



***The New South Wales Aboriginal Land Council's
submission to the
Review of Complying Development for Inland NSW***

May 2016



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

Director
Policies and System Implementation
GPO Box 39
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Via online submission form

Submission to the Review of Complying Development for Inland NSW

Dear Sirs and/or Madams,

The NSW Aboriginal Land Council (**NSWALC**) welcomes for the opportunity to submit comments regarding the review of complying development for inland NSW (**Review**), including the proposed draft Inland Code for complying development to apply to land west of the Great Dividing Range in NSW, currently on exhibition by the Department of Planning and Environment (**Department**).

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 23,000 members, is the largest Aboriginal member based organisation in Australia. NSWALC is a self-funded statutory corporation created under the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**), and has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW. NSWALC also provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) across the state. LALCs have similar statutory objectives to NSWALC in regards to their own local communities, and manage land for the cultural, economic and social benefit of their members.

NSWALC do not support the proposed changes in their current form. NSWALC has consistently taken the position that exempt and complying development provisions may allow proponents to bypass Aboriginal culture and heritage regulations and risk further degrading Aboriginal culture and heritage sites throughout NSW. Therefore, expanding exempt and complying development provisions are not supported without first ensuring adequate safeguards for risks to Aboriginal culture and heritage. Current restrictions to exempt and complying development are not capable of safeguarding Aboriginal culture and heritage, chiefly because the majority of these types of heritage items are not formally recorded in planning instruments.

While we understand the overarching policy objective of facilitating and simplifying development approval processes in rural and regional areas, it is crucial to balance this against other policy objectives such as the urgency of protecting and maintaining Aboriginal culture and heritage in NSW. All too often, unique Aboriginal culture and heritage assets are harmed or damaged at the expense of streamlining and prioritising growth and development. Aboriginal culture and heritage is being lost at an astonishing rate in NSW and its regulation continues to be poorly integrated with planning and development processes.

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Aboriginal culture and heritage that might arise from the proposal to streamline exempt and complying development in inland areas, and integrate better safeguards to avoid or mitigate these impacts. Until this is done, NSWALC will not support the current proposals. NSWALC will continue to work with the Department to improve the NSW planning system to support the objectives of the ALRA to ensure the economic, social and cultural prosperity of Aboriginal people in NSW.

In summary:

- **NSWALC do not support the current proposals to expand exempt and complying development provisions in inland areas, including the draft Inland Code, due to concerns regarding the impact on Aboriginal culture and heritage.**

NSWALC urge the Department to:

- Undertake a rigorous analysis of the potential impacts that expanding complying development in inland areas may have on Aboriginal culture and heritage;
- Postpone the implementation of the proposed changes until adequate safeguards are put in place to protect Aboriginal culture and heritage from these impacts; and
- Review and revise the guidance provided to individuals and developers to ensure that clear information is provided regarding the need to comply with Aboriginal culture and heritage regulations at all times.

Impacts on Aboriginal Culture and Heritage

NSWALC has previously made submissions to the NSW Government stating our position regarding exempt and complying development provisions, which can be provided upon request¹. Our position has consistently been that we do not support provisions that allow a broad scope of activities to take place without assessment or regulation, as they have the potential to impact on Aboriginal culture and heritage, and fail to deter individuals and businesses from destroying Aboriginal culture and heritage.

Aboriginal culture and heritage is broadly comprised of both tangible objects and items such as middens and stone tools, along with intangible features such as ceremonies and songlines associated with broader cultural landscapes. As you would be aware, a narrow scope of Aboriginal cultural objects and places are regulated in NSW under the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**), the *Environmental*

¹ See NSWALC's submissions to: *The proposal to expand exempt and complying development to include two-storey medium density housing types* (March 2016) *Planning Review Panel: Review of NSW Planning System* (November 2011), the *Planning Review Panel: Issues Paper* (March 2012), *Submission to NSW Government Green Paper: A new planning system for NSW* (September 2012) and *Submission to NSW Government White Paper: A new planning system for NSW* (June 2013) available at <<http://www.alc.org.au/publications/other-publications.aspx>>.

Planning and Assessment Act 1979 (NSW) and regulations and guidelines under these Acts. It is an offence to harm or desecrate a known Aboriginal object under the NPW Act².

The draft Inland Code would streamline a broad spectrum of development at high risk of impacting Aboriginal culture and heritage, such as the construction of stockyards, farm building, silos and swimming pools; along with developments within 50m of watercourses. This is of great concern to the Aboriginal Land Rights Network, given there is often a high concentration of Aboriginal heritage sites in close proximity to water courses, and that Aboriginal culture and heritage is very vulnerable to harm from works which involve excavation or earthworks. NSWALC has highlighted the astonishing loss of Aboriginal culture and heritage across NSW in previous submissions³; urgent reform is needed to ensure Aboriginal culture and heritage is not irrevocably damaged in NSW.

We note that exempt and complying development provisions generally cannot be undertaken on areas classed as 'heritage conservation areas,' that is, if an item or area has been included on a public 'heritage schedule' or mapped out in a Local Environmental Plan (LEP). These restrictions would also apply to the draft Inland Code and other proposed changes, which recognises the potential risks that such provisions pose to sensitive heritage assets. However, unfortunately, the overwhelming majority of Aboriginal culture and heritage has not been formally identified and listed in planning instruments or public registers. Many local councils have not undertaken Aboriginal heritage studies in order to identify Aboriginal culture and heritage items appropriate for inclusion in LEP mapping, nor would Aboriginal culture and heritage on most private property have been identified and registered. As such, Aboriginal culture and heritage is largely excluded from this protection mechanism and remains vulnerable to damage from unregulated exempt and complying development.

Case study: complying development

NSWALC has been directly notified of several incidences where destruction of Aboriginal culture and heritage has occurred because of complying development processes.

One example occurred when a LALC Sites Officer was conducting a site survey for the local council on a local council managed reserve. The LALC Sites Officer happened to notice that an Aboriginal midden was being dug up on a privately owned property nearby in order to install a backyard pool. A family had been carrying out complying development earthworks in a coastal local government area and had consulted with the local council for this process.

² Section 86, NPW Act.

³See, for example, NSWALC, *More than Flora and Fauna* (2009) 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; NSWALC and NTSCORP, *Our Culture in Our Hands* (2011) Submission in response to the reform of Aboriginal Cultural Heritage in NSW, available by request or at <http://www.alc.org.au/publications/other-publications.aspx>.

Despite this incident being reported to the Office of Environment and Heritage (OEH) along with photos of the destruction, the OEH failed to issue an immediate stop-work order, and it took almost 2 weeks for the OEH to inspect the site. When OEH finally conducted an inspection of the site, the destruction had already occurred.

Additionally, the local council involved had previously undertaken sensitivity mapping of the area, which had identified the presence of the Aboriginal midden in the vicinity. It is unclear whether the local council consulted this mapping in order to determine whether the property owners should have undertaken an Aboriginal Heritage Assessment.

NSWALC submits that addressing these issues will require further consideration by the Department. It is disappointing to note that the potential negative impacts of extending regional and rural complying development provisions, including impacts on Aboriginal culture and heritage, do not appear to have been extensively considered during the development of the proposed changes, including the draft Inland Code.

Further consideration needs to be given to ensuring appropriate safeguards for Aboriginal culture and heritage in complying development processes, especially in light of the fact that existing protection mechanisms are not working effectively. One option to achieve this may be through expanding the exemptions to where exempt and complying development applies and ensuring that exemptions are effectively targeted to areas and places of Aboriginal culture and heritage significance.

Another area which could be improved is ensuring that individuals and developers are provided clear guidance regarding the need to ensure Aboriginal culture and heritage processes are complied with, including the obligation to report the discovery of Aboriginal culture and heritage items. The exempt and complying development provisions are presented by the Department as a way to 'fast track' and 'streamline' development approvals processes. This can mislead individuals and developers into mistakenly believing that obligations to protect Aboriginal culture and heritage do not apply in these circumstances. There is a lack of clear information provided to individuals and developers in this regard.

It would be useful for the Department to review its current policies and other information provided to the public and developers regarding exempt and complying development processes, including inserting clear guidance regarding exempt and complying development and Aboriginal culture and heritage obligations.

Ensuring that individuals and developers are notified of their obligations to protect Aboriginal culture and heritage up-front will be beneficial to all parties. Addressing these issues from the outset is likely to be more expedient and cost-effective compared to costly and time-consuming processes under the NPW Act, such as stop-work orders or remediation of a damaged Aboriginal culture and heritage site.

We thank you for the opportunity to make a submission to the proposed reforms to inland complying development processes and we look forward to working further with the Department with regard to

planning and development reforms in NSW. If you have questions or comments regarding the content of this submission, please contact the Policy and Programs Unit on (02) 9689 4444 or policy@alc.org.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'K. Aubrey-Poiner', with a stylized flourish at the end.

Kate Aubrey-Poiner
A/ Executive Director Policy & Programs

Date: 12/5/16