



Aboriginal Culture and Heritage: Our Responsibility

The NSW minerals industry has an important role in protection and preservation of Aboriginal culture and heritage. The management of culture and heritage is not only legislated but it is also important in the eyes of the community. Under NSW legislation it is an offence to harm an Aboriginal object, regardless of whether you know it is an Aboriginal object. Due diligence is therefore required for many activities undertaken by the minerals industry. This fact sheet provides an overview of the legislative framework and our responsibilities for Aboriginal culture and heritage. Separate legal advice should always be sought in relation to specific issues or projects.

What is Aboriginal culture and heritage?

Aboriginal culture and heritage refers to the sites, places, objects, stories and documents that relate to Aboriginal life. Land or sites may be of cultural value regardless of whether native title exists and regardless of whether the land is freehold, Crown land or otherwise. Culture and heritage is evidence of the lives of Aboriginal people right up to the present. Aboriginal culture and heritage is dynamic and may comprise tangible or intangible elements. As such, it includes things made and used in earlier times, like stone tools, art sites and ceremonial or burial grounds, as well as more recent evidence such as old mission buildings, massacre sites and cemeteries.

An Aboriginal place, declared under Section 84 of the *National Parks and Wildlife Act 1974*, is 'a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture'. Information about the location of Aboriginal places in NSW can be found on the Office of Environment and Heritage website at <http://www.environment.nsw.gov.au/>.

What is the relevant legislation?

Aboriginal culture and heritage is currently regulated in NSW by the *National Parks and Wildlife Act 1974*. Recent amendments to this Act in 2010 are part of wide ranging reform. A Government working party is developing further reform options that may significantly change the regulatory framework.

Under Section 86(2) of the *National Parks and Wildlife Act 1974*, it is an offence to harm an Aboriginal object, defined as 'any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises NSW, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains'.

There are two forms of offence regarding harm to an Aboriginal object:

- When the person knows it is an Aboriginal object (a 'knowing offence')
- Whether or not a person knows it is an Aboriginal object (a 'strict liability offence').

The maximum penalty for a knowing offence is currently \$550,000 for an individual, or \$1.1 million for a corporation, and a 2 year gaol term. The maximum penalty for a strict liability offence is \$110,000 for an individual, or \$220,000 for a corporation. The *NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects* provides guidance and a due diligence procedure to satisfy the requirements under this Act.

It is also a strict liability offence to harm a declared Aboriginal place. The maximum penalty for harming an Aboriginal place is \$550,000 for an individual or \$1.1 million for a corporation. Since the locations and boundaries of Aboriginal places are made available to the public via the Office of Environment and Heritage's website, there is no provision in the Act for a due diligence defence for Aboriginal places.



Aboriginal culturally modified trees cannot be disturbed by any activity without approval. Aboriginal culturally modified trees are trees that have been scarred or carved by an Aboriginal person and show the deliberate removal of bark or wood by traditional methods.

What do we need to do?

Due diligence is required for many activities undertaken by the minerals industry. If a person or company can demonstrate that they exercised due diligence and determined that it was unlikely that Aboriginal objects would be harmed, then they may have a defence against the strict liability offence.

'Low Impact Activities', as prescribed by the *National Parks and Wildlife Amendment Regulation 2010*, may be undertaken without the need for due diligence. Clauses 80B (1) (f) and (g) of the Regulation directly relate to activities undertaken by the minerals industry. There is a clear defence against the strict liability offence if harm to Aboriginal objects is caused when undertaking the prescribed low impact activities. This does not apply in situations where there are known Aboriginal objects, nor does it authorise the harm to known Aboriginal places.

The NSW Minerals Industry *Due Diligence Code of Practice for the Protection of Aboriginal Objects* has been developed to assist the minerals industry to exercise due diligence when carrying out activities that may harm Aboriginal objects. This Code of Practice sets out the reasonable and practicable steps to:

- Identify whether or not Aboriginal objects are present or likely to be present in an area
- Consider whether or not proposed activities are likely to harm Aboriginal objects (if present) and
- Determine whether an Aboriginal Heritage Impact Permit (AHIP) is required.

The NSW Minerals Industry *Due Diligence Code of Practice for the Protection of Aboriginal Objects* was developed by the NSW Minerals Council and is based on the generic *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW*, produced by the Office of Environment and Heritage. Examples specific to the minerals industry have been included to clarify the process for the NSW minerals industry. Both Codes of Practice were called up under the regulator. The Code of Practice provides guidance on legislative requirements and conditions but does not provide legal advice.

Further information:

Office of Environment and Heritage <http://www.environment.nsw.gov.au/>

NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects
<http://www.nswmining.com.au/community/aboriginal-culture-heritage>

National Native Title Tribunal <http://www.nntt.gov.au>

NTS Corp <http://www.ntscorp.com.au/>

NSW Aboriginal Land Council <http://www.alc.org.au/>

For additional NSW Minerals Council Fact Sheets, go to <http://www.nswmining.com.au/menu/media/fact-sheets>

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