Comparing the NSW Aboriginal heritage system with other Australian systems
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1. Introduction

What is the purpose of the information paper?

This publication compares the Aboriginal cultural heritage system in New South Wales with the systems in the other Australian states and territories and with the Commonwealth system. Some examples from New Zealand and Canada are also included where they offer a useful point of difference to Australian situations. The purpose of the publication is to assist individuals and communities to better understand the ways in which different culture and heritage systems operate across Australia.

The publication has been prepared as an information resource for people wishing to participate in the process to reform Aboriginal heritage legislation in NSW.

In November and December 2011, 26 Aboriginal community workshops (as well as five industry and local government roundtables) were held across NSW and were attended by approximately 340 people. The purpose of the workshops was to provide an opportunity for people to voice their views on the present system for protecting Aboriginal culture and heritage in NSW and to offer ideas for changing it.1

This publication is a response to requests made at the workshops for more background information on the Aboriginal heritage legislation in NSW and in other Australian states and territories. It provides a comparative review of heritage systems in Australia with some examples from New Zealand and Canada. A separate information paper gives an overview of the Aboriginal heritage system in NSW.2

The two information papers will be circulated prior to community information workshops to be undertaken across NSW in mid-2012. The information papers are available as free downloads from the Office of Environment and Heritage website at www.environment.nsw.gov.au/achreform/index.htm.

Who is the information paper for?

While the paper has been written mainly for members of Aboriginal communities in NSW it may also be of use to the broader public interested in the legislative reform process.

What legislation protects Aboriginal heritage in Australia?

The Australian Federal (or Commonwealth) Government and all of Australia’s states and territories have enacted laws protecting Aboriginal cultural heritage. Table 1 shows the main pieces of legislation (laws) in each state. In most states and territories, there are also other pieces of legislation which protect Aboriginal heritage. For example, in NSW these include the Heritage Act 1977, Environmental Planning and Assessment Act 1979, Aboriginal Land Rights Act 1983, Native Title Act (NSW) 1994 and Threatened Species Conservation Act 1995.

In the 1960s and early 1970s, when the Australian states and the Northern Territory first legislated for protection of Aboriginal heritage, two distinct approaches emerged. In the southern states the term ‘relics’ was used to describe Aboriginal heritage, and archaeologists were put in charge of investigating and protecting them (for their archaeological value). By contrast, in northern Australia, Aboriginal sacred sites would be protected, with the assistance of anthropologists, mainly for their significance to contemporary Aboriginal people.

During the 1980s and 1990s, Aboriginal heritage management systems in southern Australia responded to increased Aboriginal assertiveness, as well as to trends in the fields of archaeology and heritage conservation, by employing Aboriginal staff and insisting that consultation take place with Aboriginal communities regarding heritage assessments and permit processes.

Over the last decade, the Australian approach to Indigenous heritage has moved to give Aboriginal communities (or, more specifically, native title owners and claimants) a central role. The new legislation in Queensland and Victoria reflects this move, particularly with regard to the issues discussed in Sections 5 and 6 of this document. There are indications that South Australia, Tasmania and Western Australia, where Aboriginal heritage legislation is currently under review, will also follow this trend.

Table 1: Australian Aboriginal cultural heritage legislation

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Legislation</th>
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| Commonwealth    | Aboriginal and Torres Strait Islander Heritage Protection Act 1984  
                  | Environment Protection and Biodiversity Conservation Act 1999  
                  | Protection of Movable Cultural Heritage Act 1986 |
| New South Wales | National Parks and Wildlife Act 1974  
                  | Heritage Act 1977  
                  | Environmental Planning and Assessment Act 1979 |
| Queensland      | Aboriginal Cultural Heritage Act 2003  
                  | Torres Strait Islander Cultural Heritage Act 2003 |
| ACT             | Heritage Act 2004 |
| Victoria        | Aboriginal Heritage Act 2006 |
| Tasmania        | Aboriginal Relics Act 1975 |
| South Australia | Aboriginal Heritage Act 1988 |
| Western Australia | Aboriginal Heritage Act 1972 |
| Northern Territory | Heritage Conservation Act 1991  
                      | Aboriginal Sacred Sites Act 2006 |
How is Aboriginal heritage legislation administered?

In most states and territories in Australia, Aboriginal heritage legislation is administered through government agencies. For example, in NSW the agency responsible for administering the *National Parks and Wildlife Act 1974* is the Office of Environment and Heritage; in Victoria, Aboriginal Affairs Victoria administers the *Aboriginal Heritage Act 2006*; and in the ACT, ACT Heritage administers the *Heritage Act 2004*. In the Northern Territory, however, the Aboriginal Areas Protection Authority is an independent statutory organisation established to administer the *Aboriginal Sacred Sites Act 2006*. This body operates independently from government.

At the request of an Aboriginal or Torres Strait islander person, the Commonwealth can intervene in any state or territory to protect places and objects that are of traditional significance to Aboriginal people, if the Commonwealth decides that state laws have proven to be ineffective in protecting them. This would take place under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This intervention is intended to be a measure of last resort, and is intended to provide protection for a limited time period.

Government agencies in Australia tend to administer Aboriginal heritage legislation in similar ways, though details may vary. For example, all states and territories:

- regulate the impact on heritage by land development
- are responsible for taking action against individuals or organisations who damage Aboriginal sites or are otherwise in breach of the laws protecting sites
- maintain centralised registers or lists of Aboriginal heritage. These map the distribution of recorded heritage sites and are an important means of protecting them. The registers also store information provided by Aboriginal communities
- carry out conservation activities including the repatriation of human remains and management of Aboriginal heritage sites
- promote public awareness of Aboriginal heritage.

Defining Aboriginal heritage

The way in which Aboriginal heritage is defined in law helps determine how it is protected and administered in each state and territory. In Tasmania, for instance, the *Aboriginal Relics Act 1975* defines a *relic* as the physical remains of past Aboriginal occupation (e.g. a stone artefact, painting, carving, engraving, arrangement of stones, midden) dating to before 1876. Spiritual places and plant resource sites are not included in this definition and are therefore not protected by these laws.

In some other states or territories, the definition of Aboriginal heritage is broader, such as in South Australia where the *Aboriginal Heritage Act 1988* applies to ‘all Aboriginal sites, objects and remains in South Australia that are of significance to Aboriginal tradition, archaeology, anthropology and/or history’. In the Northern Territory, the definition of Aboriginal heritage includes ‘any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition’. In the Northern Territory, Aboriginal heritage is defined in two pieces of legislation that separate ‘sacred sites’ and ‘archaeological sites’. Two different administration systems are used for these different site categories.

In NSW, where the NPW Act defines Aboriginal heritage in terms of Aboriginal objects and declared Aboriginal Places, the heritage administration system focuses strongly on Aboriginal Heritage Impact Permits to regulate harm to Aboriginal objects and on the process of nominating Aboriginal Places for gazettal.

In summary, systems that define heritage in terms of the physical material (e.g. as relics or objects) will be administered differently to systems which define heritage in terms of places and land that are important to Aboriginal groups.
4. Who owns Aboriginal heritage?

In most Australian states Aboriginal cultural material is owned by the state, or by private owners of land where sites such as rock art and scarred trees occur. This is the situation in NSW. There are a small number of exceptions outside of NSW where the ownership of certain kinds of cultural material by Aboriginal groups is recognised, particularly in more recent legislation.

Ownership of Aboriginal heritage in Victoria and Queensland

In Victoria, the legislation provides for the ownership of Aboriginal human remains and ‘secret and sacred’ objects by Aboriginal people who have a ‘traditional and familial link’ to the remains and objects. Other Aboriginal heritage items (e.g. non-sacred stone artefacts, occupation deposits) continue to be owned by property owners where these objects are found.

In Queensland, Aboriginal ownership of Aboriginal human remains and of secret or sacred objects held in state collections is also recognised. In addition, Aboriginal parties can enter into heritage agreements related to particular areas of land that are under development, and these parties own any Aboriginal cultural heritage that they lawfully take away from an area under an agreement. Agreements were recently negotiated between the company Transcity and Jagera and Turrbal (Aboriginal parties) about protecting Aboriginal cultural heritage during a road-building project. These agreements establish a secure keeping place which nominees of the Jagera and Turrbal communities have access to. Cultural objects found during excavation will be stored here until the communities decide what to do with them.3

Repatriation of Aboriginal human remains in Tasmania

Prior to 1984, Aboriginal remains in the Tasmanian Museum and Queen Victoria Museum were ‘owned’ by the museums. The Museums (Aboriginal Remains) Act 1984 transferred ownership of all Aboriginal remains in the museums to the Crown or State of Tasmania. The Tasmanian Government subsequently ordered the trustees of these museums to deliver the remains to Elders of the Tasmanian Aboriginal community who had been campaigning for the release of their ancestors’ remains from the museum for many years. When the remains were finally handed over, the Elders were exempted from certain laws so they could cremate the remains at a specific historic site. Truganini’s remains were cremated and scattered over the D’Entrecasteaux Channel, according to her own wishes.

Repatriation of Aboriginal human remains and cultural objects in the USA

In Canada and New Zealand, Indigenous cultural materials are generally owned by the Crown (or federal government). However in the United States, the federal Native American Graves Protection and Repatriation Act (1989):

- gives Native Americans and Hawaiians ownership and control of ancestral remains and cultural objects on federal and tribal lands
- requires museums and federal agencies to compile lists or summaries of Native American remains or cultural objects in their possession, and to return them to people who can prove they are direct descendants or have a cultural affiliation.

5. **Who makes decisions?**

Across Australia decision-making about Aboriginal cultural heritage is in most cases the responsibility of the relevant Minister and the head of the government agency that administers the main legislation for the protection of Aboriginal cultural heritage. This is how decisions are made in NSW, although the Aboriginal Cultural Heritage Advisory Committee advises the Minister for the Environment and the Director General of the Department of Premier and Cabinet on cultural heritage matters.

In some cases Aboriginal bodies established under legislation are responsible for appointing Traditional Owner groups (Victoria), entering into management plan agreements (Queensland), or issuing permits for access and works near sacred sites (Northern Territory).

**Victoria – the Aboriginal Heritage Council and RAPs**

Victoria’s Aboriginal Heritage Council is made up of eleven Traditional Owners appointed by the Minister for Aboriginal Affairs. The Council provides advice to the Minister and to the Secretary of the Department of Planning and Community Development. It assesses applications by Aboriginal groups to be Registered Aboriginal Parties (RAPs) and decides which groups should be registered. The Council also supports and advises RAPs in their work. It is able to contribute policy advice, consider some matters relating to cultural heritage management plans (CHMPs), and promote public awareness of Aboriginal cultural heritage.

Registered Aboriginal Parties are responsible for cultural heritage decisions at a local level. Any person or company wishing to undertake a high impact activity or an activity in an area of high cultural sensitivity on land that has not been subject to ground disturbance must make a Cultural Heritage Management Plan. The local RAP evaluates these plans and decides whether to approve or refuse to approve them. The Victorian *Aboriginal Heritage Act 2006* sets out the matters that the RAP must consider when making this decision. RAPs can also develop voluntary cultural heritage agreements with other parties about the heritage in their area.

Where no RAP is registered for an area, the Secretary of the Department of Planning and Community Development, or the Aboriginal Heritage Council may make decisions about Aboriginal cultural heritage for that area. The Secretary may consult with the Council and with people who have traditional and familial links to the area (or historical links to the area), but is not obliged to accept their views.

**Queensland – making cultural heritage agreements**

In Queensland, Aboriginal parties have the opportunity to enter into cultural heritage agreements with people or companies who wish to develop land as part of a Cultural Heritage Management Plan. These plans are compulsory for some kinds of development, but agreements are also often made voluntarily between Aboriginal groups and developers. Under the agreement process, Aboriginal parties identify and assess their own heritage, with assistance from experts if they wish, and reach agreement with development parties about how their heritage is to be protected and managed in the area affected by the development proposal.

If a dispute arises, the matter is referred to the Land Court for mediation. If agreement cannot be achieved, the Minister can approve the plan without the Aboriginal party’s consent, if the Land Court recommends this.
Northern Territory

In the Northern Territory, the *Aboriginal Land Rights Act (Northern Territory) 1976* is administered through one of four Land Councils which have the ability to issue or deny permits for access and works near sacred sites on unalienated Crown land.

In other areas of the Territory, the Aboriginal Areas Protection Authority (made up of equal numbers of Aboriginal men and women, mostly custodians of sacred sites) has decision-making powers, registers and records sacred sites, and issues authority certificates for development. The Minister has the power to override decisions of the Authority.

New Zealand – Maori Heritage Council

Indigenous heritage in New Zealand is also managed by an advisory body which works directly with Maori communities. The Maori Heritage Council, which has a minimum of three Maori members (out of eight in total), provides advice and recommendations to the Historic Places Trust on matters relating to Maori heritage. Maori staff who work for the Maori Heritage Council consult with communities about archaeological permits and the registration of places or areas of traditional or spiritual significance. The Council provides recommendations to the Historic Places Trust (it does not itself have decision-making power). Its greatest role in facilitating Maori involvement in the heritage management process is through its power to make sure the relevant tribal authorities have been consulted for applications which require an archaeological authority.

Under the *Historic Places Act (1993)*, the relevant *iwi* (tribe) authorities make decisions about which archaeological investigations should go ahead. Investigations must also be considered ‘appropriate’ by the Maori Heritage Council before they can be authorised.
6. Who speaks for Country?

To ‘speak for Country’ means speaking on behalf of the Aboriginal community and there is often debate as to who is the most appropriate person (or persons) to take on this role. This is a significant issue, particularly when dealing with government and private businesses about land use and heritage management.

It is commonly agreed that those who speak for Country require an understanding and knowledge of the people, landscape, and history of the Country as well as an inherited responsibility and right to look after it. This authority to speak for Country is influenced by traditional law, seniority, kinship, and gender. As a result, speaking for Country is often the responsibility of traditional owners, and especially Elders, because of their knowledge and connection to Country.

Native title and who speaks for Country

Registered native title holders have official status under Commonwealth and state law and are recognised as having a right to speak for Country on Aboriginal culture and heritage.

Recent Aboriginal heritage legislation in Queensland and Victoria uses the *Native Title Act 1993* to help establish who can make decisions about cultural heritage.

In Victoria, if registered native title holders or parties to registered agreements under Victoria’s *Traditional Owner Settlement Act 2010* apply to become a Registered Aboriginal Party (RAP), the Aboriginal Heritage Council must register them as the one and only RAP for that area. If there are no registered native title parties for an area, the Council can then consider the applications of other native title claimants, and bodies representing Aboriginal people with traditional or family links to the area, or with a historical or contemporary interest in the heritage of the area. So far the Victorian Aboriginal Heritage Council has only registered parties that represent traditional owners.

In Queensland, native title holders must be given the first opportunity to become party to a cultural heritage agreement. If there are no native title determinations for that area, then registered claimants have an opportunity, and then other or past claimants must be contacted. If none of these parties exist for an area, other Aboriginal people with particular knowledge about the area are consulted and negotiated with. An Aboriginal party can request that other persons with relevant cultural knowledge be involved.

Who decides who speaks for heritage?

In NSW it is the responsibility of the people or companies who propose land development to identify which Aboriginal people they should consult with, undertake consultation, and document the consultation process. This must be done in accordance with provisions in the NPW Regulation. In some other places, it is the government’s responsibility to work out who should be consulted and to undertake consultation. In Victoria and New Zealand standing bodies exist which are accepted as representing particular Indigenous groups on heritage matters. In Victoria these are RAPs, and in New Zealand, they are *iwi* (tribal authorities).

In Queensland, registered Aboriginal cultural heritage bodies act as an initial contact point for those wishing to consult with Aboriginal people about an area. They have the power to nominate who is to be identified as the relevant ‘Aboriginal party’ for an area and thus who can enter into negotiations with people who are planning developments. Up to October 2010, 27 organisations had registered as cultural heritage bodies, the majority being native title groups.

In many places, there may be more than one Aboriginal group which claims the right to speak for Country. The Victorian legislation allows for more than one RAP to be consulted in these cases, and in both New Zealand and British Columbia (Canada), the government often consults with several groups about one site or development area.
7. **How do Aboriginal people participate in decision-making?**

Across Australia, Aboriginal people participate in decision-making with regard to Aboriginal cultural heritage management in many different ways.

**Consultation**

Consultation with ‘stakeholders’ (Aboriginal community groups, private companies, land owners, etc.) is a common part of the practice of Aboriginal cultural heritage management. The approach to Aboriginal community consultation taken by the Commonwealth Government is outlined in the publication *Ask First: a guide to respecting Indigenous heritage places and values*.

In NSW, Queensland, Victoria and Western Australia, it is the responsibility of developers to conduct consultation with Aboriginal groups. However in the Northern Territory it is part of the role of the Aboriginal Areas Protection Authority, which is independent of both government and developers, to identify the appropriate custodians to be negotiated with and to carry out consultation, unless the other parties desire to communicate directly.

In British Columbia (Canada), it is the government’s responsibility (rather than ‘consultants’) to conduct consultation, acting as a conduit between developers and First Nations.

**Advice**

Aboriginal participation in decision-making can take the form of ‘expert’ advice provided to the decision-maker (such as the Minister). The NSW Aboriginal Cultural Heritage Advisory Committee and the Victorian Aboriginal Heritage Council are Aboriginal bodies (recognised in legislation) that advise the relevant Minister on matters relating to the identification, assessment and management of Aboriginal heritage. In the ACT, where Aboriginal and non-Aboriginal heritage are both protected by a single Act, the ACT Heritage Council (the key advisory body on heritage issues) includes representatives of business and the community, including the Aboriginal community.

**Collaboration**

Collaboration means jointly agreeing on a decision. In NSW, one opportunity for collaboration is via the joint management of national parks through management agreements such as an Indigenous Land Use Agreement (ILUA) or Memorandum of Understanding (MoU). In some other states, such as Queensland, there is a greater proportion of Crown land than in NSW, which increases opportunities for native title activity as well as ILUAs and other collaborative agreements that take place under the Native Title Act. Of 501 ILUAs made across Australia to 31 March 2011, nine are located in NSW whereas 267 are located in Queensland.

There are many cases from around Australia where Aboriginal groups and heritage specialists have collaborated on projects, for example, in the investigation of cemeteries to locate the unmarked graves of Aboriginal people (such as at Ebenezer Mission in Victoria and Albany town cemetery in Western Australia). Another example is the Canning Stock Route project in which Aboriginal custodians and university researchers are working together to map and document rock art and *Jukurrpa* (Dreaming places).
Overseeing consultation and collaboration processes

In NSW, people and companies who undertake consultation with Aboriginal communities as part of the development process are required to do so in accordance with the NPW Regulation and to document that consultation. This is also the case in other places such as New Zealand, and in Western Australia where the Aboriginal Cultural Materials Council can make investigations into the level and appropriateness of consultation.

Where collaborative decisions are being made by Aboriginal people and other parties through agreements, it is important that these agreements are based on a transparent and equitable negotiation process between well-informed parties, with no undue influence exercised by any party. In Queensland, under the *Aboriginal Cultural Heritage Act 2003*, Cultural Heritage Management Plans are placed on a publically accessible register by the Department of Environment and Resource Management, but there is no independent review body. ILUAs in all states can be reviewed by the National Native Title Tribunal (NNTT), and in principle the NNTT can help to ensure that Aboriginal cultural heritage is protected where an agreement cannot be reached.

Control

Across Australia, most Aboriginal heritage legislation vests ultimate control in the government, even where it allows for considerable Aboriginal input into the decision-making process. Where Aboriginal people own land, they are generally able to exert more control over the ways it, and heritage sites on that land, are managed.

Aboriginal freehold land makes up more than 50 per cent of the Northern Territory and Aboriginal people have a large degree of autonomy over the protection of cultural heritage on this land. In Canada too, Aboriginal groups have control over the management of Aboriginal heritage sites on settlement lands (lands which are owned by Aboriginal people and over which they have the right to make laws).

Land Councils in the Northern Territory also have control over the issuing of permits for access and works in the vicinity of sacred sites (see Section 5).

In NSW, under Part 4A of the NPW Act, joint management of reserved land (Part 14 of the NPW Act and the *Aboriginal Land Rights Act 1983*) allows Aboriginal people a level of control over their heritage. Aboriginal traditional custodians have a majority on boards of management. Local Aboriginal Land Councils lease the reserved lands to the Minister for the Environment. The board has control over Aboriginal objects, cultural resource use and makes other decisions about management, provided that they are in accordance with the NPW Act.
8. What is protected, and what is not protected?

The way in which laws define Aboriginal heritage (see Section 3) will determine what is protected and what is not protected. For example, laws that define Aboriginal heritage only in terms of Aboriginal sites and objects will protect the physical remains of Aboriginal history and not spiritual or story places. On the other hand, laws that define Aboriginal heritage as places that are important to Aboriginal groups will protect areas such as significant sites, story places and cultural resource areas. Other aspects of cultural heritage, such as those relating to access to land and resources, may be managed under separate legislation.

Cultural heritage objects and sites

Aboriginal sites and objects are protected by law in all parts of Australia. In the southern parts of Australia, while laws normally do give protection to sacred sites the main focus of legislation and heritage conservation is on archaeological objects and sites. The Tasmanian *Aboriginal Relics Act 1975*, for example, chiefly protects sites and objects, and in South Australia heritage assessments often take the form of archaeological surveys, even though the definition of Aboriginal cultural heritage protected by the *Aboriginal Heritage Act 1988* is broader.

This also continues to be the case in Victoria, where although Aboriginal people have a greater role in identifying and assessing their own heritage, most heritage identification work is undertaken by Cultural Heritage Advisors, almost all of whom are archaeologists. These advisors are persons who must be appropriately qualified in archaeology, anthropology, or history, or with extensive experience or knowledge in relation to the management of Aboriginal cultural heritage. Currently only four Aboriginal people in Victoria are recognised Cultural Heritage Advisors.

Significant and sacred sites

Places of particular importance or significance to Aboriginal people are protected in different ways in several states. Legislation in the Northern Territory automatically protects all places that are sacred or of ‘significance according to Aboriginal tradition’. Aboriginal people acting in accordance with Aboriginal tradition have a right of access to sacred sites, and the right to pass through private land to gain access. In Victoria, Aboriginal cultural heritage objects and places (areas of cultural heritage significance to Aboriginal people) are covered by blanket protection. The Minister may also make declarations which preserve important Aboriginal heritage places and objects as ‘protected areas’. In NSW natural sacred sites (e.g. mountains, waterholes) where there are no Aboriginal objects (e.g. stone artefacts) are not protected under the NPW Act unless they are declared Aboriginal Places.

In Victoria and Queensland, where cultural heritage agreements are made with people or companies wishing to undertake development, the protection of significant or sacred sites can be part of an agreement. This is also the case in South Australia, where Work Area Clearance agreements are often made with mining companies, allowing Aboriginal people to notify companies about the presence of sacred sites without needing to specify why the places are significant or give their exact locations.
Comparing the NSW Aboriginal heritage system with other Australian systems

Landscapes

There is a tendency in all states to focus on protecting ‘sites’ rather than the cultural landscapes that surround them; however, the state and national heritage lists are gradually expanding the range of ways that heritage can be defined. The inclusion on the National Heritage List of the Wave Hill Walk-Off Route, which is made up of six places that were important in the walk-off action, shows one way of protecting related groups of places or routes.

The Commonwealth system of Indigenous Protected Areas (IPAs) also works towards protecting culturally significant landscapes. An IPA is an area 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. The largest declared Indigenous Protected Area is the Ngaanyatjarra Lands in Western Australia, at 9.8 million hectares, and the smallest is Pulu Islet in the Torres Strait, at around 15 hectares.

Plants and animals and cultural resource use

In NSW, access to land and resources for maintaining traditional uses and relationships with plants, animals and other cultural resources is facilitated to a limited extent through many different laws, including the NPW Act, Fisheries Management Act 1994 and Forestry Act 1916. Since 2006 there has been a statewide ‘cultural resource use framework’ in place to provide guidance on opportunities for cultural resource use on government owned and managed land.

In Victoria, one of the objectives of the Aboriginal Heritage Act 2006 is to ‘promote the management of Aboriginal cultural heritage as an integral part of land and natural resource management’. The cultural heritage agreements that can be made under this Act have the potential to recognise Aboriginal rights of access to land for cultural resource use. However only one agreement has been made so far. The Victorian Traditional Owner Settlement Act 2010 also has the potential to facilitate cultural resource use. The first agreement under this Act recognises the Gunai/Kurnai People as the traditional owners of a large part of Gippsland and acknowledges their rights of access to land and use for traditional purposes such as fishing and hunting. In Canada and New Zealand, fishing and hunting rights are supported by long-standing treaties, but the development of new laws and policies has still been required to make sure these rights can continue to be exercised.

In New Zealand, the rights of Maori people as custodians of the natural environment are recognised through the Resource Management Act 1991 which requires decision-makers to ‘have particular regard’ to kaitiakitanga (Maori ‘guardianship’ or ‘stewardship’ over natural and physical resources) when managing the use, development, and protection of those resources. This clause requires local and regional councils to take into account Maori responsibilities to ‘guard, conserve, nurture, foster or protect’ natural resources when making planning and development decisions, and works with the New Zealand Historic Places Act 1993 to enable Maori people to participate in land management processes in a more holistic way.

Buildings and other heritage shared with non-Indigenous people

In most states the Aboriginal cultural values of towns and cities, and of pastoral landscapes and other ‘historic’ places are little recognised and protected. In NSW the Heritage Branch of the Office of Environment and Heritage (OEH) and the declaration of Aboriginal Places work together to protect some ‘historic’ Aboriginal places. In South Australia and Western Australia the laws that protect Aboriginal heritage are focused on sacred sites on the one hand, and objects on the other, while the laws that protect non-Indigenous heritage are rarely used to protect the Aboriginal values of places. The ACT provides a different approach in which both Aboriginal and non-Indigenous heritage are protected under the same Act.
Intangible heritage – cultural knowledge, language and traditional practices

‘Intangible heritage’ such as language, stories and cultural practices (e.g. hunting, collecting for food and medicine, etc.) is not explicitly protected under cultural heritage legislation in the Australian states and territories. However in some states and territories, such as South Australia and the Northern Territory, it is illegal in some situations for people who are not traditional knowledge holders to share secret Aboriginal information without permission.

Internationally, definitions of intangible heritage and measures for protecting intangible heritage are being developed. UNESCO has established a Convention for the Safeguarding of Intangible Cultural Heritage (2003) which aims to protect living heritage including knowledge, skills and oral traditions and also to support the ‘use, enjoyment and continued transmission’ of intangible heritage. Australia has not signed the convention, owing partly to concerns about government interference in Aboriginal cultural matters.

In Brazil intangible heritage is protected via the Brazilian Constitution, including ‘ways of creating, of doing and of living’. In British Columbia (Canada), the First Peoples’ Heritage, Language and Culture Act created the First People’s Heritage, Language and Culture Council which seeks to assist First Nations in their efforts to revitalize their languages, arts and cultures. It provides funding to British Columbia’s Aboriginal communities for language, arts and culture projects.
How is Aboriginal heritage protected?

The protection of Aboriginal cultural heritage via the regulation of development, through cultural heritage management plans and permits, is discussed in Section 10. But there are many other ways in which Aboriginal heritage is protected. Those for which NSW and other states have similar approaches, include:

- conservation works
- declaring protected areas
- co-management of protected areas
- partnerships with private land owners
- regulating the possession, sale and export of Aboriginal objects or cultural material
- discouraging harmful activities through a system of penalties (Section 11)
- public education (e.g. the Victorian Aboriginal Heritage Council is responsible for promoting public awareness of Aboriginal heritage as a strategy to ensure its long-term protection).

Planning

There has been a trend in Australia and elsewhere towards heritage planning and away from regulation and prosecution as ways of conserving heritage. Planning enables decisions about Aboriginal cultural heritage to be made with longer timeframes in mind and in a broader context, in which the heritage values important to a local area or a region can be considered without the time pressure that often accompanies a development proposal. Where planning for Aboriginal cultural heritage does occur in NSW, it takes place through regional studies and land-use plans. However, in some other states and territories there is more integration between Aboriginal heritage management and formal planning processes.

Around Australia, Aboriginal heritage legislation tends to be separate from, and act largely independently of, planning legislation. The Australian Capital Territory is an exception, where the Heritage Act 2004 requires that the ACT Planning and Land Authority notifies the Heritage Council of development applications related to nominated or registered places or objects. The Council provides advice to the Authority about the effects of proposed developments on the heritage significance of places or objects, and about conditions that are to be applied to avoid or minimise such impacts.

In New Zealand the protection of Maori heritage is also integrated into the development planning system by the close interaction between the Historic Places Act 1993, which governs heritage, and the Resource Management Act 1991, which guides the development-related decision-making process of regional and district authorities (similar to the local government level in NSW). The heritage protection process is triggered by development decisions, which are based on regional plans. Regional and district authorities are required to take into account any relevant Maori planning documents when making regional plans.

Increasingly, some Indigenous communities are drawing up their own heritage plans to assist them to make decisions about which are the most important places to manage and protect. In Victoria, the Wurundjeri RAP is developing a narap (Country Plan) which is intended to be a strategic plan for their Country. Other Aboriginal groups have worked with state and federal agencies to develop Land and Sea Country Plans, such as the Ngarrindjeri Nation in South Australia and the Eden LALC in southern NSW. In British Columbia (Canada), the Stó:lō Nation has developed its own heritage policy manual to guide heritage professionals when working in traditional Stó:lō territory. Recently, the Stó:lō Nation has moved to strengthen the policy, by underpinning it with land-use plans, consisting of maps and inventories which identify zones to be avoided and zones which conserve heritage sites and recognise environmental issues. This process is an initiative of the Stó:lō Nation, and operates outside of British Columbian heritage legislation; but it does assist the community’s representatives to make informed decisions about development/archaeology permit applications.
10. How are development proposals reviewed?

All Australian Aboriginal heritage laws deal with situations in which land developments threaten to disturb or destroy Aboriginal sites. All legislative regimes (systems of law) in Australia allow for an assessment process to decide which Aboriginal objects and/or sites should be preserved from development impact.

In many instances, anyone proposing to carry out an activity that may harm an Aboriginal object, site or area, whether knowingly or unknowingly, must investigate, assess and report on the ‘harm’ that may be caused by that activity. The ways in which impacts on Aboriginal cultural heritage are regulated in Australia generally take one of two forms – a permitting process or an agreed Cultural Heritage Management Plan (CHMP). In both cases decisions are often made without the benefit of studies or plans which focus on protecting particular kinds of heritage or cultural landscapes at a regional level (Section 9).

In South Australia, Aboriginal heritage is not integrated into planning law and regulation. This means that assessments of Aboriginal heritage are not triggered by the development application process the way they are in NSW, and this means that a limited number of developments include Aboriginal heritage assessment processes.

Regulation through a cultural heritage permit

Regulation in some states, including NSW, is undertaken through a system of Aboriginal heritage impact permits. In NSW, people or companies intending to develop land must determine whether their proposed activity could harm Aboriginal objects or declared Aboriginal Places. If harm could result from these activities, they are required to consider what measures could be taken to avoid that harm. This process is called ‘due diligence’. In cases where Aboriginal cultural heritage will be damaged or destroyed, an Aboriginal Heritage Impact Permit (AHIP) is required. AHIPs are issued by the Director-General of the Department of Premier and Cabinet, who makes decisions on a case by case basis about whether to approve permits to disturb or destroy Aboriginal cultural heritage. Aboriginal people are consulted as part of this process, but do not make decisions about issuing these permits in NSW. If a permit is granted then as long as a developer is acting in accordance with it, he or she cannot be prosecuted for harming Aboriginal cultural heritage.

New Zealand and British Columbia (Canada) also regulate their Aboriginal heritage systems through issuing permits, which are sent to the relevant registered Maori and First Nation groups before being issued. Providing advice on permit applications can be a strain on the resources of Aboriginal groups.

Regulation through a Cultural Heritage Management Plan

In Victoria and Queensland, Cultural Heritage Management Plans (CHMPs) are the main mechanism for regulating large and complex projects and developments in sensitive landscapes. A CHMP involves a broad assessment of what Aboriginal heritage exists in the area that will be affected by a development, and outlines recommendations for its management. In Victoria, CHMPs must be approved by the relevant Registered Aboriginal Party (where a RAP exists).
Under the Queensland *Aboriginal Cultural Heritage Act 2003* a CHMP is an agreement between an Aboriginal party or parties and the development proponent. The Act specifies some timeframes for the process, and requires that clear communication takes place between the proponent of the study and Aboriginal parties on the timing of the study and its stages, access to the area in question for heritage assessment and the engagement of consultants. However, the Act does not specify what should be agreed upon in a CHMP. The parties can negotiate specific protection measures for cultural heritage during the development activity, and can also make agreements on related matters such as employment and ongoing access to Country and management of heritage. Aboriginal parties have the authority to define and assess their own heritage, and consultants such as archaeologists or anthropologists can be engaged if both parties agree (the Aboriginal parties are often reliant on the development proponent to fund any contributions from experts).

Cultural Heritage Management Plans and agreements are labour intensive, expensive and time consuming for all parties, and are not necessarily worthwhile for small development projects or for routine maintenance and management works. In Victoria small and routine projects are regulated by permits, and the proposed new Aboriginal cultural heritage law in Tasmania is also likely to use a combination of regulation through cultural heritage agreements for large, complex or sensitive projects and for the ongoing management of Aboriginal cultural heritage, and a permit system for small scale works.

**Duty of care**

Queensland does not have a permit or licensing system, instead a ‘duty of care’ is in place under which people or companies undertaking any kind of land development work ‘must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage’. Acting in accordance with a CHMP satisfies the ‘duty of care’. If development parties have not been able to reach agreement with Aboriginal people through a CHMP, and the Minister approves their project anyway, the ‘duty of care’ towards Aboriginal cultural heritage still stands.

‘Duty of care’ guidelines have been prepared to help people undertaking development to work out when they need to consult the heritage registers and databases, and when consultation with Aboriginal people is necessary, before proceeding. If these guidelines are not followed and Aboriginal cultural heritage is harmed, the ‘duty of care’ has been breached and penalties may apply.

**Table 2: Elements of development assessment systems in selected states and territories**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Cultural heritage permits</th>
<th>Cultural heritage plans and/or agreements</th>
<th>Duty of care</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>Yes</td>
<td>No</td>
<td>Yes (called ‘due diligence’)</td>
</tr>
<tr>
<td>Queensland</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>ACT</td>
<td>Unknown</td>
<td>Yes – and agreements bind future owners of the land</td>
<td>No</td>
</tr>
<tr>
<td>Victoria</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Yes</td>
<td>No, but proposed in new legislation</td>
<td>No</td>
</tr>
</tbody>
</table>
Where Aboriginal heritage is protected through legislation, actions or activities which are prohibited under the relevant Act are considered illegal and may attract prosecution. In NSW, heavy fines may be issued for activities which damage or destroy Aboriginal Places or objects without a permit. In other states, the threat of prosecution leading to fines or imprisonment is also used as a deterrent against harming Aboriginal cultural heritage, or sharing secret Aboriginal information.

Enforcement also depends on the ability of the state to monitor compliance with permit conditions and agreements about cultural heritage. Victoria, South Australia and Queensland each have a system of inspectors who can report back to the Minister on breaches of the cultural heritage laws.

### Table 3: Enforcement features in selected states and territories

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Fines and/or imprisonment for harming Aboriginal cultural heritage</th>
<th>Routine monitoring or audit of development activities</th>
<th>Inspectors</th>
<th>Stop Work Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Victoria</td>
<td>Yes</td>
<td>No – but RAPs are starting to initiate this role</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Queensland</td>
<td>Yes – for breaching ‘duty of care’ and harming Aboriginal cultural heritage</td>
<td>No – only if this is agreed to by parties to a cultural heritage agreement</td>
<td>Regional Compliance Teams</td>
<td>Yes</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Yes – and for photographing, publishing or reproducing Aboriginal cultural heritage in an inappropriate way</td>
<td>No</td>
<td>Honorary Wardens and officers of the Department have powers of entry and inspection</td>
<td>Yes</td>
</tr>
<tr>
<td>ACT</td>
<td>Yes – and for publishing restricted cultural heritage information</td>
<td>No</td>
<td>No</td>
<td>Yes – Heritage Directions, Heritage Orders, and Information Discovery Orders</td>
</tr>
</tbody>
</table>
Inspectors and Cultural Heritage Management Plan Audits

In Victoria, inspectors are appointed by the Minister for Aboriginal Affairs, after consultation with the Aboriginal Heritage Council, to investigate and monitor compliance with the Act. Inspectors must complete a course of training, and must have knowledge and experience in the protection of Aboriginal cultural heritage (they are typically archaeologists).

Inspectors have powers of entry, search and seizure so they can effectively enforce the provisions of the Act. They have powers to gather relevant information to assist with the investigation of offences and prosecutions. Inspectors oversee Cultural Heritage Audits and have the power to issue thirty-day Stop Work Orders in emergency situations.

Cultural Heritage Audits may be ordered by the Minister where it is suspected that the recommendations of an approved Cultural Heritage Management Plan or the conditions of a Cultural Heritage Permit have been breached. Two Cultural Heritage Audits have been completed to date.

The Wurundjeri Registered Aboriginal Party has also elected to appoint its own inspectors who carry out compliance inspections at certain key points throughout an activity and also undertake a Final Compliance Inspection once a development activity is complete. The Wurundjeri Council provides a report of this inspection to Aboriginal Affairs Victoria. There have been no prosecutions under the Act to date.

In South Australia, inspectors are appointed by the Minister, and also have powers of entry, search and seizure, and powers to inspect land to determine whether an Aboriginal heritage agreement made under the Act is being complied with. Traditional owners of an Aboriginal site have the power to veto particular inspectors from exercising their powers on particular sites in South Australia.

In Queensland the powers of ‘authorised officers’ under the Act are not as strong. An officer must gain the consent of the land owner before entering the land, unless he or she has a warrant to enter (which can only be issued if there is reason to suspect that heritage is being harmed). Aboriginal Cultural Heritage Plans can include provisions for the Aboriginal party to access the land, but this is not compulsory. As in other states, Aboriginal people may therefore not be able to monitor whether heritage is being protected and whether the conditions they agreed on are being met.
Office of Environment and Heritage NSW  
This website includes information on cultures and heritage of NSW, Aboriginal heritage law reform, research, regulation, conservation, heritage registers and publications.

New South Wales Aboriginal Land Council  
A report on research conducted on behalf of the New South Wales Aboriginal Land Council about the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia.

Queensland  
The Department of Environment and Resource Management website includes information about how the Queensland Aboriginal Heritage Act 2003 and Torres Straight Islander Heritage Act 2003 are administered.

Victoria  
The Department of Planning and Community Development website provides information (including guides and forms) about the Victorian Aboriginal heritage management system.

Tasmania  
This website provides information about Aboriginal heritage as well as guidelines and forms for Aboriginal Heritage Officers and Consulting Archaeologists.

South Australia  
This website provides information about the current review of the South Australian Aboriginal Heritage Act, including the report summarising the results of the consultation process.

Western Australia  
The Department of Indigenous Affairs website contains information about Aboriginal heritage and its protection through the Aboriginal Heritage Act 1972.

Northern Territory  
www.aapant.org.au/  
The Aboriginal Areas Protection Authority website includes information about the Authority and the Aboriginal heritage of the Northern Territory, as well as fact sheets on the way in which the Northern Territory Aboriginal Sacred Sites Act operates and news about recent events.
Australian Capital Territory
www.environment.act.gov.au/heritage
This website provides information about Aboriginal, non-Indigenous and natural heritage in the ACT.

New Zealand
www.historic.org.nz/ProtectingOurHeritage/MaoriHeritage.aspx
This website provides information about protection of Maori heritage by the New Zealand Historic Places Trust.
## Appendix: Summary of selected jurisdictional arrangements for the protection of Aboriginal heritage

<table>
<thead>
<tr>
<th>Topic</th>
<th>New South Wales</th>
<th>Victoria</th>
<th>Queensland</th>
<th>ACT</th>
<th>Northern Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who owns Aboriginal heritage?</td>
<td>‘Movable’ Aboriginal objects are the property of the Crown (that is, the State of NSW). ‘Immovable’ items such as rock art, scarred trees and grinding groves are the property of the land owner.</td>
<td>Aboriginal human remains and ‘secret and sacred’ objects may be owned by Aboriginal people. Otherwise Aboriginal objects are the property of the land owner.</td>
<td>Aboriginal human remains and ‘secret and sacred’ objects in state collections are owned by Aboriginal people. Aboriginal people can own cultural material under a heritage agreement. Otherwise Aboriginal objects are the property of the land owner.</td>
<td>Items listed on the register of heritage places and heritage objects are the property of the land owner.</td>
<td>Aboriginal sacred and other sites on Aboriginal owned land are owned by Aboriginal people. Items listed on the NT Heritage Register are the property of the land owner.</td>
</tr>
<tr>
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<tr>
<td>Who makes decisions?</td>
<td>The <strong>Minister for the Environment</strong> is responsible for declaration of Aboriginal Places. The <strong>Director General, Department of Premier and Cabinet</strong>, is responsible for protection of Aboriginal heritage and issuing permits.</td>
<td>The <strong>Minister for Aboriginal Affairs</strong> and the <strong>Secretary, Department of Planning and Community Development</strong>, issue cultural heritage permits and approve management plans for areas where there is no RAP. The <strong>Aboriginal Heritage Council</strong> appoints Registered Aboriginal Parties and evaluates some management plans. <strong>Regional Aboriginal Parties</strong> make some cultural heritage decisions at a local level.</td>
<td>Aboriginal parties may enter into <strong>cultural heritage agreements</strong> with development proponents. These agreements can include specific heritage protection measures as well as related matters such as employment, access, keeping places and education. <strong>Aboriginal heritage bodies</strong> for an area can be registered, and these have the authority to identify Aboriginal parties for an area.</td>
<td>The <strong>ACT Heritage Council</strong> is an independent body and the key advisory body on cultural heritage issues. The Council makes decisions on places and objects to be registered and must comply with any direction by the <strong>Minister</strong>. Land Councils and the <strong>Aboriginal Areas Protection Authority</strong> oversee agreement-making between custodians of sacred sites and other parties. These bodies have decision-making powers on registering sacred sites and issuing development certificates. The <strong>Aboriginal Areas Protection Authority</strong> administers the <strong>Aboriginal Sacred Sites Act 2006</strong>. It is as an advisory body to the <strong>Minister</strong>.</td>
<td>Land Councils and the <strong>Aboriginal Areas Protection Authority</strong> oversee agreement-making between custodians of sacred sites and other parties. These bodies have decision-making powers on registering sacred sites and issuing development certificates. The <strong>Aboriginal Areas Protection Authority</strong> administers the <strong>Aboriginal Sacred Sites Act 2006</strong>. It is as an advisory body to the <strong>Minister</strong>.</td>
</tr>
<tr>
<td>Who speaks for Country?</td>
<td>Current practice is inclusive. NPW Regulation and consultation guidelines emphasise consultation with traditional owners and custodians. Guidelines also acknowledge that people with historic ties may appropriately be involved in consultation.</td>
<td><strong>Traditional owners</strong> (Aboriginal people with a ‘traditional and familial link’ to an area) may be recognised as Registered Aboriginal Parties for the purpose of heritage management. <strong>People with historical attachment</strong> to an area may also be recognised as Registered Aboriginal Parties.</td>
<td>Aboriginal parties to agreements are identified via the native title system. Registered Native Title Holders, then Claimants, then ‘failed claimants’ are identified and notified of proposed developments. If there is no native title party, Aboriginal people with a ‘particular knowledge’ about the area can be identified and notified.</td>
<td>The ACT Heritage Council consults with <strong>Representative Aboriginal Organisations</strong> (RAOs) on decisions affecting Aboriginal places and objects. Four RAOs are recognised under ACT legislation.</td>
<td><strong>Traditional owners</strong> have exclusive right to speak for Country and heritage.</td>
</tr>
</tbody>
</table>
### How do Aboriginal people participate in decision-making?

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<tr>
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<tbody>
<tr>
<td>The NPW Act establishes the <strong>Aboriginal Cultural Heritage Advisory Committee</strong> (ACHAC) which advises the Minister on matters relating to Aboriginal cultural heritage. <strong>Joint management processes</strong> (e.g. co-management of parks, ILUAs) give Aboriginal people some decision-making powers. <strong>Aboriginal land owners</strong> have decision-making responsibility for cultural heritage on their land(s).</td>
<td>The Act establishes the <strong>Victorian Aboriginal Heritage Council</strong> to provide a statewide voice for Aboriginal people and advise the Minister on issues relating to Aboriginal cultural heritage. The Act introduces a system of <strong>Registered Aboriginal Parties</strong> (RAPs) to allow for local groups to be involved in decision-making.</td>
<td><strong>Chiefly via making Cultural Heritage Management Plans and other cultural heritage agreements with people and companies managing and developing land.</strong></td>
<td><strong>Aboriginal representation on the ACT Heritage Council.</strong></td>
<td><strong>Land Councils have control over issuing of permits for access and works in the vicinity of sacred sites.</strong> <strong>Aboriginal Areas Protection Authority</strong> must consult with the <strong>custodians of a sacred site</strong> when an application for an Authority Certificate is received.</td>
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</table>

### What Aboriginal heritage is protected?

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<tr>
<th>Topic</th>
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<tr>
<td>‘<strong>Blanket protection</strong>’ given to Aboriginal objects. Natural sacred sites are protected through declaration as <strong>Aboriginal Places</strong>. Languages, stories and cultural practices are not explicitly protected.</td>
<td>‘<strong>Blanket protection</strong>’ given to Aboriginal places, objects and human remains. Languages, stories and cultural practices are not explicitly protected.</td>
<td>The cultural heritage <strong>duty of care</strong> and its guidelines help to protect Aboriginal cultural objects and sites. Aboriginal people entering into agreements with other parties can negotiate to protect heritage much more broadly.</td>
<td>Aboriginal places or objects are protected on the basis of <strong>heritage significance</strong> – particular significance to Aboriginal people because of tradition and /or history. To be protected a place or object must be listed on the Heritage Register.</td>
<td>Legislation automatically protects all sites that are sacred or significant according to Aboriginal tradition (<strong>‘blanket protection’</strong>). Sites determined to be archaeologically significant are protected.</td>
<td></td>
</tr>
<tr>
<td>Topic</td>
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</tr>
<tr>
<td>How is Aboriginal heritage protected?</td>
<td>Aboriginal heritage is protected through <strong>conservation</strong> processes (physical works and reservation of land for conservation processes) and <strong>regulation</strong>. Regulation makes it an offence to harm (destroy, deface, damage or move) an Aboriginal object or Aboriginal Place without an exemption or a defence.</td>
<td></td>
<td>By a <strong>duty of care</strong>, with penalties attached for non-compliance. The duty of care can be complied with by making a compulsory or voluntary cultural heritage agreement with Aboriginal parties and working in accordance with it.</td>
<td>The Act establishes a system for the recognition, registration and conservation of <strong>natural and cultural heritage</strong> places and objects. The system is based on heritage significance rather than blanket protection.</td>
<td>The HCA (NT) aims to identify, assess, record, conserve and protect archaeological (and other) places and objects. The protection of archaeological places and objects (Aboriginal) is prescribed in the Heritage Conservation Regulations.</td>
</tr>
<tr>
<td>How does the development assessment process work?</td>
<td><strong>Part 6 of the NPW Act</strong> establishes the regulatory system for the protection of Aboriginal objects and declared Aboriginal Places. There are two <strong>types of offences</strong> for harming Aboriginal objects: (1) harming or desecrating an item that a person knows is an Aboriginal object; and (2) unintentionally harming an Aboriginal object (strict liability offence). The Director-General issues <strong>Aboriginal Heritage Impact Permits</strong> (AHIPs) where harm to an Aboriginal object or Place cannot be avoided. <strong>Dispute resolution</strong> (e.g. with regard to an AHIP) may be appealed to the NSW Land and Environment Court.</td>
<td>The AHA (Vic) establishes <strong>Cultural Heritage Management Plans</strong> (CHMPs) and <strong>Cultural Heritage Permit</strong> processes to manage activities that may harm Aboriginal cultural heritage. The Act introduces <strong>Cultural Heritage Agreements</strong> to support the development of partnerships around the protection and management of Aboriginal cultural heritage.</td>
<td>The duty of care can be discharged by the making of an agreement with Aboriginal parties and acting in accordance with that agreement. Where an environmental impact statement is required by another Act, an agreement taking the form of a <strong>Cultural Heritage Management Plan</strong> (CHMP) is compulsory. Agreements may also be made voluntarily.</td>
<td>The HA (ACT) establishes <strong>enforcement and offence provisions</strong>, including Heritage Directions, Heritage Orders, and Information Discovery Orders. The Act outlines <strong>offences</strong> relating to the damage (disturbance or destruction) of Aboriginal places and objects. The Act provides for a system <strong>integrated with land planning and development</strong>. An <strong>Authority Certificate</strong> must be obtained under the Act to carry out work on a sacred site. Development proponents have recourse to a <strong>Ministerial review</strong> of an Authority Certificate and may be granted a Minister’s Certificate which overrides an <strong>Aboriginal Areas Protection Authority</strong> decision.</td>
<td></td>
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</tbody>
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**Comparing the NSW Aboriginal heritage system with other Australian systems**

- **Aboriginal Heritage Impact Permits (AHIPs)**
- **Cultural Heritage Management Plans (CHMPs)**
- **Cultural Heritage Permit**
- **Cultural Heritage Agreements**
- **Heritage Agreements**
- **Authority Certificate**
- **Ministerial review**
- **Heritage Directions**, **Heritage Orders**, and **Information Discovery Orders**
<table>
<thead>
<tr>
<th>Topic</th>
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<th>Victoria</th>
<th>Queensland</th>
<th>ACT</th>
<th>Northern Territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>How is the protection of Aboriginal heritage enforced?</td>
<td>The Act provides for <strong>stop work orders</strong> and <strong>interim protection orders</strong> with regard to Aboriginal objects and Places.</td>
<td><strong>Inspectors</strong> appointed by the Minister for Aboriginal Affairs have extensive duties and powers. The legislation establishes a <strong>duty of care</strong>, outlined in gazetted guidelines. It requires that all reasonable and practical measures are taken to avoid harming cultural heritage. There are penalties for non-compliance.</td>
<td><strong>Regional Compliance Teams</strong> are responsible for investigating offences under the Acts. <strong>Stop work orders</strong> can be issued.</td>
<td>Heritage Directions, Heritage Orders, and Information Discovery Orders.</td>
<td>Reporting of damage to sacred sites is encouraged. Researchers working for the Aboriginal Areas Protection Authority make investigations. The Authority has the power to bring <strong>prosecutions</strong> for breaches including: unauthorised entry onto sacred sites; work on sacred sites; desecration of sacred sites; contravention of site avoidance conditions; and unauthorised communication of secret information.</td>
</tr>
<tr>
<td>What register system is used?</td>
<td>The <strong>National Parks and Wildlife Act 1974</strong> requires the establishment and maintenance of a database of Aboriginal objects and Aboriginal Places in NSW: the <strong>Aboriginal Heritage Information Management System (AHIMS)</strong>.</td>
<td>A centralised <strong>Aboriginal Cultural Heritage Register and Information System (ACHRIS)</strong> contains records of Aboriginal heritage from across the state.</td>
<td>Records of significant places, and agreements about them, are kept in the Aboriginal and Torres Strait Islander <strong>Cultural Heritage Database</strong> (which holds information about heritage places), and the Aboriginal and Torres Strait Islander <strong>Cultural Heritage Register</strong> (which holds reports and planning documents).</td>
<td>A centralised <strong>Heritage Register</strong> contains information on significant Aboriginal, historic and natural heritage items. The register provides public access to statements of heritage significance, Heritage Guidelines, Heritage Directions, and Heritage Orders.</td>
<td>Two separate registers are maintained for Aboriginal heritage: a <strong>register of sacred sites</strong> and a <strong>register of ‘archaeological’ sites</strong>.</td>
</tr>
</tbody>
</table>
Glossary

**Archaeology.** A way of revealing human history by studying the artefacts and other remains left behind by people in the past.

**Cultural Heritage Management Plan.** A plan which outlines why an Aboriginal site or area of land is important (i.e. significant) and how it should be managed. In Victoria and Queensland such plans are used to manage Aboriginal heritage for large projects and developments.

**Development area.** The area covered by a proposed development, such as a new highway, mine or housing estate.

**Heritage or cultural heritage.** The material traces (e.g. shell middens, stone arrangements or scarred trees) left by people in the past; also the intangible aspects (e.g. cultural knowledge and cultural practices) of a society.

**Heritage system.** The combination of the laws, policies and practices by which heritage is protected and managed in any particular state or country.

**Intangible heritage.** Cultural heritage that is not physical. Stories, oral histories and traditional knowledge are intangible heritage (whereas artefacts and sites are tangible heritage).

**Iwi.** The name given to Maori tribes descended from a common ancestor or ancestors.

**Jurisdiction.** Legal term referring to the area of responsibility of a given authority. In Australia, the individual states and territories, and the Commonwealth, are separate jurisdictions.

**Law.** A rule or set of rules approved by the Parliament and agreed to by the Governor. The *National Parks and Wildlife Act 1974* (NPW Act) is a law (also known as ‘legislation’) passed by the NSW Parliament.

**Permits or Cultural Heritage Permits.** Government approval to damage or destroy certain Aboriginal heritage sites, usually within development areas.

**Registered Aboriginal Parties (RAPs).** Registered groups of Aboriginal people in Victoria which are empowered to make decisions about heritage in their area.

**Regulation.** Heritage regulation is the system of official rules, based on legislation (law), which controls (i.e. regulates) what is allowed to be done to heritage.

**Site / Aboriginal site.** A location where remains, such as stone or glass artefacts, have been left behind by people in the past.