



Aboriginal Culture & Heritage

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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 Wales¹ 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.² 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.

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.

¹ [National Parks and Wildlife Act 1974 \(NSW\)](#) s 5 (‘NPW Act’).

² Ibid, s 84.

National Protection

Protection as a World Heritage Area

Any cultural heritage 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.³

Protection as National Heritage

The Federal Government also protects cultural heritage areas which are on the National Heritage List.⁴ 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.

Visit: [The Department of Agriculture, Water and the Environment](#) pages on:

- [Australia's World Heritage](#) for more information on world heritage areas
- [National Heritage](#) for more information on national heritage list, including the full list of the [National Heritage 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

The Commonwealth Heritage List comprises natural, Indigenous and historic heritage places on Commonwealth lands and waters or under Federal Government control. To determine a place's heritage values, the Commonwealth Heritage List criteria are applied.

³ [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) s 12 ('EPBC Act').

⁴ EPBC Act, s 15B.

Visit: The Department of Agriculture, Water and the Environment pages on:

- [Australia's Commonwealth Heritage List](#) to view the list
- [Commonwealth Heritage List criteria](#)

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

The [Aboriginal and Torres Strait Islander Heritage Protection Act 1984 \(Cth\)](#) 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.⁵ 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.⁶

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.⁷

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.⁸

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)

The [Environment Protection and Biodiversity Act 1999 \(Cth\)](#) (**EPBC Act**) 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.

Read: EDO Factsheet on **EPBC Act Referrals – Opportunities for Comment & Legal Action** for more information about the EPBC Act

⁵ [Aboriginal and Torres Strait Islander Heritage Protection Act 1984 \(Cth\)](#) s 4.

⁶ [Aboriginal and Torres Strait Islander Heritage Protection Act 1984 \(Cth\)](#) s 10.

⁷ [Aboriginal and Torres Strait Islander Heritage Protection Act 1984 \(Cth\)](#) s 9.

⁸ [Native Title Act 1993 \(Cth\)](#) s 25.

State Protection

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

The [National Parks and Wildlife Act 1974 \(NSW\)](#) (**NPW Act**) is the main law protecting Aboriginal culture and heritage in NSW.

Heritage NSW (part of the Community Engagement Group with the NSW Department of Premier and Cabinet) is responsible for protecting Aboriginal culture and heritage in NSW. The Aboriginal Cultural Heritage Advisory Committee advises the Minister on matters relating to the identification, assessment and management of Aboriginal culture and heritage.⁹

Visit: [Heritage NSW's page on the Aboriginal Cultural Heritage Advisory Committee to read more about the Committee and its role](#)

There are five main ways that the NSW Government protects Aboriginal culture and heritage under the NPW Act:

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.¹⁰

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.¹¹ 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 Heritage NSW 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.¹²

⁹ NPW Act, s 28.

¹⁰ Ibid, ss 30K, 62.

¹¹ Ibid, s 69C(1)(d).

¹² Ibid, s 91AA.

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.¹³ Interim protection orders are valid for the period that is specified in the order but no longer than 2 years.¹⁴

Criminal offences

There are a number of criminal offences under the NPW Act that relate to culture and heritage, including penalties for damage and destruction of items or places of heritage value.¹⁵ The approach of the courts has varied. In one judgment the court adopted a restorative justice approach including mediation, while in another the penalty was reduced to compensate for loss of land value due to the cultural heritage site.¹⁶

The definition of ‘harm’ includes destroying, defacing or damaging an Aboriginal object or place, and in relation to an object, it includes removing it from the land on which it had been situated.¹⁷

State Heritage Register

Items of natural or cultural heritage may be protected by listing them on the State Heritage Inventory.¹⁸ 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 of NSW can recommend listings. If there are Aboriginal places or items of cultural heritage that you think should be listed on the State Heritage Inventory, you should lobby the Heritage Council or the Minister.

Visit: The Heritage NSW [State Heritage Inventory](#) portal to search for declared Aboriginal Places, items listed on the State Heritage Register, Interim Heritage Orders and items of local heritage significance.

Visit: The Heritage NSW page on the [Heritage Council of NSW](#) to read more about the Council

¹³ Ibid, s 91A.

¹⁴ Ibid, s 91D(1).

¹⁵ NPW Act, s 86.

¹⁶ See *Garrett v Williams* (2007) 151 LGERA 92 ([Garrett v Williams \[2007\] NSWLEC 96](#)); [Plath v O'Neill \[2007\] NSWLEC 553](#).

¹⁷ NPW Act, s 5(1).

¹⁸ [Heritage Act 1977 \(NSW\)](#) Part 3A.

Local Government Protection

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

Under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**), 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 (**EPIs**). EPIs set out which types of development can take place on which areas and what areas are protected.

Read: [EDO Factsheet bundle on LEPs and SEPPs](#) to learn more about the NSW Environment and Planning framework.

LEPs 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.¹⁹ 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.

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.²⁰

The Planning Minister decides whether to approve a LEP. Once a 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.

Visit: [The NSW Legislation Register's In force legislation page](#) and search alphabetically under 'Environmental Planning Instruments'. For example, the LEP for Bega will be under 'B'.

¹⁹ *Standard Instrument – Principal Local Environmental Plan (NSW)*, cl. 5.10(1).

²⁰ N.B. The exhibition period is usually 28 days.

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 harm or desecrate an Aboriginal object. This attracts a penalty of up to \$275,000 for individuals or one year imprisonment or both.²¹ 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.²² 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.²³

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.²⁴

N.B. 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.

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 in accordance with the [Rural Fires Act 1997 \(NSW\)](#), conservation work undertaken by Heritage NSW or activities that fall within the terms of a conservation agreement.²⁵

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.

²¹ NPW Act, s 86(1).

²² Ibid, s 86(2).

²³ Ibid, ss 86(1) and 86(3).

²⁴ Ibid, s 86(4).

²⁵ Ibid, ss 87A and 87B.

Visit: [The Australian Business Licence and Information Service page on Aboriginal Heritage Impact Permit - New South Wales](#) to read more about AHIPs

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 NPW 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 NPW 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.²⁶ These permits allow certain actions that would ordinarily be offences under the NPW Act such as to intentionally damage an Aboriginal object or place.²⁷

Certain Aboriginal objects may be deemed the property of the Crown, and therefore under the control of the government.²⁸

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?

²⁶ NPW Act, s 90.

²⁷ Ibid, s 87.

²⁸ Ibid, s 83.

If you have trouble accessing information, information access laws may assist you. It is always better to ask for information first and then make a formal request for information as a last resort.

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

The NSW Department of Planning, Industry and Environment (**The Department**) heeds 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 Heritage NSW within a reasonable time after first becoming aware of its location. Failure to do so is an offence.²⁹ The Department 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 Department 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?

Heritage NSW keeps a register of all Aboriginal objects and places in NSW – the Aboriginal Heritage Information Management System (**AHIMS**). You can search AHIMS to see if anything is listed 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.

Visit: [The AHIMS to search for Aboriginal Places and objects, referred to as Aboriginal sites](#)

Visit: [The Heritage NSW page on Record Aboriginal sites for the AHIMS Registrar contact details.](#)

²⁹ NPW Act, s 89A.

Glossary

Key terms used in this Fact Sheet

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

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

Environment Minister means the NSW Minister for Environment

EPBC Act means the [Environment Protection and Biodiversity Act 1999 \(Cth\)](#)

EPI means Environmental Planning Instrument

Federal Environment Minister means the Federal Minister for Environment

LEP means Local Environmental Plan

NPW Act means the [National Parks and Wildlife Act 1974 \(NSW\)](#)

Planning Minister means the NSW Minister for Planning

SEPP means a State Environmental Planning Policy