



fact sheet

ABORIGINAL CULTURE AND HERITAGE



New South Wales
Aboriginal Land Council

Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW

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This Fact Sheet provides an overview of the new Office of Environment and Heritage (OEH) *Due Diligence Code of Practice of the protection of Aboriginal objects in NSW*

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 and Programs Unit on 02 9689 4444.

Please note: 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.

What are the new offences for damaging or destroying Aboriginal culture and heritage?

The *National Parks and Wildlife Act 1974* (NSW)ⁱ (**NPW Act**) is the main Act for protecting Aboriginal culture and heritage in NSW.

In 2010, the NSW Government amended the NPW Act to include a new 'strict liability' offence for harming an Aboriginal object or place.

For someone to be guilty of this offence, it is not necessary for them to have actually known that they were causing harm to an Aboriginal object or place.

For more info, see NSWALC Site Protection Fact Sheet 6 – *New fines and offences for the destruction of Aboriginal heritage*.

The NSW Government also introduced defences to this strict liability offence:

- Where harming activities were authorised by an Aboriginal Heritage Impact Permit (AHIP). For more information please see NSWALC Site Protection Fact Sheet 5; or

- Where harming activities are listed as exempt or 'low impact' activities by the *National Parks and Wildlife Act and Regulation*; or
- Where someone has exercised 'due diligence' to determine whether an activity will harm an Aboriginal object and has decided that it won't before undertaking a harming activity.

What is due diligence?

Due diligence refers to taking *reasonable and practical measures* to protect Aboriginal culture and heritage.

If a person can prove that they did this, they may have a defence against prosecution for the strict liability offence where they have harmed an Aboriginal object without an Aboriginal Heritage Impact Permit (AHIP).

However, due diligence is not a defence if the person knew that they were harming an Aboriginal object.

What is the Due Diligence Code of Practice?

The NSW Office of Environment and Heritage (OEH) have published a Code of Practiceⁱⁱ that sets out the steps they expect individuals and corporations to follow in order to exercise due diligence to:

- identify whether or not Aboriginal objects are, or are likely to be, present in an area
- determine whether or not their activities are likely to harm Aboriginal objects (if present)
- determine whether an AHIP application is required.

It is not mandatory to follow the steps outlined in the OEH code. An individual or corporation can take other measures, provided that such measures are objectively *reasonable and practicable* and meet the ordinary meaning of exercising *due diligence*.

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What are main steps in exercising due diligence?

Where proposed activities will disturb the ground or any culturally modified trees, the OEH Due Diligence Code of Practice requires proponents to take the following steps:

1. Search the Aboriginal Heritage Information Management System (AHIMS), and any other sources of information that the person is aware of eg. Local Environment Plans, cultural heritage studies or assessments; and also assess whether there are any landscape features that indicate Aboriginal objects are likely to be found. Where Aboriginal objects or relevant landscape features are not identified an AHIP may not be required to proceed;
2. Where the presence of Aboriginal objects have been identified from AHIMS or other sources, or where relevant landscape features have been identified in 'undisturbed lands', and the proponent's activities cannot be modified to avoid harming the identified Aboriginal objects or landscape features, a desktop assessment of the broader area and a visual inspection of the specific area, must be conducted (the inspection must be conducted by someone with experience in identifying Aboriginal objects). Where objects are not located or are reasonably thought not likely to be present, an AHIP may not be required to proceed;
3. If Aboriginal objects are found or are likely to be found at the location, further investigation and impact assessment is required.

Do proponents need to consult with Aboriginal people in the due diligence process?

Consultation with the Aboriginal community is not a formal requirement of the due diligence process.

However, proponents are encouraged to undertake consultation as the above methods may not be adequate to determine whether there are Aboriginal objects in the area.

Will the standard of due diligence be the same for all activities?

Not all activities will have to comply with the OEH Due Diligence Code of Practice.

Under the *National Parks and Wildlife Regulation 2009* industry-specific codes of practice may be adopted and followed for due diligence purposes.

Codes which have been adopted include:

- 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.

Does due diligence need to be followed for all activities?

The *National Parks and Wildlife Act 1974* provides exemptions for certain activities such as emergency fire fighting, and traditional Aboriginal cultural activities that are not carried out for commercial purposes. For these activities due diligence is not required.

Activities that involve 'trivial or negligible' harm, such as simply picking up and replacing a small stone artefact, do not require due diligence to be followed.

Also due diligence may not be required for the so called 'low impact' activities listed in the *National Parks and Wildlife Regulation 2009*, which includes certain mining and farming activities.

PLEASE NOTE: The 'low impact' defence does not apply to situations where a proponent already knows or becomes aware of Aboriginal objects they harm as a result of their low impact activities.

The low impact defence does not authorise harm to known Aboriginal objects.

Please also note: The due diligence process can still apply to an activity that is exempt or complying development within the meaning of the *Environmental Planning and Assessment Act 1979*.

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 Environmental Defender's Office (EDO) is a community legal centre that specialises in environmental law and may be able to provide assistance. **Contact the EDO on their free advice line 1800 626 239 or 02 9262 6989.**

The OEH Heritage Division can be contacted 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 The *OEH Due Diligence Code of Practice for the protection of Aboriginal Object in NSW*, is available from the OEH website at: <http://www.environment.nsw.gov.au/resources/cultureheritage/ddcop/10798ddcop.pdf>