



Office of  
Environment  
& Heritage



## Applying for an Aboriginal Heritage Impact Permit: Guide for applicants

*Part 6 National Parks and Wildlife Act 1974*

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## Glossary

**Aboriginal object** A statutory term, meaning: "...any deposit, object or material evidence (not being a handicraft made for sale) relating to Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-aboriginal extraction and includes Aboriginal remains" (s.5 NPW Act).

**Declared Aboriginal place** A statutory concept meaning any place declared to be an Aboriginal place (under s.84 of the NPW Act) by the Minister administering the NPW Act, by order published in the Gazette, because the Minister is of the opinion that the place is or was of special significance with respect to Aboriginal culture. It may or may not contain Aboriginal objects.

**Development area** The area which is proposed to be impacted as part of a specified activity or development proposal.

**Harm** A statutory term meaning "...any act or omission that destroys, defaces or damages an object or place or, in relation to an object - moves the object from the land on which it had been situated" (s.5 NPW Act).

**Proposed activity** The activity which is the subject of the AHIP.

**Subject area** The area that is the subject of investigation. Ordinarily this would include the area that is being considered for development approval, inclusive of the proposed development area and all associated land parcels. To avoid doubt, the subject area should be determined and presented on a project-by-project basis.

### Other relevant guides

- *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales*
- *Guide to investigating, assessing, and reporting on Aboriginal Cultural Heritage in NSW*
- *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*
- *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW*
- *Guide to Determining and Issuing Aboriginal Heritage Impact Permits*

### Abbreviations used in this guide

AHIP	Aboriginal Heritage Impact Permit
ALR Act	Aboriginal Land Rights Act 1983
OEH	Office of Environment and Heritage NSW
DG	Director General of Department of Premier and Cabinet
EP&A Act	Environmental Planning and Assessment Act 1979
NPW Act	National Parks and Wildlife Act 1974
NT Act	Native Title Act 1993 (Cth)
NPW Regulation	National Parks and Wildlife Regulation 2009

# 1. Introduction

Part 6 of the *National Parks and Wildlife Act 1974* (NPW Act) provides specific protection for Aboriginal objects and declared Aboriginal places by establishing offences of harm. Harm is defined to mean destroying, defacing, damaging or moving an object from the land.

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

The aim of this guide is to help you to prepare your AHIP application. It should be read in conjunction with the NPW Act and the *National Parks and Wildlife Regulation 2009* (NPW Regulation), in case changes have been made since this guide was published. Seek legal advice if you are unsure about your obligations under the NPW Act or NPW Regulation.

This guide:

- applies to all activities throughout New South Wales that will potentially harm Aboriginal objects or declared Aboriginal places and for which an AHIP application will be made; and
- supports other OEH policies and procedures that provide direction and guidance for AHIP applicants.

You may also need to read the following documents, available from OEH:

- *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales*
- *Guide to investigating, assessing, and reporting on Aboriginal Cultural Heritage in NSW*
- *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*
- *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW*
- *Guide to Determining and Issuing Aboriginal Heritage Impact Permits*

## 2. Aboriginal Heritage Impact Permits

An Aboriginal Heritage Impact Permit (AHIP) is a legal document that grants you permission to harm Aboriginal objects or declared Aboriginal places, and sets out any conditions you must comply with.

For more information about the NPW Act and the other legislation relating to Aboriginal cultural heritage see Appendix A.

### Will your proposed activity harm Aboriginal cultural heritage?

Before you go ahead with the proposed activity, and before you apply for an AHIP, you need to know whether your activity could harm Aboriginal objects or declared Aboriginal places.

If you do not know whether or not your activity could harm Aboriginal objects or declared Aboriginal places, you need to follow the *Due Diligence Code of Practice for Protection of Aboriginal Objects in NSW*, available on the OEH website at:

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

If you know that your activity will harm Aboriginal Objects or declared Aboriginal places or the *Due Diligence Code of Practice for Protection of Aboriginal Objects in NSW* indicates that further investigation is required, you need to follow the *Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW* available on the OEH website at

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

### When to apply for an AHIP

You should apply for an AHIP if your proposed activity will – directly or indirectly – harm an Aboriginal object, or a declared Aboriginal place. For example, you may choose to apply for an AHIP to harm:

- Aboriginal object(s) through movement
- Aboriginal object(s) through community collection
- Aboriginal object(s) or a declared Aboriginal place(s) through your proposed works or any other action
- Aboriginal object(s) while undertaking archaeological investigations and this harm is not allowed under the *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW*
- Aboriginal object(s) while undertaking archaeological salvage excavations.

### When an AHIP is not required

There are a number of circumstances in which you do not need to apply for an AHIP and you can proceed with caution.

- your activity is an approved **Part 3A project**, or you are undertaking an environmental assessment in accordance with the Director General's Requirements as part of a Part 3A project application
- there is an **exemption** for your activity from the offences in the NPW Act
- your activity will involve harm that is **trivial or negligible**
- where you are not aware of the presence of Aboriginal object(s) and your activity is a **low impact activity** for which there is a defence in Section 87(4) of the NPW Regulation

- your investigation is being carried out in accordance with OEH's *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW*.

### **Part 3A project**

If your activity is a declared Part 3A project under s.75B of the *Environmental Planning and Assessment Act (EP&A Act)*, refer to the 2005 (draft) *Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (as amended from time to time). These guidelines are available from the NSW Department of Planning and Infrastructure.

### **Exemption**

The NPW Act provides exemptions to the offences of harming Aboriginal objects and declared Aboriginal places in certain circumstances. These exemptions are set out in s.87A and 87B of the NPW Act and are for:

- Aboriginal people and their dependants when carrying out non-commercial traditional cultural activities
- emergency fire fighting activities and bush fire hazard reduction works authorised under the *Rural Fires Act 1997* that are authorised or required to be carried out under that Act
- activities carried out under the *State Emergency and Rescue Management Act 1989* that are reasonably necessary in order to avoid an actual or imminent threat to life or property
- works by or directed by authorised OEH officers to protect or conserve Aboriginal objects
- anything specifically required or permitted under the express terms of a conservation agreement entered into under Division 12 of Part 4 of the NPW Act.

### **Trivial and negligible**

Examples of what might be a trivial or negligible act includes picking up and replacing a small stone artefact; breaking a small Aboriginal object below the surface when you are gardening; crushing a small Aboriginal object when you walk on or off a track; picnicking; camping or other similar recreational activities.

### **Low impact activities**

The Act provides a defence for the strict liability offence of harm to Aboriginal objects for activities listed in the NPW Regulation as being low impact. A person carrying out any of the activities listed in cl.80B of the NPW Regulation has a defence if they inadvertently harm an Aboriginal object they did not know was an Aboriginal object. A list of low impact activities is provided at Appendix B.

### **Exclusion from harm**

The Regulation provides an exclusion from harm for activities carried out in accordance with OEH's *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW* available at the OEH website at: [www.environment.nsw.gov.au/licences/archinvestigations.htm](http://www.environment.nsw.gov.au/licences/archinvestigations.htm)

## Offences under the Act

The NPW Act establishes a number of offences and penalties that apply to harm to Aboriginal objects or declared Aboriginal places.

Offence	Maximum penalty – Individual	Maximum penalty – Corporation
A person must not knowingly harm or desecrate <sup>1</sup> an Aboriginal object	2500 penalty units (\$275,000) or imprisonment for 1 year or both	10,000 penalty units (\$1,100,000)
	5000 penalty units (\$550,000) or imprisonment for 2 years or both (in circumstances of aggravation)	
A person must not harm an Aboriginal object (strict liability offence)	500 penalty units (\$55,000)	2000 penalty units (\$220,000)
	1000 penalty units (\$110,000) (in circumstances of aggravation)	
A person must not harm or desecrate <sup>1</sup> a declared Aboriginal place	5000 penalty units (\$550,000) or imprisonment for two years or both	10,000 penalty units (\$1,100,000)

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<sup>1</sup> OEH's policy is that an AHIP will not be issued to desecrate an Aboriginal object or a declared Aboriginal place.

### 3. How to apply for an AHIP

You must apply to OEH in writing, using the approved AHIP application form, available at: [www.environment.nsw.gov.au/licences/AHIPforms.htm](http://www.environment.nsw.gov.au/licences/AHIPforms.htm)

Complete application forms, along with the required supporting information (see the Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW) and fee must be sent to the Environment Protection and Regulation Group (EPRG) regional office of OEH that has responsibility for the local area where the Aboriginal object(s) or declared Aboriginal place(s) is located. Refer to Appendix C of this guide for a list and map of EPRG regions.

#### Who can apply

OEH will only issue an AHIP to you if:

- you are responsible for the proposed activity, and
- you are a legal entity – i.e. an individual, a company or a body corporate.

Individuals, companies and body corporates are legal entities. This includes individual landowners, local councils, statutory authorities, state-owned corporations and some entities associated with government departments (e.g. Ministerial Corporations created by an Act). Business names, partnerships, joint ventures and non-statutory trusts are not legal entities.

Where harm is connected to a proposed development, the appropriate legal entity would usually be the development company. OEH will not issue an AHIP to archaeologists or consultants employed or contracted by the company.

If the AHIP is being issued in relation to research only, then it should be the legal entity carrying on the research (e.g. the individual or a university).

#### When to apply

You must obtain an AHIP before harming an Aboriginal object or declared Aboriginal place(s).

Where test excavation cannot be undertaken in accordance with OEH's *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW*, you may choose to apply for an AHIP to carry out your investigation. As test excavations can be used to inform conservation goals and harm mitigation measures for the proposed activity, these would be carried out prior to making any application for an AHIP for further harm or prior to any necessary applications for consent or a determination under Part 4 or Part 5 of the EP&A Act.

If your proposed activity also requires consent or a determination under Part 4 or Part 5 of the EP&A Act you should obtain this first, and then lodge your application for an AHIP. The AHIP application may be accepted before a decision or determination under the EP&A Act is made, but as a general rule OEH will not issue (where it is determined that an application should be granted) an AHIP before any necessary development consent has been obtained or determination made.

If your proposed activity is an integrated development, you must apply for your AHIP within 3 years of the date of development consent. For more information on land use planning and integrated development, refer to OEH's *Fact Sheet: Land Use Planning* available at: [www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09786factsheet5.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09786factsheet5.pdf)

## What it costs

Fees for an AHIP application are determined on a sliding scale, based on the costs of your proposed activity. The sliding scale charges may change from time to time and you should refer to the current AHIP application form available at:

[www.environment.nsw.gov.au/licences/ahipforms.htm](http://www.environment.nsw.gov.au/licences/ahipforms.htm) for information about the fees that must be submitted with your application.

## Information that must accompany your application

### Checklist of items you must submit

- completed AHIP application form
- one hard and one electronic copy of the Aboriginal Cultural Heritage Assessment Report prepared in accordance with OEH's *Guide to investigating, assessing, and reporting on Aboriginal Cultural Heritage in NSW*, available at:  
[www.environment.nsw.gov.au/licences/investassessreport.htm](http://www.environment.nsw.gov.au/licences/investassessreport.htm)
- copy of any necessary consents or determinations issued under Part 4 or Part 5 of the EP&A Act
- required site information – refer to:  
[www.environment.nsw.gov.au/resources/cultureheritage/10849AHIMSsiteInformation.pdf](http://www.environment.nsw.gov.au/resources/cultureheritage/10849AHIMSsiteInformation.pdf)
- map showing the exact boundary of the area to which the AHIP will apply
- the AHIP fee.

## Incomplete information

If your application does not include all the required information, OEH will notify you in writing. OEH may:

- request further information from you, or
- may refuse your application, or
- where the application is substantially incomplete, refuse to accept the application.

Where you are requested to provide further information in support of your application the 60 day deemed refusal period is put on hold (see section 4: How long does it take?).

## 4. AHIP assessment and determination

### How your application will be assessed

OEH needs to consider the following when assessing an application:

- the objects of the NPW Act
- actual or likely harm to the Aboriginal objects or Aboriginal place that are the subject of the permit
- practical measures that may be taken to protect and conserve the Aboriginal objects or Aboriginal place that are the subject of the permit
- practical measures that may be taken to avoid or mitigate any actual or likely harm to the Aboriginal objects or Aboriginal place that are the subject of the permit
- the significance of the Aboriginal objects or Aboriginal place that are the subject of the permit
- the results of any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place that are the subject of the permit (including any submissions made by Aboriginal people as part of a consultation required by the NPW Regulations)
- whether any such consultation substantially complied with any requirements for consultation set out in the NPW regulations
- the social and economic consequences of making the decision
- in connection with a permit application:
  - any documents accompanying the application
  - any public submission that has been made under the EP&A Act 1979 in connection with the activity to which the permit application relates and that has been received by the Director-General.

### How long it will take

An AHIP application will be determined within 60 days of lodgement if all information that must accompany your application has been provided.

The NPW Act enables a person to appeal to the Land and Environment Court where an application for an AHIP is refused. If an application for an AHIP has not been determined by the Director General within 60 days, the application is taken to have been refused for the purposes of this appeal. After 60 days the Director General may still determine your application.

This 60 day period does not include the time taken by you to provide any additional information requested by OEH under a notice in order to make a decision.

### If your application is approved

If your application is approved you will receive a letter from OEH containing your AHIP. You must not commence any activities that may harm Aboriginal objects or an declared Aboriginal place(s) until your AHIP has been received.

### Conditions

All AHIPs contain standard conditions. In addition your AHIP may contain additional conditions that are site specific.

It is important that you read these conditions carefully and make sure you understand them prior to carrying out your activity. It is an offence to fail to comply with the conditions of your AHIP:

Offence	Maximum penalty – Individual	Maximum penalty – Corporation
Contravention of any condition of an Aboriginal Heritage Impact Permit	1000 penalty units (\$110,000) or imprisonment for 6 months, or both, and in the case of a continuing offence a further penalty of 100 penalty units (\$11,000) for each day the offence continues	2000 penalty units (\$220,000) and in the case of a continuing offence a further penalty of 200 penalty units (\$22,000) for each day the offence continues

OEH may conduct unannounced site visits or audits to ensure compliance with the conditions of your AHIP.

## How long your AHIP will stay in force

The AHIP will remain in force for a specified term – as set out in the conditions of the AHIP.

## If your application is refused

Circumstances in which OEH may refuse to issue an AHIP will be determined on a case-by-case basis. Some instances where refusal may occur include where:

- the project design is unsympathetic to the Aboriginal cultural heritage values of an Aboriginal object(s) or declared Aboriginal place(s) and will involve extensive harm to significant Aboriginal object(s) or declared Aboriginal place(s)
- where harm could be avoided by the adoption of other reasonable and practical measures
- where the loss of an Aboriginal object would irreversibly diminish the ability of Aboriginal communities to exercise cultural practices within the region
- where an identified Aboriginal object is known to be of national, state or regional significance
- where an identified Aboriginal object is of a type that is rare or cannot be readily accessed in the wider region
- where the Aboriginal object is of a type that is known to be poorly conserved in the reserve system
- where proposed works on a declared Aboriginal place(s) are inconsistent with the reasons for its declaration.

If the Director General intends to refuse an AHIP application, the AHIP applicant will be sent a letter outlining the Director General's intention and inviting you to make a submission.

The Director General will consider your submission, then send you a written notice setting out the final decision.

## **Appeals**

The AHIP applicant or AHIP holder may appeal any decision to:

- refuse an application
- place a condition on an AHIP, or
- suspend or revoke your AHIP.

Appeals are made to the Land and Environment Court and must be made within 21 days of the date of the notice of the decision.

## 5. Other AHIP questions

### Varying the conditions of an AHIP

An AHIP holder may apply to OEH to have an AHIP's conditions varied. Variations are for minor (e.g. to amend a date) or administrative matters. Consequently, you'll need to apply for a new permit – as opposed to an application to vary an existing permit – where:

- you wish to increase the area of land to which the AHIP relates
- test excavation is carried out under an AHIP and you have determined that further harm cannot be avoided.

Your variation application must be in writing on the approved form, and must include:

- information about the nature of the proposed variation
- information about any change in harm of the proposed variation on Aboriginal objects and declared Aboriginal place(s)
- the variation fee.

The approved form is available at: [www.environment.nsw.gov.au/licences/ahipforms.htm](http://www.environment.nsw.gov.au/licences/ahipforms.htm)

OEH may also vary the conditions of the AHIP at any time to correct a typographical error or resolve an inconsistency between conditions. In this case you will receive written notification from OEH of this.

An AHIP variation application will be determined within 60 days of lodgement if all information that must accompany your application has been provided.

The NPW Act enables a person to appeal to the Land and Environment Court where an application in relation to an AHIP is refused. If an application in relation to an AHIP has not been determined by the Director General within 60 days, the application is taken to have been refused for the purposes of this appeal. After 60 days the Director General may still determine your application.

This 60 day period does not include the time taken by you to provide any additional information requested by OEH under a notice in order to make a decision.

For more information about varying AHIP conditions contact the relevant OEH EPRG regional office.

### How will be your application to vary an AHIP be assessed?

Your application to vary your AHIP will be assessed in the same way as any application in relation to an AHIP. For further information refer to section 4: How your application will be assessed, above.

### Varying AHIP conditions and consultation with Aboriginal people

You should be aware that OEH will require you to undertake additional consultation with Aboriginal people where OEH determines that the proposed variation is significant. Significance will be determined on a case by case basis, and will depend on the nature of the harm proposed by the variation application. For example, OEH may require additional consultation where:

- you wish to increase the level of harm to Aboriginal object(s) or a declared Aboriginal place(s) from that authorised in the AHIP
- you wish to harm an Aboriginal object or a declared Aboriginal place(s) that you had identified you would not harm in your original application to which the AHIP relates.

Where further consultation is required, OEH will advise what process must be followed.

## **OEH's Code of Practice for Archaeological Investigation of Aboriginal objects in NSW**

In the majority of cases, any archaeological investigation required will be undertaken in accordance with the requirements of OEH's *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW* available at the OEH website at:

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

Where test excavation cannot be undertaken in accordance with OEH's *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW*, you can apply for an AHIP to carry out your investigation.

If you have been granted an AHIP, and you finalise your investigation and assessment of Aboriginal cultural heritage and determine that further harm cannot be avoided, you should apply to OEH for a new AHIP rather than make an application to vary your existing AHIP.

It will not be necessary to initiate a new consultation process with Aboriginal people if you can demonstrate that:

- it is clear that the consultation process was initiated for the entire investigation and assessment process; and
- there has been a continuous consultation process with Aboriginal people from the investigation stage through to preparing the Aboriginal Cultural Heritage Assessment report and AHIP application. As a general rule, gaps in the consultation process of 6 months or more will not constitute a continuous consultation process. Where you envisage a gap of more than 6 months it is recommended you keep registered Aboriginal parties regularly informed of progress.

## **Transferring or surrendering an AHIP**

You can apply to transfer your AHIP to another legal entity (see section 3: Who can apply) or surrender your AHIP.

An application to transfer an AHIP can be made by either the current AHIP holder or the proposed AHIP holder with the current holder's consent in writing. The approved form is available at:

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

The Director General will consider your application, then send you written notice setting out the final decision.

If your application for transfer relates to a specified parcel of land OEH cannot refuse the application, and cannot vary any of the conditions of the AHIP.

If the Director General intends to refuse to transfer an AHIP, the AHIP holder will be sent a letter outlining the Director General's intention and inviting them to make a submission.

The Director General will consider the submission, then send a written notice setting out the final decision.

You may also make a written application to surrender your AHIP. The approved form is available at: [www.environment.nsw.gov.au/licences/ahipforms.htm](http://www.environment.nsw.gov.au/licences/ahipforms.htm)

OEH may make any approval to surrender your AHIP subject to conditions.

An AHIP transfer or surrender application will be determined within 60 days of lodgement if all relevant information has been provided.

The NPW Act enables a person to appeal to the Land and Environment Court where an application in relation to an AHIP is refused. If an application in relation to an AHIP has not been determined by the Director General within 60 days, the application is taken to have been refused for the purposes of this appeal. After 60 days the Director General may still determine your application

This 60 day period does not include the time taken by you to provide any additional information requested by OEH under a notice in order to make a decision.

## **Revoking or suspending an AHIP**

The Director General may revoke or suspend an AHIP at any time. This means that you no longer have permission to harm Aboriginal objects and/or a declared Aboriginal place(s).

If the Director General intends to revoke or suspend an AHIP, the AHIP holder will be sent a letter outlining the Director General's intention and inviting you to make a submission.

The Director General will consider your submission, and then send you a written notice setting out OEH's final decision.

OEH may make any suspension or revocation subject to conditions.

## **Further information**

Further information on Part 6 of the NPW Act can be found:

- the OEH website at: [www.environment.nsw.gov.au/licences/achregulation.htm](http://www.environment.nsw.gov.au/licences/achregulation.htm)
- by contacting OEH's Environment Line on 131555 for the cost of a local call
- by contacting your relevant OEH EPRG regional office on the contact details provided in Appendix C.

## 6. Appendix A – Legislation relating to Aboriginal cultural heritage in NSW

The following legislation provides the primary context for Aboriginal heritage management in NSW: the *National Parks and Wildlife Act 1974* (NPW Act), the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the *Heritage Act 1977* (the Heritage Act). Other relevant legislation includes the *Aboriginal Land Rights Act 1983* (ALR Act), the *Native Title Act 1993* (Cth) (NT Act) and the *NSW Native Title Act 1994* and other Australian Government legislation.

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

The NPW Act, administered by OEH, is the primary legislation for the protection of some aspects of Aboriginal cultural heritage in NSW. One of the objectives of the NPW Act is:

‘the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including but not limited to: (i) places, objects and features of significance to Aboriginal people ...’ (s.2A(1)(b))

Part 6 of the NPW Act provides specific protection for Aboriginal objects and places by making it an offence to harm them. If harm to Aboriginal objects and places is anticipated, apply for an AHIP.

A list of declared Aboriginal places can be found at:

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

Further information on the NPW Act can be found at:

[www.environment.nsw.gov.au/legislation/DECCActssummaries.htm#natpark](http://www.environment.nsw.gov.au/legislation/DECCActssummaries.htm#natpark)

### **Environmental Planning and Assessment Act 1979**

The EP&A Act, administered by NSW Department of Planning and Infrastructure, provides planning controls and requirements for environmental assessment in the development approval process. It also establishes the framework for Aboriginal heritage values to be formally assessed in the land-use planning and development consent process.

Further information on the EP&A Act can be found at: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)

### **Heritage Act 1977**

The Heritage Act, administered by OEH, protects the state’s natural and cultural heritage. Aboriginal heritage is primarily protected under the NPW Act but may be subject to the provisions of the Heritage Act if the item is listed on the State Heritage Register or subject to an interim heritage order (IHO).

The Heritage Act established the NSW Heritage Council, which provides advice and recommendations to the Minister for Planning. The Minister approves the listing of items and places on the State Heritage Register and can also prevent the destruction, demolition or alteration of items of potential heritage value through an IHO until the significance of the item has been assessed.

Further information on the Heritage Act can be found at: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)

### **Aboriginal Land Rights Act 1983**

The ALR Act, administered by NSW Department of Education and Communities, establishes the NSW Aboriginal Land Council (NSWALC) and Local Aboriginal Land Councils (LALCs). The Act requires these bodies to:

- (a) take action to protect the culture and heritage of Aboriginal persons in the council’s area, subject to any other law

- (b) promote awareness in the community of the culture and heritage of Aboriginal persons in the council's area.

These requirements recognise and acknowledge the statutory role and responsibilities of NSWALC and LALCs.

The ALR Act also establishes the registrar whose functions include, but are not limited to, maintaining the Register of Aboriginal Land Claims and the Register of Aboriginal Owners.

Under the ALR Act, the Registrar is to give priority to the entry in the Register of the names of Aboriginal persons who have a cultural association with:

- (a) lands listed in Schedule 14 to the NPW Act
- (b) lands to which section 36A of the ALR Act applies.

Note Schedule 14 to the NPW Act lists lands of cultural significance to Aboriginal persons that are reserved or dedicated under that Act.

Section 36A of the ALR Act applies to lands that are the subject of a claim by one or more Aboriginal Land Councils under section 36 of that Act and that the crown lands Minister is satisfied would be claimable lands except for the fact that the lands are needed, or likely to be needed, for the essential public purpose of nature conservation.

## **Native title legislation**

The NT Act (Cth) provides the legislative framework to:

- (a) recognise and protect native title
- (b) establish ways in which future dealings affecting native title may proceed, and to set standards for those dealings, including providing certain procedural rights for registered native title claimants and native title holders in relation to acts which affect native title
- (c) establish a mechanism for determining claims to native title
- (d) provide for, or permit, the validation of past acts invalidated because of the existence of native title.

The *NSW Native Title Act 1994* was introduced to ensure that the laws of NSW are consistent with the Commonwealth NT Act on future dealings and validates past and intermediate acts which may have been invalidated because of the existence of native title.

The National Native Title Tribunal has a number of functions under the NT Act, including maintaining the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements and mediating native title claims.

## **Other Acts**

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

## 7. Appendix B – Low Impact Activities

The following low impact activities are prescribed in the NPW Regulation as a defence against the strict liability s86 (2) offence.

### **Clause 80B Defence of carrying out certain low impact activities: section 87 (4)**

*(1) It is a defence to a prosecution for an offence under section 86 (2) of the Act, if the defendant establishes that the act or omission concerned:*

*(a) was maintenance work of the following kind on land that has been disturbed:*

- (i) maintenance of existing roads, fire and other trails and tracks,*
- (ii) maintenance of existing utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines), or*

*(b) was farming and land management work of the following kind on land that has been disturbed :*

- (i) cropping and leaving paddocks fallow,*
- (ii) the construction of water storage works (such as farm dams or water tanks),*
- (iii) the construction of fences,*
- (v) the construction of irrigation infrastructure, ground water bores or flood mitigation works,*
- (vi) the construction of erosion control or soil conservation works (such as contour banks), or*

*(c) was farming and land management work that involved the maintenance of the following existing infrastructure:*

- (i) grain, fibre or fertiliser storage areas,*
- (ii) water storage works (such as farm dams or water tanks),*
- (iii) irrigation infrastructure, ground water bores or flood mitigation works,*
- (iv) fences,*
- (v) erosion control or soil conservation works (such as contour banks), or*

*(d) was the grazing of animals, or*

*(e) was an activity on land that has been disturbed that comprises exempt development or was the subject of a complying development certificate issued under the Environmental Planning and Assessment Act 1979, or*

*(f) was mining exploration work of the following kind on land that has been disturbed:*

- (i) costeaning,*
- (ii) bulk sampling,*
- (iii) drilling, or*

(g) was work of the following kind:

- (i) geological mapping,
- (ii) surface geophysical surveys (including gravity surveys, radiometric surveys, magnetic surveys and electrical surveys), but not including seismic surveys,
- (iii) sub-surface geophysical surveys that involve downhole logging,
- (iv) sampling and coring using hand-held equipment, except where carried out as part of an archaeological investigation, or

**Note.** Clause 3A of this Regulation provides that an act carried out in accordance with the Code of Practice for Archaeological Investigation in NSW is excluded from meaning of harm an objects or place for the purposes of the Act.

(h) was the removal of isolated, dead or dying vegetation, but only if there is minimal disturbance to the surrounding ground surface, or

(i) was work of the following kind on land that has been disturbed:

- (i) seismic surveying,
  - (ii) the construction and maintenance of ground water monitoring bores, or
- (j) was environmental rehabilitation work including temporary silt fencing, tree planting, bush regeneration and weed removal, but not including erosion control or soil conservation works (such as contour banks).

(2) Subclause (1) does not apply in relation to harm to an Aboriginal culturally modified tree.

(3) In this clause, Aboriginal culturally modified tree means a tree that, before or concurrent with (or both) the occupation of the area in which the tree is located by persons of non-Aboriginal extraction, has been scarred, carved, or modified by an Aboriginal person by:

- (a) the deliberate removal, by traditional methods, of bark or wood from the tree, or
- (b) the deliberate modification, by traditional methods, of the wood of the tree.

(4) For the purposes of this clause, land is disturbed if it has been the subject of human activity that has changed the land's surface, being changes that remain clear and observable.

**Note:** Examples of activities that may have disturbed land include the following:

- (a) soil ploughing,
- (b) construction of rural infrastructure (such as dams and fences),
- (c) construction of roads, trails and tracks (including fire trails and tracks and walking tracks),
- (d) clearing of vegetation,
- (e) construction of buildings and the erection of other structures,
- (f) construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines, stormwater drainage and other similar infrastructure),
- (g) substantial grazing involving the construction of rural infrastructure,
- (h) construction of earthworks associated with anything referred to in paragraphs (a)-(g).

## **8. Appendix C – OEH Environment Protection and Regulation Group regional offices**

For a map showing the location of these and OEH offices see:

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

### **Metropolitan**

Parramatta

Office of Environment and Heritage NSW  
Planning & Aboriginal Heritage Section  
PO Box 668  
PARRAMATTA NSW 2124

Phone: (02) 9995 5000

Fax: (02) 9995 6900

### **North East**

Coffs Harbour

Office of Environment and Heritage NSW  
Planning & Aboriginal Heritage Section  
Locked Bag 914  
COFFS HARBOUR NSW 2450

Phone: (02) 6659 8294

Fax: (02) 6651 6187

### **North West**

Dubbo

Office of Environment and Heritage NSW  
Environment & Conservation Programs  
PO Box 2111  
DUBBO NSW 2830

Phone: (02) 6883 5330

Fax: (02) 6884 9382

### **South**

Queanbeyan

Office of Environment and Heritage NSW  
Landscape & Aboriginal Heritage Protection Section  
PO Box 733  
QUEANBEYAN NSW 2620

Phone: (02) 6229 7188

Fax: (02) 6229 7001



