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Introduction

In 1969 the New South Wales Government became the second government in Australia to legislate to protect elements of Aboriginal Heritage through amendments made to the *National Parks and Wildlife Act 1967*. Although the Act has been progressively amended over the years the underpinnings of the substantive Aboriginal heritage provisions of the Act remain basically as they were originally introduced and intended.

For over 30 years Aboriginal peoples and communities have called for fundamental change to the legislation governing the management of Aboriginal heritage in NSW.

The Government has established an Aboriginal Culture and Heritage Reform Working Party to review, develop and make recommendations on options for the management and protection of Aboriginal cultural heritage in NSW.

The Office of Environment and Heritage has developed a strategy to effectively engage with stakeholders and Aboriginal communities to further develop Aboriginal heritage management legislation in NSW. Part of that strategy is the publication of this document, which has been developed to provide a basic and factual information summary of past inquiries, reviews, relevant legislation, events, and issues. This document is presented in chronological order so as to provide an overview of what matters have changed or become more topical over the years from 1969 through to 2011.

I trust that this document proves informative and assists in the development of any responses or submissions that Aboriginal communities and other interested stakeholders may wish to make regarding the potential content of any future Aboriginal heritage management legislation for NSW.

**Norman Laing**

Executive Director

Country, Culture & Heritage Division

Office of Environment and Heritage
In 1969 the New South Wales Government became the second government in Australia to legislate to protect elements of Aboriginal heritage. This occurred with amendments to the National Parks and Wildlife Act 1967. The Act, which had previously established the National Parks and Wildlife Service (NPWS) and transferred areas administered by the Park Trusts to NPWS, through the 1969 amendments identified and defined Aboriginal relics that existed on national parks, and certain other lands, as being the property of the Crown. It also became an offence under the Act to knowingly disturb, damage or destroy those relics without the prior consent of the Director General of NPWS. The amendments also established the Aboriginal Relics Committee.

Between 1967 and 1974 a broad range of other amendments were made to the Act. This series of amendments was consolidated into the National Parks and Wildlife Act 1974. As part of this consolidation process, and following on from the clear need established under the Aboriginal Sites of Significance Survey (1973–1983), the 1974 Act included a provision for the declaration of Aboriginal Places. Further amendments to the Act that occurred in later years are listed below:

2. **1996** – Provided for the Aboriginal ownership and joint management of national parks (explained in Information sheet:1996 – Aboriginal ownership and management of national parks).
3. **2001** – Included the redefining of Aboriginal relics as Aboriginal objects, and the reconstitution of the membership of the Aboriginal Cultural Heritage Advisory Committee.
4. **2010** – Strengthened provisions for the protection of Aboriginal objects and Aboriginal Places by introducing new offences, providing limited defences against prosecution, increasing penalties, creating clear and flexible permits, allowing for the issue of remediation orders, etc (explained in Information sheet: 2010 – Aboriginal heritage amendments to the National Parks and Wildlife Act 1974).

Although the National Parks and Wildlife Act has been progressively amended throughout the years the substantive Aboriginal heritage provisions of the Act remain as they were originally introduced and intended, and are as follows:

**Aboriginal object** means 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.

**Aboriginal Place** may be declared over any area of land in NSW if the Minister considers that the area is or was of special significance with respect to Aboriginal culture.

**Offences** – Under the 2010 amendments to the Act, it is an offence to ‘harm’ or ‘desecrate’ an Aboriginal object or a declared Aboriginal Place. Harm means any act or omission that destroys, defaces, damages or moves the object or destroys, defaces or damages an Aboriginal place. Harm also includes any acts which cause or permit the harm. The new offences replace the previous single offence. See separate information sheet for further detail.

**Sources:** National Parks and Wildlife Act 1974
Office of Environment and Heritage website: www.environment.nsw.gov.au
The amendments to the NSW National Parks and Wildlife Act in 1969 formally established the **Aboriginal Relics Advisory Committee** whose role was to advise and report to the Director General of the National Parks and Wildlife Service (NPWS) and the Minister on matters relating to the conservation, excavation, removal and custody of relics. The committee was made up of representatives from the NPWS, the Australian Museum, the National Trust, the Anthropological Society of NSW, the Mines Department, a NSW university, and two members appointed by the Minister. The committee strongly advocated for funds to undertake surveys of Aboriginal sites of significance and was successful in securing Commonwealth funding for the Aboriginal Sites of Significance Survey in NSW, which commenced in 1973.

In the lead up to the 1974 amendments to the National Parks and Wildlife Act, the Relics Committee had sought statutory Aboriginal representation on the committee. In response to not securing this representation the members of the Relics Committee voluntarily disbanded in 1979 to make way for the **Interim Aboriginal Sites Committee** (IASC) in late 1980. IASC was made up of eight Aboriginal representatives from different regions of NSW, an Aboriginal member nominated by the Minister, three archaeologists, one member each from the Australian Museum and NPWS, and an anthropologist. At this time the Interim Committee met monthly and considered all research proposals, applications for impacts and disturbance to Aboriginal sites, as well as providing advice on Aboriginal heritage policy and programs.


ACHIAC was first established in 1993 with a term of office of three years. The committee comprised six representatives nominated by the NSW Aboriginal Land Council, a nominee of the Nature Conservation Council, a nominee of NPWS, and a nominee of the Minister. The role of the Committee was to provide advice to the Director General of the NPWS and/or the Minister for the Environment on any matter relating to the preservation, control of excavation, removal and custody of relics and Aboriginal places whether or not the matter is referred to the Committee by the Minister or the Director General.

Throughout its term of appointment from January 1993 to January 1996, ACHIAC met regularly to discuss a range of issues and provide advice directly to the Minister and the Director General. A key focus of the committee’s advice during its period of appointment was advocating and promoting action on the advancement of the preferred option of the former Ministerial Task Force on Aboriginal Heritage and Culture.

This advocacy led to the formation of the Aboriginal Cultural Heritage Working Party which developed a Discussion Paper (1995) and Draft Green Paper (1996) on the subject of the reform of Aboriginal heritage legislation for NSW.

With the expiry of the Interim Committee’s term of office, the committee was not reconstituted until the **National Parks and Wildlife Act 1974** was further amended in 2001 to allow for changes to the membership and the establishment of a permanent Committee known as the **Aboriginal Cultural Heritage Advisory Committee** (ACHAC).

The statutory role of ACHAC is to advise the Minister and the Director General on any matter relating to the identification, assessment and management of Aboriginal cultural heritage, including providing strategic advice on the plan of management and the heritage impact permit process, whether or not the matter has been referred to the Committee by the Minister or the Director General.
ACHAC consists of 11 members appointed by the Minister, for a term of up to 3 years, and includes one member nominated by the NSW Aboriginal Land Council and 10 other members appointed from nominees of Aboriginal elders groups, registered native title claimants, and Aboriginal owners listed on the register under the *Aboriginal Land Rights Act 1983*. The members of the ACHAC are to be persons who are involved in cultural heritage matters in their local communities, and have an understanding of cultural heritage management issues. The Minister is to ensure that there are at least 5 male and 5 female members on the committee, and as far as is reasonably practicable, the members should come from a range of cultural areas across NSW.

Since its inaugural meeting in 2003, ACHAC has met periodically and over that time the membership of the committee has changed according to the three-year terms of appointment. During this period some membership continuity has been achieved by having appointments made for varying terms of office of individual members. In early March 2010 the term of office of the current committee commenced.

ACHAC is not a decision-making body.

The 2010 cultural heritage amendments to the *National Parks and Wildlife Act 1974*, provide that the members of ACHAC must be Aboriginal and that the Director General of the Department of Premier and Cabinet sits on the committee as a non-voting member. Representatives from Native Title Services Corporation and the NSW Heritage Council have been added to the membership.

To date ACHAC has provided advice to the Minister and Director General on:

- programs to increase Aboriginal participation in the management of Country, national parks, conservation reserves, botanic gardens, and co-management areas
- plan of management processes for national parks, marine parks, other conservation reserves and botanic gardens
- Aboriginal cultural heritage identification, assessment and protection methodologies and tools
- Aboriginal heritage impact processes
- policies, programs and research to ensure that the approach used by the Office of Environment and Heritage, Department of Premier and Cabinet (OEH) to environmental and Aboriginal cultural heritage conservation and management responds to Aboriginal community concerns and aspirations
- communication between OEH and Aboriginal communities on Aboriginal cultural heritage management matters
- legislative amendments and review of legislation as it relates to Aboriginal cultural heritage.

**Sources:** *National Parks and Wildlife Act 1974*
Office of Environment and Heritage website: www.environment.nsw.gov.au
In the late 1960s and early 1970s Australian society's broader understanding of Aboriginal culture and heritage was limited. This limited understanding was reflected in the legislation of the time which focused on protecting Aboriginal 'relics' and regulating destructive research. There were no provisions in the legislation for Aboriginal involvement at any level.

In the context of this broader limited understanding within the Australian mindset, the Australian Institute of Aboriginal Studies (AIAS), in the early 1970s, secured Australian Government funding to conduct a national survey of Aboriginal ‘sacred’ sites throughout the country. The Aboriginal Relics Committee established under the NSW National Parks and Wildlife Act received funding to conduct an *Aboriginal Sites of Significance Survey* in NSW. This funding lasted for a period of 5 years.

The Sites of Significance Survey commenced in the early 1970s when the National Parks and Wildlife Service (NPWS) employed an anthropologist (Howard Creamer) and an Aboriginal research officer (Ray Kelly). The survey continued through to the early to mid-1980s where the period of its greatest research output was concluding. This also coincided with the redirection of Aboriginal heritage activity within NPWS towards the archaeological survey work requirements of environmental impact statements needed for the development approval processes of the Environmental Planning and Assessment Act.

The outcomes of the *Aboriginal Sites of Significance Survey* were profound and included the:

- pioneering process of site recording and assessment in NSW that recognised cultural continuity through stories and landscape, and contributed to a cultural revival within Aboriginal communities throughout the 1970s and 1980s that continues to inform Aboriginal cultural heritage work today
- recording and investigation of hundreds of stories and places that are of significance to Aboriginal peoples throughout the state and thereby establishing a broader cultural base for the Aboriginal Sites Register (now the Aboriginal Heritage Information Management System) to expand from being a database of archaeological records to a database which accommodated a diversity of site and place based recording, to store and protect culturally sensitive information
- establishment of the clear need for the broader recognition of Aboriginal cultural values in the landscape which resulted in the amendments to the Act to allow the declaration of Aboriginal Places as areas that are or were of *special significance to Aboriginal culture*.
- commencement of Aboriginal employment within the then NPWS. Throughout the life of the survey 9 Aboriginal people were employed as researchers and Aboriginal sites officers as part of the project team. In 2011 the Office of Environment and Heritage (which includes NPWS) has in excess of 300 Aboriginal staff.

*Source:* *Revival, renewal & return: Ray Kelly & the NSW Sites of Significance Survey*, 2005, Department of Environment and Conservation NSW
The *Heritage Act 1977* protects the state’s natural and cultural heritage. Aboriginal places or objects that are recognised as having a high cultural value are listed on the State Heritage Register. The register lists a diverse range of heritage items including: Aboriginal places and objects, buildings, monuments, gardens, bridges, natural landscapes, archaeological sites, shipwrecks, relics, industrial sites, streets, and precincts.

By listing Aboriginal places of high cultural value on the State Heritage Register, communities can preserve and protect their most special places. The main reason for listing a place in the register is to recognise the importance of these places and to protect them for future generations.

Listing on the State Heritage Register brings the following benefits:

- communities can have a hands-on role in caring for their heritage. It means that people can have a say about how special places are cared for
- it provides a framework for community-driven management so that communities can be involved in making decisions about conservation and management
- it protects the item by requiring the local council to consider the effect of any proposed development in the area surrounding the item
- it means eligibility for grants and funding through the Heritage Incentives Program.
- it recognises the significance of Aboriginal culture and heritage to NSW
- it raises awareness and promotes Aboriginal natural and cultural heritage in NSW.

The Heritage Branch, a Division of the Department of Planning, administers the *Heritage Act 1977* and is working with Aboriginal communities to increase the number of items on the State Heritage Register that are significant to Aboriginal people.

The Aboriginal Heritage Advisory Panel provides advice on managing and conserving heritage places that are important to Aboriginal communities. A key role is providing advice to the Heritage Council on Aboriginal issues from a regional and community perspective. The panel can also recommend grants through the Heritage Incentives Program to Aboriginal organisations or community groups throughout NSW to help them identify, conserve or promote Aboriginal Heritage in NSW.

**Difference between the State Heritage Register and the Aboriginal Heritage Information Management System Register**

The State Heritage Register protects particular places and items that the community has formally recognised as being of high cultural value. The Aboriginal Heritage Information Management System (AHIMS) is administered by the Office of Environment and Heritage, Department of Premier and Cabinet (OEH). Under s. 85 of the *National Parks and Wildlife Act 1974* (NPW Act), the Director General of the Department of Premier and Cabinet is the authority responsible for the protection and preservation of all Aboriginal places and objects in NSW. The State Heritage Register provides an extra layer of protection beyond that provided by OEH registers, as it protects against any damage or destruction to ‘significant heritage places’. The State Heritage Register should not be confused with AHIMS.

The Aboriginal heritage of NSW is irreplaceable. There are heavy penalties for offences under the NSW Heritage Act.

**Sources:**
*Heritage Act 1977*
*National Parks and Wildlife Act 1974*
Over the long weekend of October 1977, and coinciding with the annual football knockout, over 200 Aboriginal community representatives attended a three-day conference at the Black Theatre in Redfern to discuss land rights. A non-statutory NSW Aboriginal Land Council was established at the conference as a specialist Aboriginal lobby group on land rights.

The following demands of the Aboriginal Land Council were adopted at the Land Rights Conference, 1–3 October 1977 at the Black Theatre, Redfern.

1. We demand that all Aboriginal land at present held by the NSW Aboriginal Land Trust be transferred immediately to the NSW Aboriginal Land Council until such times as the deeds and title can be handed back to the local Aboriginal community in perpetuity.
2. We demand that the title to all sacred sites now gazetted and those in future claims by Aborigines be deeded in perpetuity to the NSW Aboriginal Land Council.
3. We further demand that the National Parks and Wildlife Department act immediately to transfer all titles and management of sacred sites to the NSW Aboriginal Land Council. We further demand that funds presently used by these bodies be directed immediately to the NSW Aboriginal Land Council to carry out effective administration.
4. We demand title to all areas of traditional and sacred significance. These areas to be determined by claims by local Aboriginal communities.
5. We demand an immediate freeze on all Crown land in New South Wales until all claims can be researched in advance by Aboriginal communities.
6. We demand a land base adequate to meet Aboriginals’ social, cultural and economic needs be restored to the Aboriginal people from the existing Crown land. We demand that all rights to mineral and natural resources be inalienably retained in the ownership title. We demand that, for the loss of the rest of this land and for continued social deprivation that a significant compensation fund be set up. We demand that the present Budget allocation for Aboriginals be taken out of the political arena and be free from cutbacks and alterations at the whims of government, in order to develop Aboriginal aims.
7. This NSW Aboriginal Land Council will make every effort to talk to and work with all Aboriginal communities to assert just rights and aims. We will work to ensure that every Aboriginal group and community has a fair and just representation on the NSW Aboriginal Land Council.
8. That Kooris have the right to visit sacred and important places to camp, collect wood, to hunt and fish anywhere freely.

NSWALC also took the resolutions from the October land rights conference to the then Premier and were successful the following year in having the ALP State Conference adopt a new policy in line with the resolutions from the Black Theatre Conference.

**Sources:** NSW Aboriginal Land Council website: www.alc.org.au
Unpublished work of Heather Goodall and Kevin Cook.
Although first legislated in 1975, amendments to the Environmental Planning and Assessment Act in 1979 introduced new requirements for the preparation of environmental impact statements (EIS) before development occurred. This changed the nature of the work being conducted within NPWS at that time, from a focus on recording placed-based stories with knowledgeable Aboriginal people, to a focus on archaeological site recording, survey work and impact assessment.

The Environmental Planning and Assessment Act 1979 (EP&A Act) is administered by the NSW Department of Planning and provides planning controls and requirements for environmental assessment in the development approval process. It also establishes the framework for Aboriginal heritage values to be formally assessed in land-use planning and development consent processes. Under this Act, the definition of ‘environment’ is broad and could include cultural heritage. The EP&A Act, as it relates to Aboriginal cultural heritage, is summarised below.

**Part 3** of the EP&A Act establishes two types of environmental planning instruments that are legally binding for both government and developers:

1. **State Environmental Planning Policies (SEPPs)** – deal with issues significant to the state and people of NSW. They are made by the Governor. There are currently no SEPPs that relate specifically to the protection of Aboriginal cultural heritage.

2. **Local Environmental Plans (LEPs)** – are prepared by local councils and approved by the Minister for Planning. LEPs may relate to the whole or part of the local government area. LEPs divide the local area they cover into ‘zones’ (such as residential, industrial, commercial 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. Councils must use a Standard LEP Template when developing their LEPs. A compulsory clause is included in the Standard LEP Template for heritage conservation, specifically for the conservation of places of Aboriginal heritage significance. This compulsory clause mandates that development consent is required for disturbing or excavating a heritage conservation area that is a place of Aboriginal heritage significance.

Development Control Plans (DCPs) prepared and approved by local councils are also used to help achieve the objectives of the LEP by providing specific, comprehensive requirements for certain types of development or locations (e.g. for heritage precincts).

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.

**Part 4** of the EP&A Act deals with developments that require development consent from a local council or the Minister for Planning. Types of developments include ‘complying’, ‘designated’, ‘integrated’, ‘other local’, ‘exempt development’ and ‘other development not requiring consent’.
**Complying development** is routine development that is certified in accordance with specified, predetermined development standards and is approved by a complying development certificate. It can be certified by either a local council or an accredited certifier. However, if Aboriginal objects are identified (e.g. through an AHIMS search, survey work or cultural knowledge) or the proponent/landholder otherwise knows about Aboriginal objects on their land that might be affected, an AHIP may still be required to cause harm to those objects.

**Designated developments** are generally developments with high environmental impact and are listed in Schedule 3 of the Environmental Planning and Assessment Regulation 2000. Designated development includes industries that have a high potential to pollute, large-scale developments or developments that are located near sensitive environmental areas, such as wetlands. If a proposal is designated development, an environmental impact statement (EIS) will need to accompany the development application. If the need for an s.90 AHIP is known before the development application is made, or the development is on land declared as an Aboriginal place, the development will also be assessed as an integrated development.

**Integrated development** is development that requires consent, but also requires other approvals as identified in s.91(1) of the EP&A Act (e.g. AHIP under s.90 of the NPW Act). If the development is also designated, an EIS must be prepared. Otherwise a statement of environmental effects (SEE) must accompany the application.

If a Part 4 development proposal triggers the need for an AHIP under the *National Parks and Wildlife Act 1974* (i.e. the proposal is likely to harm an Aboriginal object / place), the proposal will be assessed as an integrated development. However, this is only the case where the Aboriginal object is known to exist on the land, or the land is a declared Aboriginal Place, at the time that the development application is made. In such situations, the Director General of the Department of Premier and Cabinet is the approval body and must provide ‘general terms of approval’ to the consent authority and any development consent must be consistent with those terms. The applicant must seek approval within three years of the date of development consent. The approval body must grant an approval that is consistent with the development consent.

If an Aboriginal object is discovered after the development application is made, the development will not necessarily be assessed as an integrated development. This means that the applicant must apply for an AHIP, or the applicant may choose to resubmit the development application.

**Other local development** is a development requiring consent that is not complying, designated or integrated. The development application may need to be accompanied by a SEE depending on the likely environmental impacts of the development.

A proposed development may be considered as an ‘**exempt development**’ or ‘**general development not requiring consent**’ if it only has a minimal impact on the local environment (for example small fences, barbecues and pergolas) and is classified as such in the relevant LEP or SEPP. However, if Aboriginal objects are identified (e.g. through an AHIMS search, survey work or cultural knowledge) or the proponent/landholder otherwise knows about Aboriginal objects on their land that might be affected, an AHIP may still be required and the proponent/landholder must apply separately to the Office of Environment and Heritage to cause harm to those objects.

Part 5 of the EP&A Act deals with **activities** that do not require development consent, such as for the construction of roads or electricity infrastructure. This only applies if there is a public authority carrying out the activity or a public authority approving the activity under other legislation. The Minister or public authority responsible for deciding whether to proceed with an activity is called the ‘determining authority’. There may be more than one determining authority. If an AHIP is required, the Director General of the Department of Premier and Cabinet will be the determining authority.
Where Part 5 applies, there is a two step assessment process. First the determining authority must take into account to the fullest extent possible all matters affecting or likely to affect the environment. This is usually referred to as the review of environmental factors. If the determining authority finds that the activity is likely to significantly affect the environment, an EIS must be prepared and publicly exhibited.

Source:  Department of Planning and Infrastructure website: www.planning.nsw.gov.au
1980 First Report of the Select Committee of the Legislative Assembly upon Aborigines

The policy changes and the claims arising from the 1977 Black Theatre Conference influenced the NSW Government to establish a Select Committee of the Legislative Assembly upon Aborigines in November 1978.

The Select Committee was chaired by the then Member for Woronora, Maurice Keane, and its Terms of Reference required the Committee to inquire into, and make recommendations about:

- the causes of the socio-economic disadvantages of Aboriginal people, particularly in the areas of housing, health, education, employment, welfare and cultural issues
- the effectiveness of Commonwealth/State arrangements in Aboriginal Affairs
- land rights for Aboriginal people in NSW.

The Committee focused on land rights as a priority and was assisted in its work by an Aboriginal Taskforce established to maintain close contact with Aboriginal communities during the course of the inquiry through liaison, facilitating field trips, and community meetings. It released its first report in August 1980 which dealt with land rights and the protection of sacred and significant sites.

In August 1980, the Parliament of New South Wales published the First Report from the Select Committee of the Legislative Assembly upon Aborigines entitled, Aboriginal Land Rights and Sacred and Significant Sites. Throughout the period of November 1978 to August 1980 the Select Committee met on 81 occasions, received written submissions from 55 individuals, 5 local government bodies and 57 other organisations. The Select Committee also interviewed 145 witnesses. The Committee’s First Report made a number of recommendations, including that:

- the New South Wales Parliament accept that Aboriginal people are entitled to recognition of their sacred and significant sites
- where an Aboriginal community council identifies a site as sacred or significant that shall be prima facie evidence of that fact unless otherwise determined by the Aboriginal Land and Compensation Tribunal
- Aboriginal community councils, where practicable, have responsibility for protection, maintenance and general management of sacred sites and sites of significance
- an Aboriginal Heritage Commission be established as a statutory body to consist of Aboriginal persons elected or appointed by the Aborigines of NSW
- the legislation establishing the Aboriginal Heritage Commission shall:
  i. acknowledge the cultural revival occurring throughout Aboriginal Australia, particularly as it affects NSW
  ii. ensure that the people with the responsibility for sites have complete control of those sites
  iii. provide that persons who have no right to enter sacred sites or sites of significance are prevented from so doing without permission from the controlling body
  iv. provide that where other interests are involved in or around places having significance to Aborigines, there be close consultation between those interests, the Aboriginal Heritage Commission and the organisation in control of the site
  v. provide that where land, claimed by the Aboriginal people to be sacred or significant becomes the subject of a development proposal, such a proposal shall be suspended immediately on an Aboriginal Regional Land Council claim being lodged with the Aboriginal Land and Compensation Tribunal on behalf of the Aborigines concerned. The development proposals may not proceed while such claims are being determined by the Tribunal; pending introduction of the recommended appropriate legislation, the government should take all necessary measures to prevent, within appropriate time limits, development of land regarded as sacred or significant by the Aboriginal people.
• title to sacred sites and sites of significance be vested in the local Aboriginal community council, but if there be no council able or willing to hold the title, such title be vested in the Aboriginal Heritage Commission
• the purchase, acquisition by agreement, or recommendation for acquisition by resumption, or in respect of, any site be made by the Aboriginal Heritage Commission - acquisition by resumption be made in accordance with the Public Works Act 1912
• land acquired pursuant to section 145 of the National Parks and Wildlife Act 1974, be transferred to Aboriginal community councils on the recommendation of the Commission or to the Aboriginal Heritage Commission
• the Governor be empowered to resume sites (and where necessary easements for access) located on privately owned land, for the purpose of transferring those sites and easements to the Aboriginal community councils or the Aboriginal Heritage Commission
• title to site comprise an estate in fee simple, restricted by a provision to preclude sale, mortgage, lease or commercial development other than as a tourist attraction.

The First Report of the Select Committee dealt only with land rights and sacred and significant sites. The overall response of the government to the Committee’s report was that the NSW Aboriginal Land Rights Act 1983 was enacted. In introducing the Aboriginal Land Rights Act, the then Minister for Aboriginal Affairs, the Hon Frank Walker MP, committed the Government to a review of heritage legislation to accommodate Aboriginal demands for control of sites.

The Select Committee’s recommendation that ‘the establishment of an Aboriginal Heritage Commission will acknowledge the great importance of Aboriginal culture in the State of New South Wales and provide the means whereby the Aboriginal people will have the care, control and management of their sacred and significant sites’ still has not been actioned by the government.

Sources: First Report from the Select Committee of the Legislative Assembly upon Aborigines, Aboriginal Land Rights and Sacred and Significant Sites. Parliament of New South Wales, 1980
NSW Aboriginal Land Council Research Library
Following the release of the First Report in August 1980, which dealt with land rights and the protection of sacred and significant sites, the Second Report of the Select Committee was released in 1981. The Second Report focused on the causes of the socio-economic disadvantages of Aboriginal people, particularly in the areas of housing, health, education, employment, welfare and cultural issues; and the effectiveness of Commonwealth and state arrangements in Aboriginal affairs.

Although having a greater focus on the socio-economic disadvantage of Aboriginal peoples in NSW, the Second Report also provided further information on what an Aboriginal Heritage Commission should control; particularly addressing the important issue of Aboriginal human remains and allowing researchers access to sites and objects of significance. The Second Report goes on to support the recommendations of the First Report, and quotes then Director of Cultural Activities in the Premier’s Department, saying that the control of material Aboriginal culture should be in the hands of the Aborigines.

It goes further, in recommending that Aboriginal artefacts, as well as significant sites be placed under the control of an Aboriginal Heritage Commission. In reference to the recommendation of an Aboriginal Heritage Commission, the report suggests that:

1. an Aboriginal Heritage Commission act as an overseeing body that will mediate with organisations and individuals on behalf of the Aboriginal community councils
2. funding be allocated to Aboriginal community councils through the overarching Aboriginal Heritage Commission for the protection and maintenance of those sites and artefacts
3. the Commission be the body for consultation for skeletal remains, excavation and repatriation
4. the Commission should establish guidelines as to how research can be undertaken and the responsibilities of researchers in areas of Aboriginal community council concern
5. the Commission should intervene to protect the interests of local community councils, and have the power to arbitrate
6. the Commission be the body to organise and maintain a centralised archive of Aboriginal cultural relevance.

The suggestions and recommendations from both the First and Second reports of the Select Committee regarding management and protection of Aboriginal cultural heritage through the establishment of an Aboriginal Heritage Commission have yet to be implemented.

NSW Aboriginal Land Council Research Library
Aboriginal heritage legislation in NSW

In 1976 the Northern Territory Aboriginal Land Rights Act was passed by the Australian Government and provided for the establishment and funding of land councils in the Northern Territory and a mechanism, based on traditional connections, to claim certain lands on behalf of Aboriginal people through either the Northern or Central Land councils established under the Act.

After a long campaign conducted by Aboriginal peoples of NSW, the Aboriginal Land Rights Act 1983, was enacted by the NSW Parliament following the First Report of the Select Committee of the Legislative Assembly upon Aborigines (1980). That Committee had conducted an inquiry into the aspirations and rights of Aboriginal people in NSW, particularly in relation to land and culture. The legislation’s focus, as it was finally enacted, was on compensation for the dispossession of Aboriginal people in NSW since colonisation. In acknowledging this fact the preamble to the Act states:

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

The Act, which reflected most of the key recommendations from the Committee’s Report, was proclaimed on 10 June 1983 following passage of the legislation through the Parliament. The NSW Aboriginal Land Council (NSWALC) was formally constituted as a statutory corporation under the Act, and first met as an incorporated body in February 1984. Under the original Act each local Aboriginal land council (LALC) appointed two representatives to the Regional Aboriginal Land Council (RALC). Each RALC then nominated one representative to form NSWALC’s Governing Council.

The Act has been under constant review and amendment since first enacted in 1983. Changes to the legislation in 1990 allowed LALCs to dispose of (i.e. sell, mortgage or exchange) their land under certain circumstances. These changes also have resulted in a focus on the commercial development of land assets since then. The 1990 amendments also made substantial changes to the process for electing NSWALC councillors. The amendments introduced the current system of popular elections with each councillor for each of 13 regional areas elected by the members of LALCs within that area for a period of four years. NSWALC councillor positions became full-time and salaried at that time.

In December 2006, the thirteen regional Aboriginal land councils were abolished in a series of amendments to the Act. Those amendments introduced a two tier land council system, comprising NSWALC and LALCs. They also reduced the number of NSWALC regional councillors from thirteen to nine and made fundamental changes to the structure and governance of local Aboriginal land councils. The current nine-member council was first elected under this new governance model in May 2007.

The provisions of the current legislation and the functions of NSWALC bear little resemblance to those in the original Act although the core principles of the Act, as a compensatory scheme for dispossession of land, remain. Land rights remain the core business of NSWALC and the LALC network.

The core business of the Land Council system in NSW also includes functions relating to Aboriginal culture and heritage as follows:

NSWALC’s functions in relation to Aboriginal culture and heritage as stated in s. 106 (7) of the Aboriginal Land Rights Act 1983 are:
a. to take action to protect the culture and heritage of Aboriginal persons in New South Wales, subject to any other law,

b. to promote awareness in the community of the culture and heritage of Aboriginal persons in New South Wales.

LALCs also have similar functions under Section 52 (4) of the Aboriginal Land Rights Act with regard to Aboriginal cultural heritage in their local land council area. They are:

a. to take action to protect the culture and heritage of Aboriginal persons in the Council’s area, subject to any other law,

b. to promote awareness in the community of the culture and heritage of Aboriginal persons in the Council’s area.

The land council network, since its inception, has been actively involved in promoting awareness of Aboriginal culture and heritage issues in NSW, as well as a variety of actions aimed at protecting Aboriginal culture and heritage and associated values.

In 1985 the NSWALC initiated the state’s first community based formal training program for Aboriginal Sites identification and protection. This program was jointly funded by the NSWALC and the Australian Government and was delivered through the Tranby Aboriginal College in Sydney. Over a 2-year period 26 Aboriginal sites officers (two from each regional land council) were trained and given practical experience in Aboriginal site recording and protection. This program equipped the land councils with trained staff to undertake site identification, recording, and protection works in each land council region.

The advent of the land rights system in NSW has allowed the accumulation of substantial assets and land by Aboriginal communities, and the growth of a sophisticated and unique Aboriginal political system. It has also led to financial independence from government. The land tax payments to NSWALC, which flowed into a Statutory Investment Fund, stopped in December 1998. The capital or compensation accumulated over the first 15 years of the Council’s existence stood at $281 million when the sunset clause on those payments came into effect. The land rights system has been self-funding since 1998. The system is currently funded through interest generated from the Statutory Investment Fund.

The granting of claims now remains the sole form of compensation for dispossession of land which is available under the Aboriginal Land Rights Act 1983. More than 20,000 land claims have been lodged since the enactment of the Act, with more than half still awaiting determination by the Minister for Lands. More than five thousand have been refused and about a third of all claims granted. This has resulted in approximately 182,000 hectares of land being held in freehold ownership by Aboriginal land councils in NSW.

Land council ownership of land is generally in the form of freehold title, and includes ownership of minerals (except for the Crown minerals of gold, coal, oil and petroleum) and the natural resources existent on the lands. Lands owned by Aboriginal land councils are also subject to the broader laws of the state which govern private land and resource use.

Sources: NSW Aboriginal Land Rights Act 1983
NSW Aboriginal Land Council website: www.alc.org.au
NSW Aboriginal Land Council Research Library
The primary Commonwealth legislation for the protection of Aboriginal heritage is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act).

If it appears that state or territory laws have not provided effective protection for traditionally important artefacts and objects that are under threat, the ATSIHP Act enables the Australian Government to respond to requests to protect these areas or objects. The government can make special orders, called declarations, to protect significant Aboriginal areas, objects and classes of objects from threats of injury or desecration. However, the government cannot make a declaration unless an Aboriginal or Torres Strait Islander person (or a person representing an Aboriginal or Torres Strait Islander person) has requested it, and has provided satisfactory evidence of a body of traditions, customs, observances and beliefs that explains, firstly, why there is a threat of injury or desecration and, secondly, why the area, object or class of objects is of particular significance to Aboriginal or Torres Strait Islander people. The power to make declarations is meant to be used as a last resort, after the relevant processes of the state or territory have been exhausted.

Unlike most state and territory legislation, the ATSIHP Act is not designed to protect areas and objects of scientific or historical interest, such as rock art, archaeological sites or areas of past Aboriginal occupation. Areas and objects can only be protected under the ATSIHP Act if they are of particular significance to living Aboriginal people in accordance with Aboriginal traditions.

Similarly, the Act cannot be used for protecting wildlife, biodiversity as natural heritage, contemporary art that has no particular significance based on Aboriginal tradition, or intangible heritage such as intellectual property and language.

**Relationship to state and territory heritage laws**

The ATSIHP Act can override state and territory laws in situations where a state or territory has approved an activity, and the Australian Government Minister prevents the activity from occurring by making a declaration to protect an area or object. For example, a declaration can stop a development that has been approved or any other activity that has been approved under a state or territory law. The Minister can only make a decision after receiving a legally valid application under the ATSIHP Act and, in the case of long-term protection, after considering a report. Before making a declaration to protect an area or object in a state or territory, the Minister must consult the appropriate state or territory minister.

The ATSIHP Act was meant to encourage the states and territories to use their existing laws in the interests of Indigenous Australians and, where those laws were inadequate, to change them. Also, the ATSIHP Act was meant to provide a last resort for Indigenous Australians to seek protection of their traditional areas and objects, if there is no effective protection of the areas or objects under the laws of their state or territory. These purposes are not stated in the ATSIHP Act, but were stated in the 1984 second reading speech when the Act was introduced.

**Relationship to other Commonwealth heritage laws**

Other Commonwealth heritage legislation, enacted after the ATSIHP Act, can be used to protect traditional areas and objects. These include:

1. The *Protection of Movable Cultural Heritage Act 1986* (the PMCH Act) is the principal Commonwealth legislation for protecting heritage objects, including Indigenous heritage objects, from being exported illegally. The PMCH Act prohibits the export of prescribed Indigenous objects, such as sacred objects and human remains, bark and log coffins used as traditional burial objects, rock art, and carved trees (dendrogyphs). The power in the ATSIHP Act to protect objects cannot be used to override export permits granted under the PMCH Act.
2. The **Environment Protection and Biodiversity Conservation Act 1999** (the EPBC Act) is the principal Commonwealth legislation for providing comprehensive protection for Indigenous heritage places of national significance. The EPBC Act protects matters of national environmental significance. Since 2003, it has protected places that are on the National Heritage List and the Commonwealth Heritage List. These include places that have Indigenous heritage values, including some traditional areas.

**Relationship to native title and land rights legislation**

In many parts of Australia, Indigenous Australians are seeking or have gained formal legal recognition of their traditional entitlements to be the custodians of their land, which is often expressed as their ‘right to speak for Country’. This legal recognition happens under the Commonwealth **Native Title Act 1993** and under land rights legislation applicable in some states and territories. The second reading **Introduction to the Aboriginal and Torres Strait Islander Heritage Protection Act** speech stated that the ATSIHP Act is ‘not intended to be an alternative to land claim procedures’ and is ‘not meant to close off huge areas’.

It is possible for a person to make an application under the ATSIHP Act to protect an area that is on Aboriginal land or on land that is subject to native title claims or determinations. In this situation:

- the applicant does not have to be a traditional owner of the land, or a native title holder or claimant
- it is not necessary for the purposes of the ATSIHP Act to resolve whether the applicant, or other Aboriginal persons who make comments on an application, are traditional owners of the land, or native title holders or claimants
- declarations made under the ATSIHP Act can override Indigenous land-use agreements or other agreements that are based on native title or land rights.

**Reviews**

In the years since its enactment in 1984, there have been a number of applications made under the ATSIHP Act to protect important areas and objects under threat where state laws have been inadequate or unable to afford appropriate protection. In some instances where the Minister has made declarations under the Act these declarations have been challenged and overturned in the Courts. The purpose and effect of the Act has been significantly negated by such outcomes. As a consequence the Act has been progressively amended to accommodate these court decisions where possible.

The effectiveness of the Act was comprehensively reviewed during the mid-1990s by Justice Elizabeth Evatt, and a number of recommendations were forthcoming from that review.

In 2009, the Australian Government commenced a further review of the ATSIHP Act. This review was prompted by the fact that the Act was not meeting its intended purpose. Over 93 per cent of valid applications did not result in declarations being made. Submissions were made by the NSW Government, NSW Aboriginal Land Council, and NTSCORP to this review process. As of September 2010, the review process of the ATSIHP Act was still ongoing.

**Sources:**
- Aboriginal and Torres Strait Islander Heritage Protection Act 1984
- Protection of Movable Cultural Heritage Act 1986
- Environment Protection and Biodiversity Conservation Act 1999
- Introduction to the Aboriginal and Torres Strait Islander Heritage Protection Act – Heritage Division, Department of Sustainability, Environment, Water, Population and Communities 2010
- NSW Aboriginal Land Council website: www.alc.org.au
- NTSCORP website: www.ntscorp.com.au
In introducing the *Aboriginal Land Rights Act 1983*, the then Minister for Aboriginal Affairs committed the Government to a review of heritage legislation to accommodate Aboriginal demands for control of sites. On 27 January 1988, in response to this commitment to review heritage legislation, the then Minister for Planning and the Environment, and the then Minister for Aboriginal Affairs jointly established the New South Wales Ministerial Task Force on Aboriginal Heritage and Culture. The purpose of the Task Force was to:

- review existing legislative provisions and administrative systems effecting the protection and management of Aboriginal heritage
- identify the major principles of Aboriginal heritage protection which should be specifically addressed by legislation
- develop a range of options for the future management of Aboriginal heritage and consult widely within the Aboriginal communities on those options
- prepare a recommendation on a preferred option for Government consideration accompanied by an implementation strategy
- recommend a public relations/education strategy to increase public awareness of the value of Aboriginal heritage.

Throughout 1988–89 the Task Force met regularly and conducted extensive consultations at 101 local, and 23 regional Aboriginal community locations throughout the state, as well as considering 18 formal submissions made by various organisations and government agencies.

Following these consultations the Task Force published *The Report of the New South Wales Ministerial Task Force on Aboriginal Heritage and Culture 1989*, which recommended that:

1. new legislation for the protection and management of Aboriginal heritage and culture in New South Wales be developed
2. this legislation be separate from existing legislation concerning protection and management of Aboriginal heritage and culture
3. this legislation be based on the following principles:
   i. acknowledgment of Aboriginal ownership of Aboriginal heritage and culture in NSW
   ii. local Aboriginal involvement in protection and management of heritage and culture in NSW
   iii. protection and management of all Aboriginal sites
   iv. protection and management of all Aboriginal heritage items
   v. protection and reburial of Aboriginal skeletal remains
   vi. imposition of penalties for offences
   vii. requirement to report Aboriginal sites, heritage items and skeletal remains
   viii. access to Aboriginal sites by Aboriginal people
   ix. hunting, fishing and gathering rights.
4. this legislation is administered within the portfolio of the Minister responsible for Aboriginal affairs in NSW

5. an Aboriginal Heritage Commission with adequate staff and other resources be elected to administer the legislation

6. a phasing-in period of five years is in place during which time an elected Aboriginal Advisory Committee works in association with the NSW National Parks and Wildlife Service to advise on matters relating to Aboriginal heritage and culture

7. an education and public awareness program be developed and implemented to inform Aboriginal and other people of their rights and responsibilities under the new legislation.

Sources: Report of the New South Wales Ministerial Task Force on Aboriginal Heritage and Culture 1989
NSW Aboriginal Land Council Research Library
NSW Aboriginal Land Council website: www.alc.org.au
The April 1991 Report of the Royal Commission into Aboriginal Deaths in Custody contained in excess of 330 recommendations of which recommendations 314 and 315 focused on aspects of Aboriginal culture and heritage, as follows:

**Recommendation 314** proposes that a process of consultation and negotiation should occur between the Government, developers and Aboriginal representatives to facilitate participation by Aboriginal peoples in the equity, management and employment associated with major mining and tourism development proposals.

**Recommendation 315** aims at protecting and preserving the ‘rights and interests of Aboriginal people with cultural, historical and traditional association with national parks’, by recommending the:

1. encouragement of joint management between identified and acknowledged representatives of Aboriginal people and the relevant state agency
2. involvement of Aboriginal people in the development of management plans for national parks
3. excision of areas of land within national parks for use by Aboriginal people as living areas
4. granting of access by Aboriginal people to national parks and nature reserves for subsistence hunting, fishing and the collection of material for cultural purposes (and amendment of legislation to enable this, where necessary)
5. facilitating the control of cultural heritage information by Aboriginal people
6. affirmative action policies which give preference to Aboriginal people in employment as administrators, rangers, and in other positions within national parks
7. the negotiation of lease-back arrangements which enable title to land on which national parks are situated to be transferred to Aboriginal owners, subject to the lease of the area to the relevant State or Commonwealth authority on payment of rent to the Aboriginal owners
8. the charging of admission fees for entrance to national parks by tourists
9. the reservation of areas of land within national parks to which Aboriginal people have access for ceremonial purposes
10. the establishment of mechanisms which enable relevant Aboriginal custodians to be in control of, protection of, and access to, sites of significance to them.

In NSW, a major outcome of the Royal Commission’s recommendation 315 was the 1996 amendments made to the *National Parks and Wildlife Act 1974* which resulted in a return of ownership of certain national parks to Aboriginal peoples under a joint management regime that ensured the ongoing management of the lands as national parks.

**Sources:** Report of the Royal Commission into Aboriginal Deaths in Custody, 1991
The NSW Mining Act 1992, along with a number of related Acts, governs and regulates mining activities such as mineral claims, exploration licences, mining licences, etc. In deciding whether or not to grant an authority (licence) or mineral claim, Section 237 of the Mining Act requires that the Minister or mining registrar take into account the need to conserve and protect:

(a) the flora, fauna, fish, fisheries and scenic attractions, and
(b) the features of Aboriginal, architectural, archaeological, historical or geological interest, in or on the land over which the authority or claim is sought.

The Minister or mining registrar may request that studies (including environmental impact studies) to be carried out, as the Minister or mining registrar considers necessary, to enable such a decision to be made.

Mining-related activities can be quite diverse in their nature and impact. Mining activities range from explorers walking across the ground to map the geology, to underground activities (whose impacts tend to concentrate on the pit head infrastructure and subsequent mine subsidence) and open cut mining (with extensive landscape scale impacts). For larger scale mining activities increased transport infrastructure and broad-scale environmental impacts can often result.

Mining has constituted one of the major impacts on Aboriginal heritage in NSW and mining proposals have been subject to some of the largest-scale Aboriginal heritage assessments carried out in the state. Many test and salvage excavations have also been carried out at mining sites. A significant number of Aboriginal people have been engaged (and employed) in contributing to heritage impact assessments and salvage works since the early 1980s. This work provides a significant stream of income for some Aboriginal community groups (including land councils) and has led to the development of a heritage skills base in these communities.

Responses to these impacts from mining activities have varied and range from the protection of heritage places outside areas of direct impact; the creation of Heritage Conservation Areas within the mining licence area; to placing areas of land containing Aboriginal heritage under Voluntary Conservation Agreements.

Many mining companies implement socio-economic programs with Aboriginal communities to build the capacity of local Aboriginal people to improve their skills and employment prospects. To raise awareness of Aboriginal cultural heritage, some mining operations also undertake cross-cultural training for their employees and contractors as part of their induction or ongoing development.

Late in 2005, the NSW Government amended the Environmental Planning and Assessment Act 1979 by introducing a new Part 3A to deal with major projects. Many mining projects were included as a ‘major projects’ under the terms of this amendment. Part 3A has now been repealed and is being replaced with processes for state significant development and infrastructure under Part 4. The most significant change will be that most state significant development applications will be determined by the Planning Assessment Commission.

Following the amendments to the National Parks and Wildlife Act in 2010, due diligence is required prior to many mining activities (except those which are subject to assessment or approval under the Environmental Planning and Assessment Act 1979). Guidance on due diligence is provided by the NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects. This Minerals Code has been based largely on the NSW Government Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales but includes specific guidance and examples for the mining industry (available from www.environment.nsw.gov.au).

Sources: NSW Mining Act 1992
Environmental Planning and Assessment Act 1979
Following the passage of the *Racial Discrimination Act 1975*, a series of legal challenges were conducted through the Australian court system seeking legal recognition of the rights and interests of Aboriginal peoples and Torres Strait Islanders, of their traditional laws and customs in relation to land and waters. In 1992 the High Court of Australia found that the common law of Australia recognised the rights and interests to land and waters of Aboriginal and Torres Strait Islander people under their traditional laws and customs (known as the Mabo decision). The recognition of these rights and interests is now known as Native Title.

The *Native Title Act 1993 (Cth)* is the primary legislation governing native title law in Australia. The 1998 amendments altered certain provisions of the Act; and introduced a new registration test with a higher threshold regarding the demonstration of continuous connection to the lands and attachment based on traditional law and custom. The amendments also introduced new provisions for the making of Indigenous Land Use Agreements. In NSW the *Native Title (New South Wales) Act 1994* was the first legislative response of the NSW Parliament to the *Mabo* decision and the Commonwealth’s native title legislation. The NSW native title legislation expresses the intention of NSW to participate in the national scheme and for NSW to validate its past acts that are invalid because of the existence of native title.

**Native title rights and interests**

 Native title is a *right or interest* over land or waters that may be owned, according to traditional laws and customs, by Aboriginal peoples and Torres Straight Islanders. Some examples of the types of rights or interests that may constitute native title, if found to exist, include the right to:

- possess, occupy, use and enjoy an area  
- be acknowledged as the traditional owners of an area  
- speak for and make decisions about the use and enjoyment of an area  
- reside upon and have access to an area  
- use and enjoy the resources of an area  
- maintain and protect areas of importance under traditional laws and customs  
- determine and regulate the membership of the group entitled to the land.

**Native title holder definition**

Australian law requires that to be formally recognised as a native title holder, native title must have been found to exist. Under section 224 of the *Native Title Act 1993 (Cth)*, a native title holder is defined as either:

- a prescribed body corporate registered on the National Native Title Register as holding the native title right and interests on trust, or  
- in any other case – the person or persons who hold the native title.

**Registration of claims**

An application for the determination of a native title claim must satisfy a registration test before it can be placed on the register of native title claims and subsequently have access to a number of procedural rights. The inability of a native title claimant group to pass the registration test denies that group access to the procedural rights (including the right to negotiate) conferred under the Act. This leaves claimant groups who fail to satisfy the registration test in a vulnerable position until a final determination of their claim is made by the courts. The registration test is administered by the National Native Title Tribunal.

**Indigenous land use agreements**

An Indigenous Land Use Agreement (ILUA) is a voluntary agreement about the use and management of an area of land or waters made between a group of Native Title claimants and others (such as miners, pastoralists, governments). ILUAs are developed as part of the negotiation process in native
title claims but have since gained widespread recognition and may now be entered into completely separately from the native title determination process. ILUAs can be formed on the following topics:

- recognition of native title rights
- native title claimants and holders agreeing to a future development
- how native title rights coexist with the rights of other people
- access to and use of an area
- extinguishment of native title
- compensation

Once an ILUA is registered with the Registrar of the National Native Title Tribunal, the ILUA legally binds all native title claimants/holders and other parties to the terms of the agreement. In NSW the Land & Property Management Authority manages claims for native title that affect land in the state. It negotiates ILUAs on behalf of the government.

Native title representative bodies

The Act also makes provision for the establishment of representative bodies to support Aboriginal communities in dealing with the processes of the Native Title Act 1993 (Cth). The representative body for NSW is NTSCORP whose vision is to promote social justice, economic, cultural and social independence for the traditional owners of the land, seas and waters. NTSCORP offers assistance to native title claimants through facilitation and assistance of native title claims, notification of proposed future Acts, dispute resolution, agreement making, and research.

To date there has been a limited number of native title determinations made over lands and waters in NSW, most of which have resulted in decisions that have extinguished native title. An increasing number of ILUAs have been negotiated and registered. These are known as Area Agreements under the Act.

Indigenous Land Corporation

The Indigenous Land Corporation (ILC) was established in 1995 under amendments made to the Aboriginal and Torres Strait Islander Commission Act 1989. It formed part of the overall legislative response to the Mabo decision made by the High Court in 1992, and was designed to benefit Indigenous Australians whose native title had been extinguished, or cannot be demonstrated because of a failure to maintain continuous attachment to the land as a result of dispossession.

The purpose of the ILC is to assist Indigenous Australians with acquiring and managing land to secure cultural, social, environmental and economic benefits. The ILC has developed four land acquisition programs to deliver on this purpose, namely the:

- Cultural Acquisition Program in which culturally significant land is acquired
- Social Acquisition Program where land is obtained for its social benefit
- Environmental Program where together with state, Commonwealth and other environmental authorities and agencies, land is acquired for its environmental benefit
- Economic Acquisition Program where land obtained is to be economically beneficial through the establishment of sustainable land-based businesses.

The ILC is managed by a Board of Directors and all seven members of the board are appointed by the Minister for Families, Housing, Community Services and Indigenous Affairs and at least five members (including the Chairperson) must identify and be accepted as being from Aboriginal or Torres Strait Islander descent. In NSW the ILC has acquired 51 properties covering 228,382 hectares of land, with many now being directly managed by separate Aboriginal organisations

Sources:

- Native Title Act 1993 (Cth)
- Native Title (New South Wales) Act 1994 (NSW)
- National Native Title Tribunal website – www.nntt.gov.au
- NTSCORP website – www.ntscorp.com.au
Fisheries Management Act 1994

Aboriginal peoples have long argued that their inherent cultural rights to marine resources have been seriously impeded by the administration of fisheries management legislation. In December 2009 the NSW Parliament passed amendments to the Fisheries Management Act 1994 which included new provisions for Aboriginal cultural fishing. The 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 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 Act exempts Aboriginal people from needing permits and paying a fishing fee, when fishing according to the bag limits and fish sizes set for recreational fishers. However, when Aboriginal people engage in cultural fishing activities for larger scale cultural events (see definition above) they must apply for a permit. Under the 2009 amendments, permits may be issued to communities or groups, rather than individuals only. There are provisions under the revised Act for separate cultural fishing limits to be defined. These will be finalised by regulation following consultation with the NSW Aboriginal Fishing Advisory Council (currently in the process of being established).

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 Fisheries Management Act, and marine park zoning plans and does not involve targeting protected species (essentially the same limits set for recreational fishers).

The Marine Parks Authority NSW recognises that the practice of cultural use of marine resources is an integral part of the Aboriginal relationship with Country and great importance is placed on sustainable use. The Marine Park Authority’s Cultural Resource Use Policy outlines scope for cultural resource-use activities that are contrary to restrictions within marine park zoning plans or existing marine park closures, or involve the taking of fish protected under the Marine Parks Act 1997, provided that the cultural resource use is ecologically sustainable use.

Aboriginal people eligible to undertake cultural resource use in marine parks may do so through one or more of the following mechanisms:

- issuing of a marine parks and/or fisheries permit to individuals for specific events on a case-by-case basis, the establishment of special purpose zones within marine parks that are managed for cultural resource use within current and future zoning plans, and the issuing 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 issuing of supporting permits to organisations or individuals.

Aboriginal people are not charged a fee for these processes.

Sources: Fisheries Management Act 1994
Marine Parks Act 1997
The international negotiations, leading to the United Nations making a formal declaration on the Rights of Indigenous peoples in 2007, occurred over many decades. Lobbyists from a variety of Aboriginal organisations and groups participated in these negotiations throughout that period. The NSW Aboriginal Land Council (NSWALC) attended many of these international forums from 1986 onwards and spoke through the National Aboriginal & Islander Legal Services credentials until 1996 when NSWALC was granted ‘Consultative Status Category 2’ speaking rights as a non-government organisation. This allowed the interests of the Aboriginal peoples of NSW to be placed directly before these international forums.


The Declaration on the Rights of Indigenous Peoples is a complex document containing a substantive preamble and 46 interrelated Articles or statements of agreed rights held by Indigenous peoples. The following 14 points summarise the rights of Indigenous peoples contained within the United Nations Declaration:

1. Aboriginal Peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. The urgent need to respect and promote the inherent rights and characteristics of Aboriginal Peoples, especially their rights to lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.
3. The effective protection of the heritage of Aboriginal Peoples of the world benefits all humanity. Cultural diversity is essential to the adaptability and creativity of the human species as a whole.
4. To be effective the protection of Aboriginal Peoples’ heritage should be based broadly on the principles of self determination, which includes the right and the duty of Indigenous peoples’ to develop their own cultures, knowledge systems, and forms of social organisation.
5. Aboriginal Peoples, in exercising their right to self determination, have the right to autonomy or self government in matters relating to their local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.
6. Aboriginal Peoples’ ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.
7. The heritage of Aboriginal Peoples includes all movable cultural property, all kinds of literary and artistic works such as music, dance, song, ceremonies, art narratives and poetry; all kinds of scientific, agricultural, technical, and ecological knowledge, including medicines and the use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of Indigenous peoples’ heritage on film, photographs, videotape or audiotape.
8. Aboriginal Peoples should be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.
9. Control by Aboriginal Peoples over developments affecting them, and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.

10. Respect for Aboriginal knowledge, cultures and traditional practices contributes to the sustainable and equitable development and proper management of the environment.

11. Aboriginal Peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures such as archaeological and historic sites, artefacts and literature, as well as the right to restitution of cultural, intellectual and spiritual property taken without their free and informed consent or in violation of their laws and customs.

12. Aboriginal Peoples have the right to develop, practice and teach their spiritual and cultural traditions and ceremonies; the right to maintain, protect, and have access in privacy to their sacred and ceremonial sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains. States shall take effective measures, in conjunction with the Aboriginal Peoples concerned, to ensure that sacred places, including burial sites, be preserved protected and respected.

13. Aboriginal Peoples have the right to participate fully, if they so choose, at all levels of decision making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

14. Aboriginal Peoples have the right to promote, develop, and maintain their institutional structures and their distinctive juridical customs and traditions in accordance with internationally recognised human rights standards.

It is to be noted that throughout this entire period the ongoing development of the Declaration has significantly influenced governments in their thinking and actions concerning the rights of Indigenous peoples. For example, when the NSWALC and ATSIC entered into a Service Delivery Partnership Agreement with the NSW Government in 2002, that agreement included a statement of principles which gave formal recognition to the right to self determination for the Aboriginal peoples of NSW.

This influence has developed to the point where many see the United Nations Declaration as the necessary foundation of any legislation to protect and manage Aboriginal culture and heritage.

For Aboriginal peoples it is a commonly held belief that ‘culture’ and the ‘environment’ are inseparable. This holistic or cultural view means that culture and environment are not to be broken up into component parts and dealt with separately. From a cultural perspective Aboriginal peoples see the natural environment (and all of its elements) as a resource to sustain existence, and in doing so Aboriginal peoples recognise an inherent cultural obligation to sustain the resource. Through participation in the variety of natural resource and environmental management programs at both State and Commonwealth levels, Aboriginal people continue their advocacy for the adoption and integration of Aboriginal culture-based land and environmental management practices into current science-based environmental management processes.

The Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) is the Australian Government’s central piece of environmental legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places defined in the Act as matters of national environmental significance. Specifically, the EPBC Act aims to: conserve Australia’s biodiversity; protect biodiversity internationally by controlling the international movement of wildlife; provide a streamlined environmental assessment and approvals process where matters of national environmental significance are involved; protect our world and national heritage; and, promote ecologically sustainable development. The Commonwealth gives effect to the EPBC Act through a number of mechanisms including the development and delivery of conventions, strategic policy and programs. These include:

1. The Ramsar Convention on Wetlands is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources within Australia. Within NSW, there are 11 wetlands listed under the Ramsar Convention. Aboriginal cultural resource use and access are viewed as a quality example of the wise use of wetlands.

2. Caring for Country is an overarching program framework which guides the Commonwealth’s investment strategies in environmental, natural resource management and conservation activities across the nation.

3. Indigenous Protected Areas (IPAs) are areas of Indigenous-owned land or sea where traditional owners have entered into an agreement with the Australian Government to promote biodiversity and cultural resource conservation. IPAs make a significant contribution to Australian biodiversity conservation – making up over 23 per cent of Australia’s National Reserve System. Managing IPAs helps Indigenous communities to protect their significant cultural values for future generations and receive spin-off health, education, economic and social benefits. As of July 2010, NSW has four declared IPAs.

In NSW legislation relating to the protection of threatened species and native vegetation compliments the EPBC Act in the conservation of biodiversity, protection of natural heritage and maintaining sustainable and productive landscapes.

The Threatened Species Conservation Act 1995 (TSC Act) aims to protect terrestrial threatened species, populations and ecological communities. The Office of Environment and Heritage, Department of Premier and Cabinet (OEH) is responsible for the administration of the Act. The main objectives of the TSC Act are to: conserve biological diversity and promote sustainable development; prevent the extinction of native plants and animals; protect habitat that is critical to the survival of endangered species; eliminate or manage threats to biodiversity; properly assess the impact of development on threatened species; and encourage cooperative management in the conservation of threatened species. The TSC Act achieves these objectives through the following:
- **A scientifically robust and independent listing process** – listing species, populations and ecological communities is the foundation of the TSC Act. Listing decisions are made by the independent NSW Scientific Committee.

- **Habitat protection** – the TSC Act provides a vehicle to improve degraded environments, protect areas of high conservation value and areas critical to the survival of threatened species.

- **Species recovery and threat abatement** – the TSC Act provides for the preparation of a threatened species Priorities Action Statement, which outlines actions to recover species and manage threats.

- **Integrating threatened species into the land use planning and approval systems** – the TSC Act provides for threatened species considerations to be fully integrated within the strategic planning and development control processes of the *Environmental Planning and Assessment Act 1979* and the *Native Vegetation Act 2003*. For example approved property vegetation plans (PVPs) under the Native Vegetation Act do not require a separate threatened species licence.

The *Native Vegetation Act 2003* (NVA Act) was part of the NSW Government’s natural resource management reform package which also saw the establishment of the catchment management authorities and the Natural Resource Commission (see 2003 – Natural Resource Management). The NVA Act aims to protect and invest in healthy and productive landscapes for the people of NSW by: ending broadscale clearing unless it improves or maintains environmental outcomes; encouraging revegetation and rehabilitation; and, rewarding farmers for good land management.

An Australian first, the property vegetation plan computer-based system (known as the PVP Developer) has been created to assist the 13 NSW catchment management authorities to transparently assess the environmental outcomes of both clearing and incentive proposals.

It is evident that the NSW *Threatened Species Conservation Act 1995* and *Native Vegetation Act 2003*, although based on sound scientific principles and processes, do not address the need to integrate Aboriginal culture-based land and environmental management values and practices into current science-based environmental management processes. It is to be noted that in some instances the policy and programs generated from the legislation do make some attempt at doing so. For example:

1. The **NSW Biodiversity Strategy** seeks to recognise the contribution Aboriginal communities can make towards conservation. Under the Strategy there are also programs which serve to engage Aboriginal communities in the conservation of biodiversity within NSW.

2. The **BioBanking Scheme** is a market-based scheme that engages landowners in the biodiversity assessment process. Through the BioBanking Scheme landowners are provided with the opportunity to generate income by managing their land for conservation. The Aboriginal component of the BioBanking Scheme is known as **Land Alive**.

3. **Threatened Species Recovery Planning** – The *Threatened Species Priority Action Statement* seeks to recognise that Aboriginal communities have a strong association with many threatened species through use of medicinal plants as well as through kinship and spiritual relationships and suggests that such communities should be involved in developing and determining recovery plans.

**Sources:** Department of Sustainability, Environment, Water, Population and Communities website: www.environment.gov.au

*Environment Protection and Biodiversity Conservation Act 1999*

*Office of Environment and Heritage website: www.environment.nsw.gov.au*

*Catchment Management Authorities website: www.cma.nsw.gov.au*

*Threatened Species Conservation Act 1995*

*Native Vegetation Act 2003*
In late 1993 the then Minister for the Environment and the then Minister for Aboriginal Affairs jointly established the Aboriginal Cultural Heritage Working Party (ACHWP). The ACHWP was made up of the Directors-General of the National Parks and Wildlife Service and Department of Aboriginal Affairs and the chairpersons of the NSW Aboriginal Land Council and the Aboriginal Cultural Heritage (Interim) Advisory Committee. The overall role of the ACHWP was to develop a definitive proposal for consideration by the Ministers, which met the overriding objective of achieving Aboriginal control and management of Aboriginal heritage. The terms of reference of the ACHWP were as follows:

1. Undertake a brief review of past inquiries and reports on the subject, and analyse the currency of the recommendations made therein.
2. Review all current cultural and heritage legislation administrative systems operating within Australia, and analyse the effectiveness and applicability of such legislation and administrative systems to the situation in NSW in relation to the overriding objective of achieving Aboriginal control and management of Aboriginal heritage and preservation of cultural and scientific values in Aboriginal heritage.
3. Undertake a brief review of applicable international legislation and conventions relevant to indigenous heritage management.
4. Identify and review all other NSW legislation which may have an impact upon Aboriginal heritage protection and planning processes to ensure a consistency of approach within any future legislative and administrative proposals.
5. Review options for ministerial portfolio responsibility for Aboriginal cultural heritage management and include recognition of cultural heritage and planning functions as well as Aboriginal affairs and land management functions.
6. Undertake direct consultation with Aboriginal cultural knowledge holders and community elders from throughout NSW to ascertain their requirements of any proposed draft legislation, thereby ensuring the cultural propriety of such legislative proposals.
7. Prepare a report and discussion paper of the above (1–6) and formulate a draft proposal for consideration by the Minister for Aboriginal Affairs and the Minister for the Environment.
8. Upon endorsement of the draft proposals undertake an extensive public review of the proposals including a direct consultative process with the Aboriginal communities of NSW.
9. Analyse the outcomes of the public review process (8) and prepare a final definitive proposal for consideration by the Minister for Aboriginal Affairs and the Minister for the Environment.

Throughout 1994–95 the ACHWP engaged a small team of policy staff to research the ACHWP terms of reference one (1) to seven (7). As part of this process Aboriginal field staff from the National Parks and Wildlife Service and the NSW Aboriginal Land Council undertook an extensive community consultation programme in accord with term of reference six (6) which involved the conduct of community focus meetings and the distribution of in excess of 800 questionnaires, to which over 200 direct responses were received and analysed.

In 1995 the ACHWP prepared a discussion paper based on the results of the consultation surveys for consideration by the Ministers for the Environment and Aboriginal Affairs, in response to the terms of reference, included in which was a Charter of Principles which should underpin any new legislative system for the management and protection of Aboriginal cultural heritage in NSW as follows:

1. Recognition that Aboriginal communities are the rightful owners of Aboriginal cultural heritage in NSW.
2. The establishment of a legislative system which effects a practical balance between:
   • the recognised need to preserve and enhance Aboriginal cultural traditions
   • the need to deliver social justice to Aboriginal people in NSW to redress the significant cultural, economic, and social dispossession which they have suffered
   • the need for government to ensure the economic, social and cultural advancement of other (non-Aboriginal interests) in NSW.

3. Respect for Aboriginal cultural proprieties, including contemporary beliefs, values and practices.

4. Recognition that Aboriginal cultural heritage is part of a broader Aboriginal relationship with the land including:
   • land rights
   • land use and sustenance such as hunting, gathering and fishing practices
   • religious, spiritual and cultural beliefs and practices
   • intangible cultural property such as dance, drama, art and music.

5. Provision for the protection and management of culturally significant areas on private and public lands.

6. The establishment of management processes which:
   • recognise cultural rights and responsibilities of local Aboriginal communities, traditional owners and custodians
   • allow for the advocacy of Aboriginal interests
   • are clear, transparent and accountable.

7. The identification and mapping of cultural areas/zones in NSW, as a basis for the operation of the proposed Aboriginal Heritage Commission. Such mapping should:
   • be consistent with native title interests
   • recognise the diversity of Aboriginal interests across the state.

8. Every opportunity should be given to Aboriginal communities and other land users to discuss, negotiate and resolve land use proposals at community levels.

9. The establishment of:
   • centralised and coordinated monitoring of inter-agency policies and programs which affect Aboriginal cultural heritage
   • a coordinated and consultative approach between all levels of government on the development of policies and programs affecting Aboriginal cultural heritage.

10. Support and encouragement for greater understanding of Aboriginal cultural heritage and management and protection policies through a range of education programs and research work.

11. The establishment of an effective system of prosecution and penalties.


The extensive consultations on the reform of Aboriginal heritage legislation, facilitated by the Working Party throughout 1995 was to be the last formal consultative program undertaken by Government within NSW on the subject of overall reform of Aboriginal Heritage legislation.

**Sources:** Aboriginal Cultural Heritage Working Party Discussion Paper, 1995  
NSW Aboriginal Land Council Research Library  
NSW Aboriginal Land Council website: www.alc.org.au
Following consideration of the Discussion Paper prepared by the Aboriginal Cultural Heritage Working Party (ACHWP) a draft Green Paper was prepared in accordance with the term of reference (7) of the ACHWP Discussion Paper. The Green Paper proposed a number of key elements that should underpin any new legislative system for the management and protection of Aboriginal culture and heritage in NSW as follows:

1. Recognition that descendants of the original Aboriginal inhabitants of the State are the rightful owners of Aboriginal cultural heritage in NSW.
2. Respect for Aboriginal cultural protocols and principles, including contemporary beliefs, values and practices.
3. Recognition that Aboriginal cultural heritage is part of a broader Aboriginal relationship with the land including:
   i. land rights
   ii. native title rights and interests
   iii. land use and sustenance: hunting, gathering and fishing practices
   iv. religious, spiritual and cultural beliefs and practices
   v. intangible cultural property: dance, drama, art, music.
4. Provision for the protection and management of culturally significant areas on private and public lands.
5. The establishment of a legislative system which effects a practical balance between:
   i. the recognised need to preserve and enhance Aboriginal cultural traditions through effective Aboriginal control mechanisms
   ii. the need to deliver social justice to Aboriginal people in NSW to redress the significant cultural, economic, and social dispossession which they have suffered
   iii. the need for Government to ensure the economic, social and cultural advancement of other (non-Aboriginal interests) in NSW.
6. Recognise the need for clearly defined accountability to the Minister, and an effective appeal process.
7. The establishment of management processes which:
   i. recognise that Aboriginal culture and heritage can only be effectively protected through Aboriginal groups
   ii. recognise cultural rights and responsibilities of local Aboriginal communities, Aboriginal owners and custodians
   iii. allow for the advocacy of Aboriginal interests
   iv. are clear, transparent and accountable.
8. The identification and mapping of Cultural Country Areas in NSW, as a basis for the operation of the proposed Aboriginal Heritage Commission. Such mapping should:
   i. be consistent with native title interests
   ii. recognise the diversity of Aboriginal interests across the State
   iii. be based on at least the following criteria:
      • general Aboriginal language areas
      • common cultural law and custom
• known resource and technology usage patterns
• historical records of occupation patterns
• ecological landscape units and elements
• practical acknowledgment of existing statutory and administrative systems boundaries.

9. Every opportunity should be given to Aboriginal communities and other land users to discuss, negotiate and resolve land use proposals at community levels.

10. The establishment of:
   i. centralised and coordinated monitoring of inter-agency policies and programs which affect Aboriginal cultural heritage
   ii. a coordinated and consultative approach between all levels of Government on the development of policies and programs affecting Aboriginal cultural heritage.

11. Support and encouragement for greater understanding of Aboriginal cultural heritage and management and protection policies through a range of education programs and research work.

12. The establishment of an effective system of prosecution and penalties.


14. Recognition of national standards and policies agreed to by the governments of Australia.

The ACHWP, in response to its 7th term of reference prepared a briefing paper for consideration of the Minister for Aboriginal Affairs and Minister for Environment in April 1997. The intent of the briefing was to seek endorsement for the basic principles and features of the proposal in the Green Paper on the basis that these will be further refined in consultation with agencies before approval was sought for the Green Paper to be publicly released for more widespread comment.

The briefing provided a concise summary of the key proposals in the Draft Green Paper and identified issues related to the integration of the proposed new Aboriginal cultural heritage system with the planning and development process, accountabilities (including the question of Ministerial discretion) and funding options. The briefing addressed each of these issues and provided some broad options for further discussion with relevant agencies.

As no approval to release a Green Paper for wider consultation was forthcoming the 8th and 9th Terms of Reference of the ACHWP remains incomplete. This incomplete work included the following:

8. Upon endorsement of the draft proposals undertake an extensive public review of the proposals including a direct consultative process with the Aboriginal communities of NSW. and,

9. Analyse the outcomes of the public review process (8) and prepare a final definitive proposal for consideration by the Minister for Aboriginal Affairs and the Minister for the Environment”.

NSW Aboriginal Land Council Research Library
NSW Aboriginal Land Council website: www.alc.org.au
Aboriginal ownership and management of national parks

In response to recommendation 315 of the Royal Commission into Aboriginal Deaths in Custody, both the Australian and NSW governments commenced a process of legislative reform to return ownership of certain national parks to Aboriginal peoples under a joint management regime that ensured the ongoing management of the lands as national parks.

At the Commonwealth level both Uluru and Kakadu (and later Jervis Bay) national parks were transferred to traditional groups with the ongoing management leased back to the Commonwealth for a term of 99 years under a joint management regime.

In NSW, after a long and active period of lobbying by Aboriginal groups throughout the state, the NSW Parliament passed amendments to the National Parks and Wildlife Act 1974 and the NSW Aboriginal Land Rights Act 1983 which provided for the return of certain national park lands to the ownership of Aboriginal peoples and the terms under which a joint management regime for the ongoing management of the lands as national parks would occur.

In particular, the Act now provides for:

- the national parks that are deemed to be of cultural significance to Aboriginal people, to be transferred to the ownership of land councils (in trust for the Aboriginal owners), and managed through a Board of Management (majority Aboriginal-owner controlled) in a leaseback arrangement with the National Parks and Wildlife Service (NPWS)
- legal recognition that land is of cultural significance to Aboriginals if the land is significant in terms of the traditions, observances, customs, beliefs or history of Aboriginals, and, limits the assessment of lands for the purposes of the Act to only those factors that are considered of importance to the Aboriginal peoples of this state
- a requirement for the Director General to consider and comment on certain matters when reporting to the Minister on the cultural significance to Aboriginal people of particular lands administered by NPWS – this also requires the Director General to consult at least with those Aboriginal peoples nominated by the Registrar of the Aboriginal Land Rights Act 1983, when considering the cultural significance of the affected lands
- an Aboriginal owner of a particular area or lands is described as being an Aboriginal person who is directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated, and has a cultural association with the land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land, and is listed on the Register of Aboriginal Owners under the Aboriginal Land Rights Act 1983
- Boards of Management vested with the legal ‘care control and management’ of the national park, and are made up of a majority of Aboriginal owners, and a representative of the land council, NPWS, local government, local environment groups, and neighbours
- an ongoing 30-year renewable management lease with NPWS, and the payment of rent to a fund controlled by the Board of Management as compensation for the loss of full enjoyment of private property rights by Aboriginal peoples as the lands continue to be managed as national parks for the benefit of the broader public – the Board must spend the funds on matters relating to the management of the park
- the Aboriginal members of the Board of Management of an Aboriginal owned and jointly managed area of national parks estate have the authority to undertake, or permit others, the exercise of hunting and gathering rights for domestic, ceremonial and religious purposes. This reflects the principle of ‘traditional’ and contemporary resource utilisation rights of Aboriginal people for certain purposes, included in which is the right to engage in customary practices.

In addition to the above, the government amended the National Parks and Wildlife Act 1974 to provide a means for the Director General of the NPWS to transfer the ownership of Aboriginal objects from the Crown to the Aboriginal Owners, thereby affording recognition that the Aboriginal peoples of an area are the rightful owners of such cultural property.
As of 30 June 2010, 6 areas of existing national park estate that have been transferred to Aboriginal ownership and two new Aboriginal owned and leased back parks have been created. These are all managed by Aboriginal controlled Boards of Management under leases with NPWS and include: Mutawintji National Park, Mutawintji Nature Reserve, and Mutawintji Historic Site in the far west; Mt Grenfell Historic Site near Cobar; Biamanga National Park near Bega and Gulaga National Park near Bermagui on the far south coast; and the Worimi Conservation Lands near Newcastle, and Gaagal Wanggaan (South Beach) National Park near Nambucca Heads.

The NSW Parliament has also approved Mungo National Park near Mildura, Mt Yarrowyck Nature Reserve near Armidale, and Jervis Bay National Park near Nowra to come under the Aboriginal Ownership provisions of the Act.

There are now approximately 700 Aboriginal persons listed on the Register of Aboriginal Owners managed by the Registrar of the *Aboriginal Land Rights Act 1983*.

A further direct consequence of the introduction of the Aboriginal Ownership provisions briefly described above is that NPWS has developed a broader joint management approach to the management of other areas of national parks estate in conjunction with Aboriginal communities. The mechanisms employed under this broader approach include:

- Indigenous Land Use Agreements (ILUAs) with native title holders under the *Native Title Act 1993*
- Memorandums of Understanding (MoUs) between the Office of Environment and Heritage, Department of Premier and Cabinet (OEH) and Aboriginal communities.

Across the three forms of joint management mechanisms described above, OEH has 16 agreements currently in place with Aboriginal communities across the state, covering approximately 1.5 million hectares, or 23 per cent of the reserve system in NSW.

**Source:** Office of Environment and Heritage website: www.environment.nsw.gov.au
In 1997, the *NSW Government Statement of Commitment to Aboriginal People* set out the government’s activities in key policy areas that affected Aboriginal people. The statement committed the government, in partnership with Aboriginal people, to:

1. ensure that programs, policies and services were relevant and accessible to Aboriginal people
2. respect Aboriginal people’s right to negotiate and participate in decisions that affect them
3. incorporate the concerns of Aboriginal people at all levels of government policy and administration
4. ensure that there is fair representation of Aboriginal people on decision-making bodies, including mainstream government boards and advisory groups
5. recognise the disadvantages suffered by Aboriginal people in areas such as health, education and economic wellbeing, and work with them to redress these disadvantages
6. report on progress and outcomes.

The NSW Government took a leading role in progressing reconciliation. This was a community-based movement involving Aboriginal and non-Aboriginal Australians and helped improve relations between Aboriginal and Torres Strait Islander peoples and the wider community.

In June 1997, the NSW Parliament was the first Australian Parliament to formally apologise to Aboriginal people for the ‘Stolen Generations’. Chief executives of all NSW public sector agencies have made a joint Statement of Commitment to Reconciliation. This acknowledges Australia’s broader history, apologises for damage done by previous government policies and practices, and commits chief executives to working with Aboriginal Australians to improve services.

*Source:* Aboriginal Affairs NSW website: www.daa.nsw.gov.au
Water management in NSW is governed under the provisions of the *Water Management Act 2000*, which is administered by the NSW Office of Water.

The objects of the Act provide for the sustainable and integrated management of the water sources of the state for the benefit of both present and future generations. A particular object of the Act is to *recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water*. This object specifically includes the recognition and fostering of ‘benefits to culture and heritage’ and ‘benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water’.

The Act also makes provision for a native title holder to take and use water as a native title right without the need for an access licence, water supply work approval or water use approval.

**Water Sharing Plans** – The *Water Management Act 2000* provides for the development of Water Sharing Plans. The NSW Office of Water is progressively developing catchment-based Water Sharing Plans for the entire state. The catchment management authorities are facilitating Aboriginal community consultation and input into the water sharing plan development process. It should be noted that Water Sharing Plans allow for a percentage share of water to be allocated to native title holders with water rights.

The primary purposes of a water sharing plan is to:

- protect the environmental health of the water source
- ensure the water source is sustainable in the long term
- provide water users (including Aboriginal people) with a clear picture of when and how water will be available for extraction and use.

Water sharing plans also include specific provisions for Aboriginal people to access water.

**Aboriginal community development licences**

These licences are available in some Water Sharing Plans along the coast. They are not available in catchments within the Murray–Darling Basin, due to a cap on new commercial extractions in the Murray–Darling Basin.

- These licences are for Aboriginal-owned commercial enterprises to undertake commercial activities such as irrigated cropping, horticulture, irrigated pasture and aquaculture.
- The amount of water available for these licences is limited for each water source, and the water available can be temporarily traded (leased) to anyone, but can only be permanently traded to other Aboriginal groups or individuals.
- A small number of these licences have been issued to Aboriginal enterprises.

**Aboriginal cultural access licences**

These licences are for Aboriginal individuals and groups for non-commercial activities including: drinking; food preparation; washing; manufacture of traditional artefacts; the watering of domestic gardens; hunting; fishing and gathering; recreational, cultural and ceremonial purposes.

- Cultural access licences are capped at 10ML per licence, per year.
- A small number of these licences have been issued to Aboriginal individuals and groups.
Aboriginal Water Trust

The *Water Management Act 2000* provided for the establishment of the Aboriginal Water Trust. The Trust operated between 2000 and 2009 and provided specific purpose grant funding to Aboriginal communities throughout the state for water infrastructure (such as irrigation systems, pumps, etc) and offered opportunities to establish water based commercially viable enterprises. The Trust provided funding to sixteen Aboriginal communities throughout the state for a variety of water based projects.

**Sources:** *NSW Water Management Act 2000*

In 2002 the NSW Government negotiated and entered into a formal agreement with the NSW Aboriginal Land Council and the Aboriginal and Torres Strait Islander Commission, which resulted in a 3-way partnership of delivering services to Aboriginal communities within NSW.

The principles of this Agreement are outlined below.

**Recognition of, and Support for, Rights of Aboriginal and Torres Strait Islander People**

Aboriginal and Torres Strait Islander peoples have *inherent rights as the first peoples of Australia that were never ceded*, and that exist in addition to general citizenship rights. These include:

- the **right to self determination** - that is, the right of Aboriginal and Torres Strait Islander peoples to determine the direction of Aboriginal and Torres Strait Islander social, economic and political development; and

- the **right to maintain culture, language and identity**.

For Aboriginal peoples in NSW, recognition of these inherent rights also includes recognition of the interest of Aboriginal people in relation to traditional country and waters.

A consequence of this agreement is that for the first time in its history a NSW Government recognised the right of self determination for the Aboriginal peoples of this state. It also recognised the right to maintain culture, language and identity, and Aboriginal peoples’ traditional interests in Country and water.

**Sources:** Aboriginal Affairs NSW website: www.daa.nsw.gov.au
NSW Service Delivery Partnership Agreement
NSW Aboriginal Land Council website: www.alc.org.au
The Boomanulla Conference for Country was held in Canberra in 2002 and was jointly sponsored by the NSW Aboriginal Land Council and the then Department of Land and Water Conservation. The conference was attended by approximately 55 natural resource representatives from Aboriginal communities in NSW, assembled to prepare a statement about Aboriginal people’s expectations of the NSW government’s planning process for water, catchments and native vegetation. The outcomes of the conference included the identification of Aboriginal community natural resource goals, and a statement of principles and the protocols for Aboriginal involvement in the planning process, as follows:

**Aboriginal communities – natural resource goals**

**Social goals**
- The development of natural resources should strengthen Aboriginal communities who should be engaged in education and mentoring programs which promote respect for the land and waters and recognition of Aboriginal rights as its custodians.
- Effective contribution to the planning process should be built on strengthened relationships between communities, Elders Councils, traditional owners, land councils and the younger generation.
- Communities should develop their own protocols to make this possible.
- The planning process should strengthen the independence and economic health of the communities who depend on natural resources.

**Economic goals**
- Access to water should be seen as a matter of social justice allowing Aboriginal communities priority access to the water market (i.e. through provision of allocation of water licences to Aboriginal people through an appropriate management structure such as a Trust).
- The planning process should support sustainable land ownership and management in Aboriginal communities, leading to long-term economic independence.
- The plans should ensure the equitable distribution of economic benefits to Aboriginal communities. In this context, plans should:
  i. identify opportunities in the catchment planning process for enhanced Aboriginal involvement in natural resource management
  ii. actively involve Aboriginal people in reviews of catchment investment schemes to identify areas for priority investment and action.
  iii. identify and increase employment and training opportunities in natural resource management for Aboriginal people, promoting natural resource awareness within the Aboriginal communities.

**Cultural goals**
- Strengthen the cultural identity of Aboriginal communities through promoting awareness and respect for the diversity of traditional Aboriginal languages, boundaries, and cultures.
- Encourage, develop, resource and support effective leadership in Aboriginal communities by:
  - supporting community planning
  - resourcing leadership training
  - addressing social and economic challenges in local areas
  - respecting accountability processes in the communities.
- Support a structure within the Aboriginal communities which is relevant to the individual communities and which allows for holistic approaches to planning on resource issues.
Principles and protocols for Aboriginal involvement in the planning process

- Any planning must respect the timeframes of Aboriginal people. This must be defined and honoured in future protocols.
- Aboriginal identity and traditional ownership and custodianship must be recognised in natural resource planning process.
- Aboriginal culture and values must be identified, respected and incorporated in natural resource planning and implementation.
- Aboriginal knowledge about vegetation, water and catchments must be recognised as important and where appropriate, active measures must be made to ensure legal protection of community intellectual property rights.
- Cultural diversity must be respected – there is not one Aboriginal community, culture and/or view. Culture and traditional practices differ across communities.
- Aboriginal people are major stakeholders in natural resource management, because their lives and spirituality are related to the land. This should be acknowledged in any consultation process.
- The economic benefits that flow from natural resource management must be shared with Aboriginal communities, as Aboriginal people have a traditional custodian’s right in relation to natural resources, which they have never given up.
- Plans which affect the lives of traditional owners must be made on the basis of their informed consent.
- In recognising the rights and interests of Aboriginal people, government (and other) agencies must be preferred to ‘negotiate’ with Aboriginal people – not merely ‘consult’.
- Biodiversity must, as a minimum, be maintained at its current level.
- The only Aboriginal people who can legitimately speak for country are those who are authorised by community leaders in their country and in accordance with any agreed community protocols for nominations and representation.

Although never formally accepted by the government and respective natural resource management agencies, the Boomanulla Conference for Country outcomes have influenced the development of Aboriginal engagement practices within various natural resource management programs currently being developed and implemented across NSW.

Department of Land and Water Conservation, 2002.
NSW Aboriginal Land Council website: www.alc.org.au
In 2003, through the introduction of the *Catchment Management Authorities Act 2003* and the *Natural Resources Commission Act 2003* the NSW Government introduced significant reforms to the way that the state’s natural resources are managed. These reforms created a regional model comprising 13 catchment management authorities and a Natural Resources Commission for natural resource management (NRM). The reforms helped to ensure healthy rivers, productive soils, diverse native species and thriving communities throughout the state.

**Catchment management authorities** (CMAs) have been established across NSW to ensure that regional communities have a say in how natural resources are managed in their catchments. The state’s 13 CMAs work with farmers, Landcare and other ‘carer’ groups, Aboriginal communities, local government, industry and state agencies to respond to the key NRM issues facing their respective catchments.

The CMAs are responsible for managing natural resources at the catchment scale. Key roles include preparing catchment action plans (CAPs) and managing incentive programs to implement the plans. CMAs are primarily funded through various state and Commonwealth program funds and play the important role of gathering funds from a variety of sources and delivering them to priority regional projects. CMAs also take the initiative to develop their own investment strategies and to broaden their revenue streams to complement government funding.

CMAs secure Aboriginal community advice and engagement in their activities through regional advisory committees or reference groups. Some CMAs have Aboriginal representatives on their boards of management. Although each CMA is an independent catchment-based authority, they have common goals and objectives and work to achieving state-wide natural resource management goals and targets. They do this by holding regular CMA Chairpersons, and General Managers meetings.

The **Natural Resources Commission** (NRC) provides credible, independent advice to the NSW Government on managing the state’s natural resources in an integrated manner to maintain landscapes that are resilient, function effectively, and support environmental, economic, social and cultural values. The NRC reports to the Premier.

In 2005, the NRC developed and recommended a **Standard for Quality Natural Resource Management** (Standard) and **state-wide targets** for NRM. The Government adopted the Standard and targets, and they now form part of the ‘Green State’ Priorities and Targets of the NSW State Plan.

In 2008, the NRC commenced an ongoing program of **audits** to assess whether CAPs are being implemented effectively, in compliance with the Standard and targets.

The state’s CMAs have led the way by using the Standards to improve the way they do business. While the Standard is mandatory for CMAs, it provides a benchmark for everyone involved in NRM. The work of the CMAs has resulted in increased opportunities to care for ‘Country’, increased employment opportunities in undertaking NRM projects, and a wider understanding of the Aboriginal cultural values that exist within the landscape.

**Sources:** Catchment management authorities’ websites: www.cma.nsw.gov.au  
Natural Resource Commission website: www.nrc.nsw.gov.au
NSW Aboriginal Affairs Plan 2003–2012: Two Ways Together

The overall lack of change to the key social and economic indicators dealing with Aboriginal disadvantage in NSW, including the recognition that Aboriginal people still lacked access to traditional lands, waters and natural resources to maintain their culture, led to the realisation that to achieve improved outcomes in Aboriginal disadvantage ‘new ways of doing business’ with Aboriginal people and communities needed to be developed. This resulted in the government developing the NSW Aboriginal Affairs Plan 2003–2012, known as Two Ways Together. Two Ways Together recognised that Aboriginal people have inherent rights as the first peoples of Australia, and that these rights include the rights of Aboriginal people to determine their social, economic and political futures, and the right to maintain their culture, language, and identity. The overall objectives of Two Ways Together were to:

- develop sustainable partnerships between Aboriginal people and government
- improve the social economic and cultural wellbeing of Aboriginal peoples of NSW.

In 2011, the NSW Auditor General conducted an audit of Two Ways Together, concluding that, despite some positive emerging trends, the Two Ways Together plan has not delivered the improvement in overall outcomes for Aboriginal people that was intended. The report pointed to a lack of government accountability as a key failure in the implementation of Two Ways Together.

Following the change in the NSW Government and the audit of Two Ways Together in 2011, the government has indicated that Two Ways Together will be replaced by a new direction for Aboriginal affairs policy in NSW in the future.

NSW State Plan

In November 2006, the then Government released the NSW State Plan to focus government action on a number of priority areas. The State Plan included a chapter titled Stronger Communities containing a priority to ‘strengthen Aboriginal communities’. The targets and objectives for this priority were focused on family safety, education, environmental health and economic development, and access to Country. The State Plan also recognised the importance of supporting Aboriginal people to manage Country by including a priority under the Green State chapter ‘to improve the participation of Aboriginal people in the management of Country, including joint management of national parks’.

NSW 2021 – A plan to make NSW number one

Following the change in the NSW Government in March 2011, an updated NSW 2021 state plan was issued. NSW 2021 is a 10–year plan aimed at delivering outcomes based around five thematic strategies, including an overall strategy of ‘strengthening our local environment and communities’. A number of goals are listed across these five strategies, and within each of the goals a number targets and priority actions are featured.

Priority actions listed in NSW 2021 that are relevant to the reform of Aboriginal heritage legislation include:

- delivering legislative proposals on Aboriginal culture and heritage reforms, including those that recognise and protect places of special significance to Aboriginal culture and heritage
- providing Aboriginal people with opportunities to protect their culture and heritage, and access to traditional lands by increasing the number of Aboriginal co-management arrangements over national parks and other conservation areas
• increasing Aboriginal participation in natural resource management by supporting Aboriginal Green Teams and other Aboriginal groups working to protect and conserve natural environments
• recognising the importance of Aboriginal heritage by identifying and protecting significant Aboriginal sites, places, and objects through Aboriginal Place declarations (NPW Act) and the State Heritage Register Thematic Listings Program (Heritage Act).

Sources:  
- NSW Aboriginal Affairs Plan (2003–2012), Two Ways Together, Aboriginal Affairs NSW
- NSW 2021: A plan to make NSW number one. Department of Premier and Cabinet
- Aboriginal Affairs NSW website: www.daa.nsw.gov.au
- Department of Premier and Cabinet website: www.dcp.nsw.gov.au
At the catchment management authorities (CMAs) Board meeting of 22 September 2005, the members adopted a set of principles as listed below. These were used as a guide for engaging Aboriginal stakeholders in CMA business generally, and in the development of programs and individual projects as follows:

The 13 NSW catchment management authorities are committed to working in partnership with NSW Aboriginal communities because we recognise the significant history, knowledge and culture that Aboriginal communities can contribute to managing our natural resources - our land and water. The 13 catchment management authorities across NSW will:

1. acknowledge the culturally inherent rights of - Aboriginal traditional owners/custodians, native title holders, Aboriginal knowledge holders, Aboriginal elders and Aboriginal community members;
2. engage meaningfully with Aboriginal communities by ensuring Aboriginal people are partners in decision making on issues relating to managing NSW catchments;
3. accept the significance of Aboriginal boundaries – both traditional and contemporary, in the management of NSW catchments,
4. endeavour to achieve equitable outcomes for Aboriginal communities in catchment management authority planning, decision making, programs and service delivery;
5. recognise the importance of working with Aboriginal communities to incorporate Aboriginal cultural, heritage and landscape values into the management of all NSW catchments,
6. acknowledge that there are Aboriginal traditional and contemporary cultural heritage values that link to all natural resource management within NSW catchment management,
7. acknowledge that NSW Aboriginal communities form a large group of landholders in NSW,
8. create partnerships to establish and resource Aboriginal reference groups as an integral part of ensuring meaningful engagement and providing culturally appropriate program and services when managing NSW catchments.
9. accept that knowledge of Aboriginal culture, heritage and values belongs to Aboriginal communities,
10. value and support the challenging and important role of Aboriginal staff working in NSW catchment management authorities,
11. build the capacity of each catchment management authority to enable equitable and meaningful dialogue with Aboriginal communities,
12. invest in building the capacity of Aboriginal communities so they can effectively engage with NSW catchment management authorities and their management of catchments.

**Note:** The term *Aboriginal communities* is intended to acknowledge and include traditional custodians, native title holders, knowledge holders, elders and Aboriginal community members and their organisations.

**Source:** Catchment management authorities websites: www.cma.nsw.gov.au
The Natural Resources Advisory Council (NRAC) identified the task of facilitating ‘the full engagement of Aboriginal people in NRM’ as a high priority issue from shortly after its inception in 2004. With advice from then Department of Infrastructure, Planning and Natural Resources (DIPNR) Aboriginal Panel, NRAC resolved to explore agreement making as a way to expand Aboriginal engagement in NRM. Booroongen Djugun Aboriginal Corporation (BDAC) was contracted to develop a resource kit for this purpose. Following an extensive consultation process engaging with Aboriginal NRM practitioners and regional communities the Aboriginal Natural Resource Agreements Kit was endorsed for publication. The kit included the following principles:

**Acknowledging Aboriginal peoples relationship to the landscape**

1. The natural landscape is the source of Aboriginal Peoples spirituality, culture, identity and economy.
2. Aboriginal Peoples have cared for, owned, and occupied the lands and waters of NSW since time immemorial.
3. The health of the natural landscape and health of Traditional Owners are interconnected and interdependent.
4. Traditional Owners have responsibilities to care for and protect the landscape.
5. The health of landscape including land, waters, flora and fauna must, as a minimum, be maintained at its current level and progressively improved.

**Obtaining informed consent**

1. All decisions and actions about land use and management of natural resources must be made on the basis of Traditional Owners free, prior and informed consent.
2. Informed consent about all decisions affecting land, water, flora and fauna must be obtained from the Traditional Owners.
3. The process of reaching informed consent must respect cultural diversity amongst, and between Traditional Owners and other Aboriginal peoples.
4. Where decisions and actions about land use and management of natural resources have social or economic impacts on particular Aboriginal people, then those Aboriginal people must be consulted, and their consent obtained.

**Correctly valuing intellectual property and cultural landscapes**

1. Traditional Owners’ ecological knowledge is intellectual property which must be legally protected.
2. The collection, preservation and use of ecological knowledge by Traditional Owners must be resourced as a priority.
3. Traditional Owners must make decisions about the significance and management of cultural heritage, and landscapes, apart from post contact heritage.
4. Aboriginal Peoples cultural values must be identified by Aboriginal Peoples, respected and incorporated in natural resource policy, planning and actions.
Enabling socio-economic outcomes

1. Socio-economic benefits that flow from natural resource management must be shared with the Traditional Owners.
2. Aboriginal Peoples should be recognised as, and resourced to become, preferred providers of sustainable natural resource management outcomes.

Enabling fair and equitable negotiation

1. Aboriginal Peoples’ engagement in natural resource management agreements, policy, planning and actions must be appropriately enabled and resourced, including access to independent experts, education and training.
2. All negotiation and planning processes must respect the socio-economic circumstances, cultural responsibilities and timeframes of Aboriginal Peoples.
3. Negotiation with Aboriginal Peoples regarding natural resource management must be conducted in an honourable, open and transparent manner.

Enabling fair and equitable communication principles

1. All communications with Traditional Owners shall remain confidential, including knowledge of sites of significance and other commercially sensitive issues, unless otherwise agreed in writing.
2. All communications shall be without prejudice.
3. All communication and information shall be in a form that is easily accessible by Aboriginal people.

The Aboriginal Natural Resource Agreements Kit and principles have been formally endorsed for use by the NSW Natural Resources and Environment Chief Executive Officers Cluster. Several Aboriginal communities have taken advantage of the kit and used it as the basis for making formal agreements with government and non-government bodies for a variety of purposes.

Sources: Aboriginal Natural Resource Agreements Kit
NSW Natural Resources Advisory Council, 2007
Booroongen Djugun College – Kempsey NSW
www.booroongencollege.nsw.edu.au
In 2008, for the first time, through the National Indigenous Reform Agreement, the Australian Government, together with the states and territories through the Council of Australian Governments (COAG) signed off on a set of specific and ambitious targets to address Indigenous disadvantage. The agreement:

- committed all jurisdictions to achieving the Closing the Gap targets
- spelled out an integrated strategy for achieving the targets in urban and regional areas, as well as in remote Australia
- defined responsibilities and promoted accountability among governments
- noted the significant funding provided through Indigenous-specific national partnerships to assist in meeting the targets
- linked to other national agreements and national partnerships for all Australians that include elements that addressed the Closing the Gap targets.

The Agreement provided an integrated framework for the task of Closing the Gap. It is a living document, bringing together commitments from across the Indigenous-specific and mainstream national partnership agreements. It set out the policy principles, objectives and performance indicators underpinning Closing the Gap and the specific steps taken by governments to meet the targets.

The six key targets that formed the Closing the Gap objective were to:

1. close the life expectancy gap within a generation
2. halve the gap in mortality rates for Indigenous children under five within a decade
3. ensure access to early childhood education for all Indigenous four years olds in remote communities within five years
4. halve the gap in reading, writing and numeracy achievements for children within a decade
5. halve the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020
6. halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.

A series of principles associated with progressing performance against these key targets included the following:

**Service delivery principles**

- **Priority principle** – programs and services should contribute to closing the gap by meeting targets endorsed by COAG while being appropriate to local community needs.
- **Indigenous engagement principle** – Engagement with Indigenous men, women and children and communities should be central to the design and delivery of programs and services.
- **Sustainability principle** – Programs and services should be directed and resourced over an adequate period of time to meet the COAG targets.
- **Access principle** – Programs and services should be physically and culturally accessible to Indigenous people recognising the diversity of urban, regional and remote needs.
- **Integration principle** – There should be collaboration between and within governments at all levels and their agencies to effectively coordinate programs and services.
- **Accountability principle** – Programs and services should have regular and transparent performance monitoring, review and evaluation.
Social inclusion principles

- **Reducing disadvantage** – Making sure people in need benefit from access to good health, education and other services.

- **Increasing social, civil and economic participation** – Helping everyone get the skills and support they need so they can work and connect with community, even during hard times.

- **A greater voice, combined with greater responsibility** – Governments and other organisations giving people a say in what services they need and how they work, and people taking responsibility to make the best use of the opportunities available.

- **Building on individual and community strengths** – Making the most of people’s strengths, including the strengths of Aboriginal and Torres Strait Islander peoples and people from other cultures.

- **Building partnerships with key stakeholders** – Governments, organisations and communities working together to get the best results for people in need.

- **Developing tailored services** – Services working together in new and flexible ways to meet each person’s different needs.

- **Giving a high priority to early intervention and prevention** – Heading off problems by understanding the root causes and intervening early.

- **Building joined-up services and whole-of-government(s) solutions** – Getting different parts and different levels of government to work together in new and flexible ways to get better outcomes and services for people in need.

- **Using evidence and integrated data to inform policy** – Finding out what programs and services work well and understanding why, so that good ideas can be shared, improvements made and effort put into the things that work

- **Using locational approaches** – Working in places where there is a lot of disadvantage, to get to people most in need and to understand how different problems are connected.

- **Planning for sustainability** – Doing things that will help people and communities deal better with problems in the future, as well as solving the problems they face now.

**Sources:** Department of Families, Housing, Community Services, and Indigenous Affairs websites:

- www.fahcsia.gov.au
- www.indigenous.gov.au
On 1 October 2010, amendments made to the *National Parks and Wildlife Act 1974* (NPW Act) to regulate the protection of Aboriginal objects and Aboriginal places commenced, as did the regulations required to support those amendments. The original provisions had remained largely unchanged since their enactment many years ago.

A summary of these changes to the Act follows.

**New offences** of ‘harm’ or ‘desecrate’ an Aboriginal object or a declared Aboriginal Place have been created. Harm means any act or omission that destroys, defaces, damages or moves the object or destroys, defaces or damages an Aboriginal place. Harm also includes any acts which ‘cause or permit’ the harm. Trivial or negligible acts or omissions do not constitute harm. The new offences replace the previous single offence and are:

- Where there is intent to harm or desecrate an Aboriginal object a person must not knowingly harm or desecrate an Aboriginal object. This is the most serious level of offence for Aboriginal objects.
- A strict liability offence for Aboriginal objects where only the act causing the harm needs to be proved, not the intent – that is, a person must not harm an Aboriginal object.
- A strict liability offence for harming or desecrating a declared Aboriginal Place – that is, a person must not harm or desecrate an Aboriginal Place.
- A new offence for breaching Aboriginal Heritage Impact Permit (AHIP) conditions.

**Some defences** against prosecution are also provided for in the Act. If a person were to harm an Aboriginal object or an Aboriginal Place, then one defence available is that the harm was authorised by an Aboriginal Heritage Impact Permit (AHIP), but only if all the conditions were complied with. The main defence for the strict liability offence for harming Aboriginal objects is that of ‘due diligence’. A general Due Diligence Code of Practice will be adopted by the regulation. Codes of practice for certain industries or classes of activity can also be adopted by regulation. Other low impact activities have also been prescribed by regulations as defences.

The following activities are exempt from the new Aboriginal heritage offence provisions:

- Traditional non-commercial cultural activities carried out by Aboriginal people.
- Emergency fire fighting activities or bushfire hazard reduction work authorised by the *Rural Fires Act 1997*.
- Certain Aboriginal heritage conservation or protection work carried out by an officer of the Office of Environment and Heritage.
- Activities authorised by, or under the *State Emergency and Rescue Management Act 1989*, in relation to an emergency, and was reasonably necessary in order to avoid an actual or imminent threat to life or property.
- The harm was specifically required or permitted under the express terms of a Conservation Agreement entered into under the NPW Act.

It should also be noted that state-significant development, including major mining, infrastructure and residential developments, is dealt with under Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

This legislation is currently under review.

**New and significantly increased maximum penalties** have been put in place for the new offences along with the wider range of offences. For the most serious level offences the maximum penalty for individuals is now $275,000 or imprisonment for 1 year, and the maximum penalty for corporations is $1,100,000. Different maximum penalties apply to the different types of offences.

The Act includes ‘circumstances of aggravation’ where individuals have committed the offence. Where these circumstances of aggravation exist then the maximum penalties for individuals are doubled.
Aboriginal Heritage Impact Permits (AHIPs) will be more flexible and able to apply as broadly or narrowly across lands and to types of objects as required. AHIPs can now also be amended or varied. A single and more flexible AHIP will replace the current dual permit system. There will no longer be a requirement to obtain a permit when surveying for Aboriginal objects if the activity is undertaken in accordance with the Code of Practice for Archaeological Investigation in NSW prescribed by the regulations.

The Act provides factors that must be considered when processing AHIP applications, timeframes for those processes and appeal provisions. The factors that must be considered by the Director General of the Department of Premier and Cabinet in making a decision on an AHIP application are:

- the objects of the NPW Act
- the actual or likely harm
- practical measures that may be taken to protect and conserve
- practical measures that may be taken to avoid or mitigate any actual or likely harm
- the significance of the Aboriginal objects or Aboriginal Place
- the results of any consultation by the applicant with Aboriginal people
- the social and economic consequences of making the decision and
- any documents accompanying the application and any submission under the EP&A Act in connection with the activity to which the permit relates and that has been received by the Director General of the Department of Premier and Cabinet.

The new provisions also allow for the variation, transfer, suspension, revocation and surrender of AHIPs. They allow applicants to appeal to the Land and Environment Court against certain decisions, and allow regulations to be made which will detail consultation requirements with Aboriginal people relating to AHIP applications. The Act also allows that AHIPs which relate to a specified parcel of land can be transferred without variation.

Remediation provisions have been inserted into the NPW Act which allow the Director General of the Department of Premier and Cabinet to issue a direction to repair the damage where a breach of the Act may have caused damage or harm to Aboriginal objects and Aboriginal Places. It is an offence if that person fails to comply with the remediation direction, or to delay or obstruct a person carrying out a remediation direction. Recipients of a remediation direction may appeal to the Land and Environment Court against the Director General's decision to issue a remedial direction.

Other matters now included in the Act include:

- a provision to allow a two-year period to prosecute following the evidence of the alleged offence first coming to the attention of any relevant authorised officer
- guidance for the court to consider in imposing penalties that provide for wider alternative sentencing orders such as publication orders, restoration or training
- clarification of membership and procedures for the Aboriginal Cultural Heritage Advisory Committee. Members must be Aboriginal and the Director General of the Department of Premier and Cabinet sits on the committee as a non-voting member. Representatives from NTSCORP and the NSW Heritage Council have also been added to the membership.

The National Parks and Wildlife Act 1974 (as amended) is administered by the Office of Environment and Heritage, Department of Premier and Cabinet.
