

Cultural Resource Use: Whole-of-Government Framework (2006)

Preamble

The Aboriginal people of NSW have a custodial relationship with the land and its resources. They have never ceded the right to continue this custodial relationship, maintaining spiritual links to 'Country' and caring for the health of the land.

Public lands and waters in NSW can provide some of the best opportunities for Aboriginal people to exercise their rights to Country.

The different categories of public lands and waters in NSW will provide different opportunities for Aboriginal people dependent on the management objectives of those lands and waters.

Aboriginal culture is a living culture and Aboriginal people's practice of cultural activities, such as resource use, is not limited to traditional activities.

Introduction

Two Ways Together – the NSW Government's Aboriginal Affairs Plan 2003–2012 – establishes a framework for a wide range of Government agencies to work with Aboriginal communities and each other to improve the social, economic, cultural and emotional well-being of Aboriginal people in NSW.

As part of *Two Ways Together*, 'cluster' groups of Government agencies and Aboriginal peak bodies have been formed to address priority issues identified by Aboriginal communities. The Culture and Heritage Cluster Group, led by the Department of Environment and Conservation (DEC), is implementing an action plan to help the Aboriginal people of NSW protect, practise and promote their culture and heritage.

One of the actions for which DEC is the lead agency is to:

Develop and implement a framework for ecologically sustainable and culturally appropriate use of natural resources associated with government-managed lands and waters.

A related action, for which the Department of Aboriginal Affairs is the lead agency, is to:

Develop and implement a whole-of-government model for locally based access agreements, including framework and protocols.

The Cultural Resource Use Framework and the Access Agreements Model have been developed simultaneously by the same working group, as cultural resource use is one of the reasons for which Aboriginal people would seek to gain access to lands and waters. The whole-of-government working group has representatives from:

- Department of Environment and Conservation
- NSW Aboriginal Land Council
- Department of Aboriginal Affairs
- Marine Parks Authority
- Department of Primary Industries
- Department of Natural Resources
- Department of Lands

- Department of Local Government
- State Council for Rural Lands Protection Boards
- NSW Game Council.

Elements of the framework

The Whole-of-Government Framework for Cultural Resource Use has four components:

- 1 Cultural Resource Use Policy
- 2 Operational Guidelines
- 3 Case studies
- 4 Plain English guide.

The Access Agreement publication will be a plain English guide to agreement-making and will include a model agreement.

Objectives of the Cultural Resource Use Framework

The Cultural Resource Use Framework aims to ensure that:

- 1 Aboriginal people have opportunities to access Government-managed lands and waters in recognition of their culture and for supporting their connection with the land.
- 2 Activities are ecologically sustainable, culturally appropriate and consistent with the purposes and uses of Government-managed lands and waters.
- 3 Aboriginal culture is maintained and strengthened.
- 4 The safety of the public and the staff of agencies responsible for managing land and waters is assured.
- 5 Cultural resource use activities do not affect native title rights and interests and are consistent with the *Native Title Act 1993* (Cwlth).
- 6 Assessment of cultural resource use activities considers the availability of resources, the long-term viability of species and populations, and their capacity to be used sustainably.
- 7 Agencies adopt a consistent approach for consulting Aboriginal communities on cultural resource use activities.
- 8 Decisions about an Aboriginal person's entitlement to utilise cultural resources are made by Aboriginal people at a local or regional level.
- 9 Aboriginal people are given sufficient guidance on approvals and other administrative procedures required for undertaking cultural resource use activities.

Definitions

Cultural resource use

'Resources' are the native and introduced plants and animals and inorganic materials in the landscape used for medicinal, subsistence and cultural purposes.

'Use' is the physical taking, processing and consumption of foods, medicines and materials, and includes the activities associated with visiting or interacting with a place or landscape.

‘Cultural resource use’ is the collection of native and introduced plants and animals and other natural materials for subsistence, medicinal and other cultural purposes. It may also refer to the activities associated with visiting or interacting with a place or landscape, such as culture camps.

Previous terms for cultural resource use include hunting and gathering, which describes only some of the activities undertaken by Aboriginal people.

Alternative terms include ‘wild resource use’, ‘customary resource use’ (e.g. as used by Maori people and NZ Department of Conservation), ‘traditional resource use’ and ‘natural resource use’.

Examples of cultural resource use activities include:

- hunting kangaroos and emus and preparing and cooking the meat communally
- collecting fish and pipis and cooking them in paperbark and hot coals
- collecting pigface fruit on sand dunes for eating and using pigface sap as anaesthetic
- getting honey (nectar) from banksia flowers
- collecting leaves of mat rushes (*Lomandra* species) for weaving mats and baskets
- making spears from natural materials and manufacturing stone tools during culture camps
- shooting pigs and goats for bush tucker.

Ecologically sustainable use

‘Ecologically sustainable use’ of natural resources means the use of natural resources within their capacity to sustain natural processes, and ensuring that the use does not diminish the potential to meet the needs and aspirations of future generations.

Future act

‘Future act’ is the legal term (under the *Native Title Act 1993* (Cwlth)) for any action or activity that may affect native title that takes place after 1 July 1993 if the action is the enactment, amendment or repeal of legislation or, after 1 January 1994, if it is any other action undertaken with respect to publicly-owned land or waters in which native title has not been extinguished.

‘Future acts’ may include actions authorising the taking or disturbance of native vegetation or animals.

An act *affects* native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

The *Native Title Act 1993* (Cwlth) contains provisions to allow future acts to occur validly in certain circumstances.

Examples of activities which may constitute future acts are:

- construction of public works, such as roads, wharves or power lines
- construction of improvements or facilities in reserves, e.g. roads or visitor centres
- granting of an easement on Crown land to a private party
- granting of leases, licences or freehold on Crown lands.

Harm animals

‘Harm an animal’ means to hunt, shoot, poison, net, snare, spear, pursue, capture, trap, injure or kill an animal.

‘Harm’ includes hunting, collecting, killing or taking native animals from the wild.

Native title

‘Native title’ or ‘native title rights’ means the rights and interests possessed by Indigenous peoples in land or waters under their traditional laws and customs, and where the Indigenous peoples have a connection with the land or waters and their rights and interests are recognised by the common law.

Parks

‘Parks’ are lands reserved under the *National Parks and Wildlife Act 1974*.

Pick plants

‘Pick a native plant’ means to gather, pluck, cut, pull up, destroy, poison, take, dig up, remove or injure the plant or any part of the plant.

‘Pick’ includes collecting, harvesting or taking protected native plants from the wild.

Threatened species

These are:

- species of plants, animals, invertebrates, fungi and algae listed as ‘endangered’, ‘vulnerable’ or ‘presumed extinct’ under the *Threatened Species Conservation Act 1995*.
- species of fish and marine vegetation (i.e. seaweed or algae) listed as ‘endangered’, ‘vulnerable’ or ‘presumed extinct’ under the *Fisheries Management Act 1994*.

Cultural Resource Use Policy

1. Public lands and waters available for cultural resource use

This framework applies to Government-managed land and waters.

Public lands and waters that may be available for cultural resource use are:

- co-managed parks – parks returned to Aboriginal owners and other reserves subject to co-management agreements
- lands subject to Indigenous Land Use Agreements – some national parks, State forests and Crown lands
- other parks managed by the National Parks and Wildlife Service – Aboriginal areas, national parks, State conservation areas and regional parks
- State forests
- travelling stock reserves and stock watering places
- marine parks – general purpose zones, habitat protection zones and special purpose zones
- Crown land and Crown land reserves – subject to plans of management for reserves

- freshwater, estuarine and marine waters (including waters reserved as part of national parks) – subject to restrictions on depleted stocks of some species and issue of permit for Aboriginal cultural activities (‘section 37 permits’)
- Council-owned lands – land classified as ‘community land’ and subject to a plan of management.

2. Opportunities for cultural resource use activities

Opportunities will be provided for Aboriginal people to access public lands and waters for undertaking cultural resource use activities.

All cultural resource activities must be undertaken in such a way that:

- they are consistent with Government and agency policies
- Plans of Management and other relevant documents for specific lands and waters allow them
- relevant legislation is followed and relevant licences are obtained.

In order to implement the Cultural Resource Use Framework, each agency responsible for managing government lands and waters will prepare its own operational guidelines.

3. Activities to be ecologically sustainable and culturally appropriate

Cultural resource use activities need to conform with the principles of ecological sustainability. This will place limits on some activities, particularly the fishing, harvesting and hunting of threatened species.

Cultural resource use may be undertaken with other culturally appropriate activities, such as culture camps, educational activities and ceremonial activities.

4. Native title

Note: When native title rights have been recognised on certain lands, the provisions of any native title agreement or determination may prevail over some provisions of this policy.

Agencies need to account for actual or potential native title issues when developing their Operational Guidelines.

Cultural resource use activities may affect native title rights and should only be undertaken where they do not affect those rights. However, where a cultural resource use activity is likely to affect native title rights (i.e. a ‘future act’ under the *Native Title Act 1993*), it should not be permitted, unless it is allowed under one of the future act provisions of the Act.

5. Methods and public safety

Aboriginal people may use modern or traditional techniques and equipment for hunting and fishing.

Cultural resource use activities must ensure the safety of participants, the public and the staff of the agency managing the land or waters, and are subject to compliance with Government policy, legislation, Plans of Management and other relevant instruments for this reason.

6. Occupiers of Crown land

Aboriginal people may gain access to Crown land leased or licensed to a third party, subject to an agreement negotiated between the agency, a local Aboriginal land council and the occupier under the *Aboriginal Land Rights Act 1983* ('section 47 agreements') for the purposes of hunting, fishing or gathering.

7. Approvals for cultural resource use activities

Each agency will address areas of its lands or waters available for cultural resource use activities, approvals required and any restrictions on those activities in its Operational Guidelines. The following information is a brief summary of the approvals required by each agency and the issues to be addressed in each agency's Operational Guidelines.

Reserves managed by the National Parks and Wildlife Service

The types of approval required for cultural resource use activities in parks depend on the type of agreement in place for that park. Where the park is subject to formal co-management agreements, such as the Mutawintji reserves, Mount Grenfell Historic Site and Biamanga and Gulaga national parks, the Board of Management is responsible for approving cultural activities. In parks subject to Indigenous Land Use Agreements, such as Arakwal National Park, where native title cultural resource use rights are recognised, the exercise of those rights and any consents required are set out in the individual agreement.

In other parks, Aboriginal people may be granted licences to pick protected plants and harm animals. They are not required to obtain licences for picking flora or harming fauna outside parks for domestic use, with the exception of threatened species.

State forests

Aboriginal people may be granted approval under the *Forestry Act 1916* to access State forests for obtaining forest products (plants and animals) and forest materials (stones and ochres) ('section 31 occupation permits for traditional and cultural activities').

Inland waters, estuarine waters and marine waters

Aboriginal people may be permitted to take fish for Aboriginal cultural community events under the *Fisheries Management Act 1994* ('section 37 permits'). Permits are subject to conditions to ensure resource sustainability and protect human health in situations of contamination of fish, particularly pipis and oysters, through biotoxin or other events.

Aboriginal people are not required to obtain a licence under the *Fisheries Management Act 1994* for recreational fishing in freshwater, i.e. inland waters.

Aboriginal people are not required to obtain a licence under the *Fisheries Management Act 1994* for recreational fishing in saltwater, i.e. marine and estuarine waters, where:

- they are registered native title claimants or have had an approved determination that native title exists
- they are taking part in a traditional cultural activity as members of their local Aboriginal land council
- they are in the company of a member of their local Aboriginal land council.

Parts of inland, estuarine or marine waters included in parks are subject to the *National Parks and Wildlife Act 1974* and all vegetation in such waters (e.g. salt marshes, seagrasses and mangroves) are also protected.

Marine parks

Aboriginal people are not required to obtain approval for cultural resource use activities in General Purpose Zones and Habitat Protection Zones, where those activities are consistent with the permitted activities under those zonings. Other activities may require approval.

Cultural resource use activities in Special Purpose Zones require approval, including in Special Purpose Zones established for Aboriginal traditional or customary use.

The provisions of the *Fisheries Management Act 1994* apply in marine parks, in addition to the provisions of the *Marine Parks Act 1997*.

Aboriginal people may negotiate a Traditional Use of Marine Resources Agreement (TUMRA) with the Marine Parks Authority, in order to define how Traditional Owners wish to sustainably manage the traditional use of marine resources in their sea country.

Travelling stock reserves and stock watering places

Aboriginal people may access travelling stock reserves and stock watering places for recreational fishing and other passive activities during daylight hours without obtaining the approval of Rural Lands Protection Boards. Other cultural resource use activities, such as hunting animals or gathering plants, will require the consent of the relevant RLPB, and will need to comply with other legislation e.g. the *Firearms Act 1996*.

Other Crown lands

Aboriginal people may require a licence for cultural resource use activities from the reserve trust manager of a Reserve Trust appointed for a Crown land reserve. Alternatively, if there is no reserve trust appointed, a licence may need to be obtained from the Department of Lands. Activities permitted in a reserve are governed by the *Crown Lands Act 1989* and regulations and may also be specified in a Plan of Management for the reserve.

A local Aboriginal land council may negotiate an agreement with the owner or occupier of Crown land to give any specified Aboriginal people or communities access to the land for the purpose of hunting, gathering or fishing activities on the land under the *Aboriginal Land Rights Act 1983* ('section 47 agreements').

Council land

Aboriginal people's access to land owned by a local council and classified as community land can be specified in the Plan of Management for the land.

8. Restrictions and conditions for undertaking cultural resource use

Some tenures of public lands and some waters are affected by restrictions on public access to them and conditions on their uses.

Lands and waters which are affected by legislative restrictions or conditions include:

- water catchments – Sydney Catchment Authority- and Hunter Water Corporation-declared catchments
- reserves managed by DEC (NPWS) – areas subject to management operations, commercial leases and recreational facilities; wilderness areas, reserve Plans of Management; park management policies
- marine parks – sanctuary zones (restrictions on fishing)
- State forests – harvesting and other management operations
- Crown lands – the *Crown Lands Act 1989*, regulations, applicable by-laws and reserve Plans of Management

- inland, marine and estuarine waters – bag limits, depleted species, contaminated species, and relevant park Plans of Management.

Other restrictions applicable to all lands and waters include:

- use of firearms and threats to public safety
- native title – future act provisions
- threatened species under both the *Fisheries Management Act 1994* and *Threatened Species Conservation Act 1995*.

Agencies will address restrictions and conditions specific to lands or waters managed by them in their Operational Guidelines.

9. Operational Guidelines

(a) In order to implement (or ‘operationalise’) the Cultural Resource Use Framework, each agency responsible for managing Government lands and waters will prepare its own Operational Guidelines.

(b) To standardise the format for guidelines, each agency should use the following generic headings:

- 1 Lands/areas available for cultural resource use
- 2 Restrictions or conditions on use of lands or waters
- 3 Negotiation with Aboriginal communities
- 4 Identifying eligibility for undertaking cultural resource use
- 5 Approvals for access to lands or waters
- 6 Methods and equipment for cultural resource use
- 7 Public safety
- 8 Managing impacts of cultural resource use
- 9 Agency contacts for approvals or notifications.

(c) Operational Guidelines will be available in a plain English format that is accessible to Aboriginal communities.

(d) Agencies responsible for preparing guidelines

Agencies which will prepare operational guidelines are:

- DEC for national parks and other conservation reserves
- Department of Primary Industries (Forests) for State forests
- Department of Primary Industries (Fisheries) for fishing in inland waters and marine and estuarine waters
- Marine Parks Authority for marine parks
- State Council for RLPBs for travelling stock reserves and stock watering places
- Department of Lands for Crown land reserves
- Department of Local Government for council-managed reserves.

Case studies of successful cultural resource use

Taking of fish for specific Aboriginal cultural community events

Section 37 of the *Fisheries Management Act 1994* provides a tool to allow activities that are contrary to the provisions of, or made under, the Act. Section 37 Permits can be issued for the purposes of allowing collection of fish in excess of limits or otherwise illegal to take and/or by methods not allowed to be used in taking fish or marine vegetation. These permits can be applied to research, aquaculture, aquarium collection, and any other purpose approved by the Minister that is consistent with the objects of the Act. The permit is a tool used for cultural events involving the taking of fish as the Government supports Aboriginal cultural activities and recognises the importance of the fisheries resource in cultural events.

NSW DPI has received and approved at least 12 Section 37 Permits from Aboriginal stakeholders over the past three years. Approval has been granted on each occasion at negotiated levels and areas of access. Applications often request the taking of specific species such as abalone, lobsters, pipis and oysters. These species present specific resource management issues due to levels of stock (abalone and lobster) and, with regard to pipis and oysters, potential health risks due to environmental events. These matters have been satisfactorily addressed in each instance through a cooperative approach between parties.

Harvesting wild resources in the Wallis Lake catchment: Contribution to Aboriginal economy

The Australian National University's Centre for Aboriginal Economic Policy Research has put a dollar figure on the value to Indigenous populations of harvesting wild resources. The study looked at the value of natural resources such as fish to the communities living in the Wallis Lake catchment in the Forster area of NSW.

Resources contributed significantly to the livelihoods of the people. The value was calculated at 5 per cent of income or \$500 per person. It is the first time researchers have considered the value of wild resources to communities in the more urban areas of Australia.

Fish trap at Arrawarra Headland in Solitary Islands Marine Park

A fish trap at Arrawarra Headland in the Solitary Islands Marine Park is protected within a Special Purpose Zone that allows for the maintenance and Indigenous use of the trap with Ministerial consent, in accordance with a conservation plan. A conservation plan is being developed in consultation with Garby Elders, a recognised clan group of the Gumbayngiir Nation and the Yarrowarra Aboriginal Corporation. The conservation plan will guide the future co-operative management arrangements for the traditional use of this special area.

The fish traps are over 1000 years old and traditional use required baiting of the traps. As the tide came in, fish were attracted by bait and entered the trap through an opening in the seaward wall. Once enough fish were in the trap, a woven net or baskets were used to block the entrance. As the tide fell, the fish were left stranded in the trap and collected with nets, net traps or spears.

The fish traps will be used by Elders and identified representatives to provide food for cultural celebrations and ceremonies, Elder gatherings, funerals and during the full moon twin high tide events. Species targeted will be identified in a species list. A key consideration for the Elders is to provide opportunities to educate young Aboriginal people, ensuring that cultural knowledge and skills are passed on to the next generation. Research and monitoring will continue to be undertaken on the use of the fish traps and collection of biota from the rock platform by research institutions.