



# Aboriginal Culture & Heritage

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Sydney: 02 9262 6989

Northern Rivers: 1800 626 239

Rest of NSW: 1800 626 239

EDO NSW has published a book on environmental Law for Aboriginal communities in NSW. For a more comprehensive guide, read [Caring for Country: A guide to environmental law for Aboriginal communities in NSW](#).

## What is Aboriginal culture and heritage?

The law defines 'cultural heritage' as objects and places that are significant to Indigenous people under Aboriginal or Torres Strait Islander tradition.

### Aboriginal objects

'Aboriginal objects' are deposits, objects or material evidence (not being a handicraft made for sale) relating to Aboriginal habitation of New South Wales<sup>2</sup> and include things which are associated with traditional Aboriginal communities such as stone tools, art sites, burial grounds and Aboriginal remains as well as contemporary society.

### Aboriginal places

An 'Aboriginal place' is a place which is or was of special significance with respect to Aboriginal culture, and which is also recognised as 'significant' by the Minister for the Environment.<sup>3</sup> In other words, for an Aboriginal place to be protected under the *National Parks and Wildlife Act 1974* (NSW) the Minister needs to be convinced that a place should be declared an Aboriginal place.

<sup>1</sup> [http://www.edonsw.org.au/legal\\_advice](http://www.edonsw.org.au/legal_advice)

<sup>2</sup> *National Parks and Wildlife Act 1974* (NSW), s. 5.

<sup>3</sup> *National Parks and Wildlife Act 1974* (NSW), s. 84.

For more information about Aboriginal culture and heritage please refer to the EDO NSW publication [Caring for Country – A guide to environmental law for Aboriginal communities in NSW](#).

## How is Aboriginal culture and heritage protected?

There are several methods of protecting Aboriginal culture and heritage. These methods of protection exist at a national, State and local level and are briefly outlined below.

### National Protection

#### ***Protection as a World Heritage Area***

Any cultural heritage that falls within a [World Heritage Area](#) is protected as part of that area and includes 'exceptional cultural tradition' that is living or disappeared. World Heritage Areas are areas of outstanding universal value. Federal Government approval is needed before anyone can do anything that will have a significant effect on a World Heritage Area or the values of such an area.<sup>4</sup>

#### ***Protection as National Heritage***

The Federal Government also protects cultural heritage areas which are on the [National Heritage List](#).<sup>5</sup> You can [nominate a place](#) for inclusion on the National Heritage List if it satisfies at least one of the National Heritage criteria. These include:

- the place has outstanding heritage value to the nation because of the place's importance as part of Indigenous tradition; and
- the place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history.

[Click here](#) to see the full list of criteria.

Once a place has been nominated, the [Australian Heritage Council](#) will determine whether the place meets the National Heritage List criteria. The Heritage Council must consult owners, occupiers and Indigenous people with rights or interests in the nominated area, and must invite public comments on the nomination.

The Federal Environment Minister decides whether a place will be listed. The Minister must take into consideration the Heritage Council's assessment, and comments received from interested parties and the public.

#### ***Protection under the Commonwealth Heritage List***

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<sup>4</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 12.

<sup>5</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 15B.

The [Commonwealth Heritage List](#) comprises natural, Indigenous and historic heritage places on Commonwealth lands and waters or under Federal Government control.

The [Commonwealth Heritage List criteria](#) are applied in determining the heritage values of a place.

### ***Protection under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)***

[This Act](#)<sup>6</sup> protects areas and objects in Australia or Australian waters that are significant to Indigenous people in accordance with Aboriginal or Torres Strait Islander tradition from injury or desecration.<sup>7</sup> An Aboriginal or Torres Strait Islander person, or a person on their behalf, can apply to the Minister for Aboriginal Affairs verbally or in writing for protection of a specified area or object.<sup>8</sup>

The Minister may make an emergency declaration protecting areas and objects that are at immediate risk of injury or are at risk of being used in a manner that is inconsistent with Aboriginal tradition.<sup>9</sup>

### ***Protection under Native Title***

If you are a Native Title holder, you have the right to negotiate for the protection of the places over which Native Title applies.<sup>10</sup>

The things that are considered when the government is deciding whether certain activities should go ahead in places subject to Native Title rights include: the cultural significance of the place, economic considerations and the public interest.

### ***Protection under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)***

[This Act](#)<sup>11</sup> protects Indigenous heritage by making it an offence to take an action that will have a significant impact on the Indigenous heritage values of a place that is recognised in the National Heritage List.

## **State Protection**

### ***Protection under the National Parks and Wildlife Act 1974 (NSW)***

[This Act](#)<sup>12</sup> is the main law in NSW that protects Aboriginal culture and heritage.

<sup>6</sup> <http://www.comlaw.gov.au/Series/C2004A02943>

<sup>7</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*, s. 4.

<sup>8</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (NSW)*, s. 10.

<sup>9</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (NSW)*, s. 9.

<sup>10</sup> *Native Title Act 1993 (Cth)*, s. 25: <http://www.comlaw.gov.au/Series/C2004A04665>

<sup>11</sup> <http://www.comlaw.gov.au/Series/C2004A00485>

<sup>12</sup> <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+80+1974+cd+0+N>

The Office of Environment and Heritage is responsible for protecting Aboriginal culture and heritage in NSW. The [Aboriginal Cultural Heritage Advisory Committee](#)<sup>13</sup> advises the Minister on matters relating to the identification, assessment and management of Aboriginal culture and heritage.<sup>14</sup>

There are five main ways that the NSW Government protects Aboriginal culture and heritage under the *National Parks and Wildlife Act 1974* (NSW):

- **Aboriginal areas**

Land may be dedicated as an 'Aboriginal area' to identify, protect, and conserve areas associated with a person, event or historical theme, or containing a building, place, object, feature or landscape that is of natural or cultural significance to Aboriginal people or of importance in improving public understanding of Aboriginal culture and its development. Lands within an Aboriginal area are reserved for the purpose of preserving, protecting and preventing damage to Aboriginal objects or Aboriginal places on that land.<sup>15</sup>

- **Conservation agreements**

The NSW Environment Minister may make conservation agreements with landowners in relation to areas in which Aboriginal objects or Aboriginal places of special significance are situated.<sup>16</sup> A conservation agreement may restrict the use of the area and may require the preservation of the area.

- **Stop work orders**

The Chief Executive of the Office of Environment and Heritage may issue a stop work order for up to 40 days if an action that is being, or is about to be, carried out is likely to significantly affect an Aboriginal object or Aboriginal place.<sup>17</sup>

- **Interim Protection Orders**

The NSW Environment Minister may make an interim protection order in respect of an area of land which has natural, scientific or cultural significance.<sup>18</sup> Interim protection orders are valid for the period that is specified in the order but no longer than 2 years.<sup>19</sup>

- **Criminal offences**

There are a number of criminal offences under the *National Parks and Wildlife Act 1974* (NSW) that relate to culture and heritage, including penalties for damage and destruction of items or places of heritage value.<sup>20</sup> The approach of the courts has varied. In one judgement the court adopted a restorative justice

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<sup>13</sup> <http://www.environment.nsw.gov.au/conservation/ACHACNominations.htm>

<sup>14</sup> *National Parks and Wildlife Act 1974* (NSW), s. 28.

<sup>15</sup> *National Parks and Wildlife Act 1974* (NSW), ss. 30K, 62.

<sup>16</sup> *National Parks and Wildlife Act 1974* (NSW), s. 69C(1)(d).

<sup>17</sup> *National Parks and Wildlife Act 1974* (NSW), s. 91AA.

<sup>18</sup> *National Parks and Wildlife Act 1974* (NSW), s. 91A.

<sup>19</sup> *National Parks and Wildlife Act 1974* (NSW), s. 91D(1).

<sup>20</sup> *National Parks and Wildlife Act 1974* (NSW), s. 86.

approach including mediation, while in another the penalty was reduced to compensate for loss of land value due to the cultural heritage site.<sup>21</sup>

The definition of ‘harm’ includes destroying, defacing or damaging an Aboriginal object or place, and in relation to an object, it includes removing an object from the land on which it had been situated.<sup>22</sup>

### **State Heritage Register**

Items of natural or culture and heritage may be protected by listing them on the [State Heritage Register](#).<sup>23</sup> This list may include cultural heritage items or places, but it does not include ‘Aboriginal relics’.

The Minister for Heritage decides what gets listed, but the [Heritage Council](#) can recommend listings. If there are Aboriginal places or items of cultural heritage that you think should be listed on the State Heritage Register, you should lobby the Heritage Council or the Minister.

Items that are listed on the State Heritage Register are legally protected under the [Heritage Act 1977 \(NSW\)](#)<sup>24</sup> and cannot be demolished, redeveloped or otherwise altered without an approval from the Heritage Council.

### **Local Government Protection**

#### ***Protection under the Environmental Planning and Assessment Act 1979 (NSW)***

Under NSW planning laws,<sup>25</sup> all development and planning takes place in accordance with State Environmental Planning Policies (SEPPs) and local environmental plans (LEPs) (collectively known as environmental planning instruments)<sup>26</sup> that set out what types of development can take place on which areas and what areas are protected.

Local environmental plans must conform to the Standard LEP template designed by the State government. This requires councils to redraft LEPs that do not conform to the template. In doing so, council must observe objectives in the LEP to conserve Aboriginal objects and Aboriginal places of heritage significance.<sup>27</sup> Aboriginal bodies such as Land Councils can tell council about items and places of heritage significance which will bring the items or places within the heritage plan.

<sup>21</sup> See *Garrett v Williams* (2007) 151 LGERA 92 & *Plath v O'Neill* [2007] NSWLEC 553.

<sup>22</sup> *National Parks and Wildlife Act 1974* (NSW), s. 5(1)

<sup>23</sup> *Heritage Act 1977* (NSW), Part 3A.

<sup>24</sup> <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+136+1977+cd+0+N>

<sup>25</sup> <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+203+1979+cd+0+N>

<sup>26</sup> Most environmental planning instruments are available online at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au) under ‘Browse In Force’.

<sup>27</sup> *Standard Instrument—Principal Local Environmental Plan* (NSW), cl. 5.10(1).

- **Public involvement with LEPs**

Before a new LEP can come into force, it usually goes on public exhibition. The public can comment on the provisions of the LEP during this exhibition period. This is an opportunity for you to have a say in the level of protection your council gives to culture and heritage in your area. You can have your say by making a written submission during the exhibition period.<sup>28</sup>

The Planning Minister decides whether to approve a LEP. Once the Minister has approved the LEP, any development that is consistent with the LEP can be approved by the council. It is therefore important that you look carefully at the LEP and raise any objections during the exhibition period. Otherwise, you may not be able to challenge a development later on.

Most councils have Heritage Officers and Aboriginal Liaison Officers who can give you information and advice on culture and heritage matters. Contact your local council for more information.

## **How is the protection of Aboriginal culture and heritage regulated and enforced?**

### **What are the consequences if culture and heritage is unlawfully destroyed or damaged?**

#### ***Aboriginal objects***

It is a criminal offence to knowingly harming or desecrate an Aboriginal object. This attracts a penalty of up to \$275,000 for individuals or one year imprisonment or both.<sup>29</sup> If the offence is aggravated – that is, if an object is harmed or desecrated by a person undertaking commercial activity, or if the person has been convicted of harming or desecrating an Aboriginal object or place before, the maximum penalty increases to \$500,000 or two years in prison or both.<sup>30</sup> Corporations who knowingly harm or desecrate an Aboriginal object face a penalty of up to \$1.1 million.

Unknowingly harming an Aboriginal object attracts a penalty of up to \$55,000, or \$110,000 for an aggravated offence for an individual, and up to \$220,000 for a corporation.<sup>31</sup>

#### ***Aboriginal places***

It is a criminal offence to harm or desecrate an Aboriginal place. This attracts a penalty of up to \$550,000 or two years in prison or both for an individual, and \$1.1 million for a corporation.<sup>32</sup>

<sup>28</sup> The exhibition period is usually 28 days.

<sup>29</sup> *National Parks and Wildlife Act 1974* (NSW), ss. 86(1).

<sup>30</sup> *National Parks and Wildlife Act 1974* (NSW), ss. 86(2).

<sup>31</sup> *National Parks and Wildlife Act 1974* (NSW), ss. 86(1), (3).



## **Exemptions and defences**

Exemptions for these offences include the engagement by Aboriginal people in traditional Aboriginal cultural activities, declared emergencies, emergency fire-fighting or bush fire hazard reduction work done in accordance with the *Rural Fires Act 1997* (NSW), conservation work undertaken by the Office of Environment and Heritage or activities that fall within the terms of a conservation agreement.<sup>33</sup>

Defences for these offences include authorisation by an Aboriginal heritage impact permit (AHIP), or that the offender exercised 'due diligence' to reasonably determine that no Aboriginal object or place would be harmed.

[Click here](#) for more information about AHIPs and 'due diligence'.

It is important to remember that there must be sufficient evidence of the harm or desecration for a person to be convicted of an offence.

### **Case study: *Lester v Ashton Coal Pty Limited***

In this case, Mr Lester, an elder of the Plains Clan of the Wonnarua People in the Hunter Valley argued that Ashton Coal Operations Pty Limited ('Ashton Coal') breached the *National Parks and Wildlife Act 1974* (NSW) ('the Act') by harming Aboriginal objects at three locations.

The NSW Land and Environment Court considered whether land subsidence caused by underground coal mining operations carried out by Ashton Coal caused harm to any Aboriginal objects. The objects included artefact sites, archaeological deposits and grinding grooves. The Court also considered whether construction of a road by an unrelated company harmed any Aboriginal objects.

The Court found that there was not enough evidence to establish that Ashton Coal was in breach of the Act.

### **Does the protection of culture and heritage guarantee that it will not be destroyed?**

Even when culture and heritage is protected, there is no guarantee that it will not be damaged or destroyed. Aboriginal objects or places may be destroyed with prior consent from the relevant government department. For example, an AHIP can be issued authorising the harm or desecration of an Aboriginal object or place.<sup>34</sup> These permits allow certain actions that would ordinarily be offences under the *National Parks and Wildlife Act 1974* (NSW) such as to intentionally damage an Aboriginal object or place.<sup>35</sup>

<sup>32</sup> *National Parks and Wildlife Act 1974* (NSW), ss. 86(4).

<sup>33</sup> *National Parks and Wildlife Act 1974* (NSW), 1 ss. 87A, 87B

<sup>34</sup> *National Parks and Wildlife Act 1974* (NSW), s. 90.

<sup>35</sup> *National Parks and Wildlife Act 1974* (NSW), s. 87.

Certain Aboriginal objects may be deemed the property of the Crown, and therefore under the control of the government.<sup>36</sup>

### **How can I challenge an Aboriginal heritage impact permit?**

If consent has been granted to destroy Aboriginal objects or places, you should seek legal advice on the best way to challenge the decision.

You should not rush into legal action. It is important to do some background research first and make enquiries, including who are the people seeking to destroy cultural heritage? Was the consent issued appropriately? Who was consulted?

If you have trouble accessing information, information access laws may assist you. It is always better to ask for information first and then make formal request for information as a last resort. EDO NSW may be able to assist you with making formal request for information. Call our [Environmental Law Advice](#) line for more information.

### **Am I entitled to be consulted about decisions to destroy culture and heritage?**

The Office of Environment and Heritage has [Aboriginal Cultural Heritage consultation requirements](#) setting out when and how Aboriginal people are to be consulted about the significance of Aboriginal culture and heritage.

Any person who is aware of the location of an Aboriginal object must notify the Office of Environment and Heritage within a reasonable time after first becoming aware of its location. Failure to do so is an offence.<sup>37</sup> The Office of Environment and Heritage requires applicants to consult with the Aboriginal community about the Aboriginal culture and heritage values and cultural significance of Aboriginal objects and places within the area being considered for development before an AHIP can be issued.

If you wish to be consulted you can register your interest with the applicant. This gives you a right to be consulted on certain issues, including how the cultural and archaeological assessments were conducted and a right to provide feedback on the outcomes of such reports. If you don't register in time, you still have a right to be consulted.

The Office of Environment and Heritage will then make a decision to either grant or refuse the application. If the application is approved, your views may still be taken into account by having the approval subject to certain conditions.

### **How can I find out if there are Aboriginal objects or places on my land?**

The Office of Environment and Heritage keeps a register of all Aboriginal objects and Aboriginal places in NSW. The register is called the [Aboriginal Heritage Information Management System](#) (AHIMS).<sup>38</sup> You can search AHIMS to see if anything is listed

<sup>36</sup> *National Parks and Wildlife Act 1974* (NSW), s.83.

<sup>37</sup> *National Parks and Wildlife Act 1974* (NSW), s. 89A.

<sup>38</sup> <http://www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm>



on your land or the land of other people. However, not all Aboriginal heritage is listed on AHIMS, so the fact that there is no listing does not mean that there is nothing of cultural heritage significance on the land. You should [contact the AHIMS Registrar](#) for more information.

## Glossary

### Key to terms used in this Fact Sheet

**AHIMS** means the [Aboriginal Heritage Management System](#)

**AHIP** means an [Aboriginal Heritage Impact Permit](#)

**Environment Minister** means the NSW Minister for the Environment

**Federal Environment Minister** means the Federal Minister for the Environment

**LEP** means Local Environmental Plan

**Planning Minister** means the NSW Minister for Planning

**POEO Act** means the [Protection of the Environment Operations Act 1997 \(NSW\)](#)

**SEPP** means a State Environmental Planning Policy