



Office of
Environment
& Heritage

OEH Aboriginal Places Policy

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The purpose of the policy

The purpose of this policy is to inform and guide OEH staff and contractors employed by OEH in the identification, nomination, gazettal and management of Aboriginal Places under s. 84 of the *National Parks and Wildlife Act 1974* (NPW Act).

Scope and application

This policy applies to all Groups and Divisions in OEH.

Background

The declaration of Aboriginal Places is a way of recognising and legally protecting Aboriginal cultural heritage. The Minister for the Environment and Minister for Heritage, under s. 84 of the NPW Act, can declare any publicly- or privately-owned land area in NSW as an Aboriginal Place, if the area is deemed to have 'special significance' to Aboriginal culture. OEH has an ongoing program of assessing and recommending the declaration and gazettal of areas as Aboriginal Places throughout NSW. These declarations are a powerful conservation tool and advance the recognition, protection and understanding of Aboriginal cultural values.

It is essential that all appropriate stakeholders are involved during the assessment process preceding a recommendation to the Minister that an area should be declared as an Aboriginal Place.

Legislative and policy context

Under s. 84 of the NPW Act, Aboriginal Places may be declared over land that 'is or was of special significance to Aboriginal culture'. This allows Aboriginal Places to be declared to recognise and protect non-tangible cultural values (e.g. ceremonial and spiritual values), as well as areas containing tangible cultural material (e.g. middens, burials, reburials, Bora rings and rock art).

The NPW Act has strengthened protection for Aboriginal Places. There is a strict liability offence, under s. 86 of the NPW Act, for 'harming or desecrating' a declared Aboriginal Place, with penalties significantly increasing to a maximum of \$1.1 million for corporations, or \$550,000 for individuals. This is a clear and contemporary statutory recognition of the high regard held by the people of NSW for Aboriginal Places. However, there are also defences against (s. 87) and exemptions to (ss 87A and 87B) this offence.

An Aboriginal Place must hold values that make it, or have made it, of special significance to Aboriginal culture. In assessing values for Aboriginal Place proposals, OEH recognises that Aboriginal people are the primary determinants of the cultural significance of their heritage (see *Aboriginal people, the environment and conservation principles* on www.environment.nsw.gov.au/whoweaare/apecprinciples.htm).

OEH recognises that the proposed declaration of an area as an Aboriginal Place may be one of a number of heritage conservation options available for a place.

OEH provides access to a range of conservation options and offers information and support to Aboriginal communities in deciding how to best protect Aboriginal cultural values. These decisions are based on community aspirations, available mechanisms, the risks to and immediate needs of the cultural values present and longer-term site management considerations. Where Aboriginal Place declaration is selected by the Aboriginal community or applicant as a preferred conservation outcome, OEH set out a clear and supported assessment pathway. OEH strongly welcomes nominations for Aboriginal Places supported by the local Aboriginal community.

OEH guidelines for assessment and gazettal of Aboriginal Places (the guidelines) (Department of Environment and Climate Change 2008) and cultural values assessment provide an integrated and flexible way of assessing and investigating options for place protection. These options help the community to select the best heritage conservation mechanism. Where this is declaration as an Aboriginal Place, the guidelines set out the process for recommending such a declaration to the Minister.

Guidelines which are currently being developed will, once published, provide a consistent basis for ongoing management of declared Aboriginal Places, building on the guidance provided in section 5 of this policy.

Definitions

Aboriginal community: Aboriginal community members who have a demonstrable cultural association with a place that is the subject of a proposal, and consistent with *An Aboriginal community engagement framework for DECC* (Department of Environment and Climate Change 2007). Members of the Aboriginal community include:

- Native Title holders/claimants
- traditional owners
- Aboriginal owners
- Elders groups/councils
- cultural knowledge holders
- registered Aboriginal organisations
- other Aboriginal people with interests
- local Aboriginal land councils
- people on the AANSW traditional owner register.

traditional owners: people who, through membership of a group or clan, are responsible for caring for a particular Country. Traditional owners are authorised to speak for Country and its heritage. Authorisation to speak for Country and heritage may be as a senior traditional owner and Elder, or in more recent times, as a registered Native Title claimant.

special significance: a higher than normal level of significance to Aboriginal culture.

statement of values: a written statement of all assessed cultural values. A statement of values is generated through the Aboriginal Place assessment process as set out in the guidelines. The statement of values forms the legal basis for assessing whether activities in a declared Aboriginal Place impact on the protected cultural values.

Acronyms

AHIMS	Aboriginal Heritage Information Management System
AHIP	Aboriginal Heritage Impact Permit
CCHD	Country, Culture and Heritage Division
EPRG E	nvironment Protection and Regulation Group
NPW Act	<i>National Parks and Wildlife Act 1974</i>
the guidelines	<i>Guidelines for the assessment and gazettal of Aboriginal Places</i>

Guiding principles

OEH will be guided by the following principles when considering Aboriginal Place proposals:

1. Respecting and acting on Aboriginal peoples' inherent rights and ongoing interests in Country.
2. Formally recognising the strong cultural attachment that Aboriginal people have to their Country – this is a part of the declaration of an area as an Aboriginal Place.
3. Declaring an Aboriginal Place – this is a formal means for the NSW Government to recognise the special significance of an area to Aboriginal culture and to provide appropriate effective statutory protection of that significance.
4. Providing opportunities through Aboriginal Places for Aboriginal people to celebrate, continue to practice and renew their culture through their improved access to, and continued participation in caring for, their Country.
5. Supporting the meaningful engagement of Aboriginal people in the investigation, declaration and management of Aboriginal Places – this creates an opportunity to increase active and meaningful community participation in the government's heritage conservation initiatives and increase the wellbeing of Aboriginal communities.

Policy

1. Determining the appropriate type of protection mechanism

- 1.1 A range of heritage protection mechanisms are available for places that hold special cultural value for Aboriginal people. OEH consultation with the Aboriginal community about conservation options for a particular place will:
 - ensure that information is provided to the community about the relevant options available
 - ascertain with the community the risks to or the specific needs of the cultural values of a place
 - scope community capacity and aspiration for long-term management of the place.
- 1.2 When seeking to determine the appropriate type of protection mechanism, OEH will involve appropriate community members (such as family groups, Elders groups, traditional owners and knowledge holders) and organisations with connection to or association with the area being considered.
- 1.3 When initially considering conservation options for a place, OEH will, in partnership with appropriate community members, carry out a risk assessment to determine any immediate risks to and immediate needs of the cultural values of the place. In relation to immediate high levels of risk to values, Country, Culture and Heritage Division (CCHD) staff should consult with Environment Protection and Regulation Group (EPRG) and Legal Branch staff and use the best regulatory option for the situation, e.g. a stop work order, while a longer term response is being developed.
- 1.4 Consistent assessment methods will be used to assist in determining, with the community, whether an Aboriginal Place declaration is the most appropriate form of protection. Assessment will include a test of 'special significance' as defined by this policy.
- 1.5 For an Aboriginal Place proposal to proceed, the specific values that make a place of special significance to Aboriginal culture must first be validated by members of the Aboriginal community (see 'Definitions').
- 1.6 A decision to seek the declaration of a place as an Aboriginal Place does not preclude other conservation tools being available for that site, either concurrently or in the future.

2. Assessment and prioritisation of Aboriginal Place applications

- 2.1 The nomination process to declare a site as an Aboriginal Place can be initiated by OEH or the community.
- 2.2 All Aboriginal Place nominations will be subject to an initial assessment by OEH to confirm that:
 - evidence is, or is likely to be, available that the cultural values of a place are known to be or are likely to be of 'special significance' to Aboriginal culture

- Aboriginal community members having a cultural association with the place support the nomination.
- 2.3 OEH will make inquiries regarding the initial assessment within 3 months of the receipt of a nomination. Once an assessment confirms the criteria under clause 2.2, OEH will register the nomination as an 'Aboriginal Place proposal' on the Aboriginal Heritage Information Management System (AHIMS) and will program it for assessment so a recommendation can be eventually made to the Minister for its possible declaration as an Aboriginal Place.
 - 2.4 OEH will develop and maintain guidelines (and associated internal procedures and systems) that provide for the consistent assessment and implementation of Aboriginal Place proposals. The guidelines will provide background advice and information about the issues related to the Aboriginal Place assessment process in a step-by-step format, and include the templates and form(s) to be used. The guidelines will be made available as public documents.
 - 2.5 OEH will prioritise the order in which Aboriginal Place proposals are assessed and progressed by OEH staff. Proposals for sites with high risks or that have highly significant values will generally have priority over those with lower risks or lower significance, or both. Proposals relating to Aboriginal Heritage Impact Permit (AHIP) matters will also be prioritised. Where a community is engaged in a proposal and responsive to requests for information, the assessment process can be completed more quickly, so these proposals will generally have some priority over other proposals.

3. Stakeholders and landowner/land manager engagement

- 3.1 To progress a proposal, OEH will engage with:
 - the local Aboriginal community
 - the landowner of the publicly- or privately-owned land
 - the manager of the place, i.e. the owner, the land manager or the occupier
 - any other person or organisation having a legitimate interest (legal or otherwise) in the possible declaration of the place.
- 3.2 All relevant Government agencies with an interest in a proposed Aboriginal Place will be consulted about potential management issues.
- 3.3 OEH will work with private landowners where a proposal to declare an Aboriginal Place on private land has been lodged, and will facilitate and fund the development of management plans for declared Aboriginal Places on private land where resources permit.
- 3.4 When there is a proposal that the Minister make an Aboriginal Place declaration on private land, based on its special significance to Aboriginal culture (according to s. 84 of the NPW Act), the landowner/land manager or occupier will be informed through the assessment process, and well in advance of any gazettal. Landowner/land manager or occupier involvement and cooperation will be actively sought in the assessment and declaration process. Although the Minister does not require landowner consent to declare an Aboriginal Place, cooperation between the land holder, the

Aboriginal community and the government is highly beneficial in properly managing a site's Aboriginal heritage values in the long term.

- 3.5 If requested, OEH will provide appropriate support (including technical conservation advice, facilitation and advocacy services) to Aboriginal stakeholders, landowners/land managers or occupiers to allow the timely progress of an Aboriginal Place proposal.

4. Declaration of Aboriginal Places

- 4.1 The notice that will appear in the *Government Gazette* (the gazettal notice) will contain sufficient information relating to the place's legal property description, the cultural values that make the place of special significance, and examples of the activities and management actions for a place that are consistent with those values.
- 4.2 The publication in the *Government Gazette* (or otherwise) of any details concerning the cultural values of an Aboriginal Place will be considered on a case-by-case basis. Information considered by Aboriginal cultural knowledge holders to be culturally sensitive will not be disclosed. Section 161 of the NPW Act allows the Executive Officer OEH to issue a notice to restrict the public release of culturally sensitive information relating to the cultural values of Aboriginal Places in certain circumstances.
- 4.3 OEH will ensure that sufficient information is available to the public, including on the OEH website, concerning the location, relevant cultural values and examples of activities that are likely to harm or desecrate declared Aboriginal Places, providing the disclosure of this information is not otherwise restricted by a s. 161 notice as noted in section 4.2 above. This information will form part of the public register established under s. 188F of the NPW Act.
- 4.4 OEH will provide publicly available information explaining and promoting the general purposes, processes and legal implications of declared Aboriginal Places.

5. Management of declared Aboriginal Places

- 5.1 OEH will publish and maintain guidelines for the development of management plans for declared Aboriginal Places to assist with the ongoing management of places and the development of management plans or agreements. The guidelines will include a template for the development of management plans.
- 5.2 Formal management plans for declared Aboriginal Places should always be made, unless the cultural values or other characteristics of a place mean such an arrangement is not warranted (e.g. the place is already subject to an appropriate formal management arrangement such as a plan of management prepared under the *Local Government Act 1993*).
 - If there already is a formal management plan for the area, it should be amended on gazettal of the Aboriginal Place (or within 12 months following gazettal) to account for all relevant information and to ensure best practice conservation is being undertaken. Amendment

processes and content should be consistent with the guidelines for the management of Aboriginal places, and if on public land, also be consistent with any other specific policies and guidelines for managing the area.

- 5.3 Draft management plans (or text to amend existing management plans covering an area) should be developed and agreed to in principle before declaration, providing this does not unnecessarily delay the declaration of an Aboriginal Place. It should be noted that the assessment process provides a good opportunity to gather and organise all the important information and gain agreement about responsibilities needed to develop a management plan. Management plans should become active on gazettal, or no later than 12 months following gazettal, and may form part of gazettal notices.
- 5.4 OEHL recognises that management plans will vary for each Aboriginal Place depending on land tenure and Aboriginal community aspirations in regard to the declared area. However, as a minimum, management plans must include:
- a statement of cultural values of the Aboriginal Place
 - what constitutes harm to those values
 - an assessment of risks to the cultural values
 - ways in which significant risks will be treated
 - examples of activities in a declared Aboriginal Place that are considered to be consistent with the cultural values for which the place has been declared, i.e. activities that would generally not require an AHIP issued under Part 6 of the NPW Act and similarly the type of activities that would require an AHIP
 - maps to indicate where activities can take place or cannot take place so there is clear understanding about land use
 - the treatment of culturally sensitive information in accordance with a s. 161 notice
 - whether the place is gendered (i.e. men's or women's site)
 - ongoing management issues such as funding and resources.
- 5.5 Management plans will be co-developed by the landowner/land manager or occupier, the Aboriginal community and OEHL. OEHL will usually be able to assist with preparing a management plan through facilitation, and where resources permit, funding. Relevant government agencies will also be encouraged to provide technical and financial assistance for the development of plans or agreements, as appropriate.
- 5.6 OEHL will ensure that appropriate community members have the opportunity to be involved in the development of management plans to ensure that they are culturally appropriate and are appropriately addressing cultural issues such as gender and other specific cultural requirements of the Aboriginal Place. These may include using a notification and registration procedure.

- 5.7 All new formal management plans specifically for Aboriginal Places will require approval by CCHD, and relevant amendments to existing public plans of management covering Aboriginal Places should be endorsed by CCHD. OEH will retain a copy of each approved management plan on AHIMS, and information in the plan will be made publicly available on AHIMS, providing this does not breach privacy provisions or involve the release of culturally sensitive information.
- 5.8 OEH will provide advice and support to the Aboriginal community and landowners/land managers or occupiers to assist the ongoing management of Aboriginal Places as resources permit.

6. Aboriginal Place declaration and regulatory processes

- 6.1 An Aboriginal Place declaration will designate in advance an area as being of special significance to Aboriginal culture within the regulatory system. This can allow a process of considered assessment, review and determination to be undertaken before any harm can occur, and can be a means of providing clear, up-front information to potential AHIP applicants and regulators. However, an Aboriginal Place declaration cannot guarantee that an area will never be harmed.
- 6.2 The declaration and management of Aboriginal Places involves identifying values and will usually also involve setting out what actions would or would not be considered to harm the values. This has relevance to the regulatory and planning process as it can provide a clear record agreed to by the Aboriginal community and OEH of:
- actions that will not harm the values of the place and that will not require an AHIP, e.g. interpretive signage, raised boardwalks in a defined location, maintenance of existing infrastructure, depending on the site and community values
 - actions that would harm the values of the place and would need an AHIP, but may be acceptable in certain situations and with certain controls, e.g. building visitor facilities; environmental rehabilitation works; works close to middens, rock art and significant Aboriginal objects; depending on the site and community values
 - management plans that can specify any harming actions for which OEH would refuse to recommend the issue of an AHIP. These would need to be specific and well-justified.
- 6.3 Activities that are consistent with the statement of values or with any OEH approved management plan prepared for an Aboriginal Place would not usually require an AHIP, as the activity would not usually be considered to harm the values of the place.
- 6.4 Proposed activities that are not clearly and fully consistent with the statement of values or OEH-approved management plan prepared for the Aboriginal Place are likely to require an application for an AHIP. If the proposed activity will harm Aboriginal objects in the Aboriginal Place in any way, an AHIP is usually required.
- 6.5 There is an exemption to the s. 86 NPW Act harm provisions (harm to Aboriginal Places and Aboriginal objects) for actions specifically carried out

under a s. 69B NPW Act conservation agreement, if the agreement was entered into or modified after October 1 2010 (s. 87A of the NPW Act). An AHIP will not be required for actions listed in conservation agreements, including such agreements covering areas that are declared Aboriginal Places.

- 6.6 OEH will resolve any uncertainties around the need for, or conditions to be placed on, an AHIP in relation to an activity in a nominated, declared or proposed Aboriginal Place. OEH will provide information about site values and management plans to the public, subject to cultural confidentiality.
- 6.7 Remediation directions can be used to remediate damage to Aboriginal Places (s. 91L of the NPW Act) and OEH can recover costs (s. 91O of the NPW Act). Advice from OEH should be sought in relation to using remediation directions, which are issued by OEH.

7. Procedural guidelines

- 7.1 *Guidelines for the assessment and gazettal of Aboriginal Places* under s. 84 of the NPW Act.
- 7.2 Guidelines on preparing management plans for Aboriginal Places declared under s. 84 of the NPW Act. These guidelines are being prepared.

Accountability table

Group	Role or responsibility
OEH - CCHD	<p>Accounting for the full range of conservation mechanisms available and in consultation with the Aboriginal community:</p> <ul style="list-style-type: none"> • manage the system of Aboriginal Place nomination, assessment and declaration, and the development of management plans • manage specific Aboriginal Place nominations, assessment and declaration and co-develop, with the land holder and the Aboriginal community, the management plans for specific sites • manage information and policy issues relating to Aboriginal Place assessment and declarations, including informing EPRG about Aboriginal Place proposals as appropriate • provide information and education to the community about how to nominate Aboriginal Places • provide final recommendation to the Minister on gazettal of an area as an Aboriginal Place
OEH - EPRG	<ul style="list-style-type: none"> • issue and manage AHIPs and other regulatory approaches relating to proposed and declared Aboriginal Place areas and objects in the areas, through EPRG's normal regulatory functions. • assist the land holder/manager to manage risks to heritage values at a proposed or declared Aboriginal Place site through normal regulatory mechanisms, including through providing advice where appropriate • advise land holders on managing risks to heritage

	<p>values at a proposed or declared Aboriginal Place through regulatory mechanisms</p> <ul style="list-style-type: none"> • assist CCHD to develop Aboriginal Place-related policy, guidance and other resources when this advice is requested. • advise CCHD on possible Aboriginal Place declarations.
Landowner – publicly-owned land	<ul style="list-style-type: none"> • Co-develop, with the Aboriginal community and OEH, a management plan or equivalent for the area either before or within 12 months of declaration.
Landowner – privately-owned land	<ul style="list-style-type: none"> • Co-develop, with the Aboriginal community and OEH, a management plan for the area either before or within 12 months of declaration.

Note: Any person is entitled to nominate an area as an Aboriginal Place.

Relevant legislation or other mandating instruments

Legislation and instruments that support this policy are:

Native Title Act 1993 (Cth)

National Parks and Wildlife Act 1974, Part 6, ss 84 and 90.

Aboriginal Land Rights Act 1983

Related policies, guidelines and other documents

Guide to determining and issuing Aboriginal Heritage Impact Permits (see www.environment.nsw.gov.au/licences/consultation.htm)

Aboriginal cultural heritage consultation requirements for proponents 2010 (see www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09781ACHconsultreq.pdf)

Operational policy – protecting Aboriginal cultural heritage (see www.environment.nsw.gov.au/resources/cultureheritage/09122ACHOpPolicy.pdf)

Policy review

OEH will review this policy at least every five years, and more frequently if changes in legislation, policies or other areas require the policy to be amended. The next scheduled review is due in June 2016.