Aboriginal heritage legislation in NSW

Public consultation on issues for reform
A strong connection with Aboriginal heritage and culture is recognised as a vital factor in maintaining the language, identity and wellbeing of Aboriginal people. Protecting Aboriginal culture and heritage provides an essential link between the past and present – it is an integral part of cultural identity, connection and a sense of belonging to Country.

The effective protection and conservation of this heritage is important in supporting the right to the ongoing cultural self-determination of Aboriginal communities. Cultural heritage conservation can support community wellbeing, be a source of economic opportunity through employment and enterprise development, and produce a wider awareness of Aboriginal culture and heritage through tourism and education.

For over 30 years the National Parks and Wildlife Act 1974 has been the primary piece of NSW legislation for the protection of Aboriginal cultural heritage. Since then, many Aboriginal people and communities have called for change to this legislation.

An Aboriginal Culture and Heritage Reform Working Party has been established to bring together ideas from the Aboriginal communities of NSW and other interested parties, which will help to streamline regulation, better define roles for Aboriginal people in the conservation of their heritage and integrate Aboriginal culture and heritage considerations into land use and environmental management matters.

The Aboriginal Culture and Heritage Reform Working Party are a group of experts who will advise the Government on options for stand-alone legislation to manage and protect Aboriginal culture and heritage in NSW.

The investment of your time, effort and interest in the process is appreciated and the NSW Government welcomes your views on the Aboriginal culture and heritage legislative reform process.

The Hon. Robyn Parker MP
Minister for the Environment
Minister for Heritage

The Hon. Victor Dominello MP
Minister for Aboriginal Affairs
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1. Introduction

An Aboriginal Culture and Heritage Reform Working Party has been established to advise the Government on options for the protection and management of Aboriginal culture and heritage in NSW.

This publication will guide the first round of public consultation to reform Aboriginal culture and heritage legislation in NSW. Comments received in response to this document will contribute towards the development of draft recommendations. The draft recommendations will be presented to Government, Aboriginal communities and other stakeholders for further input.

This publication:
- identifies how the current Aboriginal culture and heritage regime operates in NSW
- identifies key issues or concerns with the current regime
- seeks community views on these concerns and issues
- seeks ideas and suggestions for a way forward.

This is the initial opportunity for the wider public to contribute to the reform of laws for the better protection of Aboriginal cultural heritage in NSW. There will be other opportunities for input and comment over the next 12 months.

The NSW Government and the Aboriginal Culture and Heritage Reform Working Party are particularly interested in receiving views about practical solutions to the issues raised and any other issues of concern. All comments should be submitted by 1 December 2011. This is an open process and your comments will be publicly available unless you indicate that all, or a particular part, of your comments are confidential.

The topic areas are presented in more detail in Appendix A. The timetable for the reform is outlined in Appendix B. The membership of the Working Party and the Terms of Reference are at Appendix C, and information on supporting legislation is included in Appendix D.

2. Objectives of the reform

The objectives of this reform of Aboriginal culture and heritage legislation are to:
- recognise and delineate the role of Aboriginal people in the management of their culture and heritage as understood and culturally determined by them
- protect and manage NSW Aboriginal culture and heritage through a streamlined and flexible regulatory system which balances the protection of Aboriginal culture and heritage with the economic development needs of Aboriginal communities and NSW generally
- link Aboriginal culture and heritage protection with NSW natural resource management and planning processes
- clearly delineate and streamline responsibilities for NSW government agencies and Aboriginal organisations with culture and heritage management and protection functions in NSW
- ensure that effective mechanisms are in place for the protection of Aboriginal culture and heritage with clearly defined roles and responsibilities for the Aboriginal community, heritage professionals, government and industry.
Aboriginal culture and heritage

Aboriginal culture is based on ‘Country’. Country refers to the land and water, which includes people, plants and animals and also embraces the seasons, stories and creation spirits of Aboriginal people. It includes both tangible (physical) and intangible (non-physical) aspects – it is the landscapes, places, objects, customs, and cultural traditions and practices that communities have inherited from the past and wish to conserve as part of their Country for the benefit of current and future generations. Aboriginal heritage is a fundamental part of the Australian culture, heritage and identity and can be described in the following ways:

- Aboriginal culture and heritage is dynamic.
- One of the issues with the National Parks and Wildlife Act 1974 is that the definition of Aboriginal culture and heritage in terms of ‘places’ and ‘objects’ is based on an archaeological understanding which does not accord with Aboriginal peoples’ own concepts of culture.
- Aboriginal people’s definition of culture is not limited to particular places or physical evidence of Aboriginal existence on the land. Culture includes tangible and intangible elements that tell a story about the land, environment, people, family, history, law, community and spirituality.
- Aboriginal cultural knowledge is part of Aboriginal culture and heritage and includes:
  - specific knowledge about places and objects
  - knowledge about natural resources and processes, food sources, medicine, biodiversity, land management and landscape functions
  - knowledge about language, cultural traditions and social processes.

Best practice Aboriginal cultural heritage regulation would recognise both tangible and intangible heritage.

Q1: What specific aspects of Aboriginal culture and heritage do you think should be protected by law?

Management of Aboriginal culture and heritage

The responsibility for protecting Aboriginal culture and heritage in NSW primarily rests with the NSW Government. However, Commonwealth heritage legislation can also come into play where state laws have proven to be ineffective in protecting certain objects or artefacts. The primary Commonwealth legislation for the protection of Aboriginal heritage is the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act). Under this Act, the Australian Government may consider and respond to requests made by an Aboriginal or Torres Strait Islander person to protect certain areas or objects. The ATSIHP Act is currently being reviewed by the Commonwealth, with the aim of improving Indigenous heritage protection laws nationally.

In NSW, there is legislation at various levels that deals with Aboriginal culture and heritage (see Appendix A). However, currently, the primary piece of legislation for the protection of Aboriginal culture and heritage in NSW is the National Parks and Wildlife Act 1974. Under this Act, the Director General of the Department of Premier and Cabinet is responsible for the protection of Aboriginal cultural heritage and for issuing permits to cause harm to Aboriginal objects or places.

The Aboriginal Heritage Information Management System and the Aboriginal Heritage Impact Permit approval processes and compliance or enforcement measures are managed and administered by the Office of Environment and Heritage, Department of Premier and Cabinet (OEH), as well as the development of any related policies.
Past Aboriginal heritage reviews have supported the creation of an independent administrative structure to fulfil these roles. The two-tiered structure previously proposed, was intended to allow for decision making at a local or regional level by Aboriginal people, with a central body or commission to provide for the monitoring and review of locally made decisions, as well as for the resolution of disputes. The previous reviews have also recommended that additional administrative options or processes, such as plans of management entered into between land owners and Aboriginal communities, are needed to provide adequate protections for Aboriginal culture and heritage.

Q2 (a): Who should be responsible for making decisions on the management and protection of Aboriginal culture and heritage?

Q2 (b): What management structures and processes will effectively manage Aboriginal culture and heritage protection in NSW?

5. Ownership of Aboriginal culture and heritage

Aboriginal people and communities in NSW have consistently asserted their ownership of Aboriginal cultural heritage objects, ancestral remains, places and ‘intangible’ cultural heritage. Currently, the law states that:

- under the National Parks and Wildlife Act 1974, almost all NSW Aboriginal objects are the ‘property of the Crown’
- ownership of land can be granted to Aboriginal people and groups under the Aboriginal Land Rights Act 1983. Native title law can recognise ownership rights over places and cultural knowledge.

Q3 (a): Should any proposed legislation make a statement about ownership of physical and intangible Aboriginal heritage?

Q3 (b): If you agree that any proposed legislation should address the issue of ownership, how should any new laws address ownership of physical and intangible Aboriginal heritage?

6. Speaking for Country

Amendments to the NSW National Parks and Wildlife Act 1974 and regulations in 2010 have created clear steps and requirements to ‘consult’ with Aboriginal people before applying for a permit to harm Aboriginal heritage. These steps are reflected in Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010 (www.environment.nsw.gov.au/licences/consultation.htm).

In addition, under existing laws, there are people and groups with recognised rights, responsibilities and roles with regard to Aboriginal culture and heritage such as Native Title Holders, Aboriginal Owners and Aboriginal Land Councils. Other people and groups that undertake culture and heritage activities may also have these cultural rights and responsibilities, but may not have the same statutory recognition. Identifying the people or groups within Aboriginal communities who have a role in making decisions about the management and protection of Aboriginal culture and heritage is often complex and requires time to navigate.

Given this complexity, one mechanism that can be used is a process or ‘protocol’ which helps the broader community identify the appropriate people and groups within Aboriginal communities.

Another approach is the Victorian model where Registered Aboriginal Parties (RAPs) are appointed to speak for Country by a state Aboriginal Heritage Council. These RAPs have a number of legislative functions including approval of Cultural Heritage Management Plans and advising on permits.
Q4 (a): What are your views about who speaks for Country?

Q4 (b): What do you think are the best ways to ensure that the appropriate people speak for Country in public processes, including who resolves conflict?

Q4 (c): Should these mechanisms be reflected in any proposed legislation or in protocols and guidelines?

7. Land-use planning and development processes

Protecting heritage values before they are under immediate threat allows long-term strategies to be developed and improves the heritage protection environment. The planning system works in three ways – it guides planning for the future use of particular areas, it makes rules for responding to proposals to use land, and makes rules for dealing with specific issues (e.g. protecting koala habitats).

A separate process is underway to review the Environmental Planning and Assessment Act 1979 (EP&A Act), the primary piece of planning legislation in NSW.

Q5 (a): Do you understand how Aboriginal cultural heritage is protected in legislation and planning instruments?

Q5 (b): How could Aboriginal heritage be better protected through land-use plans and other planning instruments?

8. Public natural resource management processes

Land and natural resource management, or caring for Country, is central to Aboriginal culture. For Aboriginal peoples, this approach to land and natural resource management includes cultural and/or spiritual values or aspects, and deals with all elements of an environment together.

There are potential benefits for NSW in the ‘best practice’ management of natural resources of Country, through the integrative and connective understandings contained within Aboriginal culture.

A large part of Aboriginal culture and heritage is based around caring for Country.

There are a number of mechanisms at the ‘landscape scale’ for involving Aboriginal people in natural resource management. These include:

- national park hand-backs
- Indigenous land-use agreements
- Indigenous protected areas
- programs managed by catchment management authorities.

Q6 (a): How well do you think current natural resource management processes help protect Aboriginal heritage?

Q6 (b): How could Aboriginal cultural values and knowledge be better incorporated into natural resource management processes?
9. Next steps

The NSW Government, advised by its Aboriginal Culture and Heritage Reform Working Party, is committed to an extensive program of consultation across NSW. Comments on this Issues Paper are welcome and would be especially helpful in the initial consultation process.

After receiving comments and views through the first public consultation process, the Reform Working Party will develop draft recommendations. These recommendations will be presented to Aboriginal communities and non-Aboriginal stakeholders for further public input. When this second public consultation process is complete, final recommendations will be provided to the NSW Government for consideration.

The NSW Government and the Reform Working Party are very interested in receiving feedback on these issues and would like to hear your views on protecting Aboriginal heritage in NSW. This is an open process and your comments will be publicly available unless you indicate that all, or a particular part, of your comments are confidential.

Q7: Do you have any other comments or suggestions on the reform of Aboriginal culture and heritage legislation in NSW?

10. Further information

Detailed information on these issues is provided in Appendix A. More information can also be found in:

- Department of Planning and Infrastructure website (EP&A Act and Heritage Act) – www.planning.nsw.gov.au
- NTSCORP website – www.ntscorp.com.au
- NSW Aboriginal Land Council website – www.alc.org.au
- Australian Network of Environmental Defenders Offices website – www.edo.org.au

11. How to make a submission

The closing date for responses to the issues raised in this paper is 1 December 2011. Responses can be provided in the following ways:

- Send written submissions to: Mr Norman Laing, Country, Culture and Heritage Division Office of Environment and Heritage, PO Box 1967, Hurstville BC NSW 1481
- Record a message – free phone message line 1800 881 152
- Send a fax to: 02 9585 6366
- Participate in an online discussion forum at www.environment.nsw.gov.au
- Email submissions to ach.reform@environment.nsw.gov.au
- Attend a regional workshop. Details at www.environment.nsw.gov.au
Appendix A – Background information on issues

Aboriginal culture and heritage

Aboriginal culture is based on ‘Country’. Country refers to the land and water, which includes people, plants and animals and also embraces the seasons, stories and creation spirits of Aboriginal people. It includes both tangible (physical) and intangible (non-physical) aspects – it is the landscapes, places, objects, customs and cultural traditions and practices that communities have inherited from the past and wish to conserve as part of their Country for the benefit of current and future generations. Aboriginal heritage is a fundamental part of Australian culture, heritage and identity.

The present NSW landscape is the product of long-term and complex relationships between people and the environment. For many Aboriginal people, the significance of individual landscape features is derived from their interrelatedness within the broader cultural landscape. This means features cannot be assessed in isolation and any assessment must consider the feature and its associations in a holistic way. Aboriginal cultural landscapes include the stories behind landscape features and demonstrate the associations that may exist between peoples, sites, objects and other features within the landscape.

There is a vast and rich array of Aboriginal cultural sites across NSW and they include stone arrangements, middens, hearths, campsites, fish traps and stone quarries. The Aboriginal Heritage Information Management System (AHIMS) managed by the Office of Environment and Heritage (OEH) contains over 60,000 records of such sites. These cultural sites in the landscape are points of focus for Aboriginal cultural learning and expression. Teaching, healing and ceremonial sites, significant objects such as scarred trees, significant men’s and women’s sites, initiation grounds, birthing sites, story sites all have an importance to Aboriginal culture, and to Australian culture. These sites are connected to the transmission of Aboriginal cultural knowledge.

Aboriginal cultural knowledge is handed down through oral tradition (song, story, art, language and dance) from generation to generation as well as being added to by the experience and creativity of each new generation. Aboriginal cultural knowledge embodies and preserves the relationship of people to the land and waters. Cultural places and landscapes link to oral tradition so the experience of seeing or visiting a particular place will often trigger the retelling of stories about it. Protection of these places and landscapes is related to the long-term survival of these stories in Aboriginal culture.

Aboriginal cultural objects are recognised as having cultural value to Aboriginal people, and include items as diverse as stone flakes, scarred trees, woven baskets, axe heads, and carved fishing hooks.

Aboriginal culture and heritage involves conserving Country with and by Aboriginal people and communities, and ensuring that connections to Country are recognised, respected and can be maintained.

Reasons to protect Aboriginal heritage

Legislation expresses the public interest in achieving particular outcomes. There are four main public interest reasons for Government action to conserve or assist the protection of Aboriginal culture and heritage. These are as follows:

1. The Crown has vested ownership of Aboriginal heritage objects under the NPW Act, and as owner, protects Crown property, where this is in the ‘public interest’.
2. The heritage significance of some Aboriginal objects and places is recognised and considered important enough by heritage experts that public protection is offered to it through the Heritage Act 1977, the EP&A Act and the NPW Act.
3. The NSW Constitution now acknowledges and honours the Aboriginal people as the state’s first people and nations. It recognises that, as the traditional custodians and occupants of the land in NSW, Aboriginal people have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and have made, and continue to make, a unique and lasting contribution to the identity of the state. These recent constitutional amendments create a clear implication that the relevant laws of NSW should afford similar acknowledgement and recognition to the Aboriginal peoples of this state particularly in regards to the cultures and heritage of those first peoples.

4. Under the United Nations Declaration on the Rights of Indigenous Peoples agreed to by Australia in 2009, it is core business for Australian governments to act as guarantor of the basic rights of Aboriginal groups to ‘cultural self-determination’. In heritage protection terms, the public interest is in creating an environment where cultural self determination can occur, for example, by assisting Aboriginal community efforts to conserve cultural heritage, including intangible cultural heritage and ongoing cultural processes.

These reasons underpin current and potential public action to protect Aboriginal culture and heritage in a range of different situations.

Current NSW Aboriginal heritage protection laws

This section discusses the main laws that specifically protect Aboriginal heritage in NSW – the NPW Act and the Heritage Act. Planning legislation (the EP&A Act and the Crown Lands Act 1989) and how legislation affects Aboriginal heritage interests in natural resource management are also discussed below. A summary of the Aboriginal Land Rights Act 1983 and the Native Title Act 1994 is included at Appendix D.

National Parks and Wildlife Act 1974

The National Parks and Wildlife Act 1974 (NPW Act), administered by OEH, is currently the primary legislation for the protection of some aspects of Aboriginal culture and 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))

The NPW Act partly defines Aboriginal heritage as comprising ‘Aboriginal objects’ and ‘Aboriginal places’. Aboriginal objects include objects on both public and private lands.

• An Aboriginal object under the NPW Act is 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 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’ (section 5 of the NPW Act).

• An Aboriginal place is defined as ‘a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture’ (section 84 of the NPW Act). The Minister establishes an Aboriginal place by order published in the Gazette.

One of the issues with the NPW Act is that where Aboriginal culture and heritage is defined in terms of ‘places’ and ‘objects’, this is based on an archaeological understanding which does not accord with Aboriginal peoples’ own concepts of culture.

It is understood that Aboriginal peoples’ definition of culture is not limited to particular places or physical evidence of Aboriginal existence on the land, including both the tangible and intangible things that tell a story about the land, environment, people, family, history, law, community and spirituality.
Offence provisions

Part 6 of the NPW Act provides specific protection for Aboriginal objects and declared Aboriginal places by establishing offences of harm. Harm is defined as destroying, defacing or damaging an Aboriginal object or place, or moving an object from the land. There are a number of defences and exemptions to the offence of harming an Aboriginal object or declared Aboriginal place.

One of the defences is that the harm was carried out under an Aboriginal Heritage Impact Permit (AHIP). Under the NPW Act, the Director General of the Department of Premier and Cabinet is the decision-maker for AHIP applications. This function has been delegated to the Chief Executive of OEH.

The NPW Act includes the provision that all Aboriginal objects are considered to be ‘property of the Crown’ other than those which:

- were located in private collections prior to 13 April 1970 and have not been since abandoned, or

- are ‘real property’ (i.e. objects such as rock art, rock carvings or scarred trees that are attached to private land and are legally considered part of that land).

Protecting places under the NPW Act

The objects of the current NPW Act highlight the need to conserve not only objects but also places, and features of significance to Aboriginal people and to foster appreciation, understanding and enjoyment of this heritage.

The declaration of ‘Aboriginal Places’ is one way of recognising and protecting Aboriginal heritage under the current NPW Act. Under section 84 of the Act the Minister may declare any land to be an Aboriginal Place if it ‘is or was of special significance to Aboriginal culture’. There are over 70 declared Aboriginal Places in NSW. Examples of the cultural values recognised and protected by their declaration as Aboriginal Places include:

- places identified by Aboriginal stories or celebrated by ceremony
- former Aboriginal reserves and missions
- areas where important historical events took place, such as massacre sites
- areas with culturally important plant and animal species
- archaeological sites requiring special recognition.

The NPW Act aims to protect places of cultural significance through their reservation and management of Aboriginal Areas under the Act. These are lands directly managed by OEH as part the NSW conservation reserve system, along with national parks, nature reserves, historic sites and state conservation areas. There are currently 21 Aboriginal Areas managed by OEH, totalling over 33,000 hectares.

OEH has an ongoing program of developing jointly-managed national parks. These are managed with Aboriginal communities to provide access, connection to Country and employment on Country for those communities, while protecting the biodiversity values of those places. More than 20% (that is, more than 1.5 million hectares) of the national park system is subject to formal agreements with Aboriginal people about the joint management of these lands.

The NPW Act also applies specific protections to Aboriginal heritage sites. This means that particular protections may be applied under particular forms of ownership. Examples include areas of particular cultural significance that can be reserved as national parks (section 30E), state conservation areas (section 30G), or Aboriginal Areas (section 30K).

The NPW Act also provides for formal conservation agreements to be made to protect natural and cultural values. A Conservation Agreement is a formal agreement between landowners and the Minister for the Environment made under sections 69A–KA of the NPW Act. The area under the Conservation Agreement is registered on the title of the land ensuring that if the land is sold, the Conservation Agreement and management requirements remain in place. Landholders who enter into a Conservation Agreement are eligible for rates relief and tax concessions.
The Heritage Act 1977

The *Heritage Act 1977* (NSW) protects the state’s natural and cultural heritage, including Aboriginal cultural heritage through the establishment of a State Heritage Register (SHR). Aboriginal places or objects that are recognised by the Heritage Council as having high historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value and are considered to meet the significance threshold may be listed on the SHR under Part 3A of the Act. The Minister for the Environment decides what is listed on this register with advice from the Heritage Council.

Listing Aboriginal places of high cultural value on the SHR is a way that communities can preserve and protect significant places. This indicates that the places are recognised as having heritage values that are important to society and that the places should be looked after for future generations. Currently, there are ten sites listed on the SHR under the Aboriginal heritage theme. Approval from the NSW Heritage Council is required for any works to an item listed on the SHR which is not covered by the standard exemptions for general maintenance and repair under the Heritage Act.

Speaking for Country

Speaking for Country is a part of caring for Country and involves listening to Country, and explaining the significance of the landscape and parts of the landscape based on traditional Aboriginal cultural law and custom. In Aboriginal culture, some people in an Aboriginal community have permission to interpret or speak for their own Country. Only the Aboriginal community can determine who can speak for Country in any particular case. In some parts of NSW ‘rights to speak for Country’ may be held by separate people or groups in the Aboriginal community.

Under the NPW Act, the Heritage Act and other Acts, wherever consultation with Aboriginal people is required or where public consultation potentially involves cultural matters, public involvement in the issue of the ‘right to speak for Country’ arises. In some cases, there are conflicting claims to these rights from a community leading to further issues about who the government recognises as having the right to speak for Country, and the processes used to determine claims to these rights. In NSW, legislation processes for consultation exist, but not for deciding between competing cultural claims to have rights to ‘speak for Country’ other than through formal native title claim processes.

Native title laws can protect the exclusive right to speak for Country by a claimant group, if this right is claimed through an application for native title recognition, and accepted in the legal determination of the case. Native title is the legal recognition of the communal rights which Aboriginal people have through traditional law and custom in land and water.

Native title laws requires that an ‘objective test’ is used to identify the members of a claim group, for example, by naming the ancestors from which each member of a claim group descends. Under native title law, decisions by the Aboriginal community about who is part of the claimant group need to be made according to a traditional method of decision making.

However, in much of NSW, native title has been extinguished by previous government acts such as the grant of freehold title (private property). Traditional knowledge holders, traditional people, owners, custodians and Elders Groups often exist in relation to an area of land, Aboriginal nation or language group, but these groups are not formally or exclusively recognised in government processes as being able to ‘speak for Country’.

Local Aboriginal Land Councils (LALCs) have a statutory responsibility to:

- take action to protect the culture and heritage of Aboriginal persons in the council’s area, subject to any other law
- promote awareness in the community of the culture and heritage of Aboriginal persons in the council’s area.

LALCs are managed by decision makers elected by Aboriginal people living within the LALC area, regardless of any traditional connection to an area. LALCs have a role in speaking about heritage and managing Country, but may or may not reflect the cultural right to speak for Country in all situations.
Under section 82(2) of the Aboriginal Land Rights Act 1983 (ALRA), LALCs must consult with Aboriginal Owners when making their operating plans – called Community, Land and Business Plans. ALRA defines Aboriginal owners as those people whose names are entered in the Register of Aboriginal Owners by the Registrar, because of the persons’ cultural association with particular land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land.

The process for consultation with Aboriginal communities about harming Aboriginal sites and objects is set out under section 80C of the National Parks and Wildlife Regulation 2009. Before applying for an AHIP to harm an Aboriginal site or object, the applicant must:

• consult with the relevant Aboriginal people
• notify certain Aboriginal people in the area – based on lists held by specified government agencies (and LALCs)
• register the details of any Aboriginal person who expresses an interest and holds cultural knowledge relevant to determining the significance of Aboriginal objects(s) and/or place(s) in the area of the proposed project
• consult on the assessment methodology to be used
• seek information from the registered Aboriginal parties on places and objects
• consult on draft assessment reports.

Through this process the Government sets the parameters of which Aboriginal people must be consulted in relation to cultural matters on a ‘proposal-by-proposal’ basis.

Businesses seeking to consult with Aboriginal groups about proposed activities are sometimes faced with a level of uncertainty about who, within the Aboriginal community, is able to speak for Country. Investment decisions often rely on timely decision making, and having information about ‘who speaks for Country’ can be a key to good conservation and project results for businesses and communities.

Ownership of Aboriginal heritage

Aboriginal people and communities in NSW have consistently asserted their ownership of Aboriginal cultural heritage objects, ancestral remains, places and ‘intangible’ cultural heritage. Currently, the law is that:

• under the NPW Act, all Aboriginal objects in NSW are legally the ‘property of the Crown’, other than those which:
  – were located in private collections prior to 13 April 1970 and have not been since abandoned, or
  – are ‘real property’ (i.e. objects such as rock art, rock carvings or scarred trees that are attached to private land and are legally considered part of that land)
• ownership of land can be granted to Aboriginal people and groups under the ALRA
• native title law has scope for case-by-case legal recognition of some types of ownership rights of specific places and objects and for legal recognition of Aboriginal cultural knowledge
• Aboriginal cultural knowledge is part of Aboriginal culture and heritage and includes:
  – specific knowledge about places and objects
  – knowledge about natural resources and processes, food sources, medicine, biodiversity, land management and landscape functions
  – knowledge about language, cultural traditions, and social processes.

Current linking of Aboriginal heritage processes with land-use planning and development processes

Thinking about how to protect heritage values before they are under immediate threat allows long-term strategies to be developed and allows governments, communities and business to work in a ‘no surprises’ heritage protection environment. The use of inclusive community-based planning approaches can provide opportunities to develop long-term strategies to protect
significant heritage objects and places and involve communities in their ongoing conservation. The two main land-use planning processes in NSW are set out in the EP&A Act and the Crown Lands Act 1989.

The EP&A Act administered by the NSW Department of Planning and Infrastructure provides planning controls and requirements for environmental assessment in the development assessment process. It establishes the framework for Aboriginal heritage values to be formally assessed in land-use planning and development consent processes. Under this Act, culture and heritage is considered to be a part of the environment. However, there is no specific mention of culture or heritage in the ‘objects’ or ‘statement of intent’ that guides the EP&A Act.

The planning system works in three ways – it guides plan-making for the future use of particular areas, it makes rules for responding to proposals to use land, and makes rules for dealing with specific issues (e.g. protecting koala habitats). The EP&A Act covers:

- **land use planning for local areas** – under Part 3 of the Act, local environment plans (LEPs) set out what types of development can happen and where, and what areas are protected. LEPs must consider the impact of proposed development on items of Aboriginal heritage
- **assessing development proposals** – the development assessment processes under Part 3A have been repealed and are currently being replaced with processes for state significant development and infrastructure under Parts 4 and 5 for private and public proponents, respectively
- **rules that apply to land-use plans and development assessment across NSW** – state environmental planning policies (SEPPs), and ministerial directions provide rules on how to protect significant environmental values or account for particular issues across NSW or in a defined part of NSW.

**Environmental Planning Instruments**

**Local Environmental Plans (LEPs):** Part 3 of the EP&A Act establishes LEPs as an environmental planning instrument. LEPs are prepared by local councils based on a standard template for approval by the Minister for Planning and Infrastructure. LEPs divide the local area they cover into ‘zones’ (such as residential, industrial, business etc.) to help guide planning decisions. Councils preparing a draft LEP that affects an Aboriginal object or place must include provisions to facilitate conservation of that object or place (section 117 direction 2.3: Heritage Conservation, issued under s.117 (2) of the EP&A Act). A compulsory clause is included in the standard LEP template (cl.5.10(8)) for heritage conservation, specifically for the conservation of Aboriginal places of heritage significance, that is, development consent is required for disturbing or excavating a heritage conservation area that is an Aboriginal place of heritage significance – cl.5.10(2)(d).

**State Environmental Planning Policies (SEPPs)** – Part 3 of the EP&A Act establishes SEPPs as legally binding environmental planning instruments. SEPPs deal with planning issues significant to the state and people of NSW. They help to provide an overall long-term plan and vision for development by highlighting what values are worth preserving. There are currently no SEPPs that relate specifically to Aboriginal heritage protection, although there are a number which deal with environmental protection.

**Assessment of development proposals**

*Parts 3A and 4 of the EP&A Act*

Part 3A has been repealed and is being replaced with processes for state significant development and infrastructure under Parts 4 and 5 for private and public proponents, respectively. The new processes are likely to be similar to Part 3A in many aspects. The most significant changes will be:

Approximately 50 per cent of proposals that were previously subject to Part 3A will be returned to local government as the consent authority; only genuine state significant development and infrastructure projects will be subject to the new processes.
• Most state significant development applications will be determined by the Planning Assessment Commission, while smaller less complex matters will be determined by the Department of Planning and Infrastructure.

• Opportunities for public engagement and participation will be increased.

Transitional arrangements are in place to deal with Part 3A proposals that will continue to be assessed under the previous Part 3A process.

Other changes to the processes for state significant development and infrastructure are currently being considered.

Developments that require development consent (from a local council or the Minister for Planning) are assessed under Part 4 of the EP&A Act. Types of developments include ‘complying’, ‘designated’, ‘integrated’, ‘other local’, ‘exempt development’ and ‘other development not requiring consent’.

Ministerial directions

Section 117 of the EP&A Act empowers the Minister to issue a section 117 direction to a particular local council, or councils when preparing planning proposals for new LEPs. The objective of Ministerial direction 2.3 Heritage Conservation, is to conserve items, areas, objects and places of environmental heritage significance and Indigenous heritage significance.

Crown Lands Act 1989

The Crown Lands Act is concerned with the management of public land reserved as Crown land in NSW.

This Act sets out assessment processes for working out what Crown land should be used for and principles for managing Crown land retained in public ownership. The Act contains a power to place covenants over Crown land to protect environmental and cultural and heritage values, before the land is sold or transferred. The Act also includes various powers about day-to-day management of Crown land, for example, generally prohibiting trespassing on public land.

The Act allows consideration of Aboriginal heritage, but decision makers are under no specific obligation to account for Aboriginal heritage, or consult Aboriginal communities about heritage values of Crown lands. Questions about how Crown land should be used, including for example, whether it is sold, leased or managed as a forest, are made without any specific processes in relation to engaging with Aboriginal people or local Aboriginal communities. Land assessment made under the Crown Lands Act affects what land may be claimed through ALRA processes.

Current recognition of Aboriginal cultural heritage in public natural resource management processes

Part of Aboriginal culture and heritage is comprised of a range of land management processes, from broad-scale landscape strategies to highly specific local actions. Aboriginal connection to land has cultural significance and a role in the spiritual, cultural and economic wellbeing of Aboriginal communities in NSW. There are recognised community and individual benefits to wellbeing from involvement in caring for Country. These benefits include mental health benefits, preventative health and social outcomes, such as education, law and justice and lower rates of substance abuse. The Government recognises that Aboriginal communities have a role in managing the state’s land, water and biodiversity.

Natural resource management (NRM) is a specific term which is understood as the management of ‘natural resources’, including water, native vegetation, salinity, soil, biodiversity and forestry. The term is usually used about managing parts of the environment within a productive landscape, rather than within protected conservation areas, and has a specifically defined meaning in some legislation.
The scope of public NRM is roughly approximate to the Aboriginal cultural concept of caring for Country – they both are concerned with the healthy and sustainable use of biodiversity, water, soils, and ecosystems. There are differences however, as caring for Country is broader and can include elements like fire management regimes and the cultural wellbeing of people and communities, and these are not usually seen as part of NRM.

Over time, NSW legislation affecting public NRM has been developed or amended to include some consideration of issues important within Aboriginal culture and heritage. Appendix D includes information on the cultural heritage concerns involved in the main public NRM legislation.

There is a range of capacities to acknowledge the Aboriginal heritage involved in particular NRM activities through the operations of these Acts (Appendix D). The Aboriginal culture and heritage that is managed through NRM – the parts of caring for Country that are represented in these Acts – is generally not managed in a coordinated way. The conservation of biodiversity in an area, for example, may protect Aboriginal cultural heritage (totemic species, general health of Country) but the outcomes are not recognised as Aboriginal heritage conservation outcomes, and not formally linked to, say, managing local ceremonial sites, water management plans or LEPs. Other heritage aspects, such as Aboriginal fire management regimes, for example, are not covered at all in the existing legislation.

Indigenous Land Use Agreement (ILUA) processes under the Commonwealth *Native Title Act 1993* and *Native Title (New South Wales) Act 1994* allow for the consideration of the whole set of Aboriginal heritage concerns, including NRM interests, based on native title related rights. As discussed earlier in current NSW Aboriginal heritage protection laws, the ILUA processes can consider these aspects, re-aggregating the cultural and heritage (and social) concerns of native title claimants in a defined area of land to form a broader agreement between government and the native title claimants.

The NSW Cultural Resource Use Framework

There are processes available under the NSW Cultural Resource Use Framework to facilitate access and use of publicly managed land for Aboriginal cultural purposes. The processes apply to parks managed by the National Parks and Wildlife Service, State forests, travelling stock routes, marine parks, Crown land and Crown land reserves, freshwater, estuarine and marine waters (including waters reserved as part of national parks) and local government owned lands (see www.environment.nsw.gov.au/nswcultureheritage/almf.htm).

Catchment management authorities

Catchment management authorities (CMAs) are responsible for managing natural resources, defined by the legislation as water, native vegetation, salinity, soil, biodiversity, coastal protection, marine environment and forestry, at the catchment level in NSW. The 13 CMAs prepare Catchment Action Plans (CAPs) and manage incentive programs to implement the plans, and work to achieve standards developed by the Natural Resources Commission. The guiding legislation does not include any duty to conserve culture or heritage specifically, or consult with Aboriginal communities, but it does refer to making decisions ‘in the social, economic and environmental interests of the State’.

CMA Aboriginal reference groups and advisory committees advise CMAs on natural resource management and Aboriginal culture and heritage issues for Aboriginal communities and can assist the flow of information between CMAs and Aboriginal communities. CMAs consult Aboriginal communities in preparing their CAPs, natural resource programs and investment strategies. Current NRM processes can account for some cultural concerns at the property and catchment level scales in this way. CMAs also work at the property-level scale preparing property vegetation plans (PVPs) with landholders. However, the Environmental Outcomes Assessment Methodology (available at www.environment.nsw.gov.au/vegetation/eoam/index.htm) applied to prepare a PVP does not have an Aboriginal cultural heritage component.
### Appendix B – Review and reform timetable

<table>
<thead>
<tr>
<th>Phases of the reform process</th>
<th>Duration/date</th>
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<tbody>
<tr>
<td><strong>Phase 1 commences October 2011</strong></td>
<td>A 3-month period</td>
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<tr>
<td>Public awareness campaign of the reform process and timetable.</td>
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<tr>
<td>Circulation of this paper, background materials and comprehensive Aboriginal community and stakeholder consultation.</td>
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<tr>
<td>Initial community and stakeholder engagement.</td>
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<tr>
<td>This consultation is seeking input on the key issues and suggested solutions. The consultation will include 25 regional briefings, workshops and interviews with Aboriginal stakeholders and a series of meetings with industry sectors, environmental groups, heritage practitioners, local government, government agencies and catchment management authorities.</td>
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<tr>
<td><strong>Phase 2:</strong></td>
<td>A 3-month period</td>
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<tr>
<td>Collate and review Aboriginal community and stakeholder input and outcomes.</td>
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<tr>
<td>The Aboriginal Culture and Heritage Reform Working Party will collate and review outcomes from stakeholder and community engagement and review of the Issues Paper and information products and develop an options paper.</td>
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<tr>
<td><strong>Phase 3:</strong></td>
<td>A 3-month period</td>
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<tr>
<td>Second consultation on options paper. Undertake second community and stakeholder consultation on options to canvass preferred model and outcomes.</td>
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<tr>
<td><strong>Phase 4:</strong></td>
<td>September 2012</td>
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<tr>
<td>Provide Reform Working Party report and recommendations to Ministers.</td>
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</table>
Appendix C – Aboriginal Culture and Heritage Reform Working Party

Proposed membership
Mr Norman Laing – Office of Environment and Heritage – Chair and ex-officio member.

A nominee from Aboriginal Affairs NSW – ex officio member.

A nominee from the Coalition of Aboriginal Peak Organisations (CAPO) – ex officio member

An expert in community engagement with a broad understanding of the cultural and social issues affecting Aboriginal people in NSW

Two individuals with expertise in land management and the issues affecting Aboriginal cultural heritage

An Aboriginal culture and heritage legal expert

An expert in Aboriginal culture and heritage conservation

Two individuals from industry or business with experience in issues relating to Aboriginal culture and heritage

Terms of reference
The Aboriginal Culture and Heritage Reform Working Party will provide expert advice to Government on options for the management and protection of Aboriginal culture and heritage in NSW. The Working Party should particularly focus on (but not be limited to) the following:

- review of the existing provisions in NSW legislation that concern the protection of Aboriginal cultural heritage
- review of the laws and policies of other jurisdictions that concern the protection and conservation of Aboriginal cultural heritage
- those existing provisions that should be included in any new legislation
- the roles and responsibilities of Aboriginal people regarding their cultural heritage
- processes to identify significant Aboriginal cultural heritage items, places and landscape values
- the possible use of negotiated outcomes as well as, or as alternatives to, regulation as mechanisms to protect Aboriginal culture and heritage
- dispute resolution and mediation processes
- linking of Aboriginal culture and heritage processes with environmental planning, development control and natural resource management processes
- NSW agency responsibilities.
## Appendix D – Information on supporting legislation

<table>
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<tr>
<th>Legislation</th>
<th>Aboriginal heritage and NRM concerns</th>
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| Aboriginal Land Rights Act 1983 | The *Aboriginal Land Rights Act 1983* (ALRA) allows Aboriginal people and groups to negotiate access to private land, enabling a connection to Country to be maintained. It also establishes the 119 Local Aboriginal Land Councils (LALCs), which have responsibility for protecting and promoting Aboriginal culture and heritage within their areas. The ALRA is administered by Aboriginal Affairs NSW and establishes the NSW Aboriginal Land Council (NSWALC) and LALCs. The Act requires these bodies to:  
1. take action to protect the culture and heritage of Aboriginal persons in the council’s area, subject to any other law  
2. promote awareness in the community of the culture and heritage of Aboriginal persons in the council’s area.  
The NSWALC is the peak representative body for the Aboriginal communities of NSW. The ALRA establishes the Aboriginal Land Rights Act Registrar whose functions include maintaining the Register of Aboriginal Land Claims and the Register of Aboriginal Owners. |
| Native title legislation | The *Native Title Act 1993* (Cth) provides the legislative framework to recognise and protect native title. The *Native Title Act (NSW) 1994* (NTA) was introduced to ensure that the laws of NSW are consistent with the Commonwealth law. |
| Native Title Act (NSW) 1994 | The NTA allows for claims for legal recognition of native title rights which can take the form of access and use rights to an area of land or to full native title ownership of a land area. To the extent that native title rights are recognised, this law protects Aboriginal culture and heritage. In NSW, many native title rights are extinguished due to settlement patterns and land tenure arrangements. However, even where no legal determination about native title rights has been made in a particular case, the NTA has provisions for making agreements between Aboriginal groups and the government, called Indigenous Land Use Agreements (ILUAs).  
An ILUA is an agreement relating to the use and management of land and waters made between one or more native title groups and the Government.  
ILUAs can enable Aboriginal groups to negotiate involvement in broad-scale NRM management and specific local actions. Negotiated outcomes such as these can provide sustainable benefits and wellbeing for whole Aboriginal communities. The native title rights recognised by an ILUA have the same force under Commonwealth law as if they were part of a native title determination made by the Court. |
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<tr>
<td>Fisheries Management Act 1994</td>
<td>The <em>Fisheries Management Act 1994</em> (FM Act) controls fishing activities to manage fish stocks as a sustainable resource. The FM Act now formally recognises the ‘spiritual, social and customary significance to Aboriginal persons of fisheries resources’, and one of its objectives is to ‘protect, and promote the continuation of Aboriginal cultural fishing’. The FM Act defines Aboriginal cultural fishing as: fishing activities and practices carried out by Aboriginal persons for the purpose of satisfying their personal, domestic or communal needs, or for the educational, ceremonial or other traditional purposes, and which do not have a commercial purpose. The FM Act exempts Aboriginal people from paying a fishing fee when fishing according to the bag limits and fish sizes set for recreational fishers. Aboriginal people wishing to engage in cultural fishing must apply for a permit which may be issued to communities or groups rather than to individuals only.</td>
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<tr>
<td>Forestry Act 1916</td>
<td>NSW Forests manages 2.4 million hectares of land under the <em>Forestry Act 1916</em>, but heritage aspects are not specifically acknowledged in this legislation – the NSW Cultural Resource Use Framework allows for land access and cultural use of reserved land through agreements made between Aboriginal people and Forests NSW.</td>
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<tr>
<td>Mining Act 1992</td>
<td>The <em>Mining Act 1992</em> sets out the government’s powers to grant licences to explore and leases to mine, including specific rights and duties for both exploration licences and mining leases.</td>
</tr>
<tr>
<td>Threatened Species Conservation Act 1995</td>
<td>Aboriginal landholders and communities have a legislatively recognised interest in providing advice on what actions to take to restore threatened species populations and their habitats. To guide recovery and threat abatement actions, the <em>Threatened Species Conservation Act 1995</em> (TSC Act) provides for the preparation of a Threatened Species Priorities Action Statement which outlines actions to recover species and manage threats. In 2002, the TSC Act was amended to require Aboriginal peoples’ interests to be considered during the development of recovery plans for threatened species, populations and ecological communities.</td>
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<td>Legislation</td>
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| Marine Parks Act 1997 | The *Marine Parks Act 1997* currently enables cultural resource use within marine parks where the activity is undertaken in accordance with the provisions of the FM Act, and marine park zoning plans and does not involve targeting protected species. Aboriginal people eligible to undertake cultural resource use in marine parks may do so through one or more of the following mechanisms:  
  - issue of a marine parks or fisheries permit to individuals for specific events on a case-by-case basis  
  - establishment of Special Purpose Zones within marine parks that are managed for cultural resource use within current and future zoning plans and the issue of supporting permits to organisations or individuals.  
  - development of overarching cultural resource-use agreements between the Marine Parks Authority and eligible Aboriginal people and the issue of supporting permits to organisations or individuals. |
| Rural Lands Protection Act 1998 | The *Rural Lands Protection Act 1998* establishes Travelling Stock Routes (TSRs) and the permit system for accessing and using the land. Many TSRs contain Aboriginal heritage values and cultural sites as they usually follow water courses that are song-lines and were Aboriginal walking routes, and some also remain effective wildlife corridors with highly significant biodiversity values. There is no specific reference to considering heritage values or consulting with Aboriginal communities in managing TSRs. A general access permit system exists to regulate access to TSRs. |
| Water Management Act 2000 | A water sharing plan is a legal document prepared under the *Water Management Act 2000*. It establishes rules for sharing water between the environmental needs of the river or aquifer and water users, and also between different types of water users such as town supply, rural domestic supply, stock watering, industry and irrigation.  
Large-scale water sharing plans recognise the importance of rivers and groundwater to Aboriginal culture. Aboriginal people in NSW were actively involved in the development of the first round of water sharing plans, along with landholders, conservationists, industry and government representatives.  
The plans allow Aboriginal landholders to apply for a water access licence for both commercial and cultural purposes such as manufacturing traditional artefacts, hunting, fishing, gathering, recreation, and cultural and ceremonial purposes. An Aboriginal cultural licence can also be used for drinking, food preparation, and watering domestic gardens. |
<p>| Native Vegetation Act 2003 | The <em>Native Vegetation Act 2003</em> controls the clearing of native vegetation and requires land managers to prepare Property Vegetation Plans. There is no specific requirement for Aboriginal heritage to be taken into account under this Act. |</p>
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<tr>
<td>Catchment Management Authorities Act 2003</td>
<td>The state’s 13 catchment management authorities (CMAs) manage the development of Catchment Management Plans that account for social, environmental and economic effects of NRM in NSW. Involvement of Aboriginal people in the work of CMAs is through each CMA’s Aboriginal Reference Group. CMAs have no specific legislative obligation to consult with Aboriginal communities. However, there is a duty to use the best available information in making NRM decisions.</td>
</tr>
<tr>
<td>Natural Resources Commission Act 2003</td>
<td>The Natural Resources Commission provides standards for CMAs to work to. Although relating to natural resource management, these standards do include community involvement requirements, but no measures that deal specifically with the protection of Aboriginal culture and heritage.</td>
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