New South Wales Aboriginal Land Council

Planning laws and Aboriginal culture and heritage

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This Fact Sheet provides information about planning laws and policies in NSW and their impact on the protection of Aboriginal culture and heritage. It is one of a series of Planning Fact Sheets which have been developed for Local Aboriginal Land Councils (**LALCs**) and the Aboriginal community 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 March 2011.

Culture and heritage legislation in NSW

There is no one law for the protection of Aboriginal culture and heritage in NSW.

While planning laws in NSW manage building and development, they also coexist with laws to protect heritage. In some cases planning laws can override heritage provisions.

The key law in NSW regarding the protection and management of Aboriginal culture and heritage is the ***National Parks and Wildlife Act 1974***. The *National Parks and Wildlife Act* gives the Director-General of the Department of Environment, Climate Change and Water (**DECCW**) responsibility for the proper care, preservation and protection of 'Aboriginal objects' and 'Aboriginal places'.[1]

The Director-General can prosecute people who unlawfully destroy or damage 'Aboriginal objects' or 'Aboriginal places' and can also issue stop work or interim protection orders.

Where a development may impact on an 'Aboriginal object' or 'Aboriginal place', the developer will usually be required to apply for a permit from DECCW before proceeding. These permits are called Aboriginal Heritage Impact Permits or AHIPs.[2]

For more information about the *National Parks and Wildlife Act* and AHIPs, including new penalties for destruction of Aboriginal heritage in place from 1 October 2010, see NSWALC Culture and Heritage 'Site Protection' Fact Sheets available at www.alc.org.au.

AHIMS

The Aboriginal Heritage Inventory Management System (**AHIMS**) is managed by DECCW.

It records over 60,000 Aboriginal places and objects and other Aboriginal heritage values in NSW. However, it is not a comprehensive register of all Aboriginal sites.

Developers and local councils can check AHIMS when planning to undertake development.

For more information about AHIMS, including the new online search tool available from 1 October 2010, contact DECCW on 02 9585 6471 or www.environment.nsw.gov.au under 'Culture and Heritage', then 'Heritage Registers'.

The NSW planning system

The key planning law in NSW is the *Environmental Planning and Assessment Act 1979,* also known as

[1] *National Parks and Wildlife Act 1974,* Part 6

[2] *National Parks and Wildlife Act 1974,* Part 6

the **EP&A Act**[3]. The EP&A Act is administered by the NSW Department of Planning.

Development in NSW is mainly regulated by environmental plans such as Local Environmental Plans (**LEPs**) made through the EP&A Act.

The different requirements for development, including the relevant decision-maker and whether environmental and heritage assessments are needed, depend on whether a development is being considered under Part 3A, Part 4 or Part 5 of the EP&A Act.

Generally, projects that require a written development application (**DA**) will also require some form of environmental impact assessment, to allow the decision-maker (such as the Local Council or the Minister for Planning) to understand the impact of the project before deciding whether to approve it.

Environmental impact assessments can look at cultural heritage and in some cases an Aboriginal Heritage Assessment report will be prepared.

In addition to their Local Environmental Plans, many Local Councils will have one or more **Development Control Plans** (**DCPs**) which provide more detailed planning provisions. Local councils can include specific clauses their DCPS that may encourage new developments to consider Aboriginal heritage in the development application process.

Exempt and complying development

To speed up the time it takes to undertake development, the NSW Government has created a list of common developments for which development consent is not needed. These kinds of developments are known as '**exempt or complying**' developments, and include backyard swimming pools, flagpoles and sheds.

As long as certain 'standards' are met, approval for these types of development can't be refused.[4]

However, LEPs cannot designate anything as **complying development** if it applies to land that comprises, or on which there is an 'environmental heritage item'.[5]

For further information about the EP&A Act see NSWALC Planning Fact Sheet 1 – *Introduction to Planning Laws*.

Other heritage laws

Certain significant Aboriginal sites or areas may have additional protection under the ***NSW Heritage Act 1977***. This Act establishes the State Heritage Register for natural, cultural and built heritage places or objects that are of State heritage significance.

Once an item of significance is listed on the State Heritage Register, major changes to it usually require the approval of the Heritage Council.

Other laws which can offer some protection to Aboriginal sites against development include:

- The ***Environment Protection and Biodiversity Conservation Act 1999***, which is a Commonwealth law that establishes the National Heritage List for places that are of 'outstanding' heritage value to the nation, and the Commonwealth Heritage List for lands and waters of significance.
- The ***Native Title Act 1993***, in relation to places over which native title applies or for where there is recognition under an Indigenous Land Use Agreement (ILUA).
- The ***Aboriginal and Torres Strait Islander Heritage Protection Act 1984,*** under which an Aboriginal or Torres Strait Islander person can apply to the Federal Minister administering the Act to protect an area or object which is under threat of injury or desecration.[6]

For more information about heritage and environmental laws that may offer protection to Aboriginal sites see the Environmental Defender's Officer booklet *Caring for Country* which is available to download from www.edo.org.au.

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[3] The *Environmental Planning and Assessment Act* 1979 can be accessed on the NSW legislation website at www.legislation.nsw.gov.au Click on 'Browse'. Under heading 'Browse in Force', see sub-heading 'Acts'. Click on 'E'.

[4] See *State Environmental Planning Policy No 60—Exempt and Complying Development*, available at www.legislation.nsw.gov.au

[5] See *Environmental Planning and Assessment Act* 1979, s76A(5)

[6] See section 4, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

Part 3A developments

Developments under Part 3A of the EP&A Act do not need to comply with the normal rules for environmental and heritage assessments. Part 3A also 'switches off' many of the requirements under other laws which offer protection for Aboriginal heritage.

For example, an Aboriginal Heritage Impact Permit (**AHIP**) under the *National Parks and Wildlife Act* is not required for a Part 3A project, even if the project is likely to damage an Aboriginal object or place.

However, the Director-General for Planning may decide to create obligations on a developer to undertake heritage and environmental assessments under the *National Parks and Wildlife Act*, or other similar requirements.

This can include a requirement to consult with the Aboriginal community to determine whether a site or broader area which will be impacted by a development is of Aboriginal heritage significance.

The Director-General does this by making it a requirement of the approval for the project that studies and/ or consultation be undertaken. These are known as the 'Director-General's Requirements'.

For more information about Part 3A projects see NSWALC Planning Fact Sheet 4 – *Part 3A Developments*.

Protection of heritage through zoning

There are 34 'standard' zones which are used to classify land through a LEP. Each zone sets out what kind of developments and activities can occur in that zone and what kinds of developments are prohibited. These zones are grouped into 8 categories: rural, residential, business, industrial, special purpose, recreation, environment protection, and waterway zones.

The 'standard' zones do not include any 'heritage' zones. However, there are two zones that may be compatible with the protection of Aboriginal culture and heritage:

- E2 Environmental Conservation, and
- E3 Environmental Management.

The main purposes of the E2 and E3 zones are to protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values. NOTE: Zones E2 and E3 prohibit some developments, such as industrial developments, but may allow other kinds of developments that would not affect the values of the area.

For more information on zoning, including how to apply to have land rezoned, see the NSWALC Planning Fact Sheet 6 – *Zoning and LEPs*.

Listing heritage places in LEPs

Local Councils are required to consider Aboriginal culture and heritage within their LEPs. If a Local Council identifies a site or area as being of local heritage significance in its LEP, it can offer protection by limiting what development the Local Council will allow in that area.

Recently, the Department of Planning gazetted a number of changes to the Standard Instrument LEP which means that sensitive Aboriginal heritage sites or places, would not need to be placed on a public map.

Planning decisions made about Aboriginal heritage will now be made earlier in the development approval processes which is intended to provide greater certainty for community, council and developers.

LEP clauses require that where areas and sites have been assessed as having a high likelihood to contain Aboriginal heritage, the Aboriginal community should be consulted in the early stages when a development application is lodged and appropriate studies undertaken.

Note: Places of Aboriginal significance can be recognised in a LEP even if they are not otherwise recognised on a heritage register or on the site database held by DECCW (**AHIMS**).

Section 117 Directions issued by the Planning Minister

The Planning Minister can issue 'directions' under section 117 of the EP&A Act which outline what a

Local Council, or other relevant planning authority (**RPA**), must consider when preparing a LEP.[7]

The Planning Minister has issued 'Direction 2.3: Heritage Conservation' which states that all Local Councils must now facilitate the conservation of '*Aboriginal areas, Aboriginal objects, Aboriginal places or landscapes identified by an Aboriginal heritage survey*'.

This means that Local Councils who did not previously recognise Aboriginal heritage in their LEPs will now be required to do so.[8]

LALCs are strongly encouraged to contact their Local Council to discuss how the Aboriginal heritage survey will be undertaken and how areas of significance will be recognised.

Note: Local Councils are supposed to follow the directions issued by the Planning Minister. However, a LEP cannot be challenged in court on the basis that it does not follow such a direction. Also a planning proposal may be inconsistent with Direction 2.3 if the inconsistencies are of '*minor significance'*, or if the heritage area is conserved by an existing law.

Local heritage assessments

The Heritage Branch, within the NSW Department of Planning, has funding available to assist Local Councils to undertake Aboriginal cultural heritage assessments. The Heritage Branch may also be able to provide advice to Local Councils about Aboriginal heritage issues.

The Heritage Branch can be contacted at:
Phone: (02) 9873 8500
Web: www.heritage.nsw.gov.au
Email: heritage@planning.nsw.gov.au

Development in the coastal zone

There is a specific requirement that applies to LEPs in coastal areas in NSW.[9]

When deciding what developments can take place within the coastal zone, the decision maker needs to consider the protection of '*Aboriginal cultural places, values and customs*'.

To find out if you are in this zone you can contact the NSW Department of Planning or look at the maps on the Department of Planning's website.[10]

Do developers still need to apply for a permit under the *National Parks and Wildlife Act?*

With a few exceptions, all developments in NSW are required to comply with NSW laws, including the *National Parks and Wildlife Act.*

A permit from DECCW will be required for any developments that will cause harm to an Aboriginal object or place, as defined by the *National Parks and Wildlife Act*.

A permit application is required in addition to any requirements for development approvals or consents to local Councils or the Department of Planning.

Except where the *National Parks and Wildlife Act* has been specifically 'switched off' by another law – such as Part 3A of the EP&A Act – it continues to operate in relation to development.

Amendments to the *National Parks and Wildlife Act* changed the way Aboriginal heritage is protected in NSW. These amendments came into force on **1 October 2010**. For more information on these changes, see the NSWALC Culture and Heritage 'Site protection' Fact Sheets, available at www.alc.org.au.

Where to find out more

For more information see the NSWALC Fact Sheets, including the 'Site Protection' series, available from www.alc.org.au, or by calling the NSWALC Policy and Research Unit on 02 9689 4444.

[7] Directions from the Planning Minister can be accessed at www.planning.nsw.gov.au. Under the heading 'Local Environmental Plans', Click on 'Local Planning Directions'. Section 117 directions were issued by the Planning Minister on 1 July 2009. The directions apply to planning proposals lodged on or after the date the particular direction was issued.
[8] See Section 5 of Direction 2.3 Heritage Conservation issued by the Planning Minister 1 July 2009
[9] See clause 5.5 of the Standard Instrument - Principal LEP
[10] From the home page of the Department's website, click on 'Plans for Action' then 'Coastal Protection'.