



fact sheet

ABORIGINAL CULTURE AND HERITAGE



New South Wales
Aboriginal Land Council

New fines and offences for the destruction of Aboriginal heritage

6

This Fact Sheet outlines offences and penalties for harming or desecrating Aboriginal culture and heritage.

This is one of a series of Site Protection Fact Sheets which have been developed for Local Aboriginal Land Councils (LALCs) 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 and Programs Unit on 02 9689 4444.

Please 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. The information in this Fact Sheet is current as of February 2015.

What are the offences for the destruction of Aboriginal culture and heritage?

The *National Parks and Wildlife Act 1974 (NPW Act)*ⁱ is the main law for the protection of Aboriginal sites in NSW. The NPW Act contains new offences for harming or desecrating Aboriginal objects or places that have been in force since **1 October 2010**. They are:

- A 'strict liability' offence for harming or desecrating Aboriginal objects or places. This does not require someone to know that it is an Aboriginal object or place they are causing harm to in order for them to be prosecuted.; and
- An offence for 'knowingly' harming and Aboriginal object.

Certain 'circumstances of aggravation' such as previous convictions for harming Aboriginal objects or places, or causing harm in the course of a commercial activity, may double the penalties for individuals who harm Aboriginal objects.

There are also offences for:

- Failing to notify OEH of the location of an Aboriginal object, and
- Contravening any condition of an Aboriginal Heritage Impact Permit (AHIP).

What are the penalties?

The new maximum penalties for 'knowingly' harming or desecrating an Aboriginal object are:

- For individuals, \$425,000, or imprisonment for 1 year, OR \$850,000 or imprisonment for 2 years in circumstances of aggravation;
- For corporations, \$1.7 million.

The new maximum penalties for harming or desecrating an Aboriginal object (strict liability offence) are:

- For individuals, \$85,000, OR \$170,000 in circumstances of aggravation;
- For corporations, \$340,000.

The new maximum penalties for harming or desecrating an Aboriginal place (strict liability offence) are:

- For individuals, \$850,000, or imprisonment for 2 years, or both;
- For corporations, \$1.7 million.

The new maximum penalties for failing to notify OEH of the location of an Aboriginal object:

- For individuals, \$17,000. For continuing offences a further penalty of up to \$1,700 applies for each day the offence continues;
- For corporations, \$34,000. For continuing offences a further penalty of up to \$3,400 for each day the offence continues.

SITE PROTECTION

February 2015

The new maximum penalties for contravening any condition of an Aboriginal Heritage Impact Permit (AHIP), are

- For individuals, \$170,000, or imprisonment for 6 months, or both, and in the case of a continuing offence a further penalty of up to \$17,000 for each day the offence continues;
- For corporations, \$340,000 and in the case of a continuing offence a further penalty of up to \$34,000 for each day the offence continues.ⁱⁱ

How many people are prosecuted each year for destroying Aboriginal culture and heritage in NSW?

Between 2005 and 2010 there were only eight successful prosecutions for 'knowingly' causing or permitting damage to Aboriginal culture and heritage. Since 2010 there has only been one prosecution.

Do the new offences apply to Aboriginal people?

Section 87B of the *National Parks and Wildlife Act* creates an exemption for Aboriginal people when carrying out traditional cultural activities (except commercial activities) to the offences relating to harming or desecrating an Aboriginal object or place.

What is the definition of harm?

The offences outlined above relate to actions or omission that cause 'harm' to Aboriginal objects or places.

The Act defines harm to an object or place as any act or omission that:

- (a) destroys, defaces or damages the object or place, or
- (b) in relation to an object—moves the object from the land on which it had been situated, or
- (c) is specified by the regulations, or
- (d) causes or permits the object or place to be harmed in a manner referred to in paragraph (a), (b) or (c),

but does not include any act or omission that:

- (e) desecrates the object or place, or
- (f) is trivial or negligible, or
- (g) is excluded from this definition by the regulations.ⁱⁱⁱ

What acts or omissions are 'trivial or negligible'?

The OEH Due Diligence Code of Practice states that:

"Examples of what might be a trivial or negligible act are picking up and replacing a small stone artefact,

breaking a small Aboriginal object below the surface when you are gardening, crushing a small Aboriginal object when you walk on or off a track, picnicking, camping or other similar recreational activities."^{iv}

What are the new defences?

Along with the new offences, new defences have been introduced which apply where a person harms an Aboriginal object without knowing what it was or without a permit from OEH, including:

- A '**due diligence**' defence is available where a person followed reasonable and practical measures to avoid harming any Aboriginal objects that were harmed. For more info see NSWALC Site Protection Fact Sheet 7 – *Due Diligence*.
- A '**low impact**' defence is available where a person was undertaking an activity listed as 'low impact' in Cl 80B of the *National Parks and Wildlife Regulations*. Activities include several mining and farming related works.

Is the Aboriginal community compensated for damage to cultural heritage?

Under the *National Parks and Wildlife Act* all Aboriginal objects, whether on public or private land, are the property of the Crown (with some exceptions).

Fines for damaging Aboriginal objects and places go into the National Parks Fund, which is managed by OEH.

There are also provisions in the Act that allow the Chief Executive to issue remediation directions which would force a person or company to take steps to control, abate or mitigate damage, or to work to protect, conserve, maintain, remediate or restore the harmed Aboriginal object or Aboriginal place concerned.

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 via the general information line on 02 9995 5000.

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

ⁱⁱ 1 penalty unit is \$170 as of February 2015, see: http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/s4aa.html

ⁱⁱⁱ Section 5, *National Parks and Wildlife Act 1974*

^{iv} See page 5, OEH Due Diligence Code of Practice, available at <http://www.environment.nsw.gov.au/resources/cultureheritage/ddcop/10798ddcop.pdf>