

"Land in the State of New South Wales was traditionally owned and occupied by Aborigines. Land is of spiritual, social, cultural and economic importance to Aborigines. It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land. The Government has accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation."

# fact sheet



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

## New Fines & Offences for the Destruction of Aboriginal Culture and Heritage

This Fact Sheet provides general information about the changes being proposed by the NSW Government to the law and policies which govern the protection of Aboriginal culture and heritage.

It is one of a series of Culture and Heritage Fact Sheets which have been developed for Local Aboriginal Land Councils (LALCs) by the NSW Aboriginal Land Council (NSWALC).

**Please Note:** While all care has been taken in the preparation of these fact sheets, they are not a substitute for legal advice in individual cases.

The information in these fact sheets is current as of May 2009.

### What offences currently exist for the destruction of Aboriginal culture and heritage?

The *National Parks and Wildlife Act*<sup>1</sup> gives the Director-General of the Department of Environment and Climate Change (or DECC) the power to give permission to damage Aboriginal cultural heritage.

However, if a person disturbs or moves an 'Aboriginal object', or intentionally damages an Aboriginal object or 'Aboriginal place', *without a permit*, they can be found guilty of an offence.

The current law makes it an offence if someone 'knowingly' caused or allowed damage.

It has been difficult to prove that a person knew their actions would cause damage or knew that an Aboriginal object was an Aboriginal object.

The proposed *National Parks and Wildlife Amendment Bill 2009* would create two different types of offences.

### How many people are prosecuted each year for destroying Aboriginal culture and heritage?

Between 2005 to 2008 there were only seven successful prosecutions for 'knowingly' causing or permitting damage to Aboriginal culture and heritage under the *National Parks and Wildlife Act*.<sup>2</sup>

### What are the proposed new offences?

The proposed *National Parks and Wildlife Amendment Bill 2009* (also known as the **Omnibus Bill**) would create two different types of offences:

- a new 'strict liability' offence for harm to Aboriginal objects or Aboriginal places; and
- a 'knowingly' offence, similar to that which already exists in the Act.

A **strict liability** offence does not require someone to know that it is an Aboriginal object or place they are causing harm to in order to be prosecuted.

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The proposed strict liability offence would apply to any act (or failure to act) which 'destroys, defaces, damages or desecrates' an Aboriginal object or place, or moves an object from the land on which it was situated.

### **What are the proposed new penalties?**

Currently the maximum penalties for knowingly damaging an Aboriginal object under the *National Parks and Wildlife Act* are:

- \$5,500 or imprisonment for 6 months, or both, for individuals; and
- \$22,000 in the case of a corporation.

Of the six successful prosecutions between 2005 and 2008, typically the average fine was approximately \$450<sup>3</sup>.

DECC hopes that increased penalties will act as a stronger deterrent.

The *Omnibus Bill* proposes that the maximum penalties be increased for people who knowingly destroy Aboriginal objects or places, to:

- \$550,000 or imprisonment for 2 years, or both, for an individual; and
- \$1.1 million in the case of a corporation.

The maximum strict liability penalty would be:

- \$110,000 or imprisonment for 6 months, or both, for an individual; and
- \$220,000 in the case of a corporation.

It is also proposed that the penalties increase for breaching a condition of an Aboriginal Heritage Impact Permit (AHIP), and for failing to notify DECC of the location of an Aboriginal object.

Currently it is an offence for someone who becomes aware of the location of an Aboriginal object to fail to notify the Director General of DECC within a reasonable timeframe. It is proposed that the fine for this offence double, from \$11,000 to \$22,000, with further fines for every day that the offence continues.

### **Will the new offences apply to Aboriginal people?**

Aboriginal people who damage a place or object when acting 'in accordance with Aboriginal tradition' are currently exempt from prosecution under the *National Parks and Wildlife Act*.

The Bill does not propose a significant change to this. Aboriginal people carrying out traditional cultural activities will still be exempt.

### **What are the new defences?**

Along with the new strict liability offence, it is proposed that a defence be created of 'due diligence'.

Due diligence refers to the taking of *reasonable and practical measures to avoid harm* to an Aboriginal object.

If a person can prove they acted with 'due diligence' (as outlined in DECC policy and/ or regulation) they will not be guilty of the new offence even if they did cause damage.

For more information see NSWALC Fact Sheet 4 - *Proposed Guidelines for Due Diligence for the Protection of Aboriginal Culture and Heritage*.

It is also proposed that it be a defence if harm to an object or place was caused as a result of:

- Authorised activities under the *State Emergency and Rescue Management Act 1989* such as some emergency fire fighting activities; or
- The activity was required or permitted under a conservation agreement.

In addition, the Minister will have the power to create more defences through regulation.

## What is the definition of 'harm'?

The offences outlined above relate to actions or omissions that cause 'harm' to Aboriginal objects or places. Currently the *National Parks and Wildlife Act* includes a broad definition of 'harm'.

The *Omnibus Bill* proposes to amend the definition of harm so that 'trivial or negligible' acts are not included.

There is no definition of what is trivial or negligible harm, which is determined at the discretion of the Minister.

It is also proposed that the Minister have the power to create regulations which exclude certain acts or omissions from the definition of harm.

## Is the Aboriginal community compensated for damage to cultural heritage?

The *National Parks and Wildlife Act* defines all Aboriginal objects, whether on public or private land, as the property of the Crown (with some exceptions).

Fines for the damage to Aboriginal objects and places go into the National Parks Fund, which is managed by DECC.

It is proposed that a new power be added to the *National Parks and Wildlife Act*, to allow DECC to issue 'remedial directions' which would force a person or company to take steps to protect, conserve, maintain or repair the damage they have caused to an object or place.

DECC could choose to issue a remedial direction in addition to, or instead of, taking legal action. Similar powers already exist in other legislation, in relation to repairing damage to the environment.

## Where can I get more information about the proposed changes?

For more information about the *National Parks and Wildlife Amendment Bill 2009* see the other NSWALC Culture and Heritage Fact Sheets produced by the NSW Aboriginal Land Council at [www.alc.org.au](http://www.alc.org.au).

Visit the DECC website at [www.environment.nsw.gov.au](http://www.environment.nsw.gov.au)

- For the *Omnibus Bill* and the *Draft Due Diligence Requirements* follow the links to 'About DECC', then 'Legislation' and '[NPW Amendment Bill 2009](#)' in the menu bar down the left hand side of the DECC website.
- For the *Draft Community Consultation Requirements* follow the links to 'About DECC', then 'Public Consultation', then 'Documents for Public Consultation' or 'Proposed legislation, policies and guidelines', and then scroll down to '[Interim Community Consultation Requirements for Applicants 2009](#)' in the menu bar on the left hand side of the screen.

## Can I have a say about the *National Parks and Wildlife Amendment Bill 2009*?

Yes. DECC has invited submissions from the community on the *Omnibus Bill* and the draft policies.

The closing date for written submissions is **Tuesday 7 July 2009**.

Comments can be emailed to [consultation.npwbill2009@environment.nsw.gov.au](mailto:consultation.npwbill2009@environment.nsw.gov.au).

Submissions should include your name, address, contact phone numbers and email address.

Local Aboriginal Land Councils wanting to discuss the changes and the NSW Aboriginal Land Council's response should contact their local Zone Office or the Land, Policy and Research Unit on 02 9689 4444.

### Footnotes

- 1 A current version of the *National Parks and Wildlife Act 1974* can be accessed online at NSW Legislation: <http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22National%20Parks%20and%20Wildlife%20Act%201974%20No%2080%22&nohits=y>
- 2 See Answer to Question on Notice (NSW Legislative Council) number 2384, to the Minister representing the Minister for the Environment, answered on 5 January 2009, and printed in Questions & Answers Paper No. 84. Copies are available from [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)
- 3 See Question to Notice (NSW Legislative Council) number 2091, to the Minister representing the Minister for the Environment, answered on 28 October 2008, and printed Questions & Answers Paper No. 71. Copies are available from [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)