2010 No 548

New South Wales

National Parks and Wildlife Amendment (Aboriginal Objects and Aboriginal Places) Regulation 2010

under the

National Parks and Wildlife Act 1974

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *National Parks and Wildlife Act 1974*.

FRANK SARTOR, MP
Minister for Climate Change and the Environment

Explanatory note

The object of this Regulation is to amend the *National Parks and Wildlife Regulation 2009* as a consequence of the commencement of amendments made to the *National Parks and Wildlife Act 1974* (***the Principal Act***) by the *National Parks and Wildlife Amendment Act 2010*.

More specifically, the Regulation:

(a) excludes acts carried out in accordance with the *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW* as published by the Department of Environment, Climate Change and Water from the meaning of "harm" an object or place under the Principal Act, and

(b) prescribes certain codes of practice and other documents, compliance with which will constitute a defence under section 87 (2) of the Principal Act against the new strict liability offence of harming an Aboriginal object, and

(c) creates an additional defence against that offence where the defendant establishes that the act or omission concerned occurred in the course of certain specified low impact activities, such as certain farming or maintenance work on disturbed land, and

(d) specifies a process of community consultation with relevant Aboriginal parties that must be undertaken before a person makes an application for an Aboriginal heritage impact permit, and

(e) provides that an application for an Aboriginal heritage impact permit must be accompanied by a cultural heritage assessment report and setting out what such a report is to deal with and include, and

(f) provides that the Director-General of the Department of Environment, Climate Change and Water may require an applicant for a variation of an Aboriginal heritage impact permit to carry out such community consultation as the Director-General considers appropriate if the Director-General is satisfied that the variation will result in a significant increase in harm to the Aboriginal objects or Aboriginal places concerned, and

(g) prescribes penalty notice amounts for certain new offences inserted into the Principal Act, and

(h) makes other amendments consequential on changes to provisions of the Principal Act.

This Regulation is made under the *National Parks and Wildlife Act 1974*, including the definition of ***harm*** in relation to an object or place in section 5 (1), sections 87 (3), 90A (2) (b), 90N, 135 and 192 and Part 13 (the general regulation-making provisions) and clause 1 of Schedule 3 (relating to savings and transitional provisions).

National Parks and Wildlife Amendment (Aboriginal Objects and Aboriginal Places) Regulation 2010

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National Parks and Wildlife Act 1974

1 Name of Regulation

This Regulation is the *National Parks and Wildlife Amendment (Aboriginal Objects and Aboriginal Places) Regulation 2010*.

2 Commencement

This Regulation commences on 1 October 2010 and is required to be published on the NSW legislation website.

Schedule 1 Amendment of National Parks and Wildlife Regulation 2009

[1] Clause 3 Definitions

Omit "sections 47GC or 47U or" from clause 3 (3) (a).

[2] Clause 3A

Insert after clause 3:

3A Exclusion from meaning of "harm" objects and places

An act carried out in accordance with the *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW* as published by the Department in the Gazette on 24 September 2010 is excluded from the definition of ***harm*** an object or place in section 5 (1) of the Act.

[3] Clause 50 Applications for permits, licences or registration certificates

Insert "an Aboriginal heritage impact permit," before "a licence" wherever occurring in clause 50 (1) and (3).

[4] Part 8A

Insert after Part 8:

Part 8A Aboriginal objects and Aboriginal places

80A Defence of compliance with codes of practice or other prescribed documents: section 87 (3)

For the purposes of section 87 (3) of the Act, compliance with any of the following codes of practice and documents (when undertaking an activity to which the code or document applies) is taken for the purposes of section 87 (2) of the Act to constitute due diligence in determining whether the act or omission constituting the alleged offence would harm an Aboriginal object:

(a) the *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* published by the Department of Environment, Climate Change and Water and dated 13 September 2010,

(b) the *Plantations and Reafforestation Code* (being the Appendix to the *Plantations and Reafforestation (Code) Regulation 2001*) as in force on 15 June 2010,

(c) the *Private Native Forestry Code of Practice* approved by the Minister for Climate Change, Environment and Water and published in the Gazette on 8 February 2008,

(d) the *NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects* published by NSW Minerals Council Ltd and dated 13 September 2010,

(e) the *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,

(f) the *Operational Guidelines for Aboriginal Cultural Heritage Management* published by Forests NSW and dated 13 September 2010.

Note. The *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* can be accessed at www.environment.nsw.gov.au/legislation/DueDiligence.htm.

The *Private Native Forestry Code of Practice* can be accessed at www.environment.nsw.gov.au/pnf/index.htm.

80B Defence of carrying out certain low impact activities: section 87 (4)

Note. This clause creates a defence to the strict liability offence in section 86 (2) of the Act (being the offence of harming an Aboriginal object whether or not the person knows it is an Aboriginal object). The defence does not apply to the separate offence under section 86 (1) of the Act of harming or desecrating an object that a person knows is an Aboriginal object. If a person discovers an Aboriginal object in the course of undertaking any of the activities listed below, the person should not harm the object—as the person may be committing an offence under section 86 (1) of the Act (the offence of knowingly harming an Aboriginal object)—and should obtain an Aboriginal heritage impact permit, if needed.

(1) It is a defence to a prosecution for an offence under section 86 (2) of the Act, if the defendant establishes that the act or omission concerned:

(a) was maintenance work of the following kind on land that has been disturbed:

(i) maintenance of existing roads, fire and other trails and tracks,

(ii) maintenance of existing utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines), or

(b) was farming and land management work of the following kind on land that has been disturbed:

(i) cropping and leaving paddocks fallow,

(ii) the construction of water storage works (such as farm dams or water tanks),

(iii) the construction of fences,

(iv) the construction of irrigation infrastructure, ground water bores or flood mitigation works,

(v) the construction of erosion control or soil conservation works (such as contour banks), or

(c) was farming and land management work that involved the maintenance of the following existing infrastructure:

(i) grain, fibre or fertiliser storage areas,

(ii) water storage works (such as farm dams or water tanks),

(iii) irrigation infrastructure, ground water bores or flood mitigation works,

(iv) fences,

(v) erosion control or soil conservation works (such as contour banks), or

(d) was the grazing of animals, or

(e) was an activity on land that has been disturbed that comprises exempt development or was the subject of a complying development certificate issued under the *Environmental Planning and Assessment Act 1979*, or

(f) was mining exploration work of the following kind on land that has been disturbed:

(i) costeaning,

(ii) bulk sampling,

(iii) drilling, or

(g) was work of the following kind:

(i) geological mapping,

(ii) surface geophysical surveys (including gravity surveys, radiometric surveys, magnetic surveys and electrical surveys), but not including seismic surveys,

(iii) sub-surface geophysical surveys that involve downhole logging,

(iv) sampling and coring using hand-held equipment, except where carried out as part of an archaeological investigation, or

Note. Clause 3A of this Regulation provides that an act carried out in accordance with the *Code of Practice for Archaeological Investigation in NSW* is excluded from the meaning of ***harm*** an object or place for the purposes of the Act.

(h) was the removal of isolated, dead or dying vegetation, but only if there is minimal disturbance to the surrounding ground surface, or

(i) was work of the following kind on land that has been disturbed:

(i) seismic surveying,

(ii) the construction and maintenance of groundwater monitoring bores, or

(j) was environmental rehabilitation work, including temporary silt fencing, tree planting, bush regeneration and weed removal, but not including erosion control or soil conservation works (such as contour banks).

(2) Subclause (1) does not apply in relation to harm to an Aboriginal culturally modified tree.

(3) In this clause, ***Aboriginal culturally modified tree*** means a tree that, before or concurrent with (or both) the occupation of the area in which the tree is located by persons of non-Aboriginal extraction, has been scarred, carved or modified by an Aboriginal person by:

(a) the deliberate removal, by traditional methods, of bark or wood from the tree, or

(b) the deliberate modification, by traditional methods, of the wood of the tree.

(4) For the purposes of this clause, land is ***disturbed*** if it has been the subject of a human activity that has changed the land's surface, being changes that remain clear and observable.

Note. Examples of activities that may have disturbed land include the following:

(a) soil ploughing,

(b) construction of rural infrastructure (such as dams and fences),

(c) construction of roads, trails and tracks (including fire trails and tracks and walking tracks),

(d) clearing of vegetation,

(e) construction of buildings and the erection of other structures,

(f) construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines, stormwater drainage and other similar infrastructure),

(g) substantial grazing involving the construction of rural infrastructure,

(h) construction of earthworks associated with any thing referred to in paragraphs (a)–(g).

80C Consultation process to be undertaken before applying for Aboriginal heritage impact permit

(1) **General obligation to consult**

Before making an application for the issue of an Aboriginal heritage impact permit, the proposed applicant must carry out an Aboriginal community consultation process in accordance with this clause.

(2) **Notification of Aboriginal persons—where no relevant determination of native title**

The proposed applicant must (except in circumstances referred to in subclause (3)):

(a) ascertain from the following bodies or persons the names of any Aboriginal persons who may hold knowledge relevant to any relevant Aboriginal objects or Aboriginal places:

(i) the Department,

(ii) the relevant Local Aboriginal Land Council,

(iii) the Registrar appointed under the *Aboriginal Land Rights Act 1983*,

(iv) the relevant local council,

(v) the National Native Title Tribunal,

(vi) NTSCORP Limited,

(vii) the relevant catchment management authority, and

(b) give the Aboriginal persons whose names were ascertained under paragraph (a) notice of the proposed activity that may be the subject of the application, and

(c) cause notice of the proposed activity to be published in a local newspaper circulating generally in the area of the land on or in which the proposed activity is to be carried out.

(3) **Notification of Aboriginal persons—where relevant native title determined to exist**

If an approved determination of native title that native title exists in relation to the land on or in which the proposed activity that may be the subject of such an application is to be carried out, the proposed applicant must give notice of that proposed activity to:

(a) the registered native title body corporate for that land,

(b) if no such body corporate exists, the native title holders of that land.

(4) **Contents of notice**

A notice referred to in subclause (2) (b) and (c) and (3) must contain the following:

(a) the name and contact details of the proposed applicant,

(b) a brief overview of the proposed activity that may be the subject of an application for an Aboriginal heritage impact permit, including the location of the proposed activity,

(c) an invitation to Aboriginal people who hold knowledge relevant to determining the cultural heritage significance of Aboriginal objects and Aboriginal places in the area in which the proposed activity is to occur to register an interest in a process of community consultation with the proposed applicant regarding the proposed activity,

(d) a statement that the purpose of community consultation with Aboriginal people is to assist the proposed applicant in the preparation of an application for an Aboriginal heritage impact permit and to assist the Director-General in his or her consideration and determination of the application,

(e) a closing date for the registration of such interests (being a date that is at least 14 days after the date the notice was given or published).

(5) **Registering interested Aboriginal parties and providing them with information**

The proposed applicant must, within 28 days after the closing date for the registration of interests:

(a) make a record of the names of each Aboriginal person who registered such an interest (***registered Aboriginal party***), and

(b) forward a copy of that record to the Department of Environment, Climate Change and Water and the relevant Local Aboriginal Land Council, and

(c) provide each registered Aboriginal party with detailed information regarding the activity that may be the subject of the proposed application.

(6) **Consultation on proposed methodology of cultural heritage assessment report**

The proposed applicant must:

(a) provide the registered Aboriginal parties with a proposed methodology to be used in the preparation of the cultural heritage assessment report to be submitted with the application (as referred to in clause 80D), and

(b) give those parties a reasonable opportunity (being at least 28 days after the date of providing the proposed methodology) to make submissions (whether written or oral) on the proposed methodology.

(7) **Proposed applicant to seek certain information**

The proposed applicant must, during the consultation on the proposed methodology of the cultural heritage assessment report referred to in subclause (6), seek the following information from the registered Aboriginal parties in relation to the area of land to which the proposed application relates:

(a) whether there are any Aboriginal objects of cultural value to Aboriginal people in the area,

(b) whether there are any places of cultural value to Aboriginal people in the area (whether they are Aboriginal places declared under section 84 of the Act or not).

(8) **Consultation on draft cultural heritage assessment report**

After giving each registered Aboriginal party the opportunity to make submissions to be used in the preparation of the proposed methodology of the cultural heritage assessment report (as referred to in subclause (6) (b)), the proposed applicant must:

(a) provide a copy of a draft of the cultural heritage assessment report to the registered Aboriginal parties, and

(b) give those parties a reasonable opportunity (being at least 28 days after the date of providing the draft report) to make submissions (whether written or oral) on the draft report.

(9) An application for an Aboriginal heritage impact permit is not invalid merely because the applicant for the permit failed to comply with any one or more of the requirements set out in this clause.

Note. Under section 90K (1) (g) of the Act, the Director-General, in making a decision in relation to an Aboriginal heritage impact permit, must consider whether any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place that are the subject of the permit substantially complied with any requirements for consultation set out in the regulations.

(10) **Modified or alternative Aboriginal community consultation process**

Despite subclause (1), if an agreement of the following kind specifies or identifies a modified or alternative Aboriginal community consultation process for the purposes of Part 6 of the Act, the proposed applicant is to carry out an Aboriginal community consultation process in accordance with that modified or alternative consultation process:

(a) a registered Indigenous Land Use Agreement under the *Native Title Act 1993* of the Commonwealth entered into between an Aboriginal community and the State,

(b) a lease entered into under Part 4A of the Act,

(c) an agreement entered into by the Director-General and a board of management for land reserved under Part 4A of the Act that has the consent of the Aboriginal owner board members for the land concerned,

(d) an agreement entered into between an Aboriginal community and the Department.

(11) In this clause:

approved determination of native title has the same meaning as in the *Native Title Act 1993* of the Commonwealth.

native title holder has the same meaning as in the *Native Title Act 1993* of the Commonwealth.

registered native title body corporate has the same meaning as in the *Native Title Act 1993* of the Commonwealth.

80D Application for Aboriginal heritage impact permit to be accompanied by cultural heritage assessment report

(1) For the purposes of section 90A (2) (b) of the Act, an application for the issue of an Aboriginal heritage impact permit must be accompanied by a cultural heritage assessment report.

(2) A cultural heritage assessment report is to deal with the following matters:

(a) the significance of the Aboriginal objects or Aboriginal places that are the subject of the application,

(b) the actual or likely harm to those Aboriginal objects or Aboriginal places from the proposed activity that is the subject of the application,

(c) any practical measures that may be taken to protect and conserve those Aboriginal objects or Aboriginal places,

(d) any practical measures that may be taken to avoid or mitigate any actual or likely harm to those Aboriginal objects or Aboriginal places.

(3) A cultural heritage assessment report must include:

(a) if any submission has been received from a registered Aboriginal party under clause 80C (including any submission on the proposed methodology to be used in the preparation of the report and any submission on the draft report), a copy of the submission, and

(b) the applicant's response to each such submission.

(4) An applicant for the issue of an Aboriginal heritage impact permit must, within 14 days of making the application, send a copy of the application (including any cultural heritage assessment report submitted with the application) to the following:

(a) each registered Aboriginal party (within the meaning of clause 80C) in relation to the application (if any),

(b) the relevant Local Aboriginal Land Council.

80E Consultation process to be undertaken before applying for a variation of Aboriginal heritage impact permit

If an application to vary an Aboriginal heritage impact permit is made and the proposed variation will authorise a significant increase in harm to the Aboriginal objects or Aboriginal places concerned, the Director-General is to require the applicant to carry out:

(a) if a modified or alternative consultation process (as referred to in clause 80C (10)) applies in relation to the Aboriginal objects or Aboriginal places concerned—an Aboriginal community consultation process in accordance with that modified or alternative consultation process, or

(b) a community consultation process that the Director-General considers appropriate in the circumstances.

[5] Clause 100

Omit the clause. Insert instead:

100 Appeal period

For the purposes of section 135 of the Act, the period within which an appeal is to be made is 28 days after the date of the refusal, cancellation or attaching of the condition or restriction against which the appeal is brought.

[6] Clause 101 Appeals

Omit "90 or" from clause 101 (1).

[7] Clause 102 Notification of sites of Aboriginal objects

Omit "section 91". Insert instead "section 89A".

[8] Schedule 2 Penalty notice offences

Omit the matter relating to sections 86 (a), (b), (c), (d) and (e) and 91 of the *National Parks and Wildlife Act 1974* from the Schedule.

[9] Schedule 2

Insert in appropriate order in Columns 1, 2 and 3, respectively, under the heading "**Offences under *National Parks and Wildlife Act 1974***":

Section 86 (2)	1500
Section 86 (4)	3300
Section 89A	300
Section 90J	1500

[10] Schedule 3

Insert after Schedule 2:

Schedule 3 Savings, transitional and other provisions

Part 1 Provision consequent on enactment of National Parks and Wildlife Amendment Act 2010

1 Aboriginal objects and Aboriginal places: applications for permits under section 87 and consents under section 90

(1) An application for a permit under section 87 of the Act or a consent under section 90 of the Act (as those sections were in force immediately before their repeal by the amending Act) that was not finally determined before that repeal is taken to be an application for an Aboriginal heritage impact permit under section 90 of the Act (as inserted by the amending Act).

(2) In this clause, ***amending Act*** means the *National Parks and Wildlife Amendment Act 2010*.

Note. Section 90F of the Act enables the Director-General to require an applicant for an Aboriginal heritage impact permit to supply the Director-General with such further information as the Director-General considers necessary and relevant to the application.

Part 2 Provisions consequent on enactment of National Parks and Wildlife Amendment (Visitors and Tourists) Act 2010

2 Definitions

In this Part:

amending Act means the *National Parks and Wildlife Amendment (Visitors and Tourists) Act 2010*.

transition period means the period commencing on the commencement of this Part and ending on 1 October 2012.

3 Grant of certain leases and licences during transition period

During the transition period, the following leases and licences may be granted as if the amendments to Part 12 of the Act by the amending Act had not been made:

(a) any lease or licence identified or specified in an agreement to lease (however described) entered into before the commencement of those amendments by the Minister or the Director-General and the proposed lessee or licensee,

(b) any licence in relation to a cabin in the Royal National Park,

(c) any lease or licence to a person or body specified in Column 1 of the following Table in relation to the corresponding land or place specified in Column 2 of the Table.

Proposed lessee or licensee	Land or place
Susan Thomson	Hosies Store, Hill End Historic Site
Jan Poona and Jeff Turner	Faradays Cottage, Hill End Historic Site
Edward Woolard	Woolards Cottage, Hill End Historic Site
Glenn Woodley	Heaps Cottage, Hill End Historic Site
Garie Surf Life Saving Club Inc	Garie Beach Surf Club, Royal National Park
Skyville Events Pty Ltd	Scheyville Camp Precinct, Scheyville National Park

4 Reference of certain proposed leases and licences for advice

A referral of a proposed lease or licence to the Council for advice under section 151AA of the Act before the repeal of that section by the amending Act is taken to be a referral of the proposed lease or licence to the Council for advice under section 151G of the Act.