

## Providing certainty for the protection of Aboriginal heritage through due diligence

Recent amendments to the Aboriginal heritage provisions contained in the *National Parks and Wildlife Act 1974* (NPW Act) introduced two new types of offences for harming Aboriginal objects.

The first is the offence of harming or desecrating an Aboriginal object which a person knows is an Aboriginal object. This is the most serious offence, and has higher penalties.

The second offence is that of harming an Aboriginal object, whether or not the person knows it is an Aboriginal object. This is a strict liability offence, and is committed even if the harm was unintentional. The common law defence of honest and reasonable mistake of fact applies to strict liability offences

Anyone who exercises due diligence in determining that their actions will not harm Aboriginal objects has a defence against prosecution for the strict liability offence if they later unintentionally harm an object.

Fact sheet 1 outlines when due diligence is not required. There is a range of exemptions and low impact activities for which due diligence is not required.

### The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW

The *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* (the Code) explains and provides practical guidance about what due diligence means ([www.environment.nsw.gov.au/legislation/NPWamendmentAct2010](http://www.environment.nsw.gov.au/legislation/NPWamendmentAct2010)).

The Code provides practical steps which individuals and organisations who own, manage or use land need to take in order to:

- identify whether or not Aboriginal objects are, or are likely to be, present in an area
- determine whether or not their activities are likely to harm Aboriginal objects
- determine whether an Aboriginal Heritage Impact Permit (AHIP) is required.

There are many benefits in having a due diligence process for assessing potential harm to Aboriginal objects. These include:

- providing certainty to land managers and developers about appropriate measures they can take
- encouraging a precautionary approach
- more effective conservation of Aboriginal cultural heritage
- providing a defence against prosecution.

Due diligence obliges people whose actions may affect Aboriginal cultural heritage to take reasonable steps (precautions) to consider if Aboriginal objects may be present and avoid harm to that heritage. If harm cannot be avoided they are required to apply for an AHIP.

## Take precautions

Check the Code before any land use to determine what precautions are needed to address Aboriginal cultural heritage issues. The code explains when due diligence is not required or can be met when you follow planning assessment processes. Exemptions and other defences are also outlined in fact sheet 1.

Steps in the due diligence process are:

- searching the Aboriginal Heritage Information Management System (AHIMS)
- checking for landscape features which may indicate the presence of Aboriginal objects
- strategies to avoid harming Aboriginal objects
- desktop assessment and visual inspection to confirm the presence of Aboriginal objects.

Fact sheet 3 summarises the penalties for harming or desecrating Aboriginal objects and declared Aboriginal Places.

## Codes of practice for specific activities

Due diligence may also be exercised by complying with industry-specific codes of practice as adopted under the National Parks and Wildlife Regulation 2009 (NPW Regulation). These codes provide due diligence guidance for specific activities or industries. Codes which have been adopted by the Regulation (as at October 2010) are the:

- Plantations and Reafforestation Code, which is the Appendix to the Plantations and Reafforestation (Code) Regulation 2001 as in force on 15 June 2010 ([www.dpi.nsw.gov.au/agriculture/resources/private-forestry](http://www.dpi.nsw.gov.au/agriculture/resources/private-forestry))
- Private Native Forestry Code of Practice, approved by the Minister for Climate Change and the Environment and published in the Gazette on 8 February 2008 ([www.environment.nsw.gov.au/pnf/index.htm](http://www.environment.nsw.gov.au/pnf/index.htm))
- NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects published by the NSW Minerals Council Ltd and dated 13 September 2010
- Aboriginal Objects Due Diligence Code for Plantation Officers Administering the Plantations and Reafforestation (Code) Regulation 2001, published by the Department of Industry and Investment and dated 13 September 2010
- Operational Guidelines for Aboriginal Cultural Heritage Management, published by Forests NSW and dated 13 September 2010.

If an activity is subject to an industry-specific code that has been adopted by the NPW Regulation, follow that code instead of the general requirements of the Code.

Individuals can use these codes or any other due diligence process which meets the standards of these codes, such as an environmental impact assessment.

## Further information

Further information on Aboriginal cultural heritage regulation can be found at [www.environment.nsw.gov.au/licences/achregulation.htm](http://www.environment.nsw.gov.au/licences/achregulation.htm), or contact DECCW's Environment Line on 131555 or by email at [info@environment.nsw.gov.au](mailto:info@environment.nsw.gov.au).

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