



Heritage compliance policy

A policy for compliance with the *Heritage Act 1977* and Heritage Regulation 2012

Department of Climate Change,
Energy, the Environment and Water



Acknowledgement of Country

Department of Climate Change, Energy, the Environment and Water acknowledges the Traditional Custodians of the lands where we work and live.

We pay our respects to Elders past, present and emerging.

This resource may contain images or names of deceased persons in photographs or historical content.

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1. Introduction

1.1 Compliance function of Heritage NSW

The *Heritage Act 1977* (the Act) provides laws to identify and protect objects, buildings, works, relics, precincts, and places that are significant to New South Wales as outlined in the *Heritage compliance framework*.

The Act sets out how to regulate change and mitigate harm to items listed on the State Heritage Register (SHR), historic archaeological relics, maritime archaeology, and items subject to an interim heritage order (IHO).

The Minister for Heritage is responsible for the administration of the Act, having most of the regulatory and enforcement functions under the Act.

The Heritage Council of NSW predominantly supports and provides advice to the minister to exercise their functions under the Act, in addition to undertaking several other independent functions discussed in section 3.1.

Heritage NSW is part of the NSW Department of Climate Change, Energy, the Environment and Water (the department) and is the agency responsible for supporting the minister and the Heritage Council with the day-to-day administration of the Act. This includes assisting with compliance and enforcement actions discussed in section 3.1.

1.2 Purpose of this policy

This policy explains how the compliance priorities are set by Heritage NSW. It also guides how decisions are legally robust, credible, and consistent. The policy aims to encourage owners and managers of SHR listed items (places and objects) to achieve positive heritage outcomes through self-compliance, education, and awareness of their responsibilities under the Act.

1.3 Exclusions

This policy relates to compliance with the Act and the Heritage Regulation 2012 (the Regulation). It does not apply to any other legislation administered by Heritage NSW.

2. Compliance principles

Our compliance and enforcement activities follow 7 key principles:

Consistent	Heritage NSW will apply procedures, so we respond to alleged breaches in a consistent manner.
Targeted	Heritage NSW uses a risk assessment tool to assess potential breaches and to target those that pose the greatest risk to heritage. This strategy focuses appropriate resources towards more significant matters.
Proportional	Heritage NSW ensures compliance responses are equal to the seriousness of the breach and culpability of those involved.
Supportive	Heritage NSW supports and promotes voluntary compliance by seeking to resolve breaches promptly and to support owners/managers of heritage items/places or potential suspects in becoming compliant with the Act.
Transparent	Heritage NSW reports the outcomes of compliance matters and the monitoring of key performance indicators to the Heritage Council of NSW and the Senior Management Team, subject to legal and privacy considerations.
Natural justice	Heritage NSW recognises a duty to afford a person procedural fairness when decisions are made, by providing those that may be affected by an investigation an opportunity to present evidence in their case. Decision-makers do not to have an interest in the matter to be decided, they do not prejudge a situation before knowing the facts, and they make their assessment based on logical and probative evidence.
Ethical and legal	Heritage NSW employees act in accordance with the <i>Code of Ethics and Conduct for NSW Government Sector Employees</i> and within the limits of powers authorised under the Act.

3. Regulatory relationships

3.1 Exercise of functions by the minister, Heritage Council of NSW and Heritage NSW

The Minister for Heritage is responsible for the administration of the Act, having among other things, the following functions and powers under the Act:

- listing or removing heritage items from the SHR under s 32
- making and revoking IHO under s 24
- declaring historic shipwrecks under s 48
- entering heritage agreements for the conservation of heritage items under Pt 3B
- determining appeals against a decision of the Heritage Council in relation to an application for approval to undertake controlled activities in relation to a heritage item listed on the SHR or subject to an IHO under Pt 4 or an excavation permit under Pt 6 Div 9
- authorising site inspections under s 148
- undertaking the following enforcement actions:
 - issuing stop work orders under s 79C and orders restricting harm under s 136
 - issuing historic shipwreck protection orders under s 50
 - commencing civil enforcement or criminal prosecution proceedings in court in accordance with Pt 7
 - issuing orders restricting development under s 161.

The Heritage Council has some separate functions to the minister and provides advice to the minister in exercising the minister's functions under the Act by:

- making recommendations to the minister on the exercise of the minister's functions under the Act and the Regulation under s 21
- determining applications for approval to undertake controlled activities in relation to heritage items listed on the SHR or subject to the IHO under Pt 4
- providing advice to the minister on the listing or removal of heritage items from the SHR under ss 32, 38
- providing advice to the minister on the making of IHOs under s 24
- keeping and maintaining the SHR under s 31
- endorsing conservation management plans for heritage items listed on the SHR under s 38A
- providing advice to the minister on the making of historic shipwreck protection orders under s 50
- regulating excavation permits under Pt 6 Div 9
- undertaking the following enforcement actions:

- issuing stop work orders under s 79C and orders restricting harm under s 136, by the Chairperson of the Heritage Council
- issuing orders to remedy a failure to maintain or repair a heritage item listed on the SHR under s 20.

Heritage NSW is the agency responsible for supporting the minister and the Heritage Council with the day-to-day administration of the Act including:

- researching items or places that may be of state heritage significance
- providing advice on the management of heritage items
- issuing approvals, in accordance with the relevant delegation from the Heritage Council, to undertake controlled activities in relation to heritage items under Pt 4 of the Act
- undertaking compliance activities such as investigating alleged breaches of the Act in accordance with the relevant delegations from the minister and the Heritage Council
- undertaking enforcement actions, when required, in accordance with the relevant delegations from the minister and the Heritage Council.

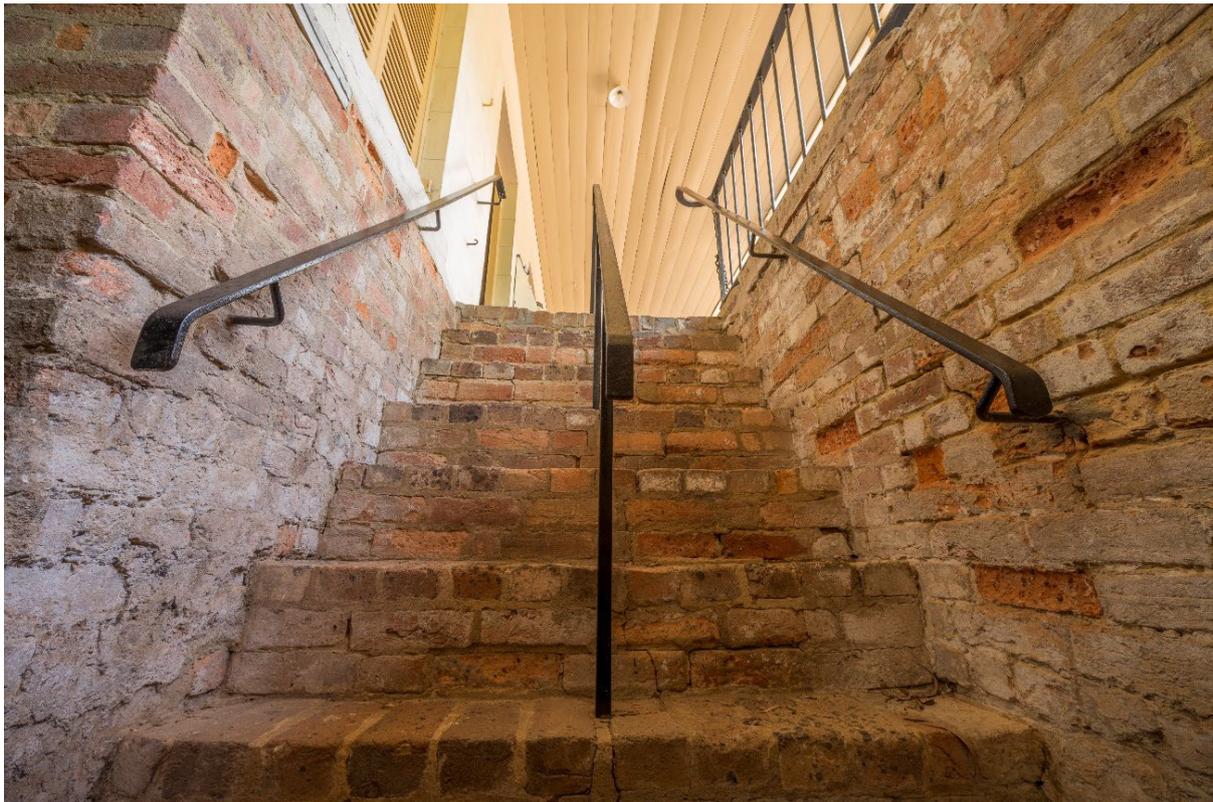


Image 1 Experiment Farm Cottage, Harris Park. John Spencer/DCCEEW

3.2 Role of other regulatory agencies

Many state and Australian government agencies are co-regulators for items managed under the Act.

Under the Act, local councils have the power to make and revoke IHOs with respect to heritage items of local heritage significance. Local councils also have the power under the *Environmental Planning and Assessment Act 1979* (EP&A Act) to list heritage items and impose restrictions on development affecting heritage items in their local environmental plan.

Other agencies may also co-regulate a site/place in accordance with other legislation outside of the Act (Table 1). In such instances, Heritage NSW works with relevant co-regulators in investigating non-compliance matters.

This cooperation streamlines government resources and reduces duplication of responses. For example, it reduces concurrent stop work orders, duplicate site inspections and multiple interviews for a single compliance action (e.g. local councils under the EP&A Act, and people authorised by the minister under the Heritage Act). It also prevents any conflicting or contradictory compliance responses.

Table 1 Acts that may impact sites managed under the Heritage Act

Act	Level of government	Example
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	Commonwealth	Items of world, national and Commonwealth heritage (e.g. Sydney Opera House, Brewarrina fish traps)
<i>Underwater Cultural Heritage (Consequential and Transitional Provisions) Act 2018</i> (supersedes <i>Historic Shipwrecks Act 1976</i>)	Commonwealth	Shipwrecks and relics
<i>National Parks and Wildlife Act 1974</i>	State – NSW	Aboriginal cultural heritage SHR items owned and managed by the National Parks and Wildlife Service
Local environmental plans (LEPs) and development applications approved under the EP&A Act	Local councils	Local heritage items and historic archaeology (most items listed on the SHR are also listed in LEPs as a heritage item of local significance) Local councils are the determining authority in relation to development applications that can relate to SHR listed items and historical archaeology

4. Monitoring compliance

4.1 Detecting breaches

Heritage NSW compliance action commences when we become aware of a potential breach. This may be through reports from the community, heritage audits and assessments, or other routine inspections.

4.1.1 Community reports

Members of the public, industry, local councils, community groups, heritage professionals and other government agencies report many potential breaches of the Act. Heritage NSW values information provided by external sources, encourages reporting of suspected breaches and strongly encourages voluntary reporting.

Heritage NSW receives community reports through both the Environment Line (matters reported to the NSW Environment Protection Authority) and the Heritage NSW main phone number, as well as emails sent directly to officers.

4.1.2 Desktop review

Heritage NSW periodically undertakes desktop review of approvals issued by the Heritage Council and/or its delegates. Desktop audits include the review of reports required under *Standard conditions of consent*; for example, notifications of commencement and finalisation of works on site, post-excavation archaeological reports and photographic archival recording.

When required, the desktop review may also include satellite imagery, aerial surveys, photography, and surveillance flights. Heritage NSW uses this information to assist in identifying unapproved work activities or potential non-compliance.

4.1.3 Public domain inspections

Heritage NSW undertakes public domain inspections as part of a research function in maintaining an SHR site. We often become aware of compliance breaches through these inspections.

4.1.4 Site-specific inspections

Heritage NSW may undertake proactive inspections of a site:

- if there is reason to believe, based on a desktop review or complaint report, that a breach of the Act is occurring or is imminent
- to check compliance with the conditions of consent of an approval or permit or other authority issued under the Act.

Where owners/occupants cannot provide evidence that works undertaken are in accordance with, or do not require, a consent, licence, permit or authority under the Act,

Heritage NSW will initially request access from the owner or occupant (as applicable), with reasonable notice, to further investigate the matter.

Where Heritage NSW is unable to make voluntary access arrangements, authorised persons may exercise powers of entry and inspection under s 148 of the Act, or Heritage NSW may seek a court order to gain entry (subject to seeking advice from the department's legal branch and in line with internal procedures guided by the Act.

Heritage NSW may also assist co-regulators at site inspections if authorised under appropriate legislation. For example, s 9.16(6) of the EP&A Act allows investigation officers authorised under that Act to be accompanied by '[any] persons as the investigation officer considers necessary'.

4.2 Investigations

Where Heritage NSW identifies a potential breach, officers conduct a formal investigation to gather evidence of the alleged incident. This may establish whether a breach has occurred and who might be responsible.

Evidence may take the form of samples, photos, videos and witness statements. Heritage NSW collects evidence and manages investigations in accordance with the *Evidence Act 1995*, the *Australian Government Investigation Standards*, common law principles and by consent.

4.3 Audit

Compliance audit is a cornerstone of a robust, credible regulatory framework and policy that:

- enables comparisons and cumulative assessment of audit conclusions to assess levels of regulatory risk
- enables Heritage NSW to objectively assess the credibility and robustness of regulatory instruments issued and the effectiveness of the outcome
- may reduce reactive workloads over time
- adds to the perception of a robust compliance framework and policy
- identifies opportunities for continuous improvement.

5. Assessment of breaches: a risk-based regulatory approach

Heritage NSW uses a risk-based and outcomes-focused approach to compliance matters. This provides for a ranking based on the merits and potential risk of the matter. It promotes voluntary compliance by reducing regulatory burden on those matters with a lower ranking and subjecting those matters with a higher ranking to a stronger regulatory response. We prioritise resources towards enforcement actions for matters that have the highest risk rating. This approach is in line with NSW Government's *Quality Regulatory Services initiative*. Heritage NSW collects evidence to determine if there has been a breach.

A threefold test is used to classify the breach's risk. The test considers:

1. the extent of harm
2. public interest
3. the culpability of the offender.

Heritage NSW classifies breaches as either low, medium or high risk. The classification guide is an appropriate compliance response.

5.1 Extent of harm

Heritage NSW considers the physical impact of a breach and the degree of harm (as defined by the Act) caused. Factors considered are:

- the significance of the site/item/place
- the extent of physical work/harm
- how the work/harm has impacted on the heritage significance of the site
- if the impact can be rectified without further harm.

5.2 Public interest

Heritage NSW considers both the impact and public interest of matters, which includes:

- community interest in or association with an SHR listed item or historic archaeology
- the need to deter others from committing similar breaches in the future
- the impact of the breach and its effect on the integrity of the Act, such as:
 - the precedent that may be set by failing to investigate or prosecute
 - the nature of the breach in the context of the intent of the legislation
 - consistency with responses adopted for similar incidents.

5.3 The culpability of the offender

Heritage NSW also considers the culpability of the offender. This takes into consideration the aggravating or mitigating factors outlined in Table 2.

Table 2 Aggravating or mitigating factors considered when determining culpability

Aggravating	Mitigating
Multiple non-compliances	Excellent compliance record
Deceitful conduct	Willingness to cooperate
Major works	Minor works
Breach is continuing (work has not stopped)	Works ceased
Profit (or other benefit) from breach	No gain from breach
Breach knowingly committed	Did not knowingly or deliberately commit breach
Adverse heritage impact	No heritage impact
Likelihood that further damage will occur when compliance action commences (e.g. disposal of relics, demolition)	Likelihood that voluntary compliance can be achieved

After considering any mitigating or aggravating factors, we grade the culpability as serious, moderate or low:

- **Serious culpability** consists of, but is not limited to, intentional or wilful acts; previous non-compliances or convictions of a similar nature; ongoing duration; motivated by profit or clearly benefiting from non-compliance; fraud or serious misleading conduct; wilful ignorance; the non-compliance has an unacceptable heritage impact (i.e. would not have been approved under Div 3 of Pt 4 of the Act).
- **Moderate culpability** consists of, but is not limited to, non-intentional acts; no significant previous breaches; medium duration; self-reporting; may have benefited from the non-compliance; was aware of the risk of impact or the impact was foreseeable; the impact has an acceptable heritage impact (e.g. the breach may have been approved under Div 3 of Pt 4 of the Act).
- **Low culpability** consists of, but is not limited to, inadvertent acts; no previous breaches; self-reporting of breach; did not benefit from the non-compliance; the impact has no adverse heritage impact.

5.4 Classifying the risk

Heritage NSW reviews each breach on a case-by-case basis, with all circumstances considered and all relevant evidence reviewed objectively. The breach classification ultimately guides a compliance response.

6. Compliance responses and enforcement actions

Heritage NSW uses a range of statutory and non-statutory mechanisms to respond to compliance breaches.

6.1 Non-statutory responses

6.1.1 No breach/no enforcement action

Heritage NSW takes no formal enforcement action where:

- an investigation identifies no breach has occurred
- it is more appropriate for other regulatory agencies to undertake enforcement action (e.g. if the breach is related to a breach of a condition of development consent, it may be more appropriate for the local council to undertake formal enforcement action)
- there is insufficient evidence to establish that there has been a breach.

6.1.2 Non-compliance recorded

Informal action may be appropriate for non-compliance breaches that result in no adverse heritage impact. These non-compliance matters are usually self-reported, rectified, with controls put in place to prevent recurrence and if required, remediated.

Heritage NSW records decisions and reasons internally.

6.1.3 Advisory note

An advisory note is issued where a breach of a minor nature is identified, but where it is determined that no formal enforcement action is necessary.

This will involve issuing the alleged offender with a letter outlining the statutory requirements of management of heritage items.

Heritage NSW considers this action appropriate in situations where the degree of harm and culpability are minimal.

6.1.4 Formal warning

Heritage NSW issues a formal warning where there is sufficient evidence to prosecute but it elects not to proceed.

It considers this appropriate where an entity has low culpability, or where a simple action can bring about compliance.

Heritage NSW also considers the alleged offender's history in determining culpability in the event of any further breach.

6.1.5 Negotiated outcomes: memoranda of understanding and heritage agreements

Heritage NSW may choose to enter an agreement with an offender to act to remedy a breach that has already occurred. Negotiated outcomes are significant documents that specify remediation/restoration actions required to bring about compliance. They document what an alleged offender has agreed to do and may avoid costly court proceedings.

Negotiated outcomes take 2 forms:

- a memorandum of understanding – usually only applies to government agencies
- a formal heritage agreement (entered between the owner and the minister under the Act). Legal remedies are available for apprehended or actual breaches of a heritage agreement, for high culpability offenders, under s 44 and Pt 7 Div 2–3 of the Act.

6.2 Formal action under the Act

6.2.1 Order

Heritage NSW, under delegation from the minister or Chair of the Heritage Council, may issue stop work orders under s 79C and orders restricting harm under s 136 of the Act. These orders are a preventive step when evidence indicates works are being undertaken that are causing harm, or where harm is occurring or is about to occur.

Under delegation from the Heritage Council, Heritage NSW may also issue orders under s 120 of the Act to remedy a failure to maintain a heritage item listed on the SHR (to the minimum standards required under the Act and the Regulation).

Orders are considered on a case-by-case basis to reflect the circumstances of each breach. Heritage NSW generally only issues orders for breaches, or potential breaches, in medium or high-risk matters with all orders reviewed and approved by the department's legal branch before commencing.

Failure to comply with orders may result in increased enforcement actions, which may include criminal proceedings for an offence against the Act.

6.2.2 Court order

Heritage NSW, with appropriate high-level approval and delegation, can apply to the Land and Environment Court for an order under s 154 to restrain or remedy a breach of the Act, in circumstances where there is or may be a risk of a serious breach.

Court orders are only considered in cases where alleged offenders have been obstructive and/or immediate action is required, and the department's legal branch is briefed to manage proceedings.

Failure to comply with a court order may lead to contempt of court proceedings and/or other criminal prosecution for an offence against the Act or any other related legislative instrument.

6.2.3 Prosecution

Heritage NSW, with appropriate high-level approval and delegation, may consider criminal proceedings for high-risk matters that compromise the integrity of an item protected under the Act. Before recommending proceedings, Heritage NSW applies a twofold test to ensure:

1. there is sufficient evidence that an offence has been committed
2. it is in the public interest to bring the proceedings.

The department's legal branch must be briefed in relation to a matter and is responsible for managing, all legal proceedings for offences against the Act or any other Act.

Heritage NSW notes and follows the Premier's *Memorandum M1997-26 Litigation involving government authorities* and *Australian Government Investigation Standards*. Heritage NSW will always consult with government authorities prior to commencing a prosecution under s 161.

Heritage NSW work in conjunction with the department's legal branch in relation to prosecution. Decisions to prosecute are consistent with the *Prosecution guidelines 2021*.



Image 2 Mungo Lookout, Mungo National Park, Willandra Lakes World Heritage Region.
John Spencer/DCCEEW

7. Accountability

Compliance action is likely to involve assessments by individual officers who use their discretion when making decisions regarding likely outcomes.

Heritage NSW has in place internal governance and accountability mechanisms to manage compliance and enforcement decisions to ensure a consistent approach.

7.1 Governance

Heritage NSW ensures appropriate oversight of compliance actions by putting in place the following mechanisms:

- only managers can approve an enforcement response
- more serious enforcement action is taken once approved by the Heritage NSW Executive Director and in consultation with the department's legal branch
- all authorised persons are given specialised training regarding their duties and obligations under the law.

Heritage NSW has internal policies that govern behaviour and guide the conduct of staff including:

- Code of Ethics and Conduct
- Disclosing Interests and Managing Conflicts of Interest Policy
- Complaints Handling Policy and Guidelines.

The department's *External service-related complaints policy* explains our approach in dealing with complaints and allegations. It outlines the formal review process for handling a complaint made against the department, including Heritage NSW and its staff.

When dealing with a compliance matter that relates to actions taken by another business unit within the department, Heritage NSW may appoint independent investigators and/or legal counsel.

Investigations and prosecutions of government authorities must comply with the *Premier's Memorandum M1997-26 Litigation involving Government authorities* and the *Australian Government Investigation Standards*.

7.2 Performance measurement and reporting

Heritage NSW provide reports on compliance matters to the Heritage Council, Senior Management Team and the department's executive where requested.

Heritage NSW does not publish detailed information about individual matters under investigation due to legal and privacy considerations.

7.3 Security of information

Heritage NSW ensures any personal information is accurately collected, stored and disclosed in accordance with the *Privacy and Personal Information Protection Act 1998*.

7.4 Reporting back to the community

Where appropriate, Heritage NSW provides feedback to the community and informants who report alleged breaches and may also provide information in response to requests for information in accordance with the *Government Information (Public Access) Act 2009*.

Heritage NSW will not disclose information that may compromise an investigation or enforcement action, or breach the *Privacy and Personal Information Protection Act 1998*.

Where appropriate, we may advise on specific compliance outcomes through direct correspondence, ministerial requests or in media announcements.

7.5 Evaluating the compliance approach

Heritage NSW is committed to continually improving our approach to compliance, ensuring its effectiveness and adaptability to changing circumstances.

Heritage NSW:

- undertakes an internal debriefing for all major investigations to improve the appropriateness, effectiveness and efficiency of evidence gathering and regulatory decision-making processes and procedures
- evaluates the appropriateness, effectiveness and efficiency of all individual compliance operations
- develops its compliance monitoring approaches, adopting new and additional technologies and transparent cost-effective management
- periodically reviews its compliance priorities and risk analysis framework
- develops relationships with, and learns from, experiences of other regulators and agencies
- promotes community engagement and educational awareness
- ensures compliance staff are informed and trained in contemporary compliance and investigative processes.

7.6 Program monitoring and policy development

Heritage NSW continually examines information from current and previous compliance actions to ensure our policy approach is appropriate and consistent.

Ongoing monitoring of our compliance program allows us to:

- detect individual instances of non-compliance in a reliable and timely manner
- assess the level of non-compliance to inform the development of operations
- assess and review the effectiveness of our compliance operations and programs

- identify emerging issues and ensure compliance actions and responses remain both appropriate and effective.

Please refer any comments or questions about this policy to heritage.mailbox@environment.nsw.gov.au

8. More information

8.1 NSW Government guidelines, policies and legislation

- [Heritage compliance framework](#)
- [Heritage Act 1977](#)
- [Heritage Regulation 2012](#)
- [Environmental Planning and Assessment Act 1979](#)
- [National Parks and Wildlife Act 1974](#)
- [Standard conditions of consent](#)
- [Evidence Act 1995](#)
- [Quality Regulatory Services initiative](#)
- [Memorandum M1997-26 Litigation involving government authorities](#)
- [Prosecution guidelines 2021](#)
- [External service-related complaints policy](#)
- [Privacy and Personal Information Protection Act 1998](#)
- [Government Information \(Public Access\) Act 2009](#)
- [Code of Ethics and Conduct for NSW Government Sector Employees](#)

8.2 Federal guidelines, policies and legislation

- [Environment Protection and Biodiversity Conservation Act 1999](#)
- [Underwater Cultural Heritage \(Consequential and Transitional Provisions\) Act 2018](#)
- [Historic Shipwrecks Act 1976](#) (superseded)
- [Australian Government investigation standards](#)