



*Aboriginal Cultural Heritage – National
Parks and Wildlife Amendment Bill 2009
& Draft Community Consultation
Requirements for Proponents*

Submission of the Urban Development
Institute of Australia NSW

July 2009

Introduction

The Urban Development Institute of Australia NSW (UDIA NSW) welcomes the opportunity to comment to the Department of Environment and Climate Change (DECC) on proposed changes related to aboriginal cultural heritage. This submission comments on the proposed changes to aboriginal cultural heritage contained in the *Draft National Parks and Wildlife Amendment Bill 2009* (draft Bill) and *Aboriginal Cultural Heritage: Draft Community Consultation Requirements for Proponents* (draft consultation requirements).

The urban development industry is a major contributor to the NSW economy and its investment decisions are guided by key strategic documents including the State Plan, the Sydney Metropolitan Strategy and various Regional Strategies. The residential sector of the industry alone contributes more than \$15 billion worth of activity to the NSW economy annually. UDIA NSW believes in genuine sustainability including the preservation of environmental outcomes in balance with social equity and economic stability.

UDIA NSW commends the initiative of the DECC in proposing changes to the *National Parks and Wildlife Act 1974* (NPW Act) and consultation requirements with regards to aboriginal cultural heritage. UDIA NSW has long advocated that the aboriginal heritage objectives of the NPW Act have been incorrectly and inefficiently administered to the planning and development process.

The proposed changes reflect the Government's recognition that the existing NPW Act has been inefficiently administered to the detriment of the planning and development process. However UDIA NSW contends that there are fundamental issues that impact the development industry that need to be addressed and are not reflected in the draft Bill.

This submission, developed by the UDIA NSW Council, Sustainability Committee and Regional Chapters elaborates on the concerns of the urban development industry in NSW with the draft Bill and the draft consultation requirements, and provides a few key recommendations for consideration by the DECC. This submission is in two parts with the first part addressing the draft Bill and the second part addressing the draft consultation requirements.

Part 1 - Draft National Parks and Wildlife Amendment Bill 2009

The draft Bill proposes a range of miscellaneous amendments to the NPW Act and the *Threatened Species Conservation Act 1995*. For the purposes of this submission, this part will focus only on proposed changes relevant to the Aboriginal Heritage Impact Permit (AHIP) process and proposed changes to the enforcement procedures of the NPW Act relevant to aboriginal heritage.

1.1 Removal of Section 87 Requirements

Currently, the NPW Act requires developers to engage in two separate permit processes before they can obtain consent to 'destroy' aboriginal heritage on land where development activity is being carried out. Under section 87 of the NPW Act, a developer requires a permit from the Director-General for the purposes of searching for aboriginal objects. A separate permit is then required under section 90 of the NPW Act to 'destroy' any aboriginal place or object discovered in order to carry out a development.

UDIA NSW contends that the existing requirements for two separate permits to be obtained for the same end purpose, that is to undertake a development proposal, is an inefficient duplication of the permit process that should be removed. The proposed amendments to the NPW Act collapse section 87 and section 90 into one regulatory provision contained under section 90-90P in the draft Bill.

This amendment is supported as it will provide a developer with the ability to proceed with an environmental assessment prior to the lodgement of a development application. This

proposal effectively simplifies and reduces the complexity of existing regulation. UDIA NSW welcomes and maintains its support for this amendment.

1.2 Granting of an Aboriginal Heritage Impact Permit

The draft Bill proposes a new 'Division 2' of Part 6 that incorporates proposed sections 90-90P which will replace the existing section 87 and section 90 provisions of the NPW Act. Many of the proposed sections contained in Division 2 are administrative in nature and do not warrant further comment from UDIA NSW. However UDIA NSW will comment in this submission on the key concerns of the development industry which are not reflected in these amendments.

Section 90(3) provides the Director General with the discretion to issue an AHIP in relation to a specified aboriginal object, aboriginal place, land, activity or person or specified classes of aboriginal objects, places, land, activities or persons. UDIA NSW contends that this section does not adequately address the concerns of the development industry with the AHIP process.

The development process is complex in nature and can often be staged over a period of years and even decades from the initial rezoning to final construction of a dwelling or building. Similarly a parcel of land undergoing development can have many different landowners from rezoning through to subdivision and the purchase of single lots by homebuyers.

UDIA NSW recognises there is a need for an appropriate consultation and application process prior to the granting of an AHIP. UDIA NSW also recognises that these processes can be onerous, inefficient and financially cumbersome to a proponent.

Under the proposed section 90(3) the Director-General maintains discretion to issue a permit for an aboriginal object, place, person etc. Section 90B also enables an application to be made to the Director-General for the transfer of a permit between persons. While UDIA NSW welcomes the ability to transfer an AHIP, which is not currently permitted under existing legislation, this provision must be much broader than what is currently proposed.

UDIA NSW contends that the proposed changes do not adequately reflect an understanding of the complexities of the development process. UDIA NSW contends there must be provision in the NPW Amendment Bill enabling AHIPs to be expressed as to 'run with the land'.

If an AHIP does not automatically run with the land, similar to a development consent, it will unnecessarily restrict development and require duplicate applications for a permit to enable development to proceed. Throughout the development process there is likely to be multiple parties and owners of land for example subsequent purchasers, joint venture partner or builder developing a lot within a subdivision etc.

By not enabling AHIPs to automatically run with the land, the NPW Act provides an unwarranted duplication of consultation and application effort on the proponents part and superfluous assessment of previously assessed AHIP applications on the part of the DECC.

Case Study 1 – Coal & Allied Aboriginal Heritage Financial Costs

Coal & Allied are undertaking five concurrent residential development proposals in the Lower Hunter. Consultation time involved with engaging Local Aboriginal Land Councils and Traditional Owners to date has been equivalent to 52 person days at a cost of \$1,000 per day and a total of \$52,000.

Coal & Allied has financed an additional \$306,657 in payments to heritage consultants of which \$168,662 or 55% of consultancy costs can be attributed to aboriginal heritage matters. A further \$80,000 is likely to be required for heritage consultants to respond to public and agency submissions following public exhibition of two of the five proposals.

The total spend of Coal & Allied on aboriginal heritage consultation for the five proposals is approximately \$248,662 or \$49,732 per proposal. Such costs represent a significant burden to delivering a development and combine to adversely affect the viability of development.

Further any future holder of an AHIP will still be legally bound by the requirements of the NPW Act, with its increasingly tougher penalties, and the conditions of the AHIP.

UDIA NSW contends that no certainty is provided to a developer that a development can continue if a further AHIP is needed and approval is not guaranteed. The requirement for a proponent to be issued a new AHIP to continue activity is over-regulation and delays development on the basis of single issue planning.

This is particularly so when considering that a comprehensive consultation process with the aboriginal community and detailed environmental assessment has already been undertaken by a proponent. UDIA NSW contends that an AHIP must be attributed to run with the land by default unless otherwise requested by a proponent. This would ensure the automatic transfer of an AHIP to new landowners that become apparent throughout the development process.

UDIA NSW contends that this would reduce the regulatory requirement for a proponent to apply to the Director-General to transfer a permit to another person. This would also be consistent with the nature of a development consent which is not attributed to a specific person but to the land subject to the development consent. Additionally, a mechanism enabling AHIPs to run with the land would reduce the burden of the DECC administrative process.

UDIA NSW contends that it is of fundamental importance that AHIPs run with a parcel of land so as to ensure a developer has to undertake, what is currently an onerous consultation and application process, only once. The consultation process in combination with an environmental assessment should ensure the undelayed continuance of a development regardless if new landowners become apparent as development progresses.

UDIA NSW has repeatedly raised the development industry's concerns with the Minister for Environment regarding section 90 of the NPW Act since September 2006. UDIA NSW contends that the development industry's concerns regarding this matter are not adequately addressed in the proposed changes contained in the draft NPW Amendment Bill.

UDIA NSW, along with all other key property industry stakeholders, had been briefed by the DECC 11 May 2009 on proposed changes to the AHIP process and NPW Act. All stakeholders expressed to the DECC that the industry was unanimously supportive of the need for AHIPs to run with the land.

RECOMMENDATION 1

UDIA NSW recommends that AHIPs apply to the whole of the land and be expressed to run with the land subject to a proponent's AHIP application.

1.3 Timeframes of Aboriginal Heritage Impact Permits

Currently AHIPs are typically issued to a proponent for a period of two years but can vary, however the existing NPW Act and NPW Regulation do not specify the period that an AHIP is valid. This implies that it is at the discretion of the DECC to make that determination. Similarly the draft Bill does not propose any provisions or amendments that would provide certainty to stakeholders on the timeframe of the validity of an AHIP.

Urban development proposals often last substantially longer than two years and major precincts in Sydney's Growth Centres and regional areas of NSW can be developed in stages over a period of decades. It is a major flaw of the existing NPW Act to require a developer to repeat the aboriginal consultation and AHIP application process every two years for the same land subject to the original proposal.

UDIA NSW contends that an AHIP should not have an arbitrary time limit. UDIA NSW contends that the validity of permits should be tailored specifically to project duration on land for which it applies. It is irrelevant to apply an AHIP for an impractical period of time if the proponent and aboriginal groups have reached an amicable agreement that meets the objectives of the developer, aboriginal groups concerned, and the requirements of the NPW Act.

UDIA NSW contends that it is unrealistic to expect a proponent, and for that matter aboriginal stakeholders, to engage in a comprehensive consultation process on a repetitive basis following the expiry of an AHIP. It is also unreasonable for a proponent to finance and duplicate the AHIP application and assessment process with the DECC for the same purpose the original AHIP was granted.

UDIA NSW contends that existing timeframes on the validity of AHIPs provide developers with no long term certainty on the viability of continuing with a development proposal. UDIA NSW contends that AHIPs must be valid for the duration of a development proposal so as to enable certainty for developers, accurate financial planning for the purposes of completing a project and minimisation of risk assumed by project financiers.

Case Study 2 – Oran Park and Turner Road AHIP Timeframe

Oran Park and Turner Road are two of the first release development precincts in the Southwest Growth Centre. There is a significant lead time for these precincts which over the next 20 years will see development of approximately 11,560 new dwellings as well as 114 hectares of employment land to support a resident population of 33,500 people.

Because of the long development timeframes involved, the developers required 20 year AHIPs for practical purposes. While the applicants had sought 20 year permits the DECC was only prepared to grant seven year permits initially.

To provide certainty to the development industry it is critical that permits be granted for the duration of a development proposal. While this particular AHIP has not been granted for the full timeframe needed to complete development in the Oran Park and Turner Road precincts, the granting of a seven year permit demonstrates an increasing awareness on the part of the DECC for the complexities of the development process.

RECOMMENDATION 2

UDIA NSW recommends the proposed NPW Amendment Bill incorporate provisions that ensure the validity of an AHIP over the timeframe of a proposed development.

1.4 Proposed Division 2 - Section 90-90P

The draft Bill contains a range of additional amendments under proposed section 90-90P. UDIA NSW has considered these amendments and outlines the development industry's concerns with the proposed section not already discussed in this submission below.

Section 90D empowers the Director-General to unilaterally vary an AHIP or the conditions of an AHIP. This includes the power to impose further conditions, delete conditions or amend conditions. This provision also enables the Director-General to unilaterally vary the permit as well as on application from the permit holder.

UDIA NSW supports conferring on a permit holder the ability to apply to amend an AHIP as necessary. However conferring a power on the Director-General to unilaterally vary an AHIP after the AHIP has been approved, removes an element of certainty provided to the permit holder to proceed with the approved activity or development. UDIA NSW contends that this provision enables any person or entity who disagrees with the conditions of the AHIP to submit vexatious requests for the Director-General to vary an AHIP.

UDIA NSW contends that the Director-General's power to vary an AHIP should be limited only to the circumstances where a permit holder has applied for a variation of the AHIP. UDIA NSW contends that this would provide certainty to the proponent and discourage vexatious requests from third parties to vary a permit.

Section 90L allows for a person aggrieved by the decision of the Director-General, in relation to the granting of an AHIP, to appeal to the Minister within 21 days of the decision being made. UDIA NSW contends that for practical purposes, this section should be amended to allow for appeal to the Land and Environment Court only.

UDIA NSW contends that the Court provides a more transparent and balanced decision making process for stakeholders than does the exercise of the Minister's discretion. The consultation process undertaken with aboriginal groups, that results in a consensus amongst those stakeholders and a proponent, would validate the Director-General's decision to grant an AHIP.

Further, UDIA NSW contends that in consideration of the consultation process, there should be no scope for third party appeals to the Land and Environment Court. UDIA NSW contends that the onus is on affected parties to be involved in the initial consultation process and not on a proponent to satisfy their interests after an AHIP has been granted.

UDIA NSW contends that the NPW Amendment Bill must reflect this to provide certainty to both a proponent and the DECC in the granting of AHIPs. Further the NPW Amendment Bill should remove the scope for disparate interests to influence the Director-General's decision as proposed under section 90D.

RECOMMENDATION 3

UDIA NSW recommends section 90D be amended to remove the Director-General's power to amend or vary a permit unilaterally, without an application from a proponent seeking to amend or vary the permit.

RECOMMENDATION 4

UDIA NSW recommends section 90L be amended to confer on an aggrieved party a right of appeal against the Director-General's decision direct to the Land & Environment Court and not the Minister.

1.5 Increased penalties and offences

The draft Bill introduces a new offence for the 'harm' of an aboriginal object or place. This is defined as any act that destroys, defaces, damages, desecrates or in relation to an object, moves the object from the land on which it has been situated. The draft Bill also proposes increases to penalties for offences that harm an aboriginal place or object.

The DECC has also released *Due Diligence Guidelines* (guidelines) to provide a clear process for an applicant to demonstrate that they have followed correct due diligence. It is expected that if the correct guidelines are followed, as set out by the DECC, this would provide a defence against the harm of aboriginal heritage.

The draft Bill does not reflect the due diligence defence and only advises that 'other defences may also be created by regulation'. UDIA NSW contends that because penalties are being increased in amendments to the NPW Act it would also be appropriate to include the due diligence defence for all offences under the NPW Act relating to aboriginal objects and aboriginal places.

The proposed deletion of section 175B(1)(a) in the draft Bill removes the 'no knowledge' defence for directors and managers of a corporation. UDIA NSW understands the intent of this change is to ensure successful prosecution of company directors and managers who have unknowingly caused harm to aboriginal objects.

A due diligence defence for directors and managers is maintained in section 175B(1)(c) of the NPW Act however this applies only if due diligence has been undertaken on the part of the individual director/manager specifically and not the corporation. UDIA NSW contends that for

practical purposes this defence must be expanded and apply to directors/managers if due diligence has been undertaken on part of the corporation generally.

UDIA NSW contends that the threat of prosecution for unknowing directors and managers supports the need for the undertaking of due diligence to provide adequate defence against prosecution. UDIA NSW contends that an environmental assessment undertaken by the corporation would provide an adequate defence of due diligence for company managers and directors.

RECOMMENDATION 5

UDIA NSW recommends that provision be made in the proposed amendments to the NPW ACT providing for the 'due diligence' defence for all offences relating to harm of aboriginal heritage.

RECOMMENDATION 6

UDIA NSW recommends that provision be made in the proposed amendments to the NPW Act enabling the prior granting of an AHIP as an appropriate defence against the harm of aboriginal heritage.

Part 2 - Aboriginal Cultural Heritage: Draft Community Consultation Requirements for Proponents

UDIA NSW has reviewed the draft consultation requirements document currently on exhibition which once adopted will replace the *Interim Community Consultation Requirements*. The consultation requirements provide a comprehensive description of the consultation process that is proposed by the DECC.

Rather than comment on the content contained within the document, UDIA NSW has identified the development industry's concerns with the consultation process, which are not addressed by the consultation requirements nor reflected in the draft Bill. An efficient and streamlined consultation process is fundamental to meeting positive outcomes for both the proponent and aboriginal community.

2.1 Inconsistent consultation

The planning system in NSW is complex and new development must address a range of competing priorities in order for a development application to be approved and development carried out. To adequately balance a range of competing constraints on development, including environmental, social and economic constraints, a holistic approach to those constraints is required by stakeholders to provide the best outcomes for sustainable development.

The consultation requirements present a stand-alone process for aboriginal heritage matters that is not integrated with the holistic nature of the environmental assessment process (EA) undertaken prior to a development application being lodged. The requirement for a separate consultation process, external to the EA process, is inconsistent with the broader context of other significant planning issues addressed within the EA process.

UDIA NSW contends that the aboriginal consultation process must have scope to be integrated with the broader EA process. This will streamline consultation and ensure consistency with other consultative processes undertaken in the EA. UDIA NSW contends that the flexibility for this to occur should be reflected in the NPW Amendment Bill.

The consultation requirements imply that consultation should occur with all members of aboriginal communities and that all opinions expressed are to be seen as representative of community opinion. UDIA NSW contends that this is problematic for AHIP proponents. The

consultation requirements do not provide clarity and guidance to proponents in instances where opinions expressed are inconsistent or in conflict.

The consultation requirements state, '*Proponents must consult with aboriginal people who have cultural heritage knowledge relevant to a proposed project area*'. It is a fairly broad and generic requirement for a proponent to widely consult with what can only be determined as '*aboriginal people who have cultural heritage knowledge*'.

At present the process of determining relevant aboriginal stakeholders for consultation is carried out by developers. Generally a developer will broadly consult with all aboriginal groups whether they are relevant to the process or not. This is done at significant financial cost to the developer for the purpose of preventing delays in the AHIP approval process.

Best practice consultation, in general, involves seeking the views of representative or expert bodies to provide technical advice and information to the person undertaking the consultation. While UDIA NSW does not disagree with the need to consult with aboriginal stakeholders, proponents require certainty and clear identification of relevant representatives with whom to consult.

UDIA NSW contends that the current consultation requirements are compromised without this clarity and inconsistent with best practice consultation methods. UDIA NSW contends that the consultation guidelines must clearly specify with which aboriginal groups a proponent must consult with in a given geographic area.

UDIA NSW contends the lack of clear guidelines on relevant stakeholders developers must consult within the aboriginal community results in 'out of country' aboriginal involvement in the consultation process. This in turn marginalises and compromises the contribution of 'in country' stakeholders and can even result in non-aboriginal involvement in the consultation process. UDIA NSW contends that this leads to diminished outcomes for the aboriginal community particularly when there is disagreement on the cultural significance of an area or item.

UDIA NSW contends that the DECC must provide a register of relevant interested aboriginal parties based on widely understood ties to various development areas. This would assist landowners and developers to improve efficiencies in the aboriginal consultation process and maintain the relevance of the process to 'in country' aboriginal groups. UDIA NSW suggests such a register could be established by the DECC in consultation with relevant local aboriginal land councils or the like.

The consultation requirements also do not clearly outline the relevance to a proponents AHIP application, of information provided by the consultation process versus the information provided by archaeological experts. UDIA NSW contends that this must be made clear in the consultation requirements.

This is particularly important to environmental assessments that are intangible in nature like the presence and significance of aboriginal places. Thus the need for proponents to engage archaeological experts, and the relative roles of such experts versus the roles of aboriginal representatives, needs to be clearly explained and identified.

RECOMMENDATION 7

UDIA NSW recommends the NPW Amendment Bill provide flexibility for proponents to incorporate the required aboriginal consultation into the EA process.

RECOMMENDATION 8

UDIA NSW recommends the DECC provide clear identification of relevant aboriginal stakeholders for all regions of NSW to enable efficient and adequate consultation.

RECOMMENDATION 9

UDIA NSW recommends the consultation requirements identify the weight to be given in the AHIP process to the views of aboriginal stakeholders following consultation versus the expert views of archaeologists.

2.2 Resourcing

UDIA NSW understands that the DECC is chronically under-resourced for the purpose of assessing AHIP applications. UDIA NSW contends that the requirements for a proponent to undertake a comprehensive and time consuming consultation and AHIP application process, warrants the need for the DECC to respond with efficiency and timeliness in kind.

UDIA NSW contends that the DECC should identify areas to streamline the consultation, application and assessment processes. Additionally, the allocation of additional resourcing to assess AHIP applications will enable stakeholders to benefit from the timely consideration and approval of AHIPs.

As demonstrated by case study 1 above, developers and landowners attribute substantial financial resources to the aboriginal consultation process. Further resources are expended in the ongoing management and storage of aboriginal artefacts as well as the management and maintenance of identified aboriginal sites.

UDIA NSW contends that the best method for the DECC to address issues of resourcing in the assessment of AHIPs is to support AHIPs applying to broad areas of land on a precinct wide basis. This would remove the requirement for individual AHIPs on a site by site basis.

Precinct wide assessment of AHIPs would be mutually beneficial to the development industry and the DECC. Such assessment would remove the potential requirement for individual lot purchasers to duplicate previous AHIP application and consultation processes undertaken in earlier stages of the development.

Precinct wide assessment would also reduce pressures on the DECC's assessment resources and provide a more efficient outcome for the assessment of aboriginal cultural heritage. UDIA NSW suggests further consideration of these matters is required by the DECC.

RECOMMENDATION 10

UDIA NSW recommends the DECC supports precinct wide assessment of aboriginal cultural heritage for the purpose of granting precinct wide AHIPs on application.

Conclusion

UDIA NSW has previously expressed the concerns of the development industry to the DECC with respect to the aboriginal heritage regulatory framework and welcomes the initiative of the DECC to reform this framework. This submission has elaborated on UDIA NSW concerns with regard to the existing regulatory and consultation processes as well as the development industry's concerns with the proposed changes to aboriginal heritage.

UDIA NSW has considered the draft Bill and reviewed the draft community consultation requirements. UDIA NSW also attended a property industry briefing with the DECC to discuss proposed changes to the NPW Act. UDIA NSW offers the following recommendations to the DECC for consideration.

Recommendations

1. *UDIA NSW recommends that AHIPs apply to the whole of the land and be expressed to run with the land subject to a proponent's AHIP application.*

2. *UDIA NSW recommends the proposed NPW Amendment Bill incorporate provisions that ensure the validity of an AHIP over the timeframe of a proposed development.*
3. *UDIA NSW recommends Section 90D be amended to remove the Director-General's power to amend or vary a permit unilaterally, without an application from a proponent seeking to amend or vary the permit.*
4. *UDIA NSW recommends Section 90L be amended to confer on an aggrieved party a right of appeal against the Director-General's decision direct to the Land & Environment Court and not the Minister.*
5. *UDIA NSW recommends that provision be made in the proposed amendments to the NPW ACT providing for the 'due diligence' defence for all offences relating to harm of aboriginal heritage.*
6. *UDIA NSW recommends that provision be made in the proposed amendments to the NPW Act enabling the prior granting of an AHIP as an appropriate defence against the harm of aboriginal heritage.*
7. *UDIA NSW recommends the NPW Amendment Bill provide flexibility for proponents to incorporate the required aboriginal consultation into the EA process.*
8. *UDIA NSW recommends the DECC provide clear identification of relevant aboriginal stakeholders for all regions of NSW to enable efficient and adequate consultation.*
9. *UDIA NSW recommends the consultation requirements identify the weight to be given in the AHIP process to the views of aboriginal stakeholders following consultation versus the expert views of archaeologists.*
10. *UDIA NSW recommends the DECC supports precinct wide assessment of aboriginal cultural heritage for the purpose of granting precinct wide AHIPs on application.*