



New South Wales

National Parks and Wildlife Amendment Regulation 2010

under the

National Parks and Wildlife Act 1974

[The following enacting formula will be included if the Regulation is made:]

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *National Parks and Wildlife Act 1974*.

Minister for Climate Change and the Environment

Explanatory note

The object of this Regulation is to amend the *National Parks and Wildlife Regulation 2009* as a consequence of the commencement of amendments made to the *National Parks and Wildlife Act 1974* (*the Principal Act*) by the *National Parks and Wildlife Amendment Act 2010*.

More specifically, the Regulation:

- (a) provides for a number of matters under the amended Part 6 (Aboriginal objects and Aboriginal places) of the Principal Act (**Schedule 1 [4]**), including the following:
 - (i) prescribing certain codes of practice and other documents, compliance with which will constitute a defence under section 87 (2) of the Principal Act against the new strict liability offence of harming an Aboriginal object (**proposed clause 80A**),
 - (ii) creating an additional defence against that offence where the defendant establishes that the act or omission concerned occurred in the course of certain specified low impact activities, such as farming or maintenance work (**proposed clause 80B**),
 - (iii) specifying a process of community consultation with relevant Aboriginal parties that must be undertaken before a person makes an application for an Aboriginal heritage impact permit (**proposed clause 80C**),
 - (iv) providing that an application for an Aboriginal heritage impact permit must be accompanied by a cultural heritage assessment report and setting out what such a report is to deal with and include (**proposed clause 80D**),

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Explanatory note

- (v) providing that the Director-General of the Department of Environment, Climate Change and Water may require an applicant for a variation of an Aboriginal heritage impact permit to carry out such community consultation as the Director-General considers appropriate if the Director-General is satisfied that the variation will result in a significant increase in harm to the Aboriginal objects or Aboriginal places concerned (**proposed clause 80E**),
- (vi) providing that certain bush fire hazard reduction work is taken not to harm Aboriginal objects or places for the purposes of the offence in section 86 of the Principal Act (**proposed clause 80F**), and
- (b) omits provisions relating to boards of management under Part 4A of the Principal Act that are now to be dealt with in Schedule 14A to that Act (**Schedule 1 [3]**), and
- (c) prescribes penalty notice amounts for certain new offences inserted into the Principal Act (**Schedule 1 [10]**), and
- (d) makes other amendments consequential on changes to provisions of the Principal Act (**Schedule 1 [1], [2], [5]–[9] and [11]**).

This Regulation is made under the *National Parks and Wildlife Act 1974*, including sections 87 (3), 90A (2) (b), 90N, 135 and 192 and Part 13 (the general regulation-making provisions).

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Clause 1

National Parks and Wildlife Amendment Regulation 2010

under the

National Parks and Wildlife Act 1974

1 Name of Regulation

This Regulation is the *National Parks and Wildlife Amendment Regulation 2010*.

2 Commencement

This Regulation commences on [date or dates to be determined] and is required to be published on the NSW legislation website.

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Schedule 1 Amendment of National Parks and Wildlife Regulation 2009

Schedule 1 Amendment of National Parks and Wildlife Regulation 2009

[1] Clause 50 Applications for permits, licences or registration certificates

Insert “an Aboriginal heritage impact permit,” before “a licence” wherever occurring in clause 50 (1) and (3).

[2] Clause 71 Proceedings for offences—prescribed officers who may issue evidentiary certificates

Omit the clause.

[3] Part 8, Division 1

Omit the Division.

[4] Part 8A

Insert after Part 8:

Part 8A Aboriginal objects and Aboriginal places

80A Defence of compliance with codes of practice or other prescribed documents: section 87 (3)

For the purposes of section 87 (3) of the Act, compliance with any of the following codes of practice and documents is taken for the purposes of section 87 (2) of the Act to constitute due diligence in determining whether the act or omission constituting the alleged offence would harm an Aboriginal object:

- (a) the *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* published by the Department of Environment, Climate Change and Water and dated [to be determined],
- (b) the *Plantations and Reafforestation Code* (being the Appendix to the *Plantations and Reafforestation (Code) Regulation 2001*),
- (c) the *Private Native Forestry Code of Practice* approved by the Minister for Climate Change, Environment and Water and published in the Gazette on 8 February 2008,

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- (d) the *Operational guidelines for Aboriginal cultural heritage management* published by Forests NSW and dated May 2006.

Note. The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW can be accessed at www.environment.nsw.gov.au/legislation/DueDiligence.htm.

The Private Native Forestry Code of Practice can be accessed at www.environment.nsw.gov.au/pnf/index.htm.

80B Defence of carrying out certain low impact activities: section 87 (4)

- (1) It is a defence to a prosecution for an offence under section 86 (2) of the Act, if the defendant establishes that the act or omission concerned:
- (a) was maintenance work of the following kind on land that has been disturbed by previous activity:
 - (i) maintenance of existing roads, fire and other trails and tracks,
 - (ii) maintenance of utilities and other similar services (such as above or below ground electrical infrastructure, water and sewerage pipelines), or
 - (b) was farming and land management work of the following kind on land that has been disturbed by previous activity:
 - (i) cropping, grazing and leaving paddocks fallow,
 - (ii) maintenance of grain, fibre or fertiliser storage areas,
 - (iii) construction of new fences or the maintenance or replacement of existing fences,
 - (iv) water storage works (such as the construction or maintenance of farm dams or water tanks),
 - (v) the construction or maintenance of irrigation infrastructure, ground water bores or flood mitigation works,
 - (vi) the construction and maintenance of erosion control or soil conservation works (such as contour banks), or
 - (c) was the removal of isolated, dead or dying vegetation, but only if there is minimal disturbance to the surrounding ground surface, or
 - (d) was environmental rehabilitation work (including bush regeneration and weed removal, but not including erosion control or soil conservation works (such as contour banks)), or

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- (e) was an activity that comprises exempt development or was the subject of a complying development certificate issued under the *Environmental Planning and Assessment Act 1979*, but only if it occurred on land that had already been disturbed by previous activity, or
 - (f) was work of the following kind:
 - (i) geological mapping,
 - (ii) geophysical (but not seismic) surveying,
 - (iii) downhole logging,
 - (iv) sampling and coring using hand-held equipment, or
 - (g) was work of the following kind on land that has been disturbed by previous activity:
 - (i) geochemical surveying,
 - (ii) seismic surveying,
 - (iii) costeaning or bulk sampling,
 - (iv) drilling.
- (2) However, subclause (1) does not apply in relation to any harm to an Aboriginal scarred tree.
- (3) In this clause, ***Aboriginal scarred tree*** means a tree that has been scarred or carved by an Aboriginal person by the deliberate removal by traditional methods of bark or wood from the tree before or concurrent with (or both) the occupation of the area in which the tree is located by persons of non-Aboriginal extraction.
- Note.** For more information regarding Aboriginal scarred trees see www.environment.nsw.gov.au/conservation/AboriginalScarredTrees.htm.
- (4) For the purposes of this clause, ***land has been disturbed by previous activity*** if it has been the subject of any activity that has resulted in clear and observable changes to the land's surface, including but not limited to land disturbed by the following:
- (a) soil ploughing,
 - (b) urban development,
 - (c) rural infrastructure (such as dams and fences),
 - (d) roads, trails and walking tracks,

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- (e) pipelines, transmission lines, stormwater drainage and other similar infrastructure.

Note. This clause creates a defence to the strict liability offence in section 86 (2) of the Act (being the offence of harming an Aboriginal object whether or not the person knows it is an Aboriginal object). The defence does not apply to the separate offence under section 86 (1) of the Act of harming or desecrating an object that a person knows is an Aboriginal object. If a person discovers an Aboriginal object in the course of undertaking any of the activities listed above, the person should not harm the object—as the person may be committing an offence under section 86 (1) of the Act (the offence of knowingly harming an Aboriginal object)—and should obtain an Aboriginal heritage impact permit, if needed.

80C Consultation process to be undertaken before applying for Aboriginal heritage impact permit

(1) General obligation to consult

Before making an application for the issue of an Aboriginal heritage impact permit, the proposed applicant must carry out an Aboriginal community consultation process in accordance with:

- (a) this clause, or
- (b) if the Director-General has determined that a modified or alternative Aboriginal community consultation process is appropriate in relation to the application—the modified or alternative consultation process as determined by the Director-General.

(2) Notification of Aboriginal persons

The proposed applicant must:

- (a) if an approved determination of native title that native title exists in relation to the land on or in which the proposed activity that may be the subject of such an application is to be carried out, give notice of that proposed activity to:
 - (i) the registered native title body corporate for that land,
 - (ii) if no such body corporate exists, the native title holders of that land, or

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- (b) in any other case:
 - (i) ascertain from reasonably available sources of information the names of any Aboriginal persons who may hold knowledge relevant to any relevant Aboriginal objects or Aboriginal places, and
Note. Reasonably available sources of information could include the Department of Environment, Climate Change and Water, the relevant Local Aboriginal Land Council, the local council, the National Native Title Tribunal or NTSCORP.
 - (ii) give the persons referred to in subparagraph (i) notice of the proposed activity that may be the subject of the application, and
 - (iii) cause notice of the proposed application to be published in a local newspaper circulating generally in the area of the land on or in which the proposed activity that may be the subject of such an application is to be carried out.
- (3) A notice referred to in subclause (2) (a) and (b) (ii) and (iii) must contain the following:
 - (a) the name and contact details of the proposed applicant,
 - (b) a brief overview of the proposed activity that may be the subject of an application for an Aboriginal heritage impact permit, including the location of the proposed activity,
 - (c) an invitation to Aboriginal people who hold knowledge relevant to determining the cultural heritage significance of Aboriginal objects and Aboriginal places in the area in which the proposed activity is to occur to register an interest in a process of community consultation with the proposed applicant regarding the proposed activity,
 - (d) a statement that the purpose of community consultation with Aboriginal people is to assist the proposed applicant in the preparation of an application for an Aboriginal heritage impact permit and to assist the Director-General in his or her consideration and determination of the application,
 - (e) a closing date for the registration of such interests (being a date that is at least 14 days after the date the notice was given or published).

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(4) **Registering interested Aboriginal parties and providing them with information**

The proposed applicant must, within 28 days after the closing date for the registration of interests:

- (a) make a record of the names of each Aboriginal person who registered such an interest (*registered Aboriginal party*), and
- (b) forward a copy of that record to the Department of Environment, Climate Change and Water and the relevant Local Aboriginal Land Council, and
- (c) provide each registered Aboriginal party with detailed information regarding the activity that may be the subject of the proposed application.

(5) **Consultation on proposed methodology of cultural heritage assessment report**

The proposed applicant must:

- (a) provide the registered Aboriginal parties with a proposed methodology to be used in the preparation of the cultural heritage assessment report to be submitted with the application (as referred to in clause 80D), and
- (b) give those parties a reasonable opportunity (being at least 28 days after the date of providing the proposed methodology) to make submissions (whether written or oral) on the proposed methodology.

(6) **Proposed applicant to seek certain information**

The proposed applicant must, during the consultation on the proposed methodology of the cultural heritage assessment report referred to in subclause (5), seek the following information from the registered Aboriginal parties in relation to the area of land to which the proposed application relates:

- (a) whether there are any Aboriginal objects of cultural value to Aboriginal people in the area,
- (b) whether there are any places of cultural value to Aboriginal people in the area (whether they are Aboriginal places declared under section 84 of the Act or not).

(7) **Consultation on draft cultural heritage assessment report**

After giving each registered Aboriginal party the opportunity to make submissions to be used in the preparation of the proposed

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methodology of the cultural heritage assessment report (as referred to in subclause (5) (b)), the proposed applicant must:

- (a) provide a copy of a draft of the cultural heritage assessment report to the registered Aboriginal parties, and
 - (b) give those parties a reasonable opportunity (being at least 28 days after the date of providing the draft report) to make submissions (whether written or oral) on the draft report.
- (8) The issue of an Aboriginal heritage impact permit is not invalid merely because the applicant for the permit failed to comply with any one or more requirements set out in this clause.
- (9) In this clause:

approved determination of native title has the same meaning as it has in the *Native Title Act 1993* of the Commonwealth.

native title holder has the same meaning as it has in the *Native Title Act 1993* of the Commonwealth.

registered native title body corporate has the same meaning as it has in the *Native Title Act 1993* of the Commonwealth.

80D Application for Aboriginal heritage impact permit to be accompanied by cultural heritage assessment report

- (1) For the purposes of section 90A (2) (b) of the Act, an application for the issue of an Aboriginal heritage impact permit must be accompanied by a cultural heritage assessment report.
- (2) A cultural heritage assessment report is to deal with the following matters:
 - (a) the significance of the Aboriginal objects or Aboriginal places that are the subject of the application,
 - (b) the actual or likely harm to those Aboriginal objects or Aboriginal places from the proposed activity that is the subject of the application,
 - (c) any practical measures that may be taken to protect and conserve those Aboriginal objects or Aboriginal places,
 - (d) any practical measures that may be taken to avoid or mitigate any actual or likely harm to those Aboriginal objects or Aboriginal places.
- (3) A cultural heritage assessment report must include:
 - (a) if any submission has been received from a registered Aboriginal party under clause 80C (including any submission on the proposed methodology to be used in the

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preparation of the report and any submission on the draft report), a copy of the submission, and

- (b) the applicant's response to each such submission.
- (4) An applicant for the issue of an Aboriginal heritage impact permit must, within 14 days of making the application, send a copy of the cultural heritage assessment report submitted with the application to the following:
 - (a) each registered Aboriginal party (within the meaning of clause 80C) in relation to the application (if any),
 - (b) the relevant Local Aboriginal Land Council.

80E Consultation process to be undertaken before applying for a variation of Aboriginal heritage impact permit

If:

- (a) a person makes an application to vary an Aboriginal heritage impact permit, and
- (b) the Director-General is satisfied that the variation will result in a significant increase in harm to the Aboriginal objects or Aboriginal places concerned,

the Director-General may require the applicant to carry out such community consultation as the Director-General considers appropriate in the circumstances.

80F Exclusion of certain bush fire hazard reduction work from meaning of "harming" Aboriginal objects or places

- (1) An act or omission that is bush fire hazard reduction work is excluded from the definition of *harm* (in relation to an object or place) in section 5 (1) of the Act, but only if the work is carried out in accordance with the document entitled *Conditions for Hazard Reduction and Aboriginal Heritage* as referred to in the *Bush Fire Environmental Assessment Code for New South Wales* published by the NSW Rural Fire Service and dated February 2006.
- (2) In this clause, *bush fire hazard reduction work* means:
 - (a) the establishment or maintenance of fire breaks on land, and
 - (b) the controlled application of appropriate fire regimes or other means for the reduction or modification of available fuels within a predetermined area to mitigate against the spread of a bush fire, and
 - (c) the construction of a fire track or fire trail.

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[5] Clause 96 Penalty notice offences

Omit “section 160” from clause 96 (1). Insert instead “section 192”.

[6] Clause 100

Omit the clause. Insert instead:

100 Appeal period

For the purposes of section 135 of the Act, the period within which an appeal is to be made is 28 days after the date of the refusal, cancellation or attaching of the condition or restriction against which the appeal is brought.

[7] Clause 101 Appeals

Omit “90 or” from clause 101 (1).

[8] Clause 102 Notification of sites of Aboriginal objects

Omit “section 91”. Insert instead “section 89A”.

[9] Schedule 2 Penalty notice offences

Omit the matter relating to sections 86 (a), (b), (c), (d) and (e) and 91 of the *National Parks and Wildlife Act 1974* from the Schedule.

[10] Schedule 2

Insert in appropriate order in Columns 1, 2 and 3, respectively, under the heading “**Offences under *National Parks and Wildlife Act 1974***”:

Section 86 (2)	1500	
Section 86 (3)	3300	
Section 89A	300	
Section 90J	1500	
Section 91Q (1) (a)	1650	3300
Section 115A (9)	300	

[11] Schedule 2

Insert “species presumed extinct, any critically endangered species or any” before “endangered species” wherever occurring in the matter relating to sections 118A (1) and (2) and 118B (1) of the *National Parks and Wildlife Act 1974* in Column 1.