



environmental defender's office new south wales

Submission on the National Parks and Wildlife Amendment Bill 2009

July 2009

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

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Executive Summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to comment on provide comment on the *National Parks and Wildlife Amendment Bill 2009* ('the bill') and the *Draft Community Consultation Requirements for Proponents*. The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law.

The EDO has engaged extensively with Indigenous groups and traditional owners in relation to cultural heritage issues. We have provided legal advice, policy support and represented Indigenous clients in several cases before the courts.¹ We are also undertaking a cultural heritage project collaborating closely with Indigenous clients to identify how the law could be reformed to facilitate the substantive protection of Indigenous cultural heritage rights and to ensure meaningful consultation and collaboration with Indigenous people in NSW in relation to their heritage. We have recently held a roundtable with Indigenous experts and we will be finalising a report containing our recommendations for reform in the near future. We aim to send this report to the Department of Environment and Climate Change (DECC) on completion.

In light of feedback we have received from Indigenous clients and in our own research and experience the EDO submits that the legislation relating to cultural heritage, namely the *National Parks and Wildlife Act 1974*, is in need of substantial reform as it is not achieving one of its objects being the 'the conservation of places, objects and features of significance to Aboriginal people.'²

The Act's provisions regarding consultation with Indigenous communities are too often seen as tokenistic and discretionary, leaving traditional owners with a feeling of having no control over their cultural heritage and consequently disenchanted with the legislation. Perhaps the most significant failing of the *NPW Act 1974* cultural heritage provisions is that an Aboriginal community cannot prevent an activity that is likely to result in the destruction of their heritage.³ This is the case no matter how important the item or place is. The Act therefore offers no substantive protection of Aboriginal heritage and its provisions have been described as merely regulating its destruction.⁴

The amendments in the draft Bill do go some way to addressing these problems. However, the EDO submits that they do not go far enough. We are of the view that ensuring the conservation of Aboriginal objects and places will require a complete refurbishment of the legislative framework pertaining to cultural heritage.

¹ For example see *Williams v Director-General of National Parks and Wildlife Service and Ors* [2003] NSWLEC 121 and *Anderson v Director General of the Department of Environment and Climate Change & Anor* [2008] NSWCA 337.

² Section 2A(b)(i), *NPW Act*. See also Kathy Ridge and Anthony Seiver, 'Carriage- an elder's journey through the courts', *Indigenous law Bulletin*, February 2005, 6(9) at 6, Joseph Kennedy, 'Operative protection or regulation of destruction?- The validity of permits to destroy indigenous cultural heritage sites.' (2002) *Indigenous Law Bulletin* 6(14) at 20.

³ Kathy Ridge and Anthony Seiver, 'Carriage- an elder's journey through the courts', *Indigenous law Bulletin*, February 2005, 6(9) at 6.

⁴ *Ibid.*

This is likely to be achieved only through the creation of a stand-alone Act that places control of cultural heritage firmly in the hands of traditional owners. Indeed, NSW is the only remaining State or Territory in Australia without independent legislation protecting Aboriginal cultural heritage. Alternatively, if a separate Act is not considered, the *NPW Act* will require significant amendments to accommodate the changes needed, coupled with a shift in approach by the Government.

On the other hand, EDO strongly supports the proposed amendments in the bill that seek to strengthen the enforcement and compliance provisions of the *NPW Act* and *Threatened Species Conservation Act 1995*. These changes which help these acts better meet their environmental protection objectives and will deter further breaches of provisions. This addresses a serious gap.

Our key comments and recommendations are:

- The EDO strongly supports the proposed strengthening of the offence provisions for harming Aboriginal objects and places in the *National Parks and Wildlife Act 1974* ;
- The EDO supports the proposed *Due Diligence Guidelines for Proponents* as these have potential to provide greater guidance to proponents and ensure increased compliance with the *National Parks and Wildlife Act 1974*;
- All defences to cultural heritage offences should be contained within the Act; The power to make regulations prescribing new defences should be removed;
- The EDO supports the proposed s87A which ensures that Aboriginal people may carry out cultural activities in national parks without fear of prosecution;
- The EDO supports the prescription of factors to be considered by the Director-General in assessing an AHIP application. However, great weight should be given to the heritage significance of the item/place and the views of Aboriginal people;
- Aboriginal people should be consulted in relation to any variations to AHIPs. This is not assured by the draft Bill;
- Merits appeal rights for Aboriginal people should be granted in relation to a decision to approve an AHIP;
- The EDO supports legally enforceable community consultation guidelines. However, we submit that given the importance of effective consultation, these requirements should be found in the Act itself, not in regulations;
- Local Aboriginal Land Councils must be notified of all Aboriginal Cultural Heritage Assessments. The draft community consultation guidelines should be amended to accommodate this;
- Indigenous knowledge protocols must be developed in the community consultation guidelines to ensure that sacred and ‘secret’ information is protected; and
- The EDO strongly supports the strengthening of the compliance and enforcement frameworks in the *NPW Act* and *TSC Act*. We support amendments relating to remediation directions, sentencing considerations

for the Land and Environment Court and the expansion of the range of Court orders that can be made.

1. Aboriginal Cultural Heritage

1.1. New offences

EDO strongly supports the new offence provisions for harming Aboriginal objects and places. This will bring the Aboriginal cultural heritage penalty provisions into line with other NSW environmental legislation. This will have an important deterrence factor and constitutes a greater recognition of the importance of Aboriginal cultural heritage to Aboriginal people in NSW.

1.2. Due diligence guidelines

The EDO supports the proposed *Due Diligence Guidelines for Proponents* as these have potential to provide greater guidance to proponents on when to apply for a permit and outlines a process they can go through if they are not sure whether Aboriginal objects are likely to be present on their land. The guidelines also confine the defence that proponents can rely on when they are prosecuted for harming Aboriginal cultural heritage. Proponents will have to demonstrate that they exercised 'due diligence' instead of simply claiming that they did not know of the existence of any Aboriginal heritage items or places. This has the potential to lead to increased compliance with the *National Parks and Wildlife Act 1974*.

1.3. Other defences

S87(4) stipulates that new defences to the offence provisions can be provided for in Regulations. The EDO opposes this. Given the importance on Aboriginal heritage, any defences to harming Aboriginal places or objects must be subject to full parliamentary scrutiny and community consultation, which is not the case with Regulations. This amendment should be removed.

1.4. Exemption for traditional Aboriginal cultural activities

EDO supports the proposed s87A which ensures that Aboriginal people may carry out cultural activities in national parks without fear of prosecution. This exemption is essential in order to allow Aboriginal people to practice their culture and keep it alive for future generations.

1.5. Grant or refusal of application for AHIP

The EDO supports the proposed s90K which sets out factors to be considered by the Director-General in determining whether to approve or refuse an application. We support the explicit requirement to consider the objects of the Act, the significance of the object or place, and the results of consultation with Aboriginal people. However, although this is better than the previous process which allowed the Director-General to make a decision without having to consider any express

heads of consideration, this still allows the significance of the item to be subjugated to economic and social interests. We submit that given the importance of cultural heritage to Aboriginal people, the significance of the item and consultation with Aboriginal people should be given greater weight by the Director-General in making his/her decision.

We also note that under proposed s90C, if the Director-General seeks to refuse an application the Director-General must issue a notice to the proponent of the intention to refuse and provide written reasons for the refusal. We submit that again given the importance of heritage to the identity of Aboriginal people, then the reverse should also apply. That is, if the Director-General seeks to approve an AHIP application, then the Director-General must be required to give reasons for the approval to Aboriginal people. Given the likely cultural impact that an approval to destroy will have, at the very least Aboriginal people should be provided with written reasons for the approval.

1.6. Variation of permits

Where terms and conditions of an Aboriginal Cultural Heritage Permit are varied, or when amendments are proposed, then Aboriginal people and Traditional Owners must be consulted on such changes. This is not assured by the draft Bill. We submit that the proposed s90D should be amended to require mandatory consultation in such circumstances.

1.7. Appeals

There is no general right for Aboriginal people to appeal the destruction of their culture and heritage. Although legal proceedings can be brought against a decision of DECC to issue an Aboriginal Heritage Impact Permit (AHIP) in certain circumstances, such as where a legal error is present, there is no right for Aboriginal people to appeal on the merits of an application to approve an AHIP.

The proposed section 90L in the Bill will allow the proponent or a 'person aggrieved' to appeal to the Minister where the Director-General has made a decision to refuse an AHIP within 21 days. However, there is no similar right for Aboriginal people to appeal to the Minister where an AHIP has been approved.

Merits appeal rights for objectors dissatisfied with an administrative decision are available in other NSW legislation, such as in section 98 of the *Environmental Planning and Assessment Act 1979*. We submit that Aboriginal people should be granted this right under the *National Parks and Wildlife Act 1974*, both in the interests of equity and to recognise the impact that the destruction of cultural heritage is likely to have on Aboriginal people.

1.8. Regulations relating to consultation

One of the objectives of the *National Parks and Wildlife Act*, in addition to protecting flora and fauna, is the protection of Aboriginal Cultural Heritage, whereby the Director General acts as a guardian. However, despite this the Act

does not explicitly recognise the right for Aboriginal people to be consulted about decisions relating to their culture and heritage. Moreover, while on the one hand the Director General is guardian, he or she also has the power to issue consents to damage or destroy Aboriginal cultural heritage through issuing Aboriginal heritage permits (AHIPs).

The EDO therefore supports legally enforceable community consultation guidelines. The proposed section 90N allows regulations to be made prescribing consultation that must be undertaken with Aboriginal people in relation to AHIP applications. However, we submit that given the importance of effective consultation, these requirements should be found in the Act itself, not in regulations.

We submit that the *Draft Community Consultation Guidelines for Proponents*, which outlines the consultation that must be undertaken with Aboriginal people before an AHIP is issued, provide a basis for provisions in the Act subject to the following concerns:

- The identification of Aboriginal cultural knowledge holders;
- The requirement to consult with the Native Title Tribunal;
- The removal of mandatory notification of assessments to Local Aboriginal Land Councils; and
- The use of ‘Traditional Knowledge’

1.8.1. Identification of Aboriginal cultural knowledge holders

The requirement for the proponent to identify at the outset a list of ‘Aboriginal cultural knowledge holders’ is an improvement upon the current approach of simply sending out a notice to ‘relevant Aboriginal groups’ as determined by the proponent. However in each scenario there is considerable discretion exercised by the proponent. The EDO submits that more guidance is needed to confine this discretion and to ensure that all relevant Aboriginal stakeholders are consulted.

1.8.2. Native Title Tribunal and Local Aboriginal Land Councils

The removal of Native Title Services as a key body and its replacement with the Native Title Tribunal is problematic as the Native Title Tribunal does not advocate for the rights and interests of traditional owners as it is an adjudicatory body. Furthermore, the *Interim Consultation Guidelines* required that Aboriginal Cultural Heritage Assessment Reports are provided to the Local Aboriginal Land Councils whether or not they have a registered interest, whereas the draft Consultation Guidelines do not contain this requirement. The EDO submits that this should be reintroduced to ensure that the LALC, which is a peak local body, is informed of all Aboriginal cultural heritage assessments.

1.8.3 Traditional Knowledge

Another shortfall of the Draft Consultation Requirements is the failure to acknowledge ‘Traditional Knowledge’ and its protection which surely falls within

the ambit of Aboriginal cultural heritage relevant to and practiced amongst Aboriginal people in NSW today. This oversight is significant because the Draft Consultation Requirements rely on information contained in a database, and although proponents have access to such information it can be difficult for Aboriginal people to access it. There are also issues concerning the information contained in the database which may be sacred or 'secret'. The Draft Consultation Requirements do not address how such information is to be used by the proponent or how it will be managed or stored. The Draft Guidelines merely state that it is the responsibility of the proponents to implement appropriate protocols for sourcing and holding cultural information. Important intellectual property issues, particularly those of a collective nature, are not addressed.

2. Compliance and Enforcement

The EDO strongly supports the strengthening of the compliance and enforcement frameworks in the *NPW Act* and *TSC Act*. We submit that a clear, consistent and strong compliance and enforcement strategy is a key component of ensuring the success of environment protection legislation. The proposed provisions will markedly improve the compliance and enforcement frameworks in those Acts and will address administrative efficiencies for the Department of Environment and Climate Change. Indeed, part of the reason that enforcement of environmental laws is currently a key shortcoming in NSW may be the complexity arising from the different statutory enforcement regimes administered by DECC. Ensuring that there are consistent enforcement processes, compliance mechanisms and penalties across environmental legislation in NSW will make enforcement easier and will help facilitate a more coordinated and focused approach to enforcement by DECC. Moreover, a stronger suite of tools available will amplify the deterrence factor as people are generally more reluctant to breach environmental protection legislation when there are strong penalties and sanctions in place.

2.1 Remediation directions

The EDO strongly supports the introduction of Part 6A, Division 3 into the *NPW Act* that will apply to land reserved under the Act, listed threatened species and Aboriginal objects. This Division will allow the Director-General to direct that specified remediation work be undertaken by landholders to 'make good' damage incurred as a result of an offence under the Act. The new remediation order provisions also grant the Director-General the power to make a broad range of orders which can be tailored to the particular breach. Indeed, the Director-General will be able to require works to control, abate and mitigate damage, as well as work to restore or remediate damaged land, habitat, plant or animal concerned.

The EDO welcomes this new Division. It crucial that a 'make-good' mechanism is available to the Director-General to facilitate the remediation of any damage caused by a breach of the Act to the greatest extent possible (in addition to a financial penalty). This is important to ensure that the objects of the *NPW Act* are met, and to protect the integrity of reserved areas, threatened species and Aboriginal objects and places.

2.2. Sentencing considerations for criminal matters

The introduction of mandatory sentencing considerations for the Land and Environment Court is a welcome development. The considerations in the proposed s194 will mirror those in the *Protection of the Environment Operations Act 1997* which we support. In addition, we support the inclusion of further considerations beyond those in the *Protection of the Environment Operations Act 1997* requiring the Court to take into account the significance of the reserved land, Aboriginal object or threatened species that has been harmed, as well the views of Aboriginal persons with a cultural connection to the object or place harmed in considering which sentence is appropriate. These sentencing considerations will provide more guidance to the Court in determining that appropriate order and will ensure that the harm caused to the environment and the significance of the damaged item or place remain at the forefront of the Court's mind.

2.3. Court orders

The EDO also supports and welcomes the proposed Division 3 of Part 15 of the *NPW Act* and Part 9B of the *Threatened Species Conservation Act 1995* which provides the Land and Environment Court with the power to issue a variety of orders to offenders. These orders, which previously were not open to the Court, include orders for restoration and prevention and orders to prevent further damage and adverse publicity orders.

The proposed adverse publicity order provisions will grant the Court the power to require offenders to publish a public notice of the offence and detail its environmental consequences. The EDO strongly supports this as the potential for such orders to be made will provide a further deterrent to future offenders. An adverse publicity order has the potential to affect the reputation and public profile of individuals and corporations, which will act as a powerful incentive to comply with the provisions of the NPW Act and the TSC Act.

** For more information about this submission please contact Robert Ghanem or Neva Collings at the [EDO](#)*