



# 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*.<sup>i</sup>

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](http://www.alc.org.au) or by calling the NSWALC Resource Centre 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 19 January 2011.

### 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 Department of Environment, Climate Change and Water (DECCW) is responsible for administering this Act.

The NPW Act gives the Director-General of DECCW responsibility for the proper care, preservation and protection of 'Aboriginal objects' and 'Aboriginal places'.<sup>ii</sup> The protections for Aboriginal objects cover objects on both public and private lands.

The Director-General 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).

The Director-General 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.

For information about how permits have been issued by DECCW in recent years, refer to the NSWALC submission – *More than Flora and Fauna* – which is

available to download from the NSWALC website at [www.alc.org.au](http://www.alc.org.au) 'Culture and Heritage' page.

### Recent changes

In June 2010, the NSW Parliament passed the *National Parks and Wildlife Amendment Bill 2010*, also known as the **Omnibus Bill**<sup>iii</sup>.

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 Director-General and Courts to make remediation or restorations directions if damage has been caused.

Significantly increased fines have also been introduced of up to \$22,000 for individuals, or \$1.1 million in the case of corporations.

**Introduction of a wide range of defences:** Along with the new offences, new defences have been introduced which will apply where a person harms an Aboriginal object without knowing and without a permit from DECCW, including:

A '**due diligence**' defence will be available if a person followed certain steps to determine if an Aboriginal object exists. Due diligence is a legal concept which

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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 DECCW.

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:

- DECCW 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 and extra care should be taken in these places.

**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 Director-General must consider:** A defined list of factors that the Director-General 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 DECCW's Community Consultation Requirements policy. For more info refer to NSWALC's Fact Sheet on *Community Consultation*.

**Requirement to maintain a heritage register:** DECCW 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 Director-General 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](http://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). Refer to NSWALC's 'Access to Country' Fact Sheets for more information.

#### Independent Aboriginal heritage law for NSW?

The NSW Government announced in early 2010 that a two year Working Group would be established to consider independent Aboriginal heritage legislation for NSW. The NSW Opposition also announced their support for separate heritage legislation.

A Working Group has been established to lead the reform process.

#### Where can I get more information?

Visit the 'Culture and Heritage' pages of the NSWALC website at [www.alc.org.au](http://www.alc.org.au) or contact the NSWALC Policy and Research Unit on 02 9689 4444.

The DECCW Culture and Heritage Division can be contacted on 1300 361 967. Copies of the NPW Act, Regulation and Codes are available from the DECCW website:  
[http://www.environment.nsw.gov.au/legislation/NPW\\_amendmentACT2010.htm](http://www.environment.nsw.gov.au/legislation/NPW_amendmentACT2010.htm)

<sup>i</sup> 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'.

<sup>ii</sup> 'Aboriginal places' refers to those places gazetted by the Minister. There are around 70 Aboriginal places in NSW.

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

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