



fact sheet

ABORIGINAL CULTURE AND HERITAGE



New South Wales
Aboriginal Land Council

Aboriginal Heritage Protection under the *National Parks and Wildlife Act 1974 (NSW)*

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This Fact Sheet provides an overview of the way that Aboriginal heritage is managed in NSW, through the *National Parks and Wildlife Act 1974 (NSW)* and the *National Parks and Wildlife Regulation*.ⁱ

This is one of a series of Fact Sheets which have been developed for Local Aboriginal Land Councils (LALCs) and the Aboriginal community by the NSW Aboriginal Land Council (NSWALC). Copies of the Fact Sheets are available from www.alc.org.au or by calling the NSWALC Policy & Programs Unit on 02 9689 4444.

While all care has been taken in the preparation of this fact sheet, it is not a substitute for legal advice in individual cases. This Fact Sheet is current as of February 2015.

Note: The NSW Government is conducting a review of Aboriginal culture and heritage laws in NSW. For more information, please visit:

www.environment.nsw.gov.au/achreform

How is Aboriginal heritage protected in NSW?

The *National Parks and Wildlife Act 1974 (NPW Act)* is the main law for protecting Aboriginal culture and heritage sites and in NSW. The Office of Environment and Heritage (OEH) is responsible for administering this Act. The NPW Act gives the Chief Executive of OEH responsibility for the proper care, preservation and protection of 'Aboriginal objects' and 'Aboriginal places'.ⁱⁱ The protections for Aboriginal objects cover objects on both public and private lands.

The Chief Executive can give permission to developers, government agencies and others to disturb, damage or destroy Aboriginal heritage through the issuing of an Aboriginal Heritage Impact Permit (or AHIP). See NSWALC *Site Protection* Factsheet 5 for more detail.

The Chief Executive also has the power to prosecute people who unlawfully destroy or damage Aboriginal objects or places, and can take other action to protect cultural heritage such as issuing a stop work order. **Note:** other laws, such as State Significant development process under the *Environmental Planning and Assessment Act 1979 (NSW)*, may allow developments to harm a site without the need to obtain an AHIP.

2010 changes to the NPW Act

In June 2010, the NSW Parliament passed the *National Parks and Wildlife Amendment Bill 2010*, also known as the **Omnibus Bill**ⁱⁱⁱ. The Bill made significant changes to the Aboriginal heritage provisions of the NPW Act. These changes and the *National Parks and Wildlife Amendment (Aboriginal Objects and Aboriginal Places) Regulation 2010* came into effect on **1 October 2010**.

What were the specific changes?

New offences and increased penalties for harm to Aboriginal places and objects: Previously a person could only be prosecuted for harming an Aboriginal object or place if they knew they were causing such harm. A new offence has now been added to the Act for when a person damages an Aboriginal object or place accidentally or without knowing (this is referred to as a '**strict liability**' offence). Also added were new powers for the Chief Executive and Courts to make remediation or restorations directions if damage has been caused.

Significantly increased fines have also been introduced of up to \$34,000 for individuals, or \$1.7 million in the case of corporations (see NSWALC *Site Protection* Fact Sheet 6)

Introduction of a wide range of defences: Along with the new offences, new defences have been

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introduced which will apply where a person harms an Aboriginal object without knowing and without a permit from OEH, including:

A '**due diligence**' defence may be available if a person followed certain steps to determine if an Aboriginal object exists. Due diligence is a legal concept which generally means taking reasonable and practicable steps to determine whether a person's actions are likely to cause harm.

The NPW Act allows for Codes of Practice to be adopted into the Regulations which outline what steps will constitute due diligence – that is, what steps a person should take if they want to proceed *without* a permit from OEH^{iv}. If a person proves they have followed these steps they may be able to avoid a penalty for damage to an Aboriginal object.

The *Regulation* includes several Codes, including:

- OEH Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW,
- Plantations and Reafforestation Code,
- Private Native Forestry Code of Practice,
- NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects,
- Aboriginal Object Due Diligence Code for Plantation Officers Administering the Plantations and Reafforestation (Code) Regulation 2001,
- Forests NSW Operational Guidelines for Aboriginal Cultural Heritage Management.

The due diligence defence is not available if the person *knows* an Aboriginal object exists.

A '**low impact**' defence will be available if a person was undertaking an activity listed in the Regulations as 'low impact' activities, which include several mining and farming related works.

IMPORTANT NOTE: These defences only apply to harm to Aboriginal objects – not Aboriginal places. This is because Aboriginal places are clearly defined.

New administrative processes for permits:

Provisions have been introduced to make permits more 'flexible' and to allow permits to be issued for classes of objects, places, land, activities or persons (at section 90, NPW Act). It will also be easier to transfer permits.

Factors that the Chief Executive must consider: A defined list of factors that the Chief Executive must

consider before issuing a permit is now listed in the Act (at section 90K, NPW Act).

Definition of harm: A definition of harm has been added to the NPW Act (at section 5). Activities may be excluded from being defined as harm by the NPW Regulation.

A *Code of Practice for Archaeological Investigations in NSW*, has been included in the Regulations which removes some 'routine' archaeological activities from being defined as harm.

Regulations relating to consultation: Clause 80C of the Regulations outlines requirements for consultation. These generally reflect OEH's Community Consultation Requirements policy. For more info refer to NSWALC's Fact Sheet on *Community Consultation*.

Requirement to maintain a heritage register: OEH currently maintains a database of known Aboriginal objects and places, called the Aboriginal Heritage Information Management System (**AHIMS**). The NPW Act now includes a requirement that the Chief Executive keep AHIMS as the database of known Aboriginal objects and related information (at section 90Q), and also a public register (section 188F), parts of which are now accessible online at: www.environment.nsw.gov.au/awssapp.

Do traditional activities need a permit?

There is an exemption from the need to get a permit for certain activities that may harm an Aboriginal object or place if the person is an Aboriginal person undertaking traditional cultural activities (except commercial activities).

Where can I get more information?

Visit the 'Culture and Heritage' pages of the NSWALC website at www.alc.org.au or contact the NSWALC Policy and Programs Unit on 02 9689 4444. The OEH Heritage Division can be contacted on 02 9873 8500.

ⁱ A current version of the *National Parks and Wildlife Act 1974* and *National Parks and Wildlife Regulation* can be found at <http://www.legislation.nsw.gov.au> - Go to 'Browse', then 'Acts' or 'Regulations', then 'N'.

ⁱⁱ 'Aboriginal places' refers to those places gazetted by the Minister. There are 96 Aboriginal places in NSW. See <http://www.environment.nsw.gov.au/conservation/AboriginalPlacesNSW.htm> for more information.

ⁱⁱⁱ An 'omnibus bill' is a bill which makes changes to more than one Act of Parliament.

^{iv} See OEH website for Copies of the NPW Act, Regulation and Codes: <http://www.environment.nsw.gov.au/legislation/NPWAmendmentACT2010.htm>