

# fact sheet



New South Wales  
Aboriginal Land Council  
www.alc.org.au

## Changes to Aboriginal Heritage Protection under the *National Parks and Wildlife Act 1974 (NSW)*

This Fact Sheet provides an overview of the recent changes to the way that Aboriginal heritage is managed in NSW, through the *National Parks and Wildlife Act 1974 (NSW)*.

Also included is an overview of proposed Draft *National Parks and Wildlife Regulation 2010*, which will detail how the new changes will work in practice.

*Note:* This is one of a series of Fact Sheets which have been developed for Local Aboriginal Land Councils (LALCs) and the Aboriginal community by the NSW Aboriginal Land Council (NSWALC).

While all care has been taken in the preparation of this fact sheet, it is not a substitute for legal advice in individual cases. This Fact Sheet is current as of 6 July 2010.

### How is Aboriginal heritage protected in NSW?

The *National Parks and Wildlife Act 1974 (NSW)*<sup>i</sup> is the main law in NSW which protects Aboriginal cultural heritage sites. The Department of Environment, Climate Change and Water (DECCW) is responsible for administering this Act.

The *National Parks and Wildlife Act* gives the Director-General of DECCW responsibility for the proper care, preservation and protection of 'Aboriginal objects' and 'Aboriginal places'. Aboriginal objects include objects on both public and private lands.

The Director-General can give permission to developers, government agencies and others to disturb, damage or destroy Aboriginal heritage through the issuing of a 'consent' or permit, called an Aboriginal Heritage Impact Permit (or AHIP).

The Director-General also has the power to prosecute people who unlawfully destroy or damage Aboriginal objects or places, and can take other action to protect cultural heritage such as issuing a stop work order.

For information about how permits have been issued by DECCW in recent years, refer to the NSWALC submission – *More than Flora and Fauna* – which is available to download from the NSWALC website at [www.alc.org.au](http://www.alc.org.au) 'Culture and Heritage' Issues page.

### What are the new changes?

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

The Bill made significant changes to the Aboriginal heritage provisions of the *National Parks and Wildlife Act*, as well as general administrative changes to parks and the management of threatened species.

### When are the changes due to come into effect?

The NSW Government has advised that the heritage provisions passed in June 2010 will not be brought into effect until new Regulations have been finalised. The current timeline is **1 October 2010**.

### What are the specific changes?

**New offences and increased penalties for harm to Aboriginal places and objects:** Previously a person could only be prosecuted for harming an Aboriginal object or place if the harm was caused 'knowingly'.

A new offence has now been added to the Act when a person damages an Aboriginal object or place accidentally or without knowing what it was (this is referred to as a 'strict liability' offence). Also added were new powers for the Director-General and Courts to make remediation or restorations directions.

Significantly increased fines have also been introduced of up to \$22,000, or \$1.1 million in the case of corporations, in line with other environmental laws.

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

- A '**due diligence**' defence will be available if a person follows the steps to determine if an Aboriginal exists outlined in the Regulations or in a Code of Practice adopted into the Regulations.
- A '**low impact**' defence will be available if a person was doing an activity listed in the Regulations.

**IMPORTANT NOTE** – These defences only apply to harm to Aboriginal objects – not Aboriginal places.

**New administrative processes for permits:** This includes provisions to make permits more 'flexible'

and to allow permits to be issued for classes of objects, places, land, activities or persons (at s90). It will also be easier to transfer permits.

**Factors that the Director-General must consider:** Previously what DECCW must consider before a permit is issued, and on what conditions, was outlined in DECCW policy. A defined list of factors that the Director-General must consider before issuing a permit has now been listed in the Act (at s90K).

**Definition of harm:** A definition of harm has been added to the Act (at s5), including the power to define what is harm, or not harm, in the Regulations.

**Regulations relating to consultation:** Currently there are requirements in DECCW policy that a person must consult with the Aboriginal community before a permit is issued. Changes to the Act now allow requirements for consultation to be outlined in the Regulations (at s90N).

**Requirement to maintain a heritage register:** DECCW currently maintains a database of known Aboriginal objects and places, called the Aboriginal Heritage Information Management System (AHIMS). The Act now includes a requirement that the Director-General keep AHIMS as the database of known Aboriginal objects and related information (at s90Q), and also some form of public register (s188F).

**Administrative changes to committees:** including the Aboriginal Cultural Heritage Advisory Committee (ACHAC) and joint-management boards for Part 4A parks.

#### **What is the due diligence defence?**

Due diligence is a legal concept which generally means taking reasonable and practicable steps to determine whether a person's actions are likely to cause harm.

The Act allows for Codes of Practice to be adopted into the Regulations which outline what steps will constitute due diligence – that is, what steps a person should take if they want to proceed without a permit from DECCW.

If a person proves they have followed these steps they will be able to avoid a penalty for damage to an Aboriginal object. The due diligence defence is not available if the person *knows* an Aboriginal object exists.

The Draft *National Parks and Wildlife Regulation 2010* currently released for consultation includes several Codes, including:

- Forestry Codes (various)
- Draft General DECCW Code of Practice and
- Draft Minerals Council Code.

Also proposed is a *Draft Code of Practice for Archaeological Investigations in NSW*, which seeks to remove some 'routine' archaeological activities from the definition of harm.

#### **What is the low impact defence?**

It will be a defence to the new 'strict liability' offence if a person was undertaking an activity listed as 'low impact' by Draft Regulation 80B of the Regulations.

#### **How do I get a copy of the Draft Regulations?**

The proposed new Draft National Parks and Wildlife Regulations are available to download from the NSWALC website at

<http://www.alc.org.au/issues/culture--heritage.aspx>.

Some information is also available from the DECCW website t

<http://www.environment.nsw.gov.au/legislation/NPWamendmentACT2010.htm>.

LALCs are encouraged to review the draft Regulations and Code and contact NSWALC with any feedback.

The DECCW Culture and Heritage Division can be contacted via the general information line on: 131 555.

LALCs may also wish to contact the Minister directly:

The Hon Frank Sartor MP

Minister for the Environment

NSW Parliament House, Macquarie Street

Sydney NSW 2000

Phone (02) 9228 5811

Fax (02) 9228 5499

Email [office@sartor.minister.nsw.gov.au](mailto:office@sartor.minister.nsw.gov.au)

#### **Is it possible to deem certain Aboriginal objects to 'no longer exist'?**

No. NSWALC worked with the NSW Government to remove this provision which was originally included in the Omnibus Bill (s90S).

#### **Independent Aboriginal heritage law for NSW?**

NSW Environment Minister Frank Sartor announced in early 2010 that a two year Working Group would be established to consider independent Aboriginal heritage legislation for NSW. The Terms of Reference and members of the Working Group have not yet been announced.

#### **Do traditional activities need a permit?**

There is an exemption from the need to get a permit for certain activities if the person was an Aboriginal person undertaking traditional cultural activities (except commercial activities).

#### **Where can I get more information?**

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

<sup>i</sup> A current version of the *National Parks and Wildlife Act 1974* can be found at <http://www.legislation.nsw.gov.au> - Go to 'Browse', then 'Acts', then 'N'.

<sup>ii</sup> An 'omnibus bill' is a bill which makes changes to more than one Act of Parliament. A copy of the Bill as passed can be found at <http://www.legislation.nsw.gov.au> - Go to 'Browse as made', then 'Acts' and 'N' for *National Parks and Wildlife Amendment Act 2010*.