



Office of  
Environment  
& Heritage



*Aboriginal heritage legislation in NSW*

**How the Aboriginal heritage system works**







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## **How the Aboriginal heritage system works**

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# 1. Introduction

## What is the purpose of the information paper?

This publication explains how the Aboriginal culture and heritage system operates in New South Wales. It has been prepared as an information resource for people wishing to participate in the process to reform the state's Aboriginal heritage legislation.

In November and December 2011, 26 Aboriginal community workshops (as well as five industry and local government roundtables) were held across NSW. Approximately 340 people attended the Aboriginal community workshops. The purpose of the workshops was to provide an opportunity for people to voice their views on the present system for protecting Aboriginal culture and heritage in NSW and to offer ideas for changing it.<sup>1</sup>

*Aboriginal heritage legislation in NSW: How the Aboriginal heritage system works* is a response to requests made at the workshops for more background information on Aboriginal heritage legislation in this state and in other Australian states and territories. It provides an overview of the Aboriginal heritage system in NSW. A separate, companion paper provides a comparative review of heritage systems elsewhere in Australia.<sup>2</sup>

The two information papers will be circulated prior to community information workshops to be undertaken across NSW in mid-2012. The information papers are available as free downloads from the Office of Environment and Heritage website at [www.environment.nsw.gov.au/achreform/index.htm](http://www.environment.nsw.gov.au/achreform/index.htm)

## Who is the information paper for?

While the paper has been written mainly for members of Aboriginal communities in NSW it may also be of use to the broader public interested in the legislative reform process.

Table 1 is a summary of key legislative and administrative events relating to Aboriginal heritage protection in NSW. A detailed timeline of initiatives to reform the *National Parks and Wildlife Act 1974* (NPW Act) is provided in the Office of Environment and Heritage publication *Aboriginal heritage legislation in NSW: Reform milestones 1969–2011* ([www.environment.nsw.gov.au/resources/cultureheritage/110492milestones.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/110492milestones.pdf)).<sup>3</sup>

**Table 1:** Aboriginal heritage legislation in NSW – a timeline

1913	Crown Lands Consolidation Act	Allowed for creation of special reserves for Aboriginal art sites (to be managed by local governments). Few were created.
1939	Draft of Aboriginal heritage legislation	Submitted to the NSW Parliament by Fred McCarthy of the Australian Museum. Not adopted.
1967	National Parks and Wildlife Act	No Aboriginal heritage provisions.
1968	Aboriginal Relics Committee established	To assist preparation of draft legislation. No Aboriginal representation.

1. The Aboriginal heritage legislation in NSW: Public consultation on issues for reform (2011) guided the first round of public consultation, available at [www.environment.nsw.gov.au/resources/cultureheritage/110391issues.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/110391issues.pdf).

2. Aboriginal heritage legislation in NSW: Comparing the NSW heritage system with other Australian systems, available at [www.environment.nsw.gov.au/resources/cultureheritage/20120402comparison.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/20120402comparison.pdf).

3. See also NSW Aboriginal Land Council (NSWALC) 2010. *Our Sites, Our Rights: Returning control of Aboriginal sites to Aboriginal communities: A summary of key recommendations of past Aboriginal heritage reviews in NSW*, available at [www.alc.org.au/media/61784/110215%20our%20sites%20our%20rights%20final.pdf](http://www.alc.org.au/media/61784/110215%20our%20sites%20our%20rights%20final.pdf).

1969	National Parks and Wildlife (Amendment) Act (commenced 1970)	Beginning of legal protection for Aboriginal heritage relics and sites in NSW.
1970	Aboriginal Relics Advisory Committee established by the National Parks and Wildlife Service (NPWS)	Included representatives from the Australian Museum, the Mines Dept, and the Anthropological Society of NSW. No Aboriginal representation.
1974	National Parks and Wildlife Act (NPW Act)	Provision made for gazettal of Aboriginal Places; allowed for protection of places of cultural significance (e.g. Dreaming sites) where no 'relics' might be present.
1974	Proposal by NPWS for Aboriginal representation on the Relics Advisory Committee	Proposal not acted upon.
1976	NPWS requires archaeologists to consult Aboriginal communities in regard to NPW Act Section 90 consent applications	Archaeologists thereafter routinely consult Aboriginal communities during heritage surveys of land subject to development applications.
1977	Heritage Act	Act to promote understanding of, and encourage conservation of, the state's natural and cultural heritage.
1979	Environmental Planning and Assessment Act	Can require surveys to identify Aboriginal sites in areas subject to development applications. Led to the rapid growth of an archaeological consulting industry in NSW.
1980	Aboriginal Relics Advisory Committee restructured as the Interim Aboriginal Sites Committee	An Aboriginal Subcommittee established within it with majority Aboriginal membership (matched by an Archaeology Subcommittee).
1983	Aboriginal Land Rights Act	Established a system of Local Aboriginal Land Councils.
1984	Interim Aboriginal Sites Committee dissolved	Was intended to be reconstituted as a group with all-Aboriginal representation, but this did not occur.
1993	Establishment of an Aboriginal Cultural Heritage (Interim) Advisory Committee (ACHIAC) with a three year term of office	ACHIAC comprised six representatives nominated by the NSW Aboriginal Land Council, a nominee of the Nature Conservation Council, a nominee of NPWS, and a nominee of the Minister.
1996	Amendments to <i>National Parks and Wildlife Act 1974</i>	Provided for the Aboriginal ownership and joint management of national parks.
2001	<i>National Parks and Wildlife Amendment Act 2001</i>	Included the redefining of Aboriginal relics as Aboriginal objects, and the reconstitution of the membership of the Aboriginal Cultural Heritage Advisory Committee (ACHAC).
2001	Aboriginal Land Rights Amendment Act	Provision made for Local Aboriginal Land Councils to promote the protection of culture and heritage.
2006	Aboriginal Land Rights Amendment Act	Aboriginal cultural heritage provision modified to include promoting awareness of culture and heritage.
2006	Aboriginal Cultural Heritage Advisory Committee (ACHAC) established	13 members appointed by the Minister and one ex-officio member of OEH (all sitting members in March 2012 were Aboriginal).
2010	Amendments to the <i>National Parks and Wildlife Act 1974</i>	Increased penalties for harming Aboriginal objects and Aboriginal Places and other measures relating to the regulation of Aboriginal heritage.

## How does law reform work?

A law is a rule or set of rules made by the Parliament and agreed to by the Governor. The *National Parks and Wildlife Act 1974* (NPW Act) is a law (also known as 'legislation') passed by the NSW Parliament. On this page you will find summaries of: (1) how laws are made, and (2) how the NSW Aboriginal culture and heritage reform process will work.

## How are laws made?

Law-making in NSW is the responsibility of Parliament. Proposed laws (called 'bills') move through several stages in both of the NSW Houses of Parliament (the Lower House and the Upper House). Bills that are 'passed' by Parliament are sent to the NSW Governor and when the Governor agrees to the bill, it becomes part of the law of NSW. Figure 1 illustrates this process.

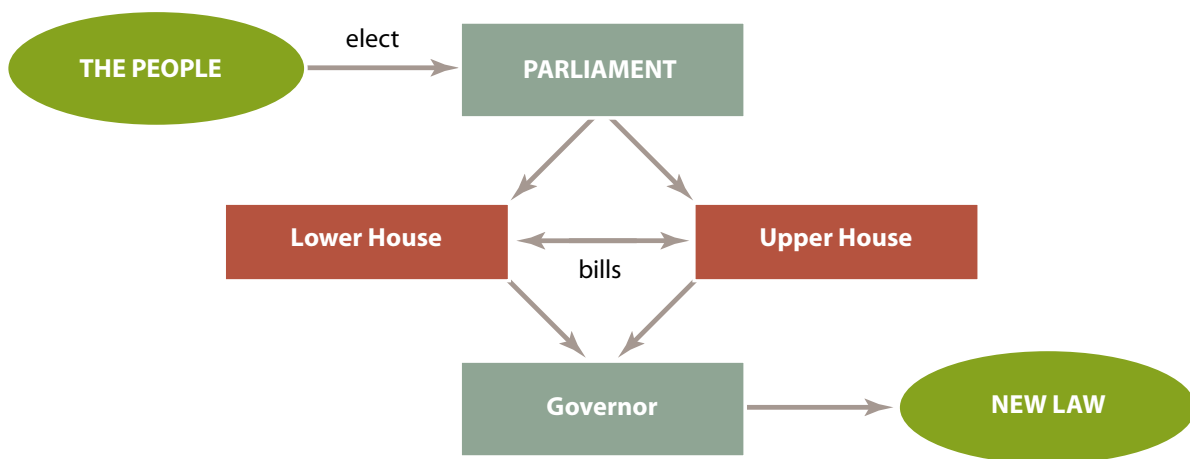


Figure 1: Flow chart of law-making in NSW

Proposed laws (or bills) are developed by legal staff in the NSW Government's Parliamentary Counsel's Office on advice from government departments. Laws are written by lawyers so that the language is understandable without being confusing. However, laws are not always absolutely clear and the meanings of laws can be tested in law courts.

## How does the Aboriginal culture and heritage reform process work?

The NSW Government has made a commitment to work towards the reform of Aboriginal heritage laws in NSW.<sup>4</sup> The government recognises that Aboriginal heritage provides essential links between the past and present and that heritage is an essential part of cultural identity and a sense of belonging to Country.

The NSW Government has established the Aboriginal Culture and Heritage Reform Working Party to advise the government on options to manage and protect Aboriginal culture and heritage in NSW. The NSW Office of Environment and Heritage (OEH), which is part of the Department of Premier and Cabinet, is providing assistance to the Reform Working Party.

The Reform Working Party provides advice to government on the best option for new Aboriginal heritage law. The NSW Government will decide on the approach it will take on the development of any new laws to manage and protect Aboriginal culture and heritage in NSW. The government may then prepare new laws (a bill) to take to Parliament.

As the reform process progresses there will be further public consultation on the details of the proposed new laws. At this stage it is thought that this process may take around one to two more years to complete.

4. The Hon Robyn Parker, Minister for the Environment and Minister for Heritage, 25 October 2011, Media Release, 'Aboriginal culture and heritage laws to be reformed'. Available at: [www.environment.nsw.gov.au/resources/MinMedia/MinMedia11102501.pdf](http://www.environment.nsw.gov.au/resources/MinMedia/MinMedia11102501.pdf)

## 2. What legislation protects Aboriginal heritage in NSW?

The NSW Government has responsibility for administering state laws concerning Aboriginal heritage in NSW. Table 2 summarises ways in which different pieces of legislation currently protect Aboriginal heritage in this state.

### National Parks and Wildlife Act 1974

The first law protecting Aboriginal cultural heritage in NSW was the *National Parks and Wildlife Act 1967*, which commenced with amendments in 1970. It principally protected pre-1788 remains of the Aboriginal occupation of NSW (such as rock art, scarred trees, shell middens, and burial sites – termed ‘relics’). In 1974, a new NPW Act was made. It protected places of special significance to Aboriginal culture where no ‘relics’, now called Aboriginal ‘objects’ in the Act, may not be present (e.g. sacred sites, story places). Such places could be protected by the Minister declaring them Aboriginal Places (Aboriginal Places are further discussed under Section 8 of this document). The main law for protecting Aboriginal heritage in NSW continues to be the *National Parks and Wildlife Act 1974*.

The NPW Act can be used to protect Aboriginal cultural heritage in a number of ways. Firstly, all Aboriginal objects are protected under this law. Secondly, places of importance to Aboriginal individuals and communities can be given additional legal protection by:

- declaration of new Aboriginal Places
- reservation and management as Aboriginal Areas and national parks
- formal agreements on the joint management of national parks
- formal agreements with land owners (Voluntary Conservation Agreements).

### Heritage Act 1977

The NSW *Heritage Act 1977* protects the state’s most outstanding natural and cultural heritage, including Aboriginal heritage, through the establishment of a State Heritage Register. Aboriginal places or objects of importance to the State of NSW (called heritage items) may be listed on the Register. Currently there are over 20 heritage items (at April 2012) listed on the Register specifically because of their Aboriginal heritage importance. These places include the Wooleybah Sawmill and Settlement, Ulgundahi Island, and Bomaderry Aboriginal Children’s Home. Any changes to items listed on the Register must be approved by the NSW Heritage Council.

### Environmental Planning and Assessment Act 1979; Crown Lands Act 1989

The two main land-use planning processes in NSW are set out in the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the *Crown Lands Act 1989*.

The **EP&A Act** is the key piece of legislation for the management of development in NSW. It sets up a planning structure that requires developers (individuals or companies) to consider the environmental impacts of new projects. Under this Act, cultural heritage is considered to be a part of the environment. This Act requires that Aboriginal cultural heritage and the possible impacts to Aboriginal heritage that development may have are formally considered in land-use planning and development approval processes.

The **Crown Lands Act** sets out processes and principles for using and managing Crown land. The Act enables covenants to be placed over Crown land to protect environmental and cultural and heritage values before the land is sold or transferred.

## Commonwealth Acts

The Australian Government *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* may be relevant where state-based processes are unable to protect any item under threat of injury or desecration that is of importance to an Aboriginal community. The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* may also be relevant to some development proposals, particularly where there are heritage values of national significance present.

**Table 2:** Aboriginal heritage legislation in NSW – ways in which different pieces of legislation protect Aboriginal heritage

Legislation / Policy	Agency	Relevance to Aboriginal culture and heritage
<i>National Parks and Wildlife Act 1974</i>	Office of Environment and Heritage	Provides for the protection of Aboriginal objects and declared Aboriginal Places in NSW; and to foster appreciation, understanding and enjoyment of Aboriginal cultural heritage. Provides protection by establishing offences for 'harm' (damage, destroy, deface or move). Requires that information on Aboriginal cultural heritage be maintained in the Aboriginal Heritage Information Management System (AHIMS). Allows for the reservation of Aboriginal Areas and for the co-management of some national parks through Boards of Management.
<i>Heritage Act 1977</i>	Office of Environment and Heritage (Heritage Branch)	Lists and gives protection to places of Aboriginal heritage significance that are of 'State' heritage significance on the State Heritage Register. Consultation is undertaken with Aboriginal groups for places listed specifically for Aboriginal significance.
<i>Environmental Planning and Assessment Act 1979</i>	Local government councils	Provides planning controls and requirements for environmental assessment. Oversees land-use planning for local areas. Compulsory clause in standard Local Environmental Plan template specifically for conservation of locally significant Aboriginal heritage.
<i>Crown Lands Act 1989</i>	Department of Primary Industries	Sets out processes and principles for using and managing Crown land. The Act enables covenants to be placed over Crown land to protect environmental and cultural and heritage values before the land is sold or transferred.
<i>Aboriginal Land Rights Act 1983</i>	Aboriginal Land Councils	Establishes a system of Local Aboriginal Land Councils (LALC) across NSW. LALCs and NSWALC can also acquire and deal in land and negotiate agreements for access to private land for cultural resource use. LALCs have a role in the protection and promotion of awareness of Aboriginal culture and heritage.
<i>Native Title Act (NSW) 1994</i>	Aboriginal Affairs NSW	Enables full ownership of land via native title as well as provision for making agreements via Indigenous Land Use Agreements (ILUA).
<i>Forestry Act 1916</i>	Department of Primary Industries (DPI)	Allows for the co-management of State Forests. Boards of Management have been established and resourced for three State Forests. Under this Act, Aboriginal people can gain access to state forests for obtaining forest products and materials.
<i>Catchment Management Authorities Act 2003</i>	Catchment Management Authorities (CMAs; 13 in NSW)	Aboriginal Reference Groups and Advisory Committees advise CMAs. Aboriginal employment facilitated via projects funded through the Commonwealth 'Caring for Country' program.

<b>Legislation / Policy</b>	<b>Agency</b>	<b>Relevance to Aboriginal culture and heritage</b>
<i>Fisheries Management Act 1994;</i> <i>Marine Parks Act 1997</i>	Department of Primary Industries (DPI)	The <i>NSW Indigenous Fishing Strategy</i> supports involvement of Aboriginal people in fisheries management and aquaculture. The Fisheries Management Act issues permits for taking fish for cultural community events. The Marine Parks Act permits Aboriginal cultural resource use in certain areas/zones of marine parks in particular circumstances.
<i>Rural Fires Act 1997;</i> <i>Bush Fire Environmental Assessment Code</i>	Rural Fire Service	When hazard reduction and wildfire control is carried out, Aboriginal heritage is taken into account via AHIMS (Aboriginal Heritage Information System) searches and consideration of relevant management plans.
<i>Water Management Act 2000</i>	Office of Water	Aboriginal representation on water management committees; Aboriginal cultural access and community development licences as part of Water Sharing Plans.
<i>Game and Feral Animals Control Act 2002</i>	Game Council of NSW	Certain Aboriginal people are exempt from licence requirements for hunting feral animals.
<i>Land Acquisition (Just Terms Compensation) Act 1991</i>	Minister for Aboriginal Affairs	An authority of the State of NSW may acquire land in exceptional circumstances.
<i>Threatened Species Conservation Act 1995</i>	Office of Environment and Heritage	Requires that Aboriginal people's interests be considered in threatened species recovery plans.
<i>NSW Cultural Resource Use Framework</i>	All NSW Government agencies	Enables access to land for cultural purposes; outlines processes of community engagement to be undertaken for public lands.

### 3. How is Aboriginal heritage legislation administered?

The government of NSW is responsible for the administration of the laws of the state. Ministers appointed by the government are responsible for one or more government departments which actually carry out the activities of government. In NSW the government department responsible for administering the *National Parks and Wildlife Act 1974* (NPW Act) is the Office of Environment and Heritage (OEH), which is part of the Department of Premier and Cabinet. The Minister responsible for the OEH is the Minister for the Environment.

The OEH administers Aboriginal heritage in line with the NPW Act in a number of ways:

- through policy and guidelines – policies such as the *OEH Aboriginal Places Policy* (2011) and guidelines such as the *OEH Oral History Guidelines* (2004) describe how the job of applying the NPW Act is to be undertaken
- by undertaking specific programs of conservation work – an example is the OEH repatriation program which aims to return NSW Aboriginal remains and cultural property held in museums and other organisations to Aboriginal communities for management and care
- through regulation – this is discussed below
- through law enforcement – fines and jail sentences can be issued for individuals or companies that break the law (for example, those who damage or destroy an Aboriginal site such as a scarred tree or shell midden). Law enforcement is discussed further in Section 11 of this document.

#### How is the development process administered?

The NPW Act states that it is an offence to ‘harm’ an Aboriginal object or declared Aboriginal Place. In many instances, a developer proposing to carry out an activity such as building a new road, a coal mine or a housing estate, risks harming an Aboriginal object or site.

The NPW Act also contains the process to help people determine that their actions will not harm Aboriginal objects. The process is described in the OEH guideline titled *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* (2010). If the due diligence process shows that an activity such as development may harm an Aboriginal object or declared Aboriginal Place then the developer must investigate, assess and report on the harm that may be caused by that activity. This second process is described in the OEH guideline titled *Guideline to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW* (2011). Where harm to an Aboriginal object cannot be avoided, an application for an Aboriginal Heritage Impact Permit (AHIP) must be made by the developer. These permits are issued at the discretion of the Director General. All AHIP applicants must undertake consultation with Aboriginal communities in accordance with the NPW Regulation (see Section 6 of this document).

If a developer harms an Aboriginal object or declared Aboriginal Place without an AHIP, the developer has broken the law and can be prosecuted in the courts. The NPW Act identifies a number of defences and exemptions to the offence of harming an Aboriginal object or declared Aboriginal Place.

The OEH maintains a record of Aboriginal heritage information collected as part of the development process. This information is contained in the Aboriginal Heritage Information Management System (AHIMS). The OEH also publishes details of many AHIP-related decisions on its website to make such information available to the public.

#### What is AHIMS?

AHIMS is a database or register that contains records of almost 65,000 Aboriginal sites, 78 declared Aboriginal Places (as at April 2012) and a library of over 9000 reports. As the largest collection of information on Aboriginal heritage in NSW it is a valuable resource for heritage conservation and planning.

## 4. Who owns Aboriginal heritage?

In NSW, Aboriginal objects are ‘the property of the Crown’ (i.e. owned by the State of NSW). There are two exceptions to this.

1. Aboriginal objects that were in private collections prior to April 1970 (when the state’s first Aboriginal heritage legislation was introduced) and have not been given away (for example, sold or traded) since that date remain the property of the owner of the collection.
2. Aboriginal objects that are ‘real property’, which means they are legally considered part of privately owned land on which they are found, are the property of the land owner. Such objects can include rock art, scarred or carved trees, and grinding grooves.

Regardless of whether Aboriginal objects are owned by the State of NSW or are in private ownership (as in the two cases described above), they are protected under the *National Parks and Wildlife Act 1974* (NPW Act).

### Ownership of human remains

Aboriginal human remains (not including a body buried in a cemetery) are considered Aboriginal objects under the NPW Act and ownership of the remains lies with the State of NSW. State ownership continues after human remains are returned to, or repatriated to, Aboriginal groups.

The NPW Act allows the transfer for safekeeping of human remains (and any other Aboriginal objects) to an Aboriginal person or Aboriginal organisation. The person or organisation must enter into a ‘Care Agreement’ with the Office of Environment and Heritage. A Care Agreement is a document that sets out the obligations of OEH and the Aboriginal person or Aboriginal organisation for the safekeeping of the transferred Aboriginal objects including human remains.

### Aboriginal objects on land owned by Local Aboriginal Land Councils

Under the *Aboriginal Land Rights Act 1983*, Local Aboriginal Land Councils (LALCs) can acquire and own land. Aboriginal objects that are ‘real property’ on that land, including rock art, scarred trees and grinding grooves, are owned by the LALC. Small objects that are easily transported, such as stone flakes or bone implements, remain the property of the State of NSW.

### Aboriginal cultural knowledge and practices

The state’s laws do not specifically protect Aboriginal cultural knowledge and practices (such as language, basket weaving, knowledge of bush foods and burning practices) or protect Aboriginal ownership of them. Some support is given to the maintenance of Aboriginal cultural knowledge and practices in NSW through government policies and programs. For example, there are processes available under the *NSW Cultural Resource Use Framework* (2006) to facilitate access and use of publicly managed land for Aboriginal cultural purposes. Aboriginal ownership of cultural knowledge and practices can be protected in a limited way by Commonwealth laws such as those that protect copyright and intellectual property.

## 5. Who makes decisions?

Decisions concerning the protection and management of Aboriginal cultural heritage under NSW law are made by a variety of individuals and groups.

### The Minister

In NSW, the Minister for the Environment is responsible for recommending changes to Aboriginal heritage provisions of the *National Parks and Wildlife Act 1974* (NPW Act). However, as previously discussed in Section 1, it is the Parliament and Governor of NSW who make new laws and amend existing laws.

The Minister is also responsible for the declaration of Aboriginal Places. For a declaration of an Aboriginal Place to happen, the Minister must be of the opinion that an area 'is or was of special significance to Aboriginal culture'.

### The Director General / Chief Executive

The Director General of the Department of Premier and Cabinet is responsible for the protection of Aboriginal objects and declared Aboriginal Places in NSW. This responsibility has been delegated to the Chief Executive, Office of Environment and Heritage and other officers of the department.

These officers have delegated responsibility for the issue of permits, called Aboriginal Heritage Impact Permits (AHIPs), to harm Aboriginal objects or declared Aboriginal Places. The Chief Executive has a responsibility to make reasonable, unbiased, impartial, transparent, accountable and independent decisions. Advice about issuing permits to harm Aboriginal objects or declared Aboriginal Places is provided to the Chief Executive by staff of the Office of Environment and Heritage. In practice, the Chief Executive delegates the making of these decisions to authorised officers of the department.

The Chief Executive has additional delegated responsibilities that include:

- investigating the purchase of land to conserve cultural heritage
- promoting education, research and conservation management on national parks
- promoting opportunities for partnerships and agreements between Aboriginal people and land owners in relation to places, objects and features of significance to Aboriginal people.

### Aboriginal Cultural Heritage Advisory Committee

The Aboriginal Cultural Heritage Advisory Committee (ACHAC) can advise the Minister and the Director General on any matter relating to Aboriginal cultural heritage in NSW. This can include, for example, advice on the heritage impact permit process and on the process for making plans of management for national parks. The Minister and Director General make the final decision about all matters that are provided to the committee for consideration. In making decisions, the Minister and Director General may also consult with other stakeholders including peak Aboriginal organisations, other Aboriginal advisory groups, government agencies and industry stakeholders.

### Local Aboriginal Land Councils and Aboriginal communities

Local Aboriginal Land Councils (LALCs) and Aboriginal communities can participate in decision-making in a number of ways. For example, Aboriginal communities can make nominations for Aboriginal Places. Aboriginal communities can also submit proposals to government for joint management arrangements to be made over public land such as national parks and state forests. The ways in which Aboriginal people participate in decision-making is discussed in Section 7.

### Local government

Local governments are required to prepare Local Environmental Plans for their local government area. A Local Environmental Plan is a legal document that guides planning decisions for these areas. Important Aboriginal objects and declared Aboriginal Places can be listed on a Local Environmental Plan so that they can be recognised in the process of land-use planning.

## 6. Who speaks for Country?

To 'speak for Country' means speaking on behalf of the Aboriginal community for a specific area. There is often debate as to who is the most appropriate person (or persons) to take on this role. This is a significant issue, particularly when dealing with government and private businesses about land use and heritage management.

It is commonly agreed that those who speak for Country require an understanding and knowledge of its people, its landscape, and its history as well as *an inherited responsibility* and right to look after it. This authority to speak for Country is influenced by traditional law, seniority, kinship, and gender. As a result, speaking for Country is often the responsibility of traditional owners, and especially Elders, because of their knowledge and connection to Country.

The *National Parks and Wildlife Act 1974* (NPW Act) does not use the term 'speaking for Country' when recognising specific Aboriginal cultural heritage roles / responsibilities for Aboriginal people. Instead, it uses a number of other terms (either in the Act or regulations) to describe who should be involved.

### Speaking for Country under the NPW Act regulations for development

Who speaks for Country when it comes to heritage? The NPW Act regulations require that Aboriginal people are consulted wherever an Aboriginal Heritage Impact Permit (AHIP) is required. Consultation with Aboriginal people is also encouraged when a person or company proposing to undertake development is unsure whether it may harm Aboriginal heritage.

The OEH publication *Aboriginal cultural heritage consultation requirements for proponents 2010* ([www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09781ACHconsultreq.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09781ACHconsultreq.pdf)) provides guidance on how Aboriginal consultation is to be undertaken during the development process, under the NPW Act regulations. The requirements specify that the right people to consult with are primarily 'the traditional owners or custodians of the land that is the subject of the proposed project'. The requirements also acknowledge that Aboriginal people with historic ties to the area, but whose traditional Country is elsewhere, may have important knowledge about historic heritage places and that they should be involved in consultation for other reasons.

In the first instance 'traditional owners or custodians' are to be identified as native title holders, registered native title claimants, and Aboriginal Owners registered under the *Aboriginal Land Rights Act 1983*. Where native title has been determined to exist for an area, only the native title holders or the relevant prescribed body corporate need to be consulted under the NPW Regulations. Otherwise, as well as contacting native title claimants and Aboriginal Owners, the person or company is also required to seek input more broadly from a range of organisations, including the regional office of the OEH, the Local Aboriginal Land Council, Catchment Management Authorities, Native Title Services, and also to place a notice in the local newspaper.

The way the development process works is discussed further in Section 10.

### Speaking for Country in heritage partnerships

Under Part 4A of the NPW Act, joint-management arrangements between Aboriginal people and the OEH can be made over certain national parks. In negotiating these arrangements, it is Aboriginal Owners (as defined and registered under the *Aboriginal Land Rights Act 1983*) who speak for Country under these provisions and with whom these agreements are made.

Likewise, the NSW Marine Parks Authority's *Aboriginal Engagement and Cultural Use of Fisheries Resources Policy* (2010) emphasises engagement with Aboriginal owners. It identifies traditional owners, Aboriginal Owners, native title owners and registered native title claimants in speaking for Country and the marine resources of Country.

In some NSW heritage partnerships, for example non-joint management partnerships relating to national parks, the Aboriginal partner groups can be more diverse than traditional owners and custodians. Such groups might include the Local Aboriginal Land Council or Aboriginal community members with an interest in park management.

## 7. How do Aboriginal people participate in decision-making?

In terms of the *National Parks and Wildlife Act 1974* processes explained in this paper, Aboriginal people participate in decision-making with regard to their Aboriginal cultural heritage management in many different ways (some were discussed previously in Section 5).

### Consultation

Consultation is a process whereby an individual or group is listened to before a decision is made. Consultation may take the form of community workshops and meetings, individual interviews, written or oral submissions and online surveys. For example, the Aboriginal cultural heritage law reform process uses each of these methods to obtain community views.

Consultation with 'stakeholders' (Aboriginal community groups, private companies, land owners, etc.) is a common part of the practice of Aboriginal cultural heritage management. In NSW, for example, consultation with Aboriginal groups is required before an activity is undertaken that may damage or disturb an Aboriginal object or a declared Aboriginal Place (discussed further in Section 10).

### Advice

Aboriginal participation in decision-making can take the form of expert advice provided to the decision-maker (such as the Minister). The NSW Aboriginal Cultural Heritage Advisory Committee is an Aboriginal group that gives policy advice to the Minister on matters relating to Aboriginal cultural heritage. Aboriginal people appointed to Regional Advisory Committees of the National Parks and Wildlife Service (NPWS) provide advice on the management of Aboriginal cultural heritage within certain national parks. The Aboriginal Heritage Advisory Panel provides advice to the Heritage Council of NSW. By providing advice, Aboriginal people have a shared management responsibility with government organisations.

### Collaboration

Collaboration is more than 'working together' and means jointly agreeing on a decision. Joint management of national parks in NSW generally requires that Aboriginal people with a cultural association with a park work collaboratively with the NPWS on the park's management. Aboriginal groups can make joint management agreements with governments using, for example, an Indigenous Land Use Agreement (ILUA), a lease or a Memorandum of Understanding (MoU). ILUAs are limited to Aboriginal groups that are native title holders or registered native title claimants. MoUs are formal agreements between the NPWS and an Aboriginal community about what the involvement of each will be in park planning and management.

### Control

Control means having responsibility for decision-making. In NSW there are a number of examples of approaches where Aboriginal people have control of decision-making in regard to Aboriginal cultural heritage. For example, in some cases where parks are Aboriginal-owned and leased back to the NSW Government (e.g. the Mutawintji reserves and Mt Grenfell Historic Site), the Aboriginal owners have direct responsibility for park management. Each board of management is made up of a majority Aboriginal owners. The boards have control of Aboriginal objects, of cultural resources and of all aspects of park management as long as their decisions are consistent with the NPW Act.

Likewise, Aboriginal communities have responsibility for decision-making about Aboriginal heritage on land in their ownership (e.g. land granted under the *Aboriginal Land Rights Act 1983*). Another example is Indigenous Protected Areas (IPAs), where Aboriginal traditional owners have a considerable degree of control over biodiversity and cultural heritage conservation. In NSW there are currently seven IPAs (at April 2012).

## 8. What is protected, and what is not protected?

### National Parks and Wildlife Act 1974

The NPW Act protects all Aboriginal objects and declared Aboriginal Places in NSW.

*Aboriginal objects* are things produced by Aboriginal people. The places where Aboriginal objects are found are commonly called Aboriginal 'sites'. Aboriginal objects include:

- physical items that can be moved or transported (such as stone tools, bone and shell food remains, and the ancestral remains of Aboriginal people)
- 'immovable' objects (such as rock engravings, paintings and scarred trees)
- earth features (such as hearths, mounds and ceremonial bora rings).

Aboriginal objects are given 'blanket protection' in NSW which means they are protected by the NPW Act regardless of whether they have been found and registered or not, or whether they are of particular significance to Aboriginal people or not.

*Aboriginal Places* are areas that are or were of special significance to Aboriginal culture. The Minister for the Environment can declare an area to be an Aboriginal Place because of its spiritual, social, historical, educational, natural resource usage or other type of cultural importance. There are currently 78 declared Aboriginal Places in NSW (at April 2012). The types of places that have been declared Aboriginal Places include sacred sites (such as natural features including mountains and water holes), settlement places (such as missions and reserves), burial grounds (such as mission cemeteries and repatriation sites) and some other site types (such as stone axe quarries).

### Heritage Act 1977

The *Heritage Act 1977* protects places that have been nominated and researched and determined to be of importance to the State of NSW or of 'State significance'. Such places are listed on the State Heritage Register. A series of questions is asked to determine whether a place is of 'State significance' for its historic, aesthetic, scientific and social values or its association with an important person or event. Whether the place is rare or a good example of a certain kind of place is also considered. Unlike the NPW Act, the Heritage Act does not provide 'blanket protection' to heritage places in NSW but instead seeks to protect those of most significance. This approach also recognises that heritage items have multiple values (e.g. social, spiritual, historic, archaeological, and educational) and that all of these should be properly documented and assessed before management decisions are made.

For over 20 years, the *Heritage Act* has been used to protect non-Indigenous heritage, most often heritage buildings. The first places that were listed on the State Heritage Register specifically for their Aboriginal cultural value were Tranby and the Cyprus-Hellene Club, both listed in 1999. From 2009, the Heritage Branch, Office of Environment and Heritage, has been working specifically to list more places for their Aboriginal cultural values.

### Heritage beyond the scope of legislation in NSW

NSW Aboriginal heritage laws protect particular Aboriginal sites, rather than the landscapes that surround and connect them to related sites. Only rarely in NSW have Aboriginal routes or pathways (for example, Dreamtime story lines, travel and trade routes) been identified for protection. Most declared Aboriginal Places and Aboriginal Areas, as well as the Aboriginal heritage places listed on the State Heritage Register, focus on 'sites' rather than larger landscapes.

Aboriginal heritage legislation in NSW does not directly protect 'intangible heritage' such as language, stories and cultural practices (e.g. hunting, collecting for food and medicine, knowledge of land management using fire, etc.). Aboriginal ownership of cultural knowledge and cultural practices can be protected in a limited way by Commonwealth laws of copyright and patent.

## 9. How is Aboriginal heritage protected?

Aboriginal cultural heritage in NSW is protected in a number of ways that can be summarised under the headings of conservation, planning, regulation and penalties.

### Conservation

Conservation means all those processes of looking after a heritage item so as to retain its importance. Conservation can mean physical works at an Aboriginal site such as removing graffiti from a rock art site, placing wire mesh on the floor of a rock shelter to prevent goats entering the shelter and rubbing against painted walls, treating a culturally modified tree to prevent termite invasion, fencing an earth mound or sacred site to prevent stock trampling, and constructing boardwalks that prevent people from causing shell middens to erode by walking over them.

In NSW over eight per cent of the state is covered by protected areas (mostly national parks) which are managed for conservation. Over 14,000 recorded Aboriginal sites are known within the NSW park system. Aboriginal Place declaration is another way in which significant Aboriginal areas can be conserved. For example, The Gully Aboriginal Place at Katoomba has a plan of management which guides the conservation and protection of the historic settlement.

Other important conservation tools include:

- education, for example, OEH's Aboriginal Discovery program employs Aboriginal people to conduct guided tours around national parks in many areas of the state. The guides interpret cultural heritage for visitors, describing the close connections between Aboriginal people and their traditional lands
- partnerships, for example, between private land owners and Aboriginal groups
- research that assists to identify the importance of Aboriginal objects and ways in which they can be best managed.

### Planning

Planning means decision-making about how to do something in the future. Planning for Aboriginal cultural heritage can take the form of Aboriginal heritage studies and land-use plans.

*Aboriginal heritage studies* are undertaken to provide a broad picture of Aboriginal heritage in a particular region – for example, a national park, a forest or a local council area. This 'broad picture' includes both places known to the Aboriginal community (e.g. story sites, good food places, old 'mission' sites), and places recorded by archaeological survey (e.g. scarred trees and old campsites with stone tools and old camps on pastoral properties). Regional Aboriginal studies are used to make forward planning decisions about what places are the most important to manage and protect.

*Land-use plans* generally join together regional Aboriginal heritage studies with other types of plans, such as plant and animal conservation plans and plans that identify where development can take place with minimal harm to heritage. Local governments use land-use plans to regulate land development in areas under their control.

### Regulation

Regulation is a system of official rules designed to control the conduct of those to whom it applies. A government regulatory framework is established through an administrative system of legislation, policy and processes and is designed to protect and manage what society (through Parliament) deems to be important.

In NSW, Aboriginal objects and declared Aboriginal Places are protected by establishing offences of 'harm'. Harm means desecrating, destroying, defacing, damaging or moving an Aboriginal object or declared Aboriginal Place. Harm can either be deliberate (e.g. vandalism to a rock art site) or unintentional (e.g. mining sand from a dune that contains unrecorded burials).

If Aboriginal objects are present or likely to be present and an activity (such as housing and infrastructure development, mining, archaeological research, etc.) will harm those objects, an Aboriginal Heritage Impact Permit (AHIP) will be required (see Sections 10 and 11).

## Penalties

In cases where an Aboriginal object or a declared Aboriginal Place is damaged or disturbed, penalties may be imposed. Penalties can be fines or, in some cases, jail sentences (see Section 11).

## 10. How are development proposals reviewed?

An environmental impact review process can be applied in situations where a development may disturb or destroy Aboriginal sites. The OEH publication *Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW (2011)*<sup>5</sup> outlines how the review process is applied in this state. The process for investigating and assessing Aboriginal cultural heritage in NSW is shown in Figure 2.

The NPW Act requires a developer to apply 'due diligence', which means a legal standard of care, to determine whether a proposed activity could harm (i.e. damage, destroy, deface or move) Aboriginal objects or declared Aboriginal Places. In the context of protecting Aboriginal cultural heritage, due diligence involves taking *reasonable and practicable measures* to determine whether a developer's actions will harm an Aboriginal object and, if so, what measures can be taken to avoid that harm. The process for applying due diligence is described in the OEH publication *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales (2010)*.<sup>6</sup>

If a proposed development could harm Aboriginal objects or declared Aboriginal Places, then investigations of the development area are required to determine:

1. what Aboriginal cultural heritage is located there
2. why (or if) the Aboriginal cultural heritage located within the area is important
3. what the likely impacts of the proposed development on Aboriginal cultural heritage are
4. how the impacts on Aboriginal cultural heritage can be avoided or minimised. In cases where Aboriginal cultural heritage will be damaged or destroyed, an Aboriginal Heritage Impact Permit (AHIP) is required.

### Consultation with Aboriginal people

In the NSW development assessment process where Aboriginal objects or declared Aboriginal Places are likely to be harmed, consultation with the relevant Aboriginal people is required. The requirements are set out in the NPW Regulation and explained in OEH's *Aboriginal cultural heritage consultation requirements for proponents 2010*.<sup>7</sup> A key purpose of consultation is to identify the spiritual, traditional, historical or contemporary associations and attachments that Aboriginal people have with the development area.

The consultation requirements state that Aboriginal people who hold cultural knowledge about Aboriginal cultural heritage that may be directly or indirectly affected by a proposed activity within a development area must be given the opportunity to be consulted. The right people to consult with are chiefly 'the traditional owners or custodians of the land that is the subject of the proposed project'. In addition, Aboriginal people who, through a historical presence in a particular area, may have relevant cultural knowledge and knowledge of, for example, missions and reserves should also be consulted.

### Archaeology

Archaeology is a way of revealing human history by studying the artefacts and other remains left behind by people in the past. Archaeology is a part of the NSW development assessment process because it is a method used to identify Aboriginal objects that may not be known to living Aboriginal people. For example, archaeologists investigate old campsites which may have buried remains such as stone tools, animal bone remains and the remains of cooking fires. The method of archaeology can be used to date an old campsite or describe the activities (e.g. hunting) that took place there in the past. Archaeology has a role in telling the story of the Aboriginal history of NSW.

5. Available at [www.environment.nsw.gov.au/resources/cultureheritage/20110263ACHguide.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/20110263ACHguide.pdf)

6. Available at [www.environment.nsw.gov.au/resources/cultureheritage/ddcop/10798ddcop.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/ddcop/10798ddcop.pdf)

7. Available at [www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09781ACHconsultreq.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09781ACHconsultreq.pdf)

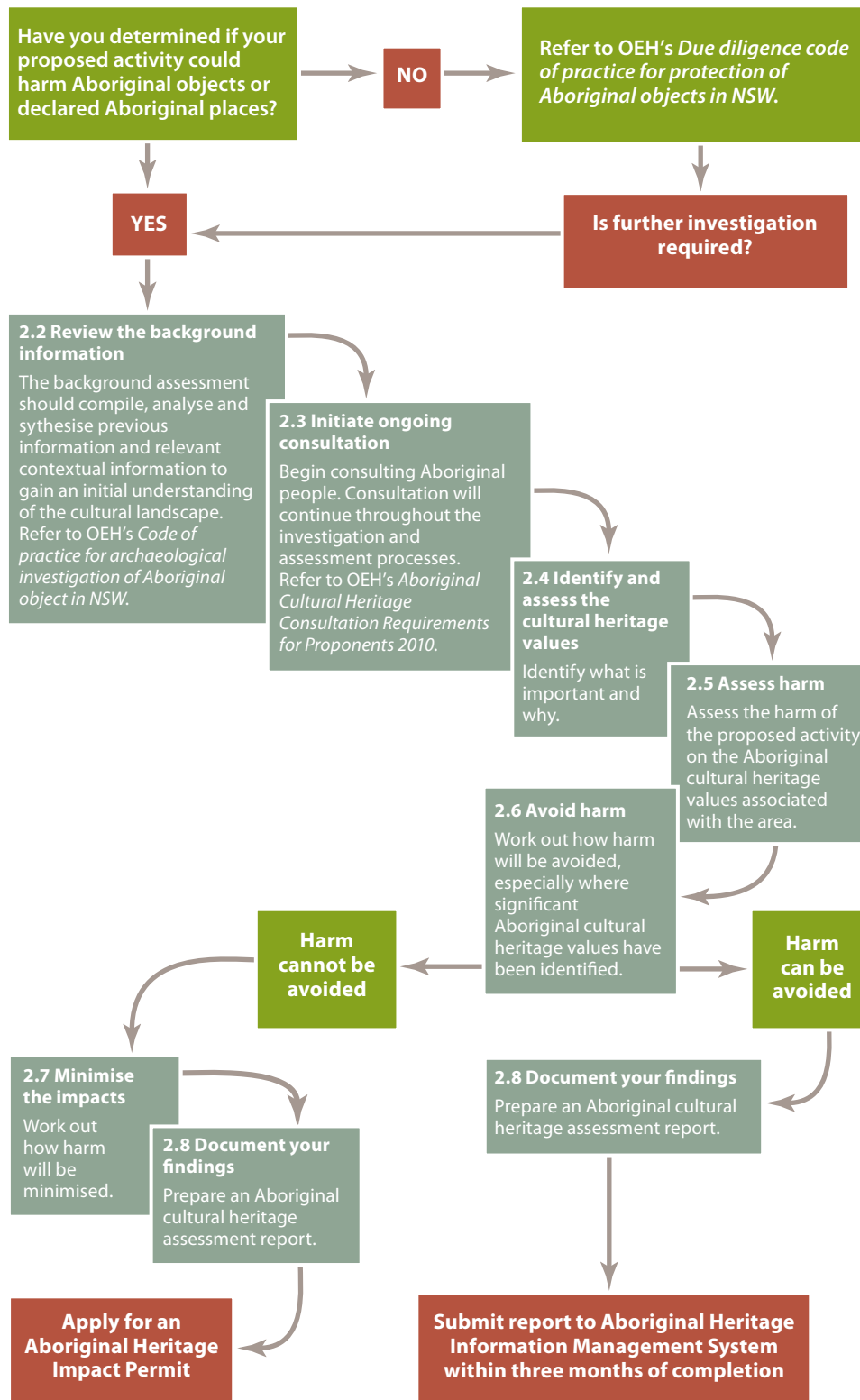


Figure 2: Process for investigating and assessing Aboriginal cultural heritage in NSW<sup>8</sup>

8. Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW: Part 6 National Parks and Wildlife Act 1974, Office of Environment and Heritage, Sydney.

## 11. How is the protection of Aboriginal heritage enforced?

### Penalties

NSW laws provide for penalties (fines and/or imprisonment) for individuals or corporations who harm or desecrate Aboriginal objects or declared Aboriginal Places. The penalties are shown in Table 3. In addition to a fine, a court can also impose a range of orders and alternative sentences, for example, orders to restore a site.

Under the NPW Act it is an offence to deliberately harm or desecrate an Aboriginal object (called a 'knowing offence'). It is also an offence to unknowingly harm or desecrate an Aboriginal object or declared Aboriginal Place (e.g. disturb an unrecorded human burial). The law calls this second offence a 'strict liability offence'.

There are a number of defences and exemptions to the offence of harming or desecrating an Aboriginal object or declared Aboriginal Place. One of the defences is that the harm was carried out under an Aboriginal Heritage Impact Permit (AHIP) (see Section 9).

**Table 3.** Offences and penalties for harming or desecrating Aboriginal objects and declared Aboriginal Places

Offence	Maximum penalty: Individual	Maximum penalty: Corporation
A person must not harm or desecrate an Aboriginal object that the person knows is an Aboriginal object	\$275,000 or imprisonment for one year \$550,000 or imprisonment for 2 years, or both (in circumstances of aggravation)	\$1,100,000
A person must not harm or desecrate an Aboriginal object (strict liability offence)	\$55,000 \$110,000 (in circumstances of aggravation)	\$220,000
A person must not harm or desecrate an Aboriginal Place (strict liability offence)	\$550,000 or imprisonment for 2 years, or both	\$1,100,000
Failure to notify OEH of the location of an Aboriginal object	\$11,000, and for continuing offences a further maximum penalty of \$1100 applies for each day the offence continues	\$22,000, and further maximum penalty of \$2200 for each day the offence continues
Contravention of any condition of an Aboriginal Heritage Impact Permit	\$110,000 or imprisonment for 6 months, or both, and in the case of a continuing offence a further penalty of \$11,000 for each day the offence continues	\$220,000, and further maximum penalty of \$22,000 for each day the offence continues

### Prosecutions<sup>9</sup>

Prior to changes to laws on penalties that began in October 2010, an individual or corporation had to deliberately or 'knowingly' damage or destroy an Aboriginal object. Proving that an individual or corporation deliberately damaged or destroyed an Aboriginal object was difficult to show in a court of law. Consequently only a few prosecutions were successfully carried out. For example, in 2007 a miner was successfully prosecuted under the NPW Act for destroying two artefact scatters and for excavating a mineral exploration pit that extended across the boundary of an Aboriginal Place at the Pinnacles, near Broken Hill.

Finally, education is a means of informing people and corporations about their responsibilities under the laws concerning Aboriginal heritage. Education is also an important way to protect Aboriginal cultural heritage (see Section 9) and help avoid damage to heritage places and the need to pursue prosecution through the law courts.

9. For a list of prosecution proceedings relating to the destruction of an Aboriginal object or Place in NSW see [www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/pages/LEC\\_prosecution\\_civilenforcement\\_destruction\\_of\\_heritageitem](http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/pages/LEC_prosecution_civilenforcement_destruction_of_heritageitem)

## 12. Further information

### **Aboriginal culture and heritage law reform process in NSW**

[www.environment.nsw.gov.au/achreform/index.htm](http://www.environment.nsw.gov.au/achreform/index.htm)

- An initial discussion paper, *Aboriginal heritage legislation in NSW: Public consultation on issues for reform*, was published by the Office of Environment and Heritage (OEH) in 2011 to stimulate discussion for the first round of consultations.
- *Aboriginal heritage legislation in NSW: Reform milestones 1969–2011* summarises the events, committees, reviews and legislation that have shaped the debate on the protection and management of Aboriginal culture and heritage in NSW over the years.

### **System of government in NSW**

[www.parliament.nsw.gov.au/prod/web/common.nsf/key/SystemofGovernmentinNSW](http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/SystemofGovernmentinNSW)

### **National Parks and Wildlife Act 1974**

[www.legislation.nsw.gov.au/maintop/view/inforce/act+80+1974+cd+0+N](http://www.legislation.nsw.gov.au/maintop/view/inforce/act+80+1974+cd+0+N)

### **Regulation of Aboriginal cultural heritage in NSW**

[www.environment.nsw.gov.au/licences/achregulation.htm](http://www.environment.nsw.gov.au/licences/achregulation.htm)

### **NSW Atlas of Aboriginal Places**

[www.environment.nsw.gov.au/aboriginalplaces/index.htm](http://www.environment.nsw.gov.au/aboriginalplaces/index.htm)

### **Aboriginal Heritage Information Management System (AHIMS)**

[www.environment.nsw.gov.au/licences/index.htm](http://www.environment.nsw.gov.au/licences/index.htm)

### **Culture and heritage research**

[www.environment.nsw.gov.au/chresearch/index.htm](http://www.environment.nsw.gov.au/chresearch/index.htm)

### **Office of Environment and Heritage (NSW)**

[www.environment.nsw.gov.au/cultureandheritage.htm](http://www.environment.nsw.gov.au/cultureandheritage.htm)

This website includes information on cultures and heritage of NSW, Aboriginal heritage law reform, research, regulation, conservation, heritage registers and publications.

## Appendix: Summary of the Aboriginal heritage system in NSW

Topic	The Aboriginal heritage system in NSW	Further information
What legislation protects Aboriginal heritage in NSW?	<p>The main laws governing Aboriginal cultural heritage in NSW are:</p> <ul style="list-style-type: none"> <li>• <b>National Parks and Wildlife Act 1974</b>: provides for the protection of Aboriginal objects and declared Aboriginal Places in NSW.</li> <li>• <b>Heritage Act 1977</b>: lists items of 'State' heritage significance on the State Heritage Register, including Aboriginal heritage items.</li> <li>• <b>Environmental Planning and Assessment Act 1979</b>: the key piece of legislation for the management of development in NSW.</li> <li>• <b>Crown Lands Act 1989</b>: sets out the uses of Crown land and principles for managing Crown land.</li> </ul> <p>Commonwealth Government laws may be relevant where state-based processes are unable to protect heritage items that are of importance to an Aboriginal community.</p>	<p>See Section 2 (page 4)</p> <p>See Table 2</p>
Who administers Aboriginal heritage legislation?	<p>The <b>Office of Environment and Heritage (OEH), Department of Premier and Cabinet</b>, administers the <i>National Parks and Wildlife Act 1974</i> and the <i>Heritage Act 1977</i>.</p> <ul style="list-style-type: none"> <li>• <i>Country, Culture and Heritage Division</i> guides and directs OEH's approach to identifying, understanding and conserving Aboriginal cultural heritage, and maintains a database of Aboriginal objects and declared Aboriginal Places in NSW: the <b>Aboriginal Heritage Information Management System (AHIMS)</b>.</li> <li>• <i>Conservation and Regulation Division</i> administers the planning and regulation processes for Aboriginal heritage.</li> <li>• <i>Heritage Branch</i> maintains listings on the State Heritage Register.</li> </ul>	<p>See Section 3 (page 7)</p>
Who owns Aboriginal heritage?	<p>In summary:</p> <ul style="list-style-type: none"> <li>• 'Movable' Aboriginal objects (e.g. stone tools and human remains) are the property of the <b>Crown</b> (that is, the State of NSW) but can be returned to Aboriginal owners.</li> <li>• 'Immovable' items such as rock art, scarred trees and grinding groves are the property of the <b>land owner</b>.</li> <li>• Aboriginal cultural knowledge and practices (e.g. language, plant medicines) are held by <b>Aboriginal people</b>.</li> </ul>	<p>See Section 4 (page 8)</p>
Who makes decisions?	<p>The <b>Minister for the Environment</b> is responsible for recommending to Parliament on making and changing laws and declaring Aboriginal Places.</p> <p>The <b>Director General, Department of Premier and Cabinet</b>, is responsible for protection of Aboriginal objects and declared Aboriginal Places and for issuing of Aboriginal Heritage Impact Permits. The Director General has additional responsibilities that include: investigating the purchase of land to conserve cultural heritage; promoting education, research and conservation management on national parks; and promoting opportunities for partnerships and agreements between Aboriginal people and land owners in relation to places, objects and features of significance to Aboriginal people.</p>	<p>See Section 5 (page 9)</p>

Topic	The Aboriginal heritage system in NSW	Further information
Who speaks for Country?	<p>The NPW Regulation and NSW Government consultation guidelines emphasise consultation with <b>Traditional Owners</b> and <b>custodians</b>, usually identified as native title holders and registered native title claimants and Aboriginal Owners registered under the <i>Aboriginal Land Rights Act 1983</i>.</p> <p>Guidelines also acknowledge that <b>people with historic ties</b> that have important knowledge concerning Aboriginal heritage may appropriately be involved in consultation.</p>	See Section 6 (page 10)
How do Aboriginal people participate in decision-making?	<p>Aboriginal people in NSW participate in decision-making with regard to Aboriginal cultural heritage management in several ways:</p> <ul style="list-style-type: none"> <li>• <b>Consultation</b>, for example, Aboriginal people are consulted as part of the development assessment process</li> <li>• <b>Advice</b>, for example, the <b>Aboriginal Cultural Heritage Advisory Committee</b> advises the Minister on matters relating to Aboriginal cultural heritage</li> <li>• <b>Collaboration</b>, for example, Aboriginal people can make Indigenous Land Use Agreements (ILUAs), a voluntary agreement between a native title group and land managers about the use and management of land and waters</li> <li>• <b>Control</b>, for example, Aboriginal communities have control of national parks that are Aboriginal owned.</li> </ul>	See Section 7 (page 11)
What Aboriginal heritage is protected, and what is not protected?	<p>Aboriginal cultural heritage that is protected by the law includes:</p> <ul style="list-style-type: none"> <li>• all <b>Aboriginal objects</b> and <b>declared Aboriginal Places</b> in NSW as defined by the <i>National Parks and Wildlife Act 1974</i></li> <li>• Aboriginal heritage <b>items listed on the State Heritage Register</b> under the <i>Heritage Act 1977</i>.</li> </ul> <p>Aboriginal cultural heritage that is not generally legally protected includes:</p> <ul style="list-style-type: none"> <li>• Aboriginal cultural knowledge and practices (such as language and knowledge of food plants)</li> <li>• cultural landscapes or broad areas with important cultural values (for example, story lines, travel routes, and areas connecting sites).</li> </ul>	See Section 8 (page 12)
How is Aboriginal heritage protected?	<p>Aboriginal heritage is protected in a number of ways:</p> <ul style="list-style-type: none"> <li>• <b>Conservation</b>, such as physical conservation (for example, removing graffiti from a rock art site) and reservation of land (for example, Aboriginal Areas). Other important conservation tools are research, partnerships and education (e.g. the Aboriginal Discovery program)</li> <li>• <b>Planning</b>, in the form of regional Aboriginal heritage studies and land-use plans</li> <li>• <b>Regulation</b>, which is the system for identifying important Aboriginal sites that should be conserved and managing the way in which some Aboriginal sites may be disturbed or destroyed</li> <li>• <b>Penalties</b>, which are applied where an Aboriginal object or declared Aboriginal Place is damaged or destroyed without an exemption or a defence.</li> </ul>	See Section 9 (page 13)

Topic	The Aboriginal heritage system in NSW	Further information
How does the development assessment process work?	<p><b>Part 6 of the NPW Act</b> establishes the regulatory system for the management of Aboriginal objects and declared Aboriginal Places.</p> <p>The process for investigating and assessing Aboriginal cultural heritage in NSW requires a developer (an individual or company) to apply '<b>due diligence</b>' (a legal standard of care) to determine whether a proposed development might disturb or damage Aboriginal objects or declared Aboriginal Places.</p> <p>If the due diligence process determines that a proposed development could harm an Aboriginal object or Place, then <b>investigations of the development area</b> are required to determine what Aboriginal cultural heritage is in the area, why it is important, what the likely impacts of development will be, and how the impacts can be avoided, minimised or not avoided.</p> <p>OEH issues <b>Aboriginal Heritage Impact Permits (AHIP)</b> where harm to an Aboriginal object or Aboriginal Place cannot be avoided.</p> <p><b>Dispute resolution</b> (e.g. with regard to an AHIP) may be appealed to the NSW Land and Environment Court.</p>	See Section 10 (page 15)
How is the protection of Aboriginal heritage enforced?	<p>There are <b>two main types of offences</b> for harming Aboriginal objects and declared Aboriginal Places: (1) deliberately desecrating an item that a person knows is an Aboriginal object (called a 'knowing offence'), and (2) unintentionally and unknowingly harming an Aboriginal object (called a 'strict liability offence'). NSW laws provide for penalties (such as <b>fines or imprisonment</b>) for individuals who harm or desecrate Aboriginal objects and declared Aboriginal Places. In addition to a fine or imprisonment, a court can also impose a range of <b>orders and alternative sentences</b> (for example, 'restoration orders').</p> <p>The NPW Act provides for <b>stop work orders</b> and <b>interim protection orders</b> with regards to Aboriginal objects and declared Aboriginal Places.</p>	See Section 11 (page 17)

## Glossary

**Aboriginal Area.** A category of protected area recognised in the NSW *National Parks and Wildlife Act 1974* (NPW Act). These are areas that have significance for Aboriginal people and which have been purchased and declared and managed as conservation reserves by the government. Some are co-managed with Aboriginal people.

**Aboriginal Heritage Impact Permit (AHIP).** Permit issued by the Director General that allows for development or research to be carried out that may damage or destroy Aboriginal objects.

**Aboriginal object.** Physical evidence of the use of an area by Aboriginal people (also referred to as **Aboriginal sites**). Aboriginal objects include items such as stone tools, scarred trees and ancestral remains of Aboriginal people, as well as shell middens, rock art sites and grinding grooves.

**Aboriginal Place.** An area that 'is or was of special significance to Aboriginal culture' (defined in the *National Parks and Wildlife Act 1974*) that has been declared an Aboriginal Place by the Minister.

**Archaeology.** A way of revealing human history by studying the artefacts and other remains left behind by people in the past.

**Development area.** The area covered by a proposed development, such as a new highway, mine or housing estate.

**Harm.** A term used in the *National Parks and Wildlife Act 1974* that means destroying, defacing, damaging or moving an object from the land on which it is situated, or destroying, defacing or damaging a declared Aboriginal Place.

**Heritage or cultural heritage.** The material traces (e.g. shell middens, stone arrangements or scarred trees) left by people in the past; also the intangible aspects (e.g. cultural knowledge and cultural practices) of a society.

**Heritage system.** The combination of the laws, policies and practices by which heritage is protected and managed in any particular state or country.

**Law.** A rule or set of rules made by the Parliament and agreed to by the Governor. The *National Parks and Wildlife Act 1974* (NPW Act) is a law (also known as '**legislation**') passed by the NSW Parliament.

**Regulation.** Heritage regulation is the system of official rules, based on legislation (law), which controls (i.e. regulates) what is allowed to be done to heritage.

**Site.** A location where remains, such as stone or glass artefacts, have been left behind by people in the past.







