting registration of interest, using the standard format (see section 4.1.3).



**HAVING A SAY** – As noted above, LALCs should receive a *initial general notice* from the proponent seeking information about people who may hold cultural knowledge and a *specific notice* inviting registrations of interest.

These notices should be received for all projects (except perhaps where there is a native title determination).

LALCs should decide whether they wish to **register an interest** as an organisation or whether individual people will register.

Only one organisational representative from the LALC or other groups can be nominated, but there is no limit any how many individual LALC members, LALC staff or board members may choose to register an interest.

It is important that the LALC or other individuals send a response in writing to the proponent to register, within the specified time frame – at least **14 days**. If a LALC does not register they may not be able to participate in consultations.

At this stage the LALCs may also want to offer the proponent **paid cultural services**, for example a Site Assessment.

NSWALC has developed a **template letter for LALCs** to provide to the proponent: either with contacts for cultural knowledge holders, to register the LALC or LALC members, or to offer paid services. A copy of the letter is available from the NSWALC website at [www.alc.org.au](http://www.alc.org.au).

The proponent must then **compile the list of registered Aboriginal parties** from those who have expressed interest in the project.

**IMPORTANT NOTE** – DECCW has advised that the purpose of the new *Consultation Requirements* is not to allow a proponent to refuse to register a LALC.

If a proponent seeks to exclude the LALC from consultations or from becoming a registered Aboriginal party the LALC is urged to immediately contact DECCW and NSWALC.

The proponent has **28 days** to provide a copy of the list of registered Aboriginal parties to the LALC and the DECCW Regional Office (see section 4.1.6).

**HAVING A SAY** – At this stage if the LALC has any concerns about the list of registered Aboriginal parties, it should contact the proponent to discuss these within the 28 day period. LALCs should raise their concerns in writing with the proponent, and provide a copy to the DECCW Regional Office.

## **STAGE 2: PRESENTATION OF INFORMATION ABOUT THE PROPOSED PROJECT** (see page 12 of the *Consultation Requirements*)

The proponent must make arrangements to **present detailed information about the proposed project** to the registered Aboriginal parties (see section 4.2.1).

The proponent should **record any agreed outcomes** or contentious issues that require further discussion, and provide a copy of this record to registered Aboriginal parties (see sections 4.2.2 & 4.2.3).

**HAVING A SAY** – At this stage LALCs should raise any issues or concerns with the process with the proponent. Where possible concerns or comments should be provided in writing and a copy kept, even if it is just an email.

The *Consultation Requirements* aim to resolve issues early on, so if at this stage it looks like there will be problems which will not be resolved by the proponent the LALC should contact the DECCW Regional Office in writing, and keep a copy for reference.

It may be also appropriate for the LALC to obtain **independent legal advice** about the planned project.

The Environmental Defenders Office has a free advice line which can be contacted on (NSW only) 1800 626 239.



**STAGE 3: GATHERING INFORMATION ABOUT CULTURAL SIGNIFICANCE** (pages 12-13 of the *Consultation Requirements*)

The proponent must present and/or provide information to the registered Aboriginal parties, so that they can provide advice on *how* the cultural heritage assessment will be conducted – the **proposed methodology** (see 4.3.1).

This could include which Aboriginal people or groups should be involved in the site assessment, where meetings should be held, and how sensitive information should be handled or recorded.

Registered Aboriginal parties have a **minimum of 28 days** to review the plan for how the assessment will be undertaken (the methodology) and provide feedback (see section 4.3.2).

**HAVING A SAY** - LALCs should review the proposed process (the methodology) and submit comments to the proponents within the time frame. A copy should be provided to DECCW and a copy kept for reference.

The proponent must then move to **collect cultural information** from the registered Aboriginal parties - that is, to undertake the cultural heritage assessment – in line with what has been agreed by the registered Aboriginal parties.

A key part of this stage is advice about:

- What sites are important in the project area;
- What steps can be taken to **avoid or minimise damage** which might be caused by from the project (**management options**); and
- Protocols for how sensitive information will be handled.

Note, even without formal written protocols for sensitive information, section 4.3.5 of the *Consultation Requirements* states that the information collected by the proponent must only be used in relation to the AHIP application, and not for any other purpose unless agreed by the registered Aboriginal parties.

**HAVING A SAY** – LALCs should provide comments and advice in writing where possible, and keep a copy for future reference. The proponent must document all feedback received from registered Aboriginal parties in the final cultural heritage assessment report, including copies of any submissions received (4.3.7).

LALCs may also wish to provide a copy of their comments directly to the DECCW, as it is a delegate of the Director-General of DECCW who makes a decision about whether or not to issue a permit.

**STAGE 4: REVIEW OF DRAFT CULTURAL HERITAGE ASSESSMENT REPORT** (page 14 of the *Consultation Requirements*)

The proponent must use the information they have collected to prepare a **draft cultural heritage assessment report** (see section 4.4.1).

The proponent is required to give **at least 28 days** for registered Aboriginal parties to **review and comment** on the draft report ( see sections 4.4.2-4.4.3).

**HAVING A SAY** – Comments on the draft report should be provided in writing to the proponent, a copy sent to the DECCW regional office, and a copy kept for reference.

Again, if LALCs have concerns that their advice may not be correctly recorded by the proponent they should provide a copy of their comments in writing to DECCW.

The proponent then prepares the **final cultural heritage assessment report** and provides it to DECCW with the application for an AHIP (see section 4.4.4).

It will be this report and the other documents provided by the proponent on which DECCW makes its decision.

The proponent must provide or **make available copies of the final report** and AHIP application to registered Aboriginal parties and relevant LALCs, whether or not the LALC registered in Stage 1, within **14 days** of applying for an AHIP (section 4.4.5).

**HAVING A SAY** - Comments should be provided in writing and a copy kept.

If LALCs have not become registered Aboriginal parties they should regularly check with the proponent or the DECCW Regional Office to check if the AHIP application has been made, so as not to miss the opportunity to comment on the final report.



### **What happens after DECCW receives an AHIP application?**

After an AHIP application is received by DECCW from a proponent, a DECCW officer then makes a decision whether or not to issue an AHIP, and whether to impose conditions.

DECCW is not required to undertake its own consultation or check the final cultural heritage assessment report with Aboriginal groups.

DECCW have advised that their guarantee of service is that an AHIP will be processed in **6 weeks** if all supporting documentation is included. However, DECCW policy states that as a general rule an AHIP should not be issued before development consent for a project has been obtained (for example from the Local Council or the Department of Planning).

### **How does a person register?**

The LALC or another Aboriginal person or organisation can register by writing to the proponent within the timeframe (see Stage 1), and clearly state that they are registering an interest.

LALCs may wish to use the **Template Letter** developed by NSWALC, which is available to download from [www.alc.org.au](http://www.alc.org.au).

### **What is the role of the Local Aboriginal Land Council?**

As outlined in the Stages, the LALC must be notified and provided documents from the consultation at several different points of the process.

The *Consultation Requirements* also identify that *where a LALC has not registered*, the LALCs can be commissioned by proponents to provide **paid services**, such as organising meetings, facilitating consultation or assisting in writing submissions (see section 3.3.2).

Where the LALC has taken on paid work, then the LALC itself cannot become a registered Aboriginal party – but individual LALC staff or members can, as individuals in their own right.

LALCs who wish to both participate in the consultation as registered Aboriginal parties, and undertake paid work for the proponent should:

- Provide details to the proponent of the services that LALC staff, or other individuals connected to the LALC, can provide, and

- Identify and register individual LALC staff or members to become registered Aboriginal parties. These individuals must be different people than those who undertake the paid work for the proponent.

*Note* – If the LALC has been engaged to undertake paid work by the proponent, the LALCs may wish to request that the person or persons doing the work attend the consultations - but as observers or advisors rather than as registered Aboriginal parties.

### **What happens if there is a native title claim or determination over the proposed project area?**

The new *Consultation Requirements* state at section 4.1.1 that where there has been an approved native title determination that native title exists in relation to the proposed project area, then proponents are not required to consult with, or notify, any other Aboriginal parties.

The proponent can still choose consult with Aboriginal groups beyond the native title holders.

Where there is are registered native title claimants but a determination has not yet been made, a proponent must notify other groups and consult with cultural knowledge holders as outlined in 4.1.2 to 4.1.7 of the *Consultation Requirements*.

### **Who writes the Cultural Heritage Assessment Report?**

The Cultural Heritage Assessment Report is written on behalf of the proponent usually by an archaeologist or heritage consultant.

### **Can Aboriginal people appeal a decision made by the Director-General of DECCW?**

Cases can be brought against a decision by DECCW to issue an AHIP in the Land and Environment Court, in certain circumstances. However, there is currently no general right for Aboriginal people to appeal the issue of a permit.

The NSW Environmental Defenders Office (EDO) operates a free legal advice line on 1800 626 239 or visit the EDO website [www.edo.org.au](http://www.edo.org.au) for more information on appealing an AHIP.

### **What happens if there is a dispute?**

The new *Consultation Requirements* do not outline a process for dispute resolution where an issue arises between the proponent and registered Aboriginal parties or between Aboriginal parties.



If LALCs are concerned about aspects of the consultation process of cultural heritage assessment, write to DECCW and the proponent clearly outlining the issues. It may also be appropriate to seek legal advice.

**Do Aboriginal people need to provide proof they are an Aboriginal person to be involved in consultation?**

The *Consultation Requirements* do not specify that any documentation needs to be given to proponents stating that someone is an Aboriginal person.

However, the *Consultation Requirements* require the proponent to determine who should be included on the list of registered Aboriginal parties.

If LALCs have concerns about whether a person is being accepted or rejected from registration based on an incorrect assessment of his or her Aboriginality this issue should be raised urgently with the proponent and, if it cannot be resolved, in writing to DECCW.

**How can I contact the DECCW Regional Office?**

The Environmental Protection and Regulation Group (EPRG) is the section of DECCW responsible for processing and issuing AHIPs.

Appendix A of the *Consultation Requirements* lists the contact details of the four EPRG offices:

**Metropolitan**

DECCW  
Planning and Aboriginal Heritage Section  
PO Box 668  
Parramatta NSW 2124  
Phone: (02) 9995 5000  
Fax: (02) 9995 6900

**North East**

DECCW  
Planning and Aboriginal Heritage Section  
Locked Bag 914  
Coffs Harbour NSW 2450  
Phone: (02) 6651 5946  
Fax: (02) 6651 6187

**North West**

DECCW  
Environment and Conservation Programs  
PO Box 2111  
Dubbo NSW 2830  
Phone: (02) 6883 5330  
Fax: (02) 6884 9382

**South**

DECCW  
Landscape and Aboriginal Heritage Protection  
PO Box 733  
Queanbeyan NSW 2620  
Phone: (02) 6229 7000  
Fax: (02) 6229 7001

**DECCW Head Office**

59-61 Goulburn Street, Sydney  
PO Box A290, Sydney South NSW 1232  
Phone: (02) 9995 5000

**Where can I get a copy of the new policy?**

For copies of the new *Consultation Requirements* and information sessions being held by DECCW in April and May 2010, visit the DECCW website at: <http://www.environment.nsw.gov.au/licences/consultation.htm>.

**Where can I get more information about the proposed new Regulations?**

DECCW is seeking to adopt key aspects of the *Consultation Requirements* into new *National Parks and Wildlife Regulations*. The Draft Regulations are available for comment until July 2010.

LALCs are encouraged to review the Draft Regulations, which are available on the DECCW website and the NSWALC website, and to write to the NSW Minister for the Environment, the Hon. Frank Sartor to raise any concerns.

The Hon Mr Frank Sartor AO, MP  
Minister for Climate Change and the Environment  
Level 35 Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

For more information about other changes to culture and heritage laws in NSW, including changes to the *National Parks and Wildlife Act*, see the Culture and Heritage Fact Sheets produced by the NSW Aboriginal Land Council on the culture and heritage pages of the NSWALC website at [www.alc.org.au](http://www.alc.org.au).

Local Aboriginal Land Councils wanting to discuss the changes and the NSW Aboriginal Land Council's response should contact their local Zone Office or the Policy and Research Unit on 02 9689 4444.

<sup>1</sup> See section 3.3.2 of the new DECCW *consultation requirements* policy and DECCW Fact Sheet 4 available at <http://www.environment.nsw.gov.au/licences/consultation.htm>