



Office of
Environment
& Heritage

Date: 12 June 2014
Our reference: DOC14/95919
Contact: Liz Mazzer 02 6883 5325

Loretta McLean
Bathurst Regional Council
Private Mail Bag 17
BATHURST NSW 2795

Dear Loretta

RE Development Application No 2014/0155

Thank you for your letter dated 12 May 2014 seeking comment from the Office of Environment and Heritage (OEH) on the Environmental Impact Statement (EIS) for the above proposal.

OEH notes that two artefacts associated with previously recorded site EP-IF-1 were unable to be located during field surveys of the project site. However a third artefact (basalt flake) was found approximately 150m northwest of the previously recorded site. An Aboriginal Heritage Impact Permit (AHIP) is required for the salvage and relocation of the third artefact. Under the *National Parks and Wildlife Act 1974* (NP&W Act), it is the responsibility of each individual proposing to conduct ground disturbance works to ensure that they have conducted a due diligence assessment to avoid harming Aboriginal objects by the proposed activity. OEH administers Part 6 of the *NP&W Act* with regard to determination of AHIP applications.

For your information please find attached OEH code of due diligence process and guidance material for obtaining an AHIP.

Should you require further information please contact me on (02) 68835325.

Yours sincerely,

LIZ MAZZER
Acting Senior Team Leader Planning, North West Region
Regional Operations



Application for an Aboriginal Heritage Impact Permit

This is an application form for an **Aboriginal Heritage Impact Permit (AHIP)** under the *National Parks and Wildlife Act 1974* (NPW Act). This form should be used for all applications in relation to impacts upon Aboriginal objects and Aboriginal places protected under the NPW Act.

This form must be accompanied by the documents listed in the Supporting Information Requirements.

If you need any help filling out the form, please contact your nearest DECC office (see list at the end of this form).

Once completed and signed, the form, together with the applicable fee, and all supporting information should be sent to your nearest DECC office. Please note that incomplete applications will not be processed.

1 What type of AHIP are you applying for?

Please indicate the type of AHIP you are seeking in the table below. The references in brackets relate to the relevant sections of the NPW Act.

Please choose **one** of the following (by placing a tick (✓) in the relevant box).

1.1. Do you seek an AHIP to disturb or excavate land for the purpose of discovering an Aboriginal object (Section 86(a))?	
1.2. Do you seek an AHIP to disturb or move an Aboriginal object (Section 86(b))?	
1.3. Do you seek an AHIP to destroy, deface or damage an Aboriginal object (Section 90)?	
1.4. Do you seek an AHIP to destroy, deface or damage an Aboriginal Place (Section 90)?	
1.5. Do you seek a combined AHIP to disturb or move an Aboriginal object and to damage, deface or destroy an Aboriginal object or Aboriginal place (Sections 86 and 90)?	

Note: Permits for activities as specified under s.86 of the NPW Act are issued under s.87 of the Act.

DECC use only

AHIP Number:		Fee Paid?	Yes / No
Date Received by DECC		Due Date	
TRIM Doc Ref:		TRIM File Ref:	

2 AHIP applicant's details

2.1 Name of the proposed AHIP holder(s)

An AHIP can be issued to individual(s), a company, body corporate or public authority, but **not** a partnership or joint-venture name. It is DECC's policy that where appropriate, an AHIP will be issued to the company responsible for the proposed works and not to individual archaeologists or consultants employed or contracted by the company.

Applicant 1

Full name			
Trading as (if applicable)			
ACN /ABN (if applicable)	ACN:	ABN:	
Business address	No:	Street name:	
	Suburb:	State:	Postcode:

Applicant 2

Full name(s)			
Trading as (if applicable)			
ACN /ABN (if applicable)	ACN:	ABN:	
Business address	No:	Street name:	
	Suburb:	State:	Postcode:

Please attach extra page(s) if more space is needed, or if there are more than 2 applicants.

2.2 Address for correspondence

Postal address and fax number for all correspondence	PO Box:		
	Suburb:	State:	Postcode:
	Fax:		

2.3 Contact details for project manager. This will be the primary contact for DECC enquiries.

Name	Mr / Mrs / Ms Given name: Surname:
Organisation	
Position	
Address	No: Street name:
	Suburb: State: Postcode:
Phone numbers	Business Mobile: After hours:
Fax	
Email	

2.4 Contact details for archaeologist

Name	Mr / Mrs / Ms Given name: Surname:
Organisation	
Phone numbers	Business: Mobile:
Fax	
Email	

2.5 Land, Aboriginal objects and sites to which this application applies

Please provide the following details of the location of the land to which this application applies.

Land description or property name			
Street address	No: Street name:		
	Town/Suburb: State: Postcode:		
Title details	Portion/s	Parish	County
	Lot & DP No.		
Local government area			

Please provide a description of the Aboriginal objects and sites on the land to which this application applies

Description of the Aboriginal objects and sites on the land to which this application applies.	

Please attach extra page(s) if more space is needed.

See Supporting Information Requirements. The application must also include a map of the location of the land to be subject of the application that clearly defines the boundaries and proposed geographic extent of the application.

3 Works to be undertaken upon the lands

Please provide a description of the works to be conducted upon the lands that are the subject of the application including information on the nature and scale of the proposed works.

Description of works/ activities (including research activities, if appropriate)	

Please attach extra page(s) if more space is needed

4 Development context

Please tick (✓) 'Yes' or 'No'

	Yes	No
4.1 Is development consent or other approval required?		

If 'Yes', and if the consent or approval has been granted, please attach.

5 Other AHIPs which may be relevant

Please tick (✓) 'Yes' or 'No'

	Yes	No
5.1 Are you aware of any other applications for AHIPs which have been issued or refused within the lands subject of this application?		

If 'Yes', please provide details:

AHIP number(s):	
AHIP status (e.g. current/expired/refused):	

6 Term of AHIP

The proposed term of an AHIP should closely mirror the period within which impact on Aboriginal objects and/or Aboriginal places is likely to occur.

Please indicate the period for which you seek an AHIP (e.g. 2 years) and the proposed start and end dates.	

7 Works on DECC estate, marine parks or aquatic reserves

Please tick (✓) 'Yes' or 'No'

	Yes	No
Does the application relate to land reserved, managed or acquired under the National Parks and Wildlife Act 1974, Marine Parks Act 1997 or Fisheries Management Act 1994 ?		
Is the application supported by the relevant National Parks and Wildlife Service Regional Manager, Marine Park Manager or Aquatic Reserve Manager?		

Attach evidence of Manager's support.

8 Determining the fee for AHIP processing

Please indicate the estimated **total** cost of the development works to determine the relevant administrative fee. Payment of the fee must be submitted with your application.

If you seek a combined s87 and s90 AHIP, the relevant processing fee will be equal to the relevant section 90 fee only.

Please tick (✓) applicable fee.

Section 90 AHIP	Fee*	
Work to an owner-occupied dwelling costing up to \$100,000	\$60	
Other work costing up to \$100,000	\$100	
Work between \$100,000 and \$250,000	\$150	
Work between \$250,000 and \$500,000	\$250	
Work between \$500,000 and \$1million	\$400	
Work between \$1million and \$2million	\$750	
Work between \$2million and \$5million	\$1,000	
Work over \$5million	\$2,000	
Section 87 AHIP		
Work relating to owner-occupied dwellings	\$25	
All other work	\$100	

* Processing fees are exempt from GST by the Commonwealth Treasurer's Division 81 determination under *A New Tax System (Goods and Services Tax) Act 1999*.

9 Supporting Information Requirements

This application must be accompanied by the documents listed in the Supporting Information Requirements.

If the listed documents are not provided, the application will not be processed.

10 Signature(s) of proposed AHIP holder(s)

This application may only be signed by a person(s) with legal authority to sign it. The various ways in which the application may be signed and the people who may sign the application, are set out in categories below.

Please tick (✓) the box next to the category that describes how this application is being signed

If the proposed AHIP holder is:		The application must be signed and certified by one of the following:
an individual	☐	the individual.
a company	☐ ☐ ☐ ☐	the common seal being affixed in accordance with the <i>Corporations Act 2001</i> , or two directors, or a director and a company secretary, or if a proprietary company has a sole director who is also the sole company secretary – by that director.
a public authority other than a council	☐	the chief executive officer of the public authority, or their authorised delegate.
a local council	☐ ☐	the general manager in accordance with s.377 of the <i>Local Government Act 1993</i> (LG Act), or the seal of the council being affixed in a manner authorised under the LG Act.

I/We (the proposed AHIP holder(s)):

- ***apply for an Aboriginal Heritage Impact Permit***
- ***declare that the information in this application form (including all the attachments) is not false or misleading in any material particular, and***
- ***declare that all the documents required in the Supporting Information Requirements are attached.***

Applicant 1

Signature		Signature	
Name (printed)		Name (printed)	
Position (in company or authority)		Position (in company or authority)	
Date		Date	

Seal (if signing under seal):

Applicant 2

Signature		Signature	
Name (printed)		Name (printed)	
Position (in company or authority)		Position (in company or authority)	
Date		Date	

Seal (if signing under seal):

Additional information

1. It is an offence under s169 (3) of the *National Parks and Wildlife Act 1974* to knowingly give any information in this form that is false or misleading in a material particular.
2. You must ensure that all questions are answered and all relevant supporting information has been attached to this application. Incomplete applications will **not** be processed.
3. Send completed form, fee and attachments to your nearest DECC office identified below.

Department of Environment and Climate Change offices

Metropolitan

Parramatta

Department of Environment and Climate Change NSW
Planning & Aboriginal Heritage Section
PO Box 668
Parramatta NSW 2124

Phone: (02) 9995 5000
Fax: (02) 9995 6900

North East

Coffs Harbour

Department of Environment and Climate Change NSW
Planning & Aboriginal Heritage Section
Locked Bag 914
Coffs Harbour NSW 2450

Phone: (02) 6651 5946
Fax: (02) 6651 6187

North West

Dubbo

Department of Environment and Climate Change NSW
Environment & Conservation Programs
PO Box 2111
Dubbo NSW 2830

Phone: (02) 6883 5330
Fax: (02) 6884 9382

South

Queanbeyan

Department of Environment and Climate Change NSW
Planning & Aboriginal Heritage Section
PO Box 733
Queanbeyan NSW 2620

Phone: (02) 6229 7000
Fax: (02) 6229 7001



Supporting Information Requirements for AHIP Applications

See Section 9 of application form

The applicant must ensure that the following documents are included in the Aboriginal Heritage Impact Permit (AHIP) application.

Note: Any culturally sensitive information in the following documents should be flagged and a list of restrictions which apply to the viewing of that information provided.

Please provide **one** paper copy and **one** electronic copy of Items 1 to 6:

1. Aboriginal Heritage Information Management System (AHIMS) site numbers or, for new sites, the correctly filled out AHIMS site cards with a unique site identifier.
2. Documentation demonstrating Aboriginal community consultation (as required by the *Interim Community Consultation Guidelines for Applicants*¹), specifically:
 - a. a consultation log, detailing the consultation undertaken
 - b. evidence that the applicant has written to DECC and other parties to obtain information on known Aboriginal groups to be consulted (copies of letters will be sufficient)
 - c. evidence of advertisement or other public media seeking community input
 - d. the outcome of the consultation, including the views of the Aboriginal community on the methodology and impact of the proposed activities, how these views have been addressed, and any mitigation and conservation measures that have been negotiated.
3. Maps:
 - a. a topographic map (e.g. 1:25,000) clearly showing the location of the subject lands, development boundary, impact area and sites or Potential Archaeological Deposits (PADs) for which a permit is sought (aerial photographs, detailed site maps, title plans etc may also be provided). The map should include clear cadastre information including a lot and DP number (as identified in the application), and the local government area, parish and zone (as applicable) as well as
 - b. a map of the location of the land to be subject of the application which clearly defines the boundaries and proposed geographic extent of the application.
4. Description of research activities to be undertaken for section 87 applications, if applicable.
5. Any development consent, Environmental Impact Assessment and/or Review of Environmental Factors, if applicable.
6. Information about what the applicant intends to do with collected objects, for example, if objects will be transferred to the Australian Museum, or whether a care and control agreement will be sought.

¹ www.environment.nsw.gov.au/resources/parks/interimConsultationGuidelines.pdf

7. Three paper copies, plus one electronic copy of an Aboriginal Cultural Heritage Impact Assessment Report. Any archaeological surveying, site recording and research methodology that is included in the Assessment Report must be consistent with the requirements in the Standards and Guidelines Kit². The Aboriginal Cultural Heritage Impact Assessment Report must contain, but is not limited to:
- a. a description of the Aboriginal objects and sites on the land to which this application applies
 - b. a description of the real or potential impacts to the Aboriginal objects, landscape features and/or Aboriginal place, as well as a description of the significance of those objects, features or place to the Aboriginal community
 - c. a description of the research methodology for the excavation or salvage of Aboriginal objects, if applicable
 - d. alternatives to impact that have been considered
 - e. measures that are to be employed to manage (mitigate/minimise) impacts.

² www.environment.nsw.gov.au/resources/cultureheritage/aboriginalHeritageGuidelinesKit.pdf



Office of
Environment
& Heritage

Guide to Aboriginal Heritage Impact Permit Processes and Decision-making

Version 2

The objective of this policy is to ensure that decisions by the Office of Environment and Heritage on Aboriginal Heritage Impact Permits (AHIPs) are transparent and defensible, and that AHIPs are managed appropriately post-approval.

Except where otherwise stated in this document, this guide replaces all existing documents and policies relating to the determination and issuing of AHIPs.

WARNING: Do not rely on a printed version of this document to be current. Always check the OEH website to ensure you have the latest version.

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See also www.environment.nsw.gov.au

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Acronyms

AHIMS	Aboriginal Heritage Information Management System
AHIP	Aboriginal Heritage Impact Permit
CCHD	Country, Culture and Heritage Division (within OEH)
DG	Director-General of Premier and Cabinet
DPC	Department of Premier and Cabinet
EHub	OEH intranet site (available to OEH staff only)
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EPRG	Environment Protection and Regulation Group (within OEH)
GIPA	<i>Government Information (Public Access) Act 2009</i>
ISEMS	Integrated Statutory Environmental Management System – a database used by OEH to track documentation associated with licences, permits and any other legal notice or documentation
LSB	Legal Services Branch (within OEH)
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NPW Regulation	National Parks and Wildlife Regulation 2009
OEH	Office of Environment and Heritage NSW
P&I	Department of Planning and Infrastructure
PWG	Parks and Wildlife Group (within OEH)
RAP	Registered Aboriginal party
RTIP officer	Right to Information Privacy Officer (Corporate Governance Branch)
TRIM	OEH corporate document and records management system

Glossary

Aboriginal Heritage Impact Permit (AHIP)	Statutory instrument issued by OEH under section 90 of the <i>National Parks and Wildlife Act 1974</i> (NPW Act) to manage harm or potential harm to Aboriginal objects and places
Aboriginal object	Statutory term, meaning ‘... any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains’ (s.5, NPW Act)
Aboriginal owners	Statutory term used in the <i>Aboriginal Land Rights Act 1983</i> (ALR Act) and the NPW Act. Aboriginal owners are defined as ‘persons whose names are entered on the Register of Aboriginal Owners because of the person’s cultural association with particular land’ (ALR Act). Registration as an Aboriginal owner under the ALR Act provides statutory recognition of an Aboriginal person’s cultural association with land.
Aboriginal place	Statutory term, meaning any place declared to be an Aboriginal place (under s.84 of the NPW Act) by the Minister administering the NPW Act, by order published in the Gazette, because the Minister is of the opinion that the place is or was of special significance with respect to Aboriginal culture. It may or may not contain Aboriginal objects.
Aboriginal site	A location or area of land that contains or is associated with Aboriginal object(s)
Applicant	Person applying for an AHIP or an AHIP variation, transfer or surrender
Community collection	May be authorised as part of an AHIP and involves the collection of Aboriginal objects by one or all registered Aboriginal parties or their representatives from a site that will be harmed
Decision-maker	Either the Director General of DPC or an OEH officer with delegated authority to make decisions in relation to an AHIP
Harm	Statutory term described in s.5 of the NPW Act: <i>‘harm an object or place includes any act or omission that:</i> <i>(a) destroys, defaces or damages the object or place, or</i> <i>(b) in relation to an object—moves the object from the land on which it had been situated, or</i> <i>(c) is specified by the regulations, or</i> <i>(d) causes or permits the object or place to be harmed in a manner referred to in paragraph (a), (b) or (c),</i> <i>but does not include any act or omission that:</i> <i>(e) desecrates the object or place, or</i> <i>(f) is trivial or negligible, or</i> <i>(g) is excluded from this definition by the regulations’</i>

Minister	Minister administering the NPW Act, i.e. the Minister for the Environment
Our clients/ stakeholders	AHIP applicants, proponents, local councils and the Department of Planning and Infrastructure: the particular client or stakeholder will depend on the nature of the proposal or issue being dealt with by OEH.
Property of the Crown	All Aboriginal objects are considered to be 'property of the Crown' other than those, which: (a) were located in private collections before 13 April 1970 and have not since been abandoned, or (b) are 'real property' (i.e. objects such as rock art, rock carvings or scarred trees that are attached to private land and are legally considered part of that land).
Recommending officer	OEH officer(s) who initially evaluates an AHIP-related application or proposes a course of action for consideration by a decision-maker
Registered Aboriginal parties	Aboriginal people, Aboriginal organisation or their representatives who have registered an interest in being consulted in accordance with clause 80C of the National Parks and Wildlife Regulation 2009 and which is further explained in OEH's <i>Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010</i>
Safekeeping	Care of Aboriginal objects by or on behalf of an Aboriginal person or organisation pursuant to s.85A(1)(c) of the NPW Act
Salvage excavation	May be authorised as part of an AHIP and is an excavation that is carried out in accordance with archaeological methodology in order to recover a sample of Aboriginal objects as an archival record or Aboriginal life from a site that will be destroyed
Test excavation	May be carried out in accordance with OEH's <i>Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW</i> . Less commonly, may be authorised by an AHIP and is an excavation carried out in accordance with archaeological methodology in order to establish the nature and extent of sub-surface Aboriginal objects and to assist in the assessment of management options for a site.

This guide is an internal Office of Environment and Heritage (OEH) document designed to provide guidance to the agency's staff. It has not been prepared to guide external parties and should not be used for this or any other purpose. The guide is subject to internal review and as a result the information contained within it may change from time to time.

1. Introduction and background

1.1 About this guide

1.1.1 Intended audience

This guide is an OEH document, prepared for an internal audience. It is targeted at Environment Protection and Regulation Group (EPRG) Aboriginal cultural heritage staff who process applications for Aboriginal Heritage Impact Permits (AHIPs) and manage them after approval. In the context of this guide, these staff are referred to as 'recommending officers' and 'decision-makers'.

A **recommending officer** is the EPRG officer who initially evaluates an application or proposes a course of action for consideration by a decision-maker. This is usually an EPRG branch:

- archaeologist
- Aboriginal heritage planning officer, or
- senior Aboriginal heritage planning officer.

A **decision-maker** is the Director-General (DG) of the Department of Premier and Cabinet (DPC) or an OEH officer who has the delegated authority¹ to issue or refuse an AHIP. This is usually the:

- EPRG branch Director, or
- Manager responsible for Aboriginal heritage regulatory matters (such as the Planning and Aboriginal Heritage Manager).

1.1.2 Objective of this guide

The objective of this guide is to ensure that OEH decisions on AHIPs are transparent and defensible, and that all AHIPs issued are appropriate, reasonable and enforceable, and managed appropriately post-approval.

1.1.3 Scope of this guide

This guide sets out the process for:

- processing and determining AHIP applications
- recording decisions
- drafting, issuing and refusing AHIPs
- managing AHIPs post-approval.

1.1.4 Applying this guide (and using discretion)

This guide represents EPRG's standard procedure for AHIP processes and decision-making and it will be applicable in the majority of situations. As with all policy and guidance documents, the guide has not been developed to cover every conceivable situation. There may be unusual or unexpected

¹ A list of delegated positions can be found on the 'Delegations' page of EHub: refer to [Delegation of Director-general and Minister's Functions: Supplementary instrument of delegation of ministerial functions – 30 June 2010](#)

situations where a departure from the advice and process outlined in the guide may be necessary (including where the process uses terms such as 'must' and 'mandatory').

The decision-maker should always use their discretion based on the unique circumstances of each matter, ensuring that any departure from the advice contained in this guide is well justified and documented. Further policy and/or legal advice may also be sought, where necessary.

1.1.5 Intended outcome

The intended outcome of this guide is that EPRG staff will be able to consistently:

- make and document decisions about AHIP applications
- issue and refuse AHIPs where required
- appropriately manage AHIPs post-approval.

1.1.6 Links to other OEH policies

This guide supports EPRG's [Operational Policy: Protecting Aboriginal cultural heritage](#) and which should be read in conjunction with the [AHIP-related templates](#), available for reference on EHub and for use on ISEMS.²

1.1.7 Review and update

This guide may need to be updated where:

- it is affected by legislative changes
- significant policy changes occur.

This guide will otherwise be reviewed by OEH's Reform and Compliance Branch every three years with the next review expected in mid-2014.

These routine reviews will evaluate the extent to which the guide has achieved its intended objective and outcomes.

1.2 Background information

1.2.1 Aboriginal cultural heritage

Aboriginal cultural heritage consists of places and objects that are of significance to Aboriginal people because of their traditions, observances, lore, customs, beliefs and history. It provides evidence of the lives and existence of Aboriginal people before European settlement through to the present.

Aboriginal cultural heritage is dynamic and may comprise physical (tangible) or non-physical (intangible) elements. It includes things made and used in traditional societies, such as stone tools, art sites and ceremonial or burial grounds. It also includes more contemporary and/or historical elements, such as old mission buildings, massacre sites and cemeteries. Tangible heritage is situated in a broader cultural landscape and needs to be considered in that context and in a holistic manner.

Aboriginal cultural heritage also relates to the connection and sense of belonging that people have with the landscape and with each other. For Aboriginal people, cultural heritage and cultural practices are part of both the past and the present, and cultural heritage is kept alive and strong by being part of everyday life.

Aboriginal cultural heritage is not confined to sites. It also includes people's memories, storylines, ceremonies, language and 'ways of doing things' that continue to enrich local knowledge about the cultural landscape. It involves teaching and educating younger generations. It is also about learning

² Integrated Statutory Environmental Management System: see Glossary

and looking after cultural traditions and places, and passing on knowledge. It is enduring but also changing. It is ancient but also new.

Aboriginal cultural heritage provides essential links between the past and present: it is an intrinsic part of Aboriginal people's cultural identity, connection and sense of belonging to Country. The effective protection and conservation of this heritage is important in maintaining the identity, health and wellbeing of Aboriginal people.

1.2.2 Relevant legislation

EPRG's [*Operational Policy: Protecting Aboriginal cultural heritage*](#) provides a detailed overview of the legislative framework for the protection of Aboriginal cultural heritage (see Appendix A of the Operational Policy). The following sections provide a brief summary.

National Parks and Wildlife Act 1974

The NPW Act, administered by OEH, is the primary legislation for the protection of those aspects of Aboriginal cultural heritage in NSW defined under the Act. One of the objects of the NPW Act is:

'the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including but not limited to (i) places, objects and features of significance to Aboriginal people ...' (s.2A(1)(b)).

Specifically, under s.85 of the NPW Act, the Director-General (DG) of the Department of Premier and Cabinet is responsible for the protection of Aboriginal objects and declared Aboriginal places in NSW, particularly those on land reserved under the Act. Part 6 of the Act provides specific protection for Aboriginal objects and places by establishing offences of harm. 'Harm' is defined in the Act to include destroying, defacing or damaging an Aboriginal object or a declared Aboriginal place, or moving an Aboriginal object from the land.

There are a number of defences and exemptions to the offence of harming an Aboriginal object or place. A valid Aboriginal Heritage Impact Permit (AHIP) issued under s.90 of the NPW Act that has not been contravened can be one defence.³

The powers in Part 6 are not inconsistent with the objects of the NPW Act or a requirement to give effect to ecologically sustainable development (ESD).

Other Acts

Various State and Commonwealth assessment and planning processes are also relevant to Aboriginal cultural heritage. OEH has responsibilities in some of these areas. Most obviously, OEH has specific roles and obligations under the *Environmental Planning and Assessment Act 1979* (EP&A Act). Heritage matters are also addressed in the *Heritage Act 1977* and Commonwealth legislation.

1.2.3 Aboriginal heritage impact permits

What is an AHIP and when is one required?

An Aboriginal Heritage Impact Permit (AHIP) is the statutory instrument that OEH issues under section 90 of the NPW Act to manage harm or potential harm to Aboriginal objects or declared Aboriginal places.

An AHIP is required when a proposed activity is likely to directly or indirectly harm an Aboriginal object or place.⁴ This includes such things as:

³ Other available defences include that the defendant exercised 'due diligence' and reasonably determined that no Aboriginal object would be harmed (s.87(2)); the defendant was carrying out a 'low impact activity' (s.87(3)).

⁴ Examples of indirect harm include harm to art in a shelter from increased visitation; destruction from increased erosion; and changes to wild food resources in an Aboriginal place (where this resource forms part of the significance of that place as listed in the 'statement of values' as discussed later in this section).

- movement of certain Aboriginal objects
- community collection of Aboriginal objects
- archaeological test excavations⁵
- archaeological salvage excavations
- harm to Aboriginal objects or places through proposed works⁶ or any other action.

Before applying for an AHIP, the applicant must thoroughly investigate and assess the cultural heritage values of the area that may be affected by a proposed activity, including consultation with Aboriginal people.

The OEH [*Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW*](#) and [*Applying for an AHIP: Guide for applicants*](#) outlines the assessment and application process that AHIP applicants are required to follow.

After receiving an AHIP application, OEH decides whether it is appropriate to issue an AHIP in relation to the proposed works and, if so, any associated conditions that are necessary.

OEH generally uses an AHIP template⁷ that includes a range of standard conditions that may be used for certain types of proposal. An AHIP may also include site-specific conditions (see Section 4). After approval, AHIPs can also be varied, transferred, surrendered, suspended and revoked, in certain circumstances, as outlined in Section 5.

When an AHIP is not required

There may be situations where an AHIP may not be required and the proponent can proceed with caution. These include:

- where the proposed activity is an approved Part 3A project⁸ or State significant development or infrastructure under the EP&A Act or when undertaking an environmental assessment for any of these types of development activities in accordance with the requirements of the Director-General of the Department of Planning and Infrastructure (P&I)
- where sections 87A and 87B of the NPW Act exempt the proposed activity from the offences listed under s.86 of the Act
- where the proposed activity does not fall under the definition of 'harm', such as an act or omission that is 'trivial or negligible' (s.5 of the NPW Act)⁹
- where the proponent has exercised due diligence and has reasonably determined that their actions will not harm Aboriginal objects (s.87(2), NPW Act)
- where the proponent is not aware of the presence of Aboriginal objects and the proposed activity is low impact for which there is a defence in the NPW Regulation (cl.80B, NPW Regulation)

⁵ These are test excavations that cannot be carried out in accordance with the *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW*.

⁶ Works related to a proposed development or activity, such as earthmoving, construction, laying roads and other infrastructure

⁷ It is possible to modify the AHIP template and conditions in unusual or unexpected situations at the discretion of the decision-maker.

⁸ Part 3A of the EP&A Act was repealed in May 2011. Following this, the NSW Government introduced transitional arrangements for those projects which were already in the major projects assessment system under Part 3A.

⁹ The definition of 'harm' to an object or place under s.5 of the NPW Act does not include something that is trivial or negligible. Examples of what may be considered a trivial or negligible act, depending on the circumstances, include picking up and replacing a small stone artefact; breaking a small Aboriginal object below the surface when gardening; crushing a small Aboriginal object when walking on or off a track; and picnicking, camping or other similar recreational activities.

- where the proposed activity is an archaeological investigation being carried out in accordance with the OEH [Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW](#) (cl.3A, NPW Regulation).

More information on these circumstances is provided in OEH's [Applying for an AHIP: Guide for applicants](#).

AHIPs for Aboriginal places

Declaration of an Aboriginal place aims to recognise and protect the special cultural significance of an area of land. It is an offence under s.86(4) of the NPW Act to harm or desecrate an Aboriginal place. The only defence available is a valid AHIP that was not contravened (s.87(1)(a)–(b)).

The declaration of an Aboriginal place does not prevent future development of the area covered by the declaration. However, it sets in place a process of assessment and review to ensure that development is compatible with and conserves the cultural significance of the place wherever possible.

A [list of declared Aboriginal places](#) with links to gazettal notices is available on the OEH website. The gazettal notices generally include a brief 'statement of significance' that highlights the cultural value of the Aboriginal place.

A full 'statement of values' is also prepared as part of the ministerial briefing note for the declaration. These briefing notes are available by contacting the CCHD Regional Manager (Community and Operations).

Management plans for Aboriginal places may also be prepared to set out the future uses for the place and how it will be managed, and may identify activities for this purpose.

Management plans for Aboriginal places are not compulsory. When determining AHIP applications for Aboriginal places, it is worth checking with the CCHD Regional Manager (Community and Operations) to see whether any have been prepared.

Generally speaking, any activities that are consistent with the statement of values (contained in the ministerial briefing note for gazettal of the Aboriginal place) or with any OEH-approved management plan prepared for an Aboriginal place would not require an AHIP, as the activity would not usually be expected to harm that place. Such activities could include (depending on the circumstances):

- low-impact visitor appreciation works
- weed management
- maintenance of existing structures and tracks.

Other activities that are *not clearly* in keeping with the statement of values or any OEH-approved management plan, depending on the circumstances, could include:

- proposed new walking or vehicle access tracks
- hazard reduction activities not referred to in a management plan
- archaeological excavations of any kind
- other research activities that may harm an Aboriginal place.

Where a proposed activity is likely to harm Aboriginal objects within an Aboriginal place in any way, an AHIP will usually be required.

Further information

Refer to [Aboriginal place declarations: assessment guidelines](#) under s.84 of the *National Parks and Wildlife Act 1974* and accompanying information (available on EHub only).

Arrangements for the deposition and safe keeping of salvaged Aboriginal objects

The DG may transfer Aboriginal objects that are the property of the Crown¹⁰ via a Care Agreement under s.85A(1)(c) of the NPW Act. Care Agreements are not AHIPs and should be issued separately from them (although both may be considered concurrently).

Extract from NPW Act

85A Transfer of Aboriginal objects

- (1) **The Director-General may, despite any other provision of this Act, dispose of Aboriginal objects that are the property of the Crown:**
- (a) **by returning the Aboriginal objects to an Aboriginal owner¹¹ or Aboriginal owners entitled to, and willing to accept possession, custody or control of, the Aboriginal objects in accordance with Aboriginal tradition, or**
 - (b) **by otherwise dealing with the Aboriginal objects in accordance with any reasonable directions of an Aboriginal owner or Aboriginal owners referred to in paragraph (a), or**
 - (c) **if there is or are no such Aboriginal owner or Aboriginal owners – by transferring the Aboriginal objects to a person, or a person of a class, prescribed by the regulations¹² for safekeeping.**

Whether or not there are any Aboriginal owners (see Glossary for definition) affects the DG's powers to 'return' or 'otherwise deal' with Aboriginal objects under s.85A(1)(a) and (b). As there are few registered Aboriginal owners at present, it is more common for Aboriginal objects to be 'transferred' for safe-keeping under s.85A(1)(c) to an Aboriginal person or organisation representing Aboriginal people. Transfers of Aboriginal objects are done under a Care Agreement struck between OEH and an Aboriginal person or organisation. An organisation representing Aboriginal people could be an entity such as a regional museum if this is endorsed by the relevant Aboriginal people.

Care Agreements should always accommodate the possibility that future Aboriginal owners may seek a permanent return of the objects. A permanent return of Aboriginal objects cannot occur unless the person is an Aboriginal owner.

A policy addressing management arrangements for salvaged Aboriginal objects is currently being developed by EPRG's Continuous Improvement Unit.

Under s.88 of the NPW Act, the Director-General *may* arrange with the Australian Museum Trust for the deposition or the exhibition of Aboriginal objects found 'on park' (national park, historic site, nature reserve, karst conservation reserve, Aboriginal area, state conservation area or regional park).

The Australian Museum is finalising its Archaeological Collection Lodgement Policy, which outlines the conditions under which the museum will consider accepting archaeological materials collected under the framework of the NPW Act (on- and off-park) and/or the EP&A Act. This policy will be available on the museum's website later in 2011.

¹⁰ 'Property of the Crown': see Glossary

¹¹ 'Aboriginal owner': defined in s.4(1) of the *Aboriginal Land Rights Act 1983*

¹² '... person, or a person of a class, prescribed by the regulations ...' cl.99 of the NPW Regulation prescribes that this can be (a) an Aboriginal person or (b) an organisation representing Aboriginal people. 'Aboriginal person' is defined in s.4(1) of the *Aboriginal Land Rights Act 1983*.

2. Decision-making and accountability

2.1 OEH role as decision-maker

The NPW Act establishes the DG of DPC as the decision-maker in relation to AHIPs. Currently, this role has been delegated to Environment Officer Class 13 and above within EPRG.¹³ In practice, this is the EPRG Regional Branch Director or, more commonly, the Branch Manager who has responsibility for regulating Aboriginal cultural heritage. The decision-maker takes advice from expert staff within the EPRG Branch: the 'recommending officer(s)'.

Decision-makers are required to adhere to a number of legal principles and legislative requirements when making AHIP-related decisions.

2.2 Legal principles for decision-makers

Decisions must be reasonable, unbiased, impartial, transparent, accountable and independent. Decision-makers must document all decisions and any actions and outcomes required. This will ensure that applicants and other stakeholders understand how the decision was reached and can be referred to if the ruling is later challenged in court (see Section 2.6).

It is particularly important to be impartial and avoid bias in making decisions. Bias may result when decision-makers have a conflict of interest, which can be pecuniary (financial) or non-pecuniary (such as through personal or family relationships).

More about conflicts of interest

If recommending officers or decision-makers have any concerns about a perceived, potential or actual conflict of interest associated with a particular application or AHIP-related decision, they should discuss this with their immediate supervisor in the first instance.

Where a conflict of interest exists, could arise or be perceived by third parties to exist, a written outline should be prepared for the relevant manager, who must then inform the Deputy Director-General, EPRG. Employees and their managers have a joint responsibility to avoid or resolve conflicts of interest.

For more information, refer to OEH's [Code of Ethical Conduct](#) which includes examples of situations that may give rise to conflicts of interest and options for resolving them.

Any allegations about a conflict of interest should be handled in accordance with the OEH [Guidelines for Managing External Complaints and Allegations](#) (available on EHub only).

The requirement to be impartial and unbiased would also be contravened where:

- the decision-maker's mind was so foreclosed that they gave no genuine consideration to the matter
- there was a reasonable suspicion that the decision-maker would not be impartial because of an association that could be seen to affect their impartiality, such as a past or present family, professional or contractual association – in these cases, the decision-maker should ask for the application to be allocated to someone else for determination.

The decision-maker should consider all reasonable options, including refusing an application (where appropriate).

Decision-makers should apply the advice in the following OEH Legal Eyes (available on EHub only) in their deliberations on AHIPs:

- [2008/10: Checklist for decision-makers](#)
- [2008/11: Legal principles for decision-makers](#)

¹³ Refer to [Delegation of Director-General and Minister's Functions: Supplementary instrument of delegation of ministerial functions – 30 June 2010](#) on EHub

2.3 Factors OEH must consider (s.90K)

S.90K of the NPW Act lists the factors that must be considered in making AHIP-related decisions and these are outlined below. Decision-makers must not consider any other matter (s.90K(2)).

Extract from NPW Act

90K Factors to be considered in making determinations regarding permits

- *In making a decision in relation to an Aboriginal heritage impact permit, the Director-General must consider the following matters:*
 - (a) *the objects of this Act,*
 - (b) *actual or likely harm to the Aboriginal objects or Aboriginal place that are the subject of the permit,*
 - (c) *practical measures that may be taken to protect and conserve the Aboriginal objects or Aboriginal place that are the subject of the permit,*
 - (d) *practical measures that may be taken to avoid or mitigate any actual or likely harm to the Aboriginal objects or Aboriginal place that are the subject of the permit,*
 - (e) *the significance of the Aboriginal objects or Aboriginal place that are the subject of the permit,*
 - (f) *the results of any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place that are the subject of the permit (including any submissions made by Aboriginal people as part of a consultation required by the regulations),*
 - (g) *whether any such consultation substantially complied with any requirements for consultation set out in the regulations,*
 - (h) *the social and economic consequences of making the decision,*
 - (i) *in connection with a permit application:*
 - (i) *any documents accompanying the application, and*
 - (ii) *any public submission that has been made under the Environmental Planning and Assessment Act 1979 in connection with the activity to which the permit application relates and that has been received by the Director-General,*
 - (j) *any other matter prescribed by the regulations.*
- *The Director-General, in making a decision in relation to an Aboriginal heritage impact permit, must not consider any matter other than the matters referred to in subsection (1).*

The s.90K factors must always be considered as part of the determination process under Part 2: Evaluation of the determination report. Section 2.4 provides general advice on completing determination reports, including the importance of making clear evidence-based conclusions.

In addition, [Guidance for Considering Section 90K Factors](#) is available (on EHub only) and will be updated from time to time to cover new experiences and situations. The reasons provided in relation to s.90K factors will always depend on the particular circumstances and merits of the case. Recommending officers may refer to this guide when considering each of the factors.

2.4 Documenting decisions: determination reports

A crucial part of the decision-making process is proper documentation. Principle 6 of EPRG's [Operating Principles](#) (available on EHub only) states: 'We must document our decisions, objectives, actions and outcomes in the most efficient way'.

To assist recommending officers apply this principle, a series of determination report templates has been developed for all AHIP processes, including applications, variations, transfers, surrenders, suspensions and revocations. All of these templates are available for use on the Integrated

Statutory Environmental Management System (ISEMS). [Reference copies](#) are also available on EHub, although notices themselves must always be prepared and issued through ISEMS.

The determination report templates have been developed to assist recommending officers and decision-makers consider and document all key matters in a consistent and robust manner. Each template follows the same basic format:

- Part 1: Background and documents considered
- Part 2: Evaluation
- Part 3: Recommendation
- Part 4: Decision

These parts are discussed in turn below and detailed user instructions are also provided in the templates on ISEMS.

Although determination reports are not routinely released externally, they are publicly accessible documents under the *Government Information (Public Access) Act 2010* and may be called on in legal proceedings. With this in mind, OEH officers should ensure the determination reports they prepare:

- are written in plain English
- clearly specify any content with restricted access (as per AHIMS) or which is otherwise culturally sensitive
- are prepared in a manner allowing their public release if required
- contain reasons for findings and decisions.

Recommending officers must prepare the determination report with sufficient detail to enable the decision-maker to independently consider the application and form their own view about whether the recommended approach is appropriate.

Templates may require modification in unusual or unexpected circumstances.

Part 1: Background and documents considered

Part 1 of the determination report template requires an outline of the relevant background information and any documents that are relevant to the decision.

The recommending officer should list all documents or submissions that were provided by the applicant or AHIP holder.

The section 'other documents that were taken into consideration' relates to documents relevant to the application but not included with it, such as any:

- additional existing reports, regional studies, historical documents or other research relevant to the application that were considered
- statement of values or management plan associated with an Aboriginal place
- relevant OEH policies such as –

[*Operational Policy: Protecting Aboriginal cultural heritage*](#)

[*Guide to AHIP Processes and Decision-making*](#)

[*Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW*](#)

[*Applying for an AHIP: Guide for applicants*](#)

[*Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*](#)

[*Code of Practice for the Archaeological Investigation of Aboriginal Objects in NSW*](#)

Part 2: Evaluation

Part 2 of the determination report template requires the recommending officer to evaluate the factual information identified in Part 1, taking into account the s.90K 'factors to be considered'. The template may need to be modified for unusual or unexpected circumstances.

The factors under s.90K of the NPW Act are an exhaustive list and no other matters should be considered. This applies to all AHIP-related decisions, including applications, variations, transfers and surrenders as well as decisions to revoke or suspend an AHIP.

For decisions relating to applications, the information sought from applicants should provide all the information needed to consider the s.90K factors. It is the role of the recommending officer to **critically** evaluate this information by forming a view about the appropriateness and correctness of the information provided. Where the recommending officer considers it necessary and relevant, they may request additional information in order to be able to adequately consider the application (s.90F of the NPW Act).

For decisions where there is no application (such as revoking an AHIP), the s.90K factors must still be considered, although in these cases it is OEH's role to provide the information and evidence necessary to consider and address each of the factors.

How detailed does the evaluation need to be?

Not all decisions will require the recommending officer to undertake a highly detailed written evaluation under Part 2. The length and detail of the evaluation will vary according to the complexity of the matter. In addition, some s.90K factors will be more relevant or applicable to an evaluation than others. It is acceptable to provide a different level of detail for each of the factors according to the relevance and significance of that factor.

The recommending officer should use their professional judgement and discretion when deciding how detailed the evaluation should be for each particular matter. The s.90K factors need to be addressed in sufficient detail to allow the decision-maker to properly determine whether to issue or refuse the AHIP or make any other AHIP-related decision.

Making clear, evidence-based conclusions

The recommending officer's position on each of the s.90K factors should be stated clearly. The officer should avoid merely restating assertions made by the applicant without some conclusion about their own position.

There must be evidence to justify the decision rather than hearsay, suspicion or speculation. The decision must be supported by facts. Decisions can be invalid if they lack certainty or finality.

The recommending officer should refer to all of the relevant documents considered (those listed in Part 1) and how they helped to inform the evaluation.

Guidance for considering section 90K factors

The reasons given in relation to s.90K factors will always depend on the particular circumstances and merits of the case. Support for considering the factors is provided in [*Guidance for Considering Section 90K Factors*](#) (available on EHub only) and this will be updated from time to time to cover new experiences and situations. Recommending officers may refer to this guide when considering each of the factors.

Part 3: Recommendation

Part 3 of the determination report templates allows the recommending officer to make recommendations on whether:

- an application for a new AHIP, transfer or surrender should be refused or approved, or
- whether an AHIP should be varied, suspended or revoked (OEH-initiated).

Part 3 also requires:

- a summary of the evaluation and conclusions identified in Part 2
- a list of the documents referred to in the AHIP determination report which the decision-maker should review in detail to reach their conclusion (and which will identify the documents that formed the basis of the decision should it be challenged later)
- identification of any key site-specific conditions for the decision-maker to consider (where relevant)

- details of any applicable letters or notices for the decision-maker's approval
- a list of all attachments to the AHIP determination report
- any additional recommendations which do not directly relate to the recommendation but are relevant for the decision-maker to note (such as consideration about declaration of an Aboriginal place).

Part 4: Decision

Part 4 of the AHIP determination report template allows the decision-maker to state their decision, based on the recommendations provided under Part 3.

It is important for the decision-maker to understand the rationale for the recommendations being made to them and to form an independent view about what the decision should be. A decision-maker must not blindly accept a recommendation or instruction from another officer 'on face value' without independently considering the application and reviewing the reasons for the recommendation and whether it and any proposed conditions are appropriate. Section 2.2 is also relevant here.

The decision-maker does not need to read every page of every document that the recommending officer considered (such as lengthy consultant reports). However, at a minimum, they should read and consider:

- the determination report
- the executive summaries of key reports referred to in the determination report
- any other documents or information (or the executive summaries of lengthy documents) that have informed the recommendations
- the conditions of any proposed AHIP or AHIP suspension or revocation (where relevant).

Where the views of the decision-maker differ from a recommendation in the determination report, they should explain how and why this decision was reached. Where appropriate, the decision maker may also reiterate any contentious issues and indicate how these were considered in making the final decision.

2.5 Public register

OEH is required to maintain a number of public registers under the legislation it administers. [Information on how to access these registers](#) is available on the agency's website.

The NPW Act public register is established under s.188F of the Act. This register also supports OEH's broad principle of ensuring that, where possible, the agency's decisions are publicly available and transparent.

The NPW Act public register contains details of:

- approved AHIPs and other AHIP-related matters
- declared Aboriginal places
- convictions in prosecutions under the NPW Act or the *Threatened Species Conservation Act 1995* (TSC Act) initiated by OEH
- the results of civil proceedings before the Land and Environment Court under the NPW Act or the TSC Act by or against OEH
- remediation directions issued by the Director-General.

2.5.1 Details of approved AHIPs and other AHIP-related matters

The [AHIP component](#) of the NPW Act public register commenced on 1 October 2010 and is available on the OEH website. It contains details of AHIP applications and a large range of AHIP-related decisions, including those refused, issued, varied, transferred, surrendered, suspended and revoked. These details are provided for each EPRG regional office, sorted by the date on which information was published.

All EPRG regional branches are required to manually enter each application and decision using the [web-based form](#) available on EHub. The web form allows the information to be entered accurately and consistently. Recommending officers should complete the form when an application for an AHIP has been received (when the 'receipt of AHIP application' letter/notice is sent) and when a decision has been made to refuse, issue, vary, transfer, suspend, surrender or revoke an AHIP (also when the relevant notice is sent).

For AHIPs issued, the details which will go on the public register are specified on the front cover of the AHIP. For all other processes, the details are specified in the determination report.

It is particularly important that recommending officers enter the details of AHIP decisions in a timely manner, as their inclusion on the register is linked to the time frames for any judicial review of the validity of the AHIP (see Section 2.6.1). Legal proceedings must commence within **three months** of the date the AHIP is published on the public register (s.90P). This is shown in the 'date published' field of the table on the OEH website which is automatically generated when the details first appear on the public register. This table cannot be manually edited by EPRG regional staff.

Note that this time frame does not relate to merit appeals as discussed in Section 2.6.2.

It is also important to note that once the web-form is submitted it **cannot** be edited or changed by EPRG regional staff. The contact officer in the Information Management and Administration Unit (IMAU – contact the ISEMS Help Desk in the first instance) will need to delete incorrect or incomplete records from the database. To avoid this occurring, ensure all required information is included (and the wording exactly reflects that in the relevant AHIP notice or determination report) before the form is submitted.

2.6 Challenges to OEH decisions

In some circumstances, OEH decisions and findings on AHIPs can be challenged in the Land and Environment Court. Legal Services Branch (LSB) should be advised as soon as possible of any potential litigation.

The information below is taken largely from [Legal Eye 2008/12: The difference between judicial review and merit appeal](#) (available on EHub only).

2.6.1 Judicial review

The Land and Environment Court generally has the power to consider whether a decision under the NPW Act (including the issue of an AHIP) has been made legally in accordance with the administrative law principles (see Section 2.2). Judicial review may be requested by any person.

A court challenge does not automatically mean a decision has been unlawful. It is up to the court to decide whether it was lawfully made. In practice, the court may find that only part of a decision is invalid (such as some conditions of an AHIP) and that the rest of the decision remains enforceable.

If the court decides that OEH's decision was made unlawfully, it will be declared invalid and have no legal effect. The court does not make a new decision. OEH will need to consider the application again and come to a fresh decision, this time following correct procedure. OEH would normally appoint a different person to make the new decision at the same or a more senior level.

Any challenge to the legal validity of an AHIP must be made within **three months** of the date the AHIP was published on the public register (s.90P) (see Section 2.5.1).

2.6.2 Merit appeals

Section 90L of the NPW Act enables an AHIP applicant, holder or former holder to appeal to the Land and Environment Court if they are dissatisfied with an OEH decision in relation to their AHIP or application for one. This includes any decision to:

- refuse an application for an AHIP or former AHIP
- suspend or revoke an AHIP
- place a condition on an AHIP, former AHIP, or surrender of an AHIP.

The Land and Environment Court can determine an appeal by either:

- refusing to grant the appeal
- granting the appeal wholly or in part and give such directions as the court thinks appropriate.¹⁴

The court has an obligation to freshly consider the merits of an application, including newly available information, and make what it considers the best decision based on the merits. This is known as a merits review or merits appeal.

The Land and Environment Court's decision on the appeal is final and binding on both the DG and the appellant (s.90(3), NPW Act).

An appeal under s.90L must be made within **21 days** of the date the person was notified of the decision.

Deemed refusal for the purposes of merit appeal

Where an application for an AHIP has not been determined by the DG within **60 days**, the application is 'deemed' to have been refused for the purposes of merit appeal (s.90L(6)). This time frame does not include the time it takes for an applicant to provide any additional information requested by OEH under s.90F (see Section 3.3.6).

Deemed refusal gives the applicant the right to challenge this in the Land and Environment Court. However, OEH can still continue to process the application after 60 days and grant or refuse the application.

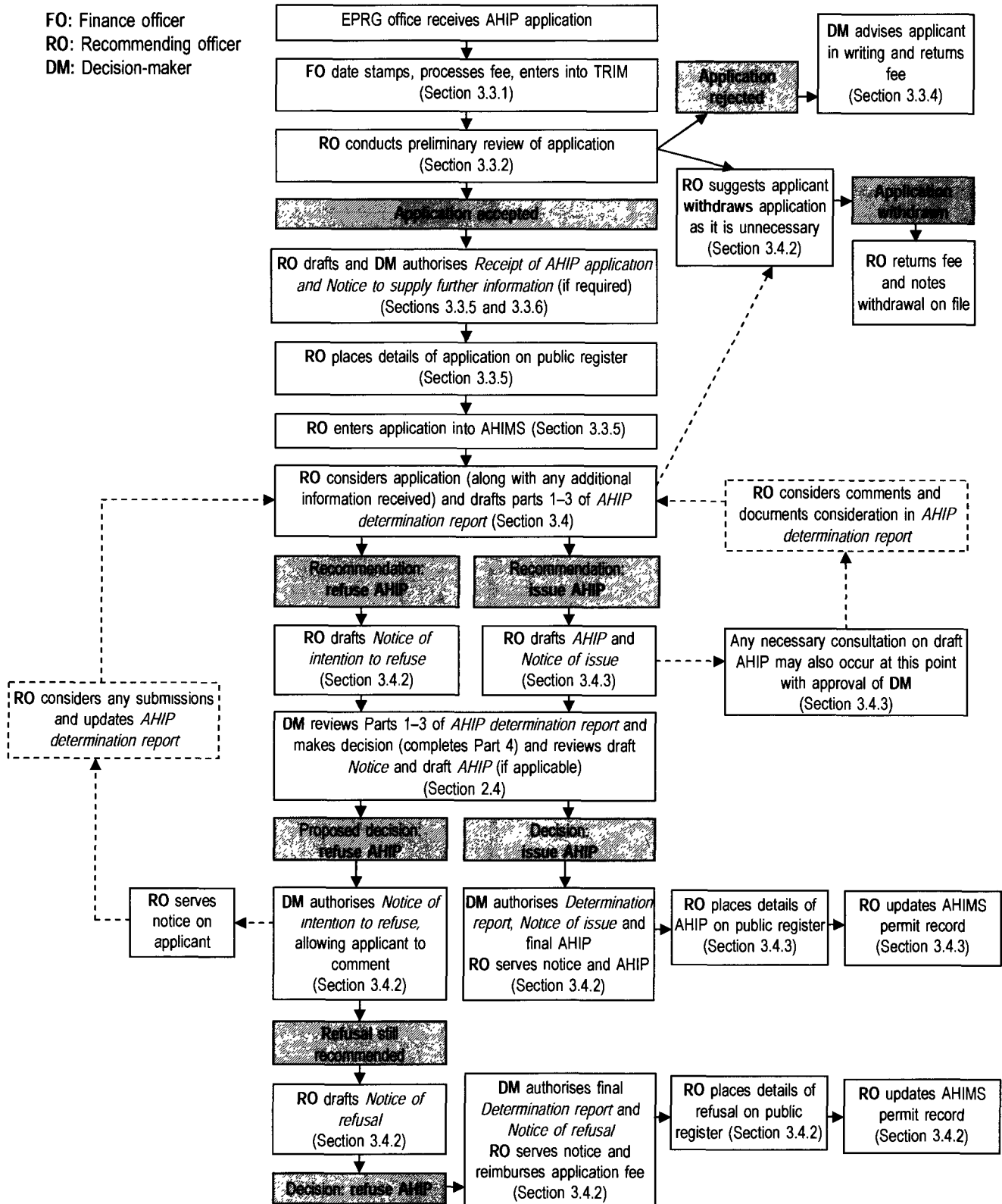
Recommending officers are responsible for keeping track of the 60-day deemed refusal period as there is no central system for this. See the timeline diagram for determining AHIP applications in Section 3.3.5 which shows when the appeal period commences and the 60-day deemed refusal period.

¹⁴ The type of direction given by the court depends on the nature of the appeal and would relate to the decision made by the court. Acting as a fresh decision-maker, the court could hypothetically decide to approve an AHIP where it had been refused by OEH.

3. AHIP application determination process

3.1 AHIP application process

FO: Finance officer
RO: Recommending officer
DM: Decision-maker



3.2 Pre-application discussions

OEH increases the effectiveness of its efforts by being involved in the early stages of a proposal, before an AHIP application is lodged (see Policy 13 in [Operational Policy: Protecting Aboriginal cultural heritage](#)).

By talking to the potential applicant upfront, OEH is able to outline the application process (referring them to the relevant guidance material) to ensure they understand what is required and supply all the information needed to make a decision, presented in the correct manner.

Upfront discussions can also potentially reveal such things as:

- where an AHIP application is unnecessary
- conservation outcomes that had not been considered
- harm minimisation strategies
- harm avoidance strategies, which in some cases may mean that an AHIP application is no longer required.

These discussions should always be documented and filed.

Applicants are also encouraged to contact OEH for assistance in completing the application form. However, while desirable, it is accepted that it might not always be possible to discuss the issues of an application prior to it being submitted.

3.3 Initial receipt of an AHIP application

3.3.1 Receipt the fee and date stamp the application

In accordance with OEH financial procedures and Treasury requirements, all money needs to be receipted and entered into the agency's financial system (SAP) on the day it is received by OEH, where practicable.¹⁵ This should happen irrespective of whether the application may later be withdrawn or rejected after the preliminary review because it is substantially incomplete or not necessary, or later refused as a result of the determination process. Where this happens, the application fees will be reimbursed to the applicant.

Once the application and fee have been received, the finance or administration officer with the delegation for receipting and cash handling initially:

- date stamps the application (including supporting documents) on the day the application is received
- processes the fee (if provided) and attaches the 'receipt of payment' to the application package as soon as practicable
- records the application on TRIM as soon as practicable.

The correct **account for AHIP fees** is:

Retained Revenue account – rendering of services – General Ledger Code 8256: Fees – Consents (NPW Act).

It is very important that this account is used as fees paid to this account are retained by the EPRG Branch.

More information on receipting and banking procedures can be found on the EHub webpage [Banking procedures and cash journals](#).

¹⁵ [OEH Finance Manual](#) page 187: Treasurer's Directions Banking and Disposal of Collections 130.01, 130.02, 130.03.

3.3.2 Preliminary review of the application

All AHIP applications should contain sufficient information to enable the decision-maker to make a decision. The recommending officer does a number of initial checks as part of a preliminary review of an application to quickly determine whether all necessary documentation has been provided.

This preliminary review involves answering each of the questions below.

Has the application form been completed correctly with all supporting information attached?

Under S.90A(2) of the NPW Act an AHIP application must:

- (a) be made in or to the effect of a form approved by the Director-General, and*
- (b) contain or be accompanied by such documents and information as is required by regulations or by the Director-General (as indicated in the form or in material accompanying the form)*

OEH would consider an application to be *substantially incomplete* if either of these criteria were not satisfied. A similar provision applies to AHIP transfer applications (s.90B(2)) while OEH policy applies the same principle to applications for AHIP variations and surrenders.

All applications must be made in writing using the [AHIP application form](#) on the OEH website. This allows applicants and recommending officers to check that all the necessary information has been provided.

Recommending officers will check that all parts of the AHIP application form have been properly completed, including that:

- the application is made on the [approved/correct form](#) including the AHIMS site information table – under no circumstances are verbal applications accepted
- the proposed AHIP holder (or holders):
 - is a legal entity
 - will have overall control of the project
 - is not an employee of a company
 - has provided an ABN or ACN (if they are a company)
 - has provided their full name (if they are an individual)¹⁶
- the proposed actions that the AHIP will cover are correct, that is, they align with the supporting information
- a copy of the development consent or other planning approval has been attached (where applicable)
- evidence of support from the relevant Parks and Wildlife Group (PWG) or Aquatic Protected Area Unit Manager has been attached, where works will be on the OEH estate or aquatic reserve
- one hard and one electronic copy of the Aboriginal cultural heritage assessment report has been attached and that the checklist in the form has been completed¹⁷
- completed AHIMS site cards for any newly identified sites have been included
- a map has been attached showing the exact boundary of the area to which the AHIP will apply

¹⁶ It is crucial that the correct person has applied for the AHIP and signed the application form. The importance of this is discussed in Section 4.2.1.

¹⁷ For more information on Aboriginal cultural heritage assessment reports, see www.environment.nsw.gov.au/licences/investassessreport.htm.

- the application has been signed and dated by the appropriate person (the person authorised to sign for the legal entity making the application, such as a director of a company – see Section 4.2.1 for more information on legal entities).

Has the correct fee been paid?

Any required application fee must be paid when the application is submitted. The application form asks the applicant to indicate the fee they are paying and what is received must match the fee nominated.

The regional administrative support officer should ensure they put a copy of the 'receipt of payment' with the application so that the recommending officer is aware that the correct fee has been paid.

The application cannot be considered without the appropriate fee. Section 143 of the NPW Act allows OEH to charge for determining AHIP applications and these fees are outlined in the AHIP application form. All revenue raised from AHIP fees is retained by EPRG.¹⁸

Waiving AHIP fees

Section 143 of the NPW Act provides that fees *may* be charged, which means that EPRG has some discretion in deciding whether or not to charge a fee.

Depending on the circumstances, examples where a fee waiver may be appropriate include:

- where CCHD or PWG staff apply for an AHIP to undertake genuine Aboriginal heritage conservation works (that is, where activities are not covered by a s.87A(a) exemption)
- where an Aboriginal community group applies to undertake Aboriginal heritage conservation works on their Country.

An example where a fee waiver may not be appropriate includes where non-Aboriginal community groups or individuals apply for an AHIP to undertake Aboriginal heritage conservation works without the clear support of the relevant Aboriginal community.

In general, OEH requires applicants to provide written justification of why their AHIP application fees should be waived. However, the recommending officer may suggest waiving a fee even if it has not been requested (by recommending refund of the fee).

Reasons for waiving the fee should be recorded on the file.

Has development consent been obtained?

Where the proposal requires development consent (Part 4 of the EP&A Act) or approval of an activity (Part 5, EP&A Act), the recommending officer will check that this has been obtained (see Part II, section 3 of the application form). A copy of the development consent or activity approval (for example a review of environmental factors [REF] determination) should be submitted along with the application. This may assist the recommending officer to:

- make sure that the correct application fee has been paid (as they will have a better idea of the scale of the development)
- understand the exact nature of the likely harm to Aboriginal objects and places proposed by the development, placing them in a stronger position to evaluate the application.

AHIP applications may be accepted before development consent or activity approval has been obtained, but they will not, as a general rule, be issued. This is because it may not be an appropriate use of OEH resources to determine an AHIP for an uncertain proposal, such as where:

- the parameters of the development may change (e.g. the development footprint) requiring OEH to vary the AHIP or issue a new AHIP
- the issue of development consent is not guaranteed.

OEH is able to use a *Notice to supply further information* (Section 3.3.6) to require the applicant to provide proof of development consent before an AHIP application is determined.

¹⁸ Retained revenue account – rendering of services – General Ledger Code 8256: Fees – Consents (NPW Act)

Where there are reasons why an AHIP should be issued before development consent or activity approval, these should be noted in the AHIP determination report (Section 3.4.1).

Exceptions to obtaining development consent

Where an AHIP application relates to a proposal for test excavation (meaning it is unable to be carried out in accordance with the [Code of Practice for the Archaeological Investigation of Aboriginal Objects in NSW](#)), the application can still be considered, even if development consent has not been obtained.

Some proposals will fall under the Integrated Development Approval (IDA) system. OEH will issue 'general terms of approval' (GTA) to be included in the development consent, which will identify any Aboriginal cultural heritage matters, in anticipation of the need for a future AHIP. In these circumstances OEH is unable to later refuse to issue an AHIP for that development. In addition, the AHIP conditions cannot be inconsistent with the conditions of the development consent.

Where an on-park proposal is subject to a REF assessment process by OEH, this can occur concurrently with consideration of the AHIP application. This is necessary to ensure the early identification of issues arising in one process that may affect other processes, such as any recommended conditions of determination that may conflict. Refer to Section 8.2 of OEH's [Determination Guidelines for the Review of Environmental Factors](#) (available on EHub only).

Finally, where an environmental impact assessment (EIA)¹⁹ has been prepared as an adjunct to a proposed AHIP, OEH should consider the application. Where the EIA is not included with the application, OEH will request a copy of it. The Aboriginal cultural heritage assessment report will often be included as part of an EIA.

Does the AHIP relate to works on the OEH estate or an aquatic reserve?

Where the application relates to land reserved, managed or acquired under the NPW Act or the *Fisheries Management Act 1994*, the recommending officer checks the following issues:

Does the reserve manager support the application (if relevant)?

Where the application relates to land reserved, managed or acquired under the NPW Act or an aquatic reserve under the Fisheries Management Act, evidence of support by the relevant NPWS Regional Manager or Manager Aquatic Protected Areas Unit must be provided with the application (see Part II, section 4 of the application form).

An application may be accepted, but as a general rule an AHIP should not be issued before evidence of this support has been obtained. The recommending officer can use a *Notice to supply further information* (Section 3.3.6) to obtain this evidence of support.

Is a park joint-management agreement in place?

A [list of current joint-managed parks](#) is available on the OEH website.

OEH enters into a range of legal agreements about the joint management of parks with Aboriginal people.²⁰ These agreements usually establish a board or committee that OEH is required to consult, involve or seek advice from when making certain decisions. A board of management established under Part 4A of the NPW Act is the park authority.

An AHIP should not be issued until any requirement to consult with, or obtain the agreement of, the relevant board or committee has been satisfied.

In some cases there may be a potential legal problem with OEH's decision if it does not fully comply with a legal agreement with a board or a committee. Recommending officers need to be aware of the specific conditions of these agreements and ensure that their decisions are made in accordance with applicable conditions of any agreement.

¹⁹ Environmental impact assessment: for example, an environmental impact statement (EIS), review of environmental factors (REF), statement of environmental effects (SEE), etc.

²⁰ Also known as 'co-management', although 'joint management' is the current (and correct) term: see an [explanation](#) on the OEH website.

For more information, refer to [*Legal Eye 2009/08: How do co-management agreements affect projects and decisions made across DECC?*](#) (available on EHub only) or contact the Aboriginal Co-management Unit in Parks and Wildlife Group.

Is the AHIP necessary or required?

It may become apparent at the preliminary review stage that an AHIP is not necessary and there are no grounds on which an AHIP defence is required. Examples where an AHIP may be unnecessary include:

- where there will be no actual or likely harm to Aboriginal objects or places – for example in an area identified by the Aboriginal community as culturally significant but where there is no evidence of Aboriginal objects, other mechanisms, such as a conservation agreement or applying for the site to be recognised as an Aboriginal place, can be used to conserve the area identified.
- where the applicant exercised due diligence to determine whether the activity would harm an Aboriginal object and reasonably determined that no Aboriginal object would be harmed
- where the AHIP application is a proposal for test excavation that could be done under the [*Code of Practice for the Archaeological Investigation of Aboriginal Objects in NSW*](#).

3.3.3 Outcome of preliminary review

Is the AHIP application complete?

If the AHIP application cannot be accepted because it is not a proper or complete application – 'substantially incomplete' – the recommending officer rejects it: Section 3.3.4.

If the preliminary review concludes that the application is complete, the recommending officer follows the process outlined at Section 3.3.5.

Is an AHIP required?

If an AHIP is not necessary, OEH should reject²¹ the application on the grounds that it is not required or ask the applicant to withdraw their application (Section 3.3.4).

3.3.4 Rejection or withdrawal of an AHIP application

If after the preliminary review of the AHIP application, the application is substantially incomplete or an AHIP is not necessary, the decision-maker communicates this to the applicant (rather than requesting further information or refusing the application, which is a statutory process, where a complete application for an AHIP refused by OEH – see section 3.4.2 below).

Reject the application

The decision-maker should always use their discretion about whether to reject an AHIP application upfront or not. The recommending officer or decision-maker should consider contacting the applicant to discuss possible rejection of the application in the first instance.

If the decision-maker decides to reject the application, they must advise the applicant in writing (keeping a copy on file) and return any fee paid. There is no template for this: an email or letter sent by the decision-maker would be acceptable.

By rejecting the application, they are declaring that it does not qualify as an application. Essentially, they are not making a decision and therefore do not have to prepare a determination report.

They will also need to notify the financial officer in their region, so they can organise reimbursement of the application fee to the applicant.

Applications will need to be re-submitted addressing any of the issues identified, together with the fee, before they can be reconsidered.

²¹ Note 'rejecting' an AHIP application is different from 'refusing' to issue an AHIP under s.90C NPW Act which occurs after consideration of a complete application.

Request a withdrawal of application

Where an AHIP is considered unnecessary, it may be appropriate to recommend (in writing and signed by the decision-maker) that the applicant withdraw the application. The applicant should be advised to provide written confirmation that they are withdrawing their application. A copy of this correspondence should be kept on file so that there is a clear record that the application did not proceed.

The financial officer in the region will also need to be notified so they can organise for a reimbursement of the application fee.

3.3.5 Accepting the application

OEH has 60 days to make a decision

If OEH does not determine an AHIP application within 60 days it is 'deemed to be refused' for the purposes of merit appeal (s.90L) (Section 2.6.2). The 60 days should be calculated from the date the 'complete' application is received by the EPRG office. This may be later than the date the initial application is received, if the application is not complete: see Section 3.3.2.

Issuing a *Notice to supply further information* formally pauses the 60-day deemed refusal period, until the information requested has been provided to OEH (Section 3.3.6).

OEH can still continue to process the application after 60 days and grant or refuse the AHIP application.

Figure 1 is an example timeline for processing an AHIP application, showing a scenario where additional information is sought from the applicant, stopping the 60-day clock and then allowing it to start again. It also depicts the 21-day appeal period, which begins at the 60-day mark or before this if the decision to grant or refuse the application has been made in less than 60 days.

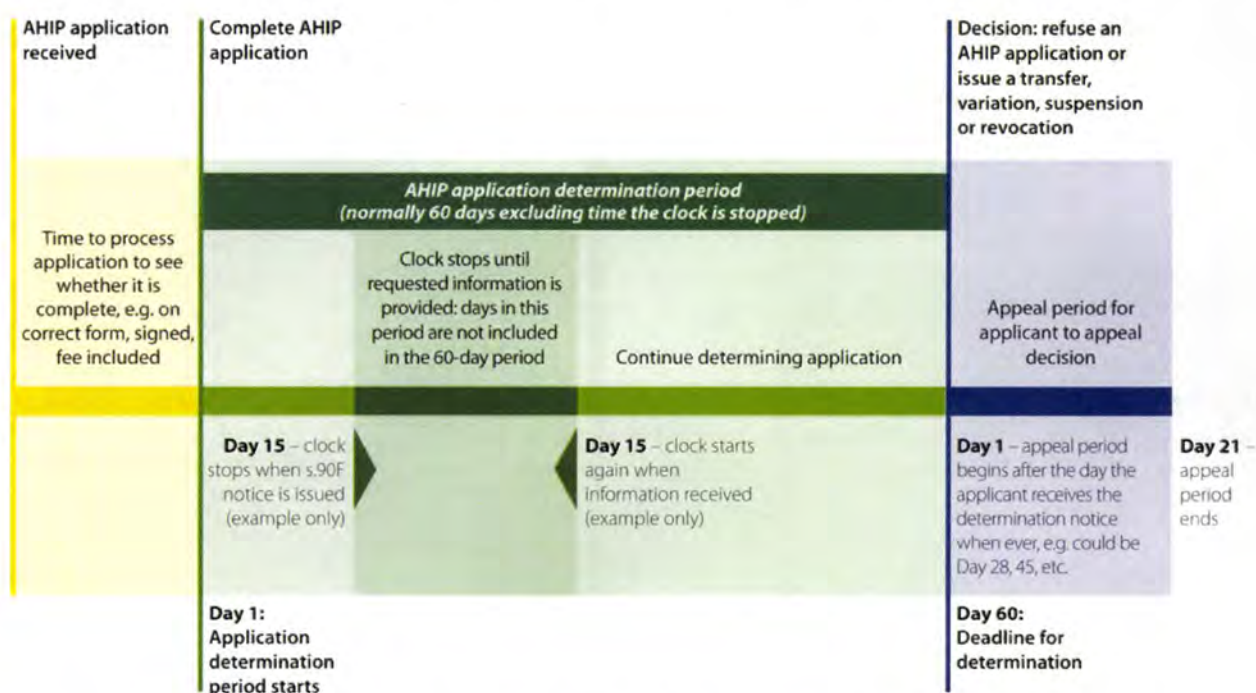


Figure 1: Timeline for processing AHIP application, including a request for further information under s.90F

Send a receipt of AHIP application

The recommending officer prepares a receipt of AHIP application in ISEMS for sign-off by the decision-maker. A *Notice to supply further information* can be attached to this receipt if required (Section 3.3.6). The decision-maker will need to authorise both notices. See also Appendix A: Hints and tips for completing ISEMS notices.

Place details of the application on the public register

Once the receipt has been authorised and served, the recommending officer records the application on the public register (Section 2.5). They will need to complete Part A of the web-form and all the information required to complete this section is on the AHIP application form (in a section specifically for public register purposes).

Enter the application into AHIMS

Next, the recommending officer records the application in AHIMS. When doing this, they will notice that the 'permit type' categories do not perfectly align with the 'actions' that can be selected on the AHIP application form (see Part II of the form) and AHIMS does not allow for the selection of multiple permit types. Discretion is required in selecting the most applicable permit type in AHIMS and the 'comments' tab may be used to explain what the application is for.

For general information about using the permit module in AHIMS, refer to Section 13 of the AHIMS User Training Manual, which is available by contacting Information Systems and Assessment Section, CCHD.

3.3.6 Requesting further information

If further information is required which is considered necessary and relevant to the application, the recommending officer can also prepare a *Notice to supply further information* in ISEMS for sign-off by the decision-maker ([template](#) available for reference on EHub). This request must clearly specify the information required, including a due date. The amount of time allowed will depend on the work involved in providing this information and can be negotiated with the applicant before the notice is sent.

It is important to use the notice, as opposed to requesting information via less formal means, because:

- the NPW Act requires the decision-maker to request further information by notice in writing (s.90F, NPW Act)
- by issuing the notice, OEH is formally 'freezing' the 60-day deemed refusal period for the purposes of merit appeal (Section 2.6.2) until the applicant provides the information²²
- the notice acts as a formal record of the request and, if relevant, can be referred to in the event that the application is refused (Section 3.4.2).

Depending on the circumstances, there may be grounds for recommending the refusal of the application if the additional requested information is not received within a reasonable time after further follow-up (such as after a *Notice of intention to refuse* has been sent – Section 3.4.2).

The *Notice to supply further information* can be issued at any stage of the determination process and there is no limit on the number of times these notices can be issued. However, where it becomes necessary to issue notice after notice due to repeated submission of inadequate information, refusal of the application should be a consideration.

The notice can also be issued in relation to applications for AHIP variations, transfers and surrenders.

²² Note that the recommending officer is responsible for keeping track of the 60-day deemed refusal period, including any stopping or starting of the clock when further information is requested as there is no central system for this.

3.4 Determining an AHIP application and notification requirements

When determining AHIPs, both recommending officers and decision-makers should be mindful of the legal principles to be followed (Section 2.2) and OEH notification requirements. In making a decision about an AHIP, the decision-maker must consider the matters set out in s.90K of the NPW Act and no others.

3.4.1 Preparing an AHIP determination report

Once an AHIP application is accepted, the recommending officer can commence preparing Parts 1–3 of the determination report in ISEMS, including recommending whether the decision-maker should issue or refuse an AHIP. The decision-maker documents their decision in Part 4 of the determination report.

Section 2.4 has detailed information about completing determination reports, including advice about considering the s.90K 'factors to be considered'.

3.4.2 Refusing an AHIP application

If refusal of an AHIP application is recommended, the grounds for this need to be clearly documented in the determination report. Where the decision-maker agrees with this, the applicant must first be notified of the intention to refuse to allow them a reasonable opportunity to make submissions on the impending decision (s.90(c), NPW Act). OEH refusal can only occur after it has considered these submissions.

Details of the refusal must be placed on the public register and the AHIMS permit record also updated.

Grounds for refusal

The circumstances in which OEH refuses an AHIP should always be determined case-by-case and will depend on the outcome of the decision-making process. Examples of grounds for refusal include:

Desecration

As a matter of policy, OEH will not issue an AHIP that will desecrate an Aboriginal object or declared Aboriginal place.

Serious heritage conservation or protection issues

The recommendation to refuse an AHIP application may be based on heritage conservation or protection grounds. Policy 30 of EPRG's [Operational Policy: Protecting Aboriginal cultural heritage](#) states:

We will refuse to issue AHIPs where there are serious heritage conservation or protection issues, that is, where there is potential for unacceptable harm to significant Aboriginal objects or places. Where an outright refusal of an AHIP is not appropriate, we will limit the harm through the conditions of the AHIP.

Examples of situations where AHIPs may be refused (or limited), because of serious heritage conservation or protection concerns include:

- where the project design is unsympathetic to the Aboriginal cultural heritage values of Aboriginal objects or places and will extensively harm them
- where harm from an AHIP could be avoided by adopting other reasonable and practical measures
- where the loss of an Aboriginal object would irreversibly diminish the ability of Aboriginal communities to exercise cultural practices within a region or have an irreversible impact on cultural identity

- where an identified Aboriginal object is –
known to be of national, state or regional significance
of a type that is rare or cannot be readily accessed in the wider region
of a type known to be poorly conserved in the reserve system
- where proposed works associated with an AHIP are inconsistent with the reasons for declaring an Aboriginal place.

Unnecessary AHIPs

Where AHIPs are not needed, the application should be refused. However, it is preferable (from an administrative perspective) for OEH to ask the applicant to withdraw the application in these cases.

Examples of situations where AHIPs may be refused because they are not necessary include:

- where there will be no harm to any Aboriginal object or declared Aboriginal place
- where the mitigation measures proposed will avoid harm to any Aboriginal object or declared Aboriginal place
- where the applicant has exercised due diligence and reasonably determined that their activity would not harm an Aboriginal object.

It is preferable to identify whether an AHIP is necessary when the recommending officer conducts their preliminary review of the application: Section 3.3.2.

Requested information not supplied

Although it would always depend on the circumstances, applications should be refused where:

- additional information requested through a *Notice to supply further information* has not been provided within the time frame specified (Section 3.3.6)²³
- the applicant did not respond to further follow-up, such as where a *Notice of intention to refuse* was sent and no submissions were made.

On-park AHIP applications inconsistent with a park joint-management agreement

A [list of current joint-managed parks](#) is available on the OEH website.

OEH enters into a range of legal agreements about the joint management of parks with Aboriginal people. These agreements usually establish a board or committee that OEH is required to consult, involve or seek advice from when making certain decisions. A board of management established under Part 4A of the NPW Act is the park authority.

An AHIP should not be issued until any requirement to consult with, or obtain the agreement of, the relevant board or committee has been satisfied.

In some cases there may be a potential legal problem with OEH's decision if it does not fully comply with a legal agreement with a board or a committee. Recommending officers need to be aware of the specific conditions of these agreements and ensure that their decisions are made in accordance with applicable conditions of any agreement.

Where the application is inconsistent with the joint-management agreement, the AHIP should be refused or renegotiated.

For more information, refer to [Aboriginal joint management of parks](#) on the OEH website, [Legal Eye 2009/08: How do co-management agreements affect projects and decisions made across DECC?](#) (available on EHub only) or contact the Aboriginal Co-management Unit in Parks and Wildlife Group.

²³ However, where OEH obtains the requested information through some other means (such as locating the requested report through its own efforts), there is no obligation to refuse the application. If this is the case, it should be documented in the determination report.

Notice of intention to refuse

Where a decision-maker intends to refuse an AHIP application, they must notify the applicant, specify why refusal is proposed and provide them with a reasonable opportunity to make submissions before a final decision is made (s.90C(3), NPW Act).

Using the template in ISEMS, the recommending officer drafts a *Notice of intention to refuse* giving the reasons for refusal as specified in the AHIP determination report, together with a time frame for the applicant to respond. A period of 14 days is recommended, although keeping in mind the need to give the applicant a reasonable opportunity to make submissions, this should be flexible. This notice must be considered by the decision-maker along with the determination report.

Following authorisation of the notice by the decision-maker in ISEMS, the recommending officer sends it to the applicant (Section 3.3.4) and also 'issues' and 'serves' the notice in ISEMS.

Any submissions received in response to this notice must be listed in Part 1 of the AHIP determination report and considered and evaluated in Part 2 (Section 2.4).

If the recommendation changes as a result of the applicant's submissions, the recommending officer discusses this with the decision-maker and starts to prepare an AHIP (Section 3.4.3).

Notice of refusal

If, after further input from the applicant, the recommendation is still to refuse the AHIP, the recommending officer prepares a *Notice of refusal* in ISEMS for the decision-maker to consider, along with the determination report.

The reasons for the decision should include those listed in the *Notice of intention to refuse* and any additional reasons or justification based on the applicant's submission in relation to that notice (if provided).

At this point, the decision-maker completes Part 4 of the determination report and authorises both the report and the *Notice of refusal* in ISEMS.

Following this, the recommending officer serves the *Notice of refusal* on the applicant (Section 3.4.4) and 'issues' and 'serves' the notice in ISEMS.

Place details of refusal on the public register

The recommending officer should place the details of the refusal on the public register (Section 2.5) as soon as practicable after the *Notice of refusal* is issued. To complete the web-form for a refusal, they need to:

1. Under 'Type of AHIP matter', choose 'AHIP refused'
2. Under Part B:
 - insert the applicant's name under 'AHIP holder'
 - insert details of the application by completing the 'Development/project name', 'Location', 'Local government area' and 'OEH office' fields
 - insert the 'Notice number' from the *Notice of refusal*.

It is not necessary to provide the reasons for the refusal on the public register.

Update AHIMS record

The last step is for the recommending officer to update the permit record in AHIMS. They will need to keep the permit status as 'pending' as AHIMS does not accommodate the status of 'refused'. However, they can use the 'comments' tab to record the refusal, the ISEMS *Notice of refusal* number and the date it was issued.

For general information about using the permit module in AHIMS, refer to Section 13 of the AHIMS User Training Manual, which is available by contacting Information Systems and Assessment Section, CCHD.

3.4.3 Granting an AHIP application

Where the granting of an AHIP application is recommended, the recommending officer should commence drafting the AHIP itself. They may seek comment on the draft AHIP if the decision-maker agrees that it is appropriate.

Details of the AHIP must be placed on the public register and the AHIMS permit record updated.

Preparing a draft AHIP

The recommending officer prepares a draft AHIP by using the AHIP template available in ISEMS. Section 4 of this guide provides detailed advice about drafting AHIPs.

Seeking comment on a draft AHIP

The NPW Act does not require comment on a draft AHIP to be sought from the applicant or any other affected parties, such as registered Aboriginal parties (RAPs) before it is issued. It is OEH policy to consult on draft AHIPs only under exceptional circumstances, as discussed below.

For example, it may be appropriate to consult an applicant on a draft AHIP about the wording of a proposed site-specific AHIP condition to ensure that the condition is practical and expressed in a way that is clear to both OEH and the proposed AHIP holder. The appropriateness of seeking comment on a draft AHIP is to be decided on a case-by-case basis. Where OEH decides to seek comment from the applicant, it may also be appropriate to seek comment from the RAPs too.

The decision-maker should be aware of and endorse a proposal to seek comment on a draft AHIP.

Where comment is sought from an applicant on a minor issue, it may not be considered necessary to consult with the RAPs. However when advice is being sought on more substantive issues, the RAPs should also have an opportunity to comment. Where it is unclear about whether or not to seek their input, Legal Services Branch may be able to offer advice. In the event that conflicting feedback is received from the RAPs and the AHIP applicant or holder, recommending officers will need to use their discretion to reach an appropriate decision.

There may be instances when it is considered more practical to seek comment on specific draft conditions, rather than all of a draft AHIP. The above policy on seeking comment also applies when providing a whole draft AHIP for comment.

If it is decided to seek comments, the letter or email accompanying a draft AHIP should specify an appropriate time frame for comments to be received: 14 days is recommended (unless there is a reason for increasing or decreasing this period). If no comments are received by the due date (unless a request for an extension has been made and agreed to), it is appropriate to proceed with the application.

Record any submissions received in response to the draft AHIP in the determination report.

Notice of issue

The recommending officer also needs to draft a *Notice of issue of AHIP* in ISEMS for the decision-maker's consideration along with the draft AHIP and its determination report.

At this point, the decision-maker completes the determination report (Part 4) and authorises the determination report, *Notice of issue* and AHIP in ISEMS.

Following this, the recommending officer serves the *Notice of issue* and AHIP on the applicant (Section 3.4.4) and 'issues' and 'serves' the notices in ISEMS.

Place details of AHIP on the public register

The recommending officer should place the details of the AHIP on the public register (Section 2.5) as soon as practicable after the AHIP is issued by completing Part B of the web-form. All required information can be found on the cover page of the AHIP and this must be entered exactly as it appears.

Update AHIMS record

The last step is for the recommending officer to update the permit record in AHIMS. They need to enter the 'issued date' and this will change the permit status to 'issued'. They can also use the 'comments' tab to record pertinent details of the AHIP that the permit tab does not accommodate, such as the 'actions' authorised by the AHIP.

For general information about using the permit module in AHIMS, refer to Section 13 of the AHIMS User Training Manual, which is available by contacting Information Systems and Assessment Section, CCHD.

3.4.4 Serving AHIPs and notices

AHIPs and notices can be served in the following ways, depending on whether they are to an individual or a company, to ensure proof of service:

1. Where the AHIP applicant or holder is an **individual** who does not have an ABN, the AHIP or notice must be served by:

- personal delivery to the individual, or
- registered post to the applicant's address as stated in the application or on the AHIP.

2. Where the AHIP applicant or holder is a **company or an individual with an ABN** (Australian Business Number), the AHIP or notice must be served by:

- personal delivery to the company's registered business address, or
- registered post to the company's registered business address, as stated in the application or on the AHIP.

It is important that the AHIP or notice is served only to the **registered business address** as it appears on ASICS for companies or those individuals with an ABN (as provided on the AHIP application form and/or via an ASIC search.) Where serving a notice in relation to a very old AHIP, confirm that the registered business address is still current. The best way to do this is to phone or email the AHIP holder and ask for it. Otherwise perform a (free) basic company search on the Australian Securities and Investments Commission's website (www.asic.gov.au) or use an information broker (for a small fee but generally able to be done quickly – list of brokers available on the ASIC website).

It is important to mail AHIPs and notices by **registered post** to ensure that the AHIP applicant has received the document and provide OEHS with a record of receipt in the event that it is challenged in court. The Australia Post receipt must be placed securely in the appropriate file in case it is required in the future.

Note that the NPW Act also allows AHIPs and notices to be served electronically. However, at this time EPRG does not have a procedure or a system to support the electronic service of documents. Where there is a reason to serve a notice or AHIP electronically, seek assistance and guidance from the ISEMS Help Desk and Legal Services Branch.

For further information on serving instruments, refer to [*Legal Eye 2004/08: Service of notices, licences and other statutory instruments only by registered post*](#) (available on EHub only).

4. Drafting AHIPs using the template

In the vast majority of situations, recommending officers will draft AHIPs using the AHIP template for harm to Aboriginal objects, available in ISEMS. The AHIP template is a *starting point only* for recommending officers. They will need to consider the circumstances of each case to determine whether the conditions in the template are applicable.

The benefit of using the template is that the structure and conditions have been approved by Legal Services Branch and represent EPRG's standard approach for drafting AHIPs. While the template can be applied to the majority of situations, there will be the occasional unusual or unexpected case where the template will need to be modified. This might involve modifying or removing mandatory conditions, or restructuring or adding new schedules and should only be done with legal advice and approval (Section 6.3).

Note that currently the AHIP template only covers harm to Aboriginal objects: a template for harm to declared Aboriginal places is being considered.

The AHIP template has been designed to step users through the drafting process with detailed drafting notes and a range of editable fields.

The main **features of the AHIP template** are:

- **flexible structure and conditions** where a wide range of actions that may cause harm are allowed for, with conditions grouped around these types of actions in the order that they might typically occur
- **detailed drafting notes** to guide the user through the drafting process
- provision for **mandatory, standard, optional and site-specific conditions** (Section 4.2), allowing for irrelevant conditions to be easily removed
- **schedules for details of specific areas and Aboriginal objects**, allowing for accurate and consistent recording of areas and sites with a clear link between the conditions and the schedules
- **collation of all restricted AHIMS site information in Appendix A** of the template to avoid unintentional release of this information to the public (see also Section 5.1).

Further information on the use of the templates:

- Appendix A: Hints and tips on completing ISEMS notices
- [Legal Eye 2005/05: Drafting enforceable legal instruments](#) (available on EHub only).

4.1 Template structure

The AHIP template is structured as follows:

Cover page

- details of the AHIP holder
- details of the relevant OEH office
- additional details for the public register (Section 3.4.3)

Inside cover: 'AHIP to harm Aboriginal objects' – a legal prelude that states:

- relevant background information
- that the AHIP is issued subject to conditions
- the commencement date and duration
- what the proposed works are²⁴

²⁴ The proposed development works or activity, such as subdivision of land and construction of infrastructure: links to Schedule C

Land to which this AHIP applies: Description of the land by lot and DP or by another appropriate reference

Conditions – These are grouped in the template according to function, as follows:

- **Administrative conditions:** deals with general accountability/responsibility issues.
- **Operational conditions:** deals with what can and cannot be done under the AHIP. They have strong links to the Schedules where the details of specific Aboriginal objects are documented. The majority of AHIP template conditions are operational conditions.
- **Notification and reporting conditions:** specify various requirements for notifying and reporting to OEHS and the RAPs.
- **General conditions:** deals with legal issues of indemnity and release and also specify how written notice is to be provided to OEHS.

Schedules (schedule headings should not be removed or re-numbered):

- *Schedule A: Aboriginal objects which must not be harmed*, including human remains (A1), specific Aboriginal objects (A2) and specific 'no-harm areas' (A3)
- *Schedule B: Aboriginal objects that may be harmed through certain actions*, including by movement only (B1), archaeological excavations (B2), community collection (B3) or other (B4)
- *Schedule C: Aboriginal objects which may be harmed through the proposed works*, including specific Aboriginal objects (C1) and specific areas (C1)

Dictionary: Explains the terms used in the AHIP

Information about this AHIP: General information about a range of matters including the public register, appeals, penalties, etc.

Appendix A: Restricted AHIMS sites

Any AHIMS sites with information access restrictions (as specified on the AHIMS site recording form) are included here rather than the main body of the AHIP along with maps showing their location (Section 4.2.6).

4.2 Completing the template

4.2.1 Identifying the correct AHIP holder

When creating an AHIP document in ISEMS, the first thing is to specify the 'accountable party' for the AHIP (the AHIP holder) who must be a legal entity and have overall responsibility for the project.

AHIP holders must be legal entities

Individuals, companies and bodies corporate are legal entities. This includes individual landowners, local councils, statutory authorities, state-owned corporations and some entities associated with government departments (such as Ministerial Corporations created by an Act).

Business names, partnerships, joint ventures and non-statutory trusts are **not** legal entities.

The AHIP application form and [Applying for an AHIP: Guide for applicants](#) provide information for applicants about legal entities and who the 'applicant' should be for any given application.

For more information about legal entities, refer to [Legal Eye 2003/03: Licences and notices may only be issued to a legal entity. Contracts may only be signed by a legal entity. Who or what is that?](#) (available on EHub only).

Example

OEHS is not a legal entity. It is part of a body politic known as the State of New South Wales established under the Constitution. Accordingly, a legal instrument issued to OEHS would be issued in the name of 'the State of New South Wales (Office of Environment and Heritage)' and not in the name of the office, the Chief Executive or an OEHS employee.

AHIP holders must have overall responsibility for a project

EPRG's policy is to issue an AHIP to the legal entity with overall responsibility for a project that will harm Aboriginal objects or places. Where the harm is connected to a proposed development, the appropriate legal entity would usually be the development company. If the AHIP is being issued in relation to research only, it should be issued to the legal entity carrying out the research (such as a university).

There may be circumstances where responsibility for the development or conservation works, research or other activity is shared equally between two or more legal entities. Where this is the case, the AHIP should be issued to all legal entities so that they can be held equally liable.

In most cases, it is not appropriate to issue an AHIP to an individual archaeologist or the company that employs that archaeologist. This is because these individuals and companies are consultants engaged by a developer, and it is more appropriate that the developer, who issues instructions to them, is responsible for the actions of their consultants.

The consultant archaeologist may, however, be listed as the 'project manager' on the application form. The role of the project manager is to oversee, for and on behalf of the AHIP holder, the actions relating to the AHIP. There is also an AHIP condition that specifically relates to 'project managers' (under 'administrative conditions').

AHIP holders must not be employees of a company

AHIPs should be issued to an employer rather than an employee, as the legal concept of 'vicarious liability' will make an employer liable for the acts of an employee which occur in the usual course of employment (but not situations where an employee is acting outside their employment).

As a matter of policy, individual employees should not be exposed to criminal liability for actions undertaken on behalf of their employer in the usual course of their employment, unless exceptional circumstances apply. Accordingly, AHIPs should not be issued to individual employees (including OEH staff).

See also [*Legal Eye 2001/11: Environmental incidents involving corporations and the concept of vicarious liability*](#) (available on EHub only), which further explains the concept of vicarious liability.

AHIP holders who are companies

Where an AHIP is issued to a company, include the Australian Company Number (ACN) or Australian Business Number (ABN) after the company's name. Be aware that ABNs can be held by bodies that are not legal entities (such as business names). It may also be necessary to include the registered business address for the company (see Section 3.4.4 for more information on the service of documents). To ensure the correct name and registered business address are used, an ASIC search is necessary. Copy the information from the ASIC search exactly as it appears.

It is not possible to create an accountable party in ISEMS without an ABN number. If a legal entity exists but does not have an ABN, then an accountable party can be created for you by the Regulatory Compliance Support Unit via email to poeo.licensing@environment.nsw.gov.au. For more information, see Appendix A.

AHIP holders who are individuals

In some cases an AHIP holder will be an individual, such as an individual landowner doing works on their property (e.g. constructing a dwelling) that requires an AHIP.

The person's full name (not their initials) must be used to avoid confusion. The name should be recorded in ISEMS as follows (including punctuation):

family name; given name(s)

If the legal instrument needs to be enforced at some later stage, there must be no confusion about who is responsible for compliance: the more specific, the better. Even a small spelling mistake in the name may erode the enforceability of the document. For more information, see Appendix A.

4.2.2 Nominating an appropriate duration for an AHIP

The recommending officer must nominate an appropriate duration for an AHIP (see the inside front cover of the AHIP template: 'Item C. Commencement and duration of AHIP' under 'AHIP to harm Aboriginal objects').

The duration will depend on what actions are being authorised by the AHIP (2–10 years is typical). The applicant's Aboriginal cultural heritage assessment report should indicate the proposed term of the AHIP. Nomination of a different time frame must be justified in the AHIP determination report (Section 3.4.1).

Ensure that the time period nominated is long enough for the completion of a development (particularly staged developments such as subdivisions) to avoid the need for a variation to extend the duration of the AHIP.

4.2.3 Identifying proposed works

Where an application is in relation to a proposed development, activity or other works, these must be specified in the AHIP (see the inside front cover of the AHIP template: 'Item D. Proposed works' under 'AHIP to harm Aboriginal objects').

This should be a very brief description of what the works are: for example – 'Subdivision of land and construction of infrastructure'. Reference should also be made to the relevant development or project approval, if applicable.

It is important to identify the proposed works as there will be specific conditions and schedules in an AHIP that relate back to this description: for example, a condition that specifies that Aboriginal objects cannot be harmed through the proposed works unless all necessary archaeological excavations have been completed.

Sometimes it will not be relevant to specify what the proposed works are: for example, where an AHIP is being issued to enable academic research involving archaeological excavation that is not connected to any development proposal. In this case, harm is only being authorised through archaeological excavation. Include the text 'Not applicable/research' under the 'D. Proposed works' heading. Also remove standard conditions relating to 'Harm to certain Aboriginal objects through the proposed works' and write 'Not applicable' under Schedule C.

4.2.4 Identifying the land to which an AHIP applies

A clear, detailed description of the land covered by the AHIP should be entered under the heading 'Land to which this AHIP applies'.

Land can be defined by noting its exact description, preferably by lot and deposited plan (DP) number, although the AHIP template provides some examples of alternative ways that it can be described.

A map should be referred to and included as an appendix to the AHIP in most situations. It is not good practice to refer to a map that is held on a file, was submitted with the application, or is otherwise not attached to the AHIP. Section 4.2.7 has guidance about inserting maps in AHIPs.

4.2.5 Using template conditions and schedules

The administrative, notification/reporting and general conditions in the AHIP template are fairly standard and, by following the drafting notes in the template, completing them is straightforward.

The operational conditions will vary most from AHIP to AHIP and recommending officers will spend most of their time editing and drafting these. There are different types of conditions according to their use, as follows.

- **Mandatory conditions:** As their name suggests, these *must be used on all AHIPs* that are drafted using the template. They can be modified only to the extent indicated in the drafting notes. The majority of AHIP template conditions are mandatory and they are not able to be edited.

- **Standard conditions:** These non-mandatory conditions ***must be used on AHIPs if they are applicable*** to the actions being authorised by the AHIP. If used, they can be modified only to the extent indicated in the drafting notes.
- **Optional conditions:** These non-mandatory conditions ***may be used if they are applicable*** to the actions being authorised by an AHIP. The drafter has discretion about whether to include the conditions. If used, they can be modified only to the extent indicated in the drafting notes.
- **Site-specific conditions:** These non-mandatory conditions ***may be drafted on a case-by-case basis*** to cover unique circumstances that are relevant to an AHIP. The template indicates where a site-specific condition may be appropriate, but they may be inserted anywhere in an AHIP, as required. Section 4.2.8 has more information about drafting site-specific conditions.

The operational conditions link directly with the schedules at the back of an AHIP, which provide specific details about certain areas and Aboriginal objects covered by the AHIP. Each group of conditions generally relates to a specific schedule and is often easier to complete these first. Schedule headings should not be removed or renumbered because there is a lot of cross-referencing with the standard conditions in the AHIP that could become confused or incorrect. Particular schedules that are not relevant should be labelled 'Not applicable' under the schedule heading.

In most cases, it is unlikely that all the operational conditions in the template will need to be used. Irrelevant conditions should be deleted (such as deleting excavation conditions where these are not being authorised). It may also be necessary to add site-specific conditions (see Section 4.2.8 about drafting these).

The applicant is required to indicate what actions they want their AHIP to cover (see Part II, section 2 of the AHIP application form). The types of actions listed in the form correspond to the groups of operational conditions and schedules in the AHIP template. Of course, the recommending officer will need to ensure that the applicant has selected the correct/appropriate actions for the harm they are proposing and make a decision about what is appropriate based on their whole application, including the Aboriginal cultural heritage assessment report and any additional information provided.

Certain Aboriginal objects must not be harmed

These conditions are used if there are areas or specific Aboriginal objects that must not be harmed and it is important to ensure that certain measures are taken to actively protect these areas/objects during the life of an AHIP. A blanket protection for human remains is also included.

These conditions link to **Schedule A**.

Certain Aboriginal objects may only be moved

These conditions are used in limited circumstances where there is a need to authorise specific movement of specific Aboriginal objects, such as to move an object from point A to point B to remove it from the path of the proposed works.

These conditions link to **Schedule B1**.

Excavations

These conditions are used to specify how archaeological excavations will be carried out, that is, in accordance with the applicant's methodology or as modified by an AHIP. This will usually be a salvage excavation²⁵, as test excavations²⁶ are typically conducted under the [*Code of Practice for the Archaeological Investigation of Aboriginal Objects in NSW*](#).

These conditions link to **Schedule B2**.

²⁵ 'Salvage excavation': see Glossary

²⁶ 'Test excavation': see Glossary

Community collection²⁷

These conditions are used to require the AHIP holder to provide the RAPs with an opportunity to collect certain Aboriginal objects.

These conditions link to **Schedule B3**.

Other action

Site-specific conditions can be included to cover 'other' types of actions that will harm Aboriginal objects that do not fit the definition of any of the actions above.

Examples might be conservation works not covered by an exemption under s.87A(a) or the analysis of a particular Aboriginal object in a laboratory that is not connected to an excavation.

These conditions link to **Schedule B4**.

Harm to certain Aboriginal objects through the proposed works

These conditions are used if an AHIP will allow harm to Aboriginal objects as a direct result of the actual development works (the 'proposed works'). These conditions specify that harm as a result of the proposed works cannot commence until all other specified actions (such as salvage excavation) have been completed.

These conditions link to **Schedule C**.

Temporary storage, long-term management and access routes

The remaining operational conditions in the template relate to temporary storage of Aboriginal objects, long-term management of Aboriginal objects, and access routes. These conditions can be used as needed.

4.2.6 Managing restricted AHIMS information

When completing the AHIMS site tables within the AHIP schedules, recommending officers will notice that they are asked to indicate whether the particular AHIMS site has an 'information access restriction' for cultural reasons. This can be determined by referring to the AHIMS site recording form (site card). Most AHIMS sites do not have any restrictions.

Site restrictions are indicated in this table (as advised by the drafting notes) with all the locational details included in the dedicated Appendix A: Restricted AHIMS Sites.

Any maps that show the location of restricted AHIMS sites should also be included in the appendix.

Where an AHIP contains no restricted sites, Appendix A may be removed from the final AHIP.

Where there are restricted sites and a member of the public requests a copy of the AHIP, the appendix can be easily removed (Section 5.1).

4.2.7 Inserting maps into AHIPs

Maps inserted into an AHIP should generally:

- be clear
- be at an appropriate resolution
- be reproducible (able to be photocopied easily without needing to use too much colour)
- include a north arrow and a scale
- include the date and source of any imagery or vector data
- include the OEH logo (if it is an OEH-generated map)
- include the general disclaimer below.

²⁷ 'Community collection': see Glossary

Disclaimer

This map has been compiled from various sources and the publisher and/or contributors accept no responsibility for any injury, loss or damage arising from its use, or errors, or omissions therein. Positional variations of some features within the map may occur due to differences between the sources of the information; this includes scale, date and method of collection.

All maps should be inserted into a new appendix at the end of the AHIP and referred to in the body of the AHIP (as indicated in the template). There are instructions within the template about how to insert a new appendix into the AHIP (see table of contents page).

Any maps that show the location of restricted AHIMS sites must be included as part of Appendix A to ensure that they are not inappropriately released to the public.

Be mindful of file size

When inserting maps into the template, recommending officers should remember that the size of *Word* documents generated in ISEMS should be no more than a maximum of 2 MB in size, unless absolutely necessary.

It is recommended that map images are saved in JPEG format if possible. These files can also be compressed to reduce their size: refer to ISEMS guidance – [*Compressing pictures in MS Word*](#) (available on EHub only).

Where the file size of a map is excessive and cannot be compressed, it may need to be saved outside of ISEMS and physically attached to the final AHIP sent to the AHIP holder. A physical copy should also be kept for the file. A note on the AHIP in ISEMS should indicate that the map was attached to the hard copy document.

For further assistance, contact the ISEMS Help Desk.

Other tips on inserting images

When using pasted images in a *Word* document, the image can be clumsy to use when applying text information around it (for example, the image can jump around or refuse to move).

It is possible to format the image so that it is easier to move around by 'dragging' around the page, which can be useful when there is a need to have text above and below the image.

1. Right-click on the image
2. Select 'format picture'
3. Select 'layout'
4. Select 'in line with text'
5. Select 'OK'
6. It should now be possible to 'drag' the image wherever it is required.

To include a border around the image:

1. Right-click on the image
2. Select 'format picture'
3. Select 'lines'
4. Use black 0.75 for consistency (recommended)

4.2.8 Drafting site-specific conditions

Recommending officers must ensure that a decision-maker is aware of any site-specific conditions, before the AHIP is issued. This must be done by documenting the proposed conditions in the AHIP determination report, along with a brief justification for each (Section 3.4.1).

The site-specific conditions included should be reasonable and not require the AHIP holder to take any action that is impractical or beyond their control. They should be based on the principles and techniques summarised below.

For further reading on drafting conditions, see the Guide to Drafting Quality Conditions on the [AELERT website](#) by going to resources (available to AELERT members only).²⁸

Conditions are legal requirements

A condition is a legal requirement, an instruction detailing what an AHIP holder must do or how the conditions are to be interpreted. Failure to comply with a condition of an AHIP is an offence (s.90J, NPW Act).

Compliance with a condition must be important enough to warrant placing an AHIP holder in a position where any failure by them to comply creates an offence.

To ensure that a condition is legally enforceable, avoid using words that do not express a mandatory requirement, such as 'should'. Instead, use more definitive words such as 'must'.

Further, a condition cannot be imposed on a permit if compliance with the condition would result in the breach of a requirement made by the NPW Act or under it (s.90(2), NPW Act).

Conditions should be concise

A condition should be as short and concise as possible and contain the minimum number of elements necessary to achieve the desired outcome. A condition should relate to one issue rather than attempt to address multiple issues or contain a number of instructions, both of which can cause confusion.

Conditions should be clear

A condition should be specific, measurable, unambiguous and not open to interpretation. It should clearly state what is required to achieve compliance. The language used must not have the potential to lead to differing meanings or outcomes. Using headings and grouping conditions together on the same topic can help structure AHIPs in a clear way.

Conditions should be reasonable

A condition should be necessary, possible and reasonable for the AHIP holder to comply with.

Example

A condition requiring an AHIP holder to lodge a copy of 'all field records' with OEH could require a significant volume of material to be lodged and cause OEH difficulties in re-recording, storing and providing access to such material.

Conditions should not require an AHIP holder to prepare numerous unnecessary reports. In general EPRG policy is to require one final assessment report to be provided on completion of the works specified in the AHIP. Additional reports will be required only where they are relevant and necessary to OEH decision-making or are needed for information on AHIMS.

Conditions should be practical

The effort and resources necessary for an AHIP holder to comply with the requirements of the statutory instrument (and for OEH to assess compliance) should reflect the seriousness of the potential consequences of a failure to comply.

Conditions should not be unnecessarily prescriptive

If a condition is overly prescriptive, an AHIP holder may find it difficult to use alternative methods to achieve the same or better conservation outcomes (for example, more cost-effective methods).

²⁸ The Australasian Environmental Law Enforcement and Regulators neTwork (AELERT) is a network of environmental regulatory authorities of which OEH is a member.

Where an AHIP holder uses alternative methods, they may be in a difficult position, as an assessment of compliance will only find 'non-compliances', regardless of what conservation outcomes are being achieved.

Example

Consider this AHIP condition:

'A program of radiocarbon dating should be undertaken if suitable charcoal or other datable material is recovered from intact excavated deposits. If suitable material is present, up to 10 radiocarbon dates should be obtained from charcoal collected during excavation or from sieve residues.'

The prescriptive nature of this condition, which requires up to 10 radiocarbon dates to be collected, may unnecessarily put the proponent in non-compliance if more than 10 dates are collected.

In addition, the use of the word 'should' does not express a mandatory requirement, and the condition may not be legally enforceable. Even if the condition is legally enforceable, the deeming clause in the condition relating to the availability of dateable material may cause problems in enforceability if the proponent claims that such material was not found during the excavation. In such a case, it would be difficult to prove that radiocarbon-dateable material was present during the excavation. To gather such evidence, OEHL would have to be present during the excavation from start to finish, with enormous resource implications.

A less prescriptive and more enforceable version of this condition could read:

'The age of charcoal or other dateable material recovered in-situ must be determined using radiocarbon dating methods. The number of radiocarbon analyses undertaken must be sufficient to provide accurate radiocarbon dates for the material recovered.'

Conditions should not go beyond OEHL legislative powers

AHIP conditions should apply to the actions that are regulated under Part 6 of the NPW Act.

The exception to this is when the DG is a determining authority for an activity under Part 5 of the EP&A Act. This entitles the DG to attach conditions to the AHIP that relate broadly to matters affecting the environment. However, there need to be strong public and operational policy reasons for including these broader conditions. Recommending officers must contact LSB if considering including broad environmental conditions in their AHIPs.

Conditions should not impose an unnecessary responsibility

Conditions should not force OEHL to take on an unnecessary responsibility nor require input or agreement from, or action to be taken by, a third party to achieve compliance (such as a council, other government department or a RAP). However, obligations may be imposed on the applicant's employees or contractors for whom the applicant may be vicariously responsible (such as a supervising archaeologist).

Case study

In a recent Land and Environment Court matter, an applicant (a traditional Elder) sought an injunction to prevent a proponent from carrying out any work in relation to an AHIP. It was alleged that the AHIP holder had not complied with two conditions of the AHIP: negotiation with the community and establishment of an Aboriginal 'keeping place'. However, the AHIP holder claimed they could not reach an agreement with the Aboriginal community groups in time. The conditions were framed in the following terms:

- The Aboriginal keeping place must be operative within 12 months of the issuing of the AHIP.
- The form and location of the Aboriginal keeping place and a plan for its management must be negotiated with the Aboriginal community groups listed in the AHIP.

The court found that the AHIP holder had committed a 'threatened breach' (not an actual breach) of the AHIP by not establishing a place to store Aboriginal objects (a 'keeping place') within the time limit prescribed by the consent.

This case highlights the need to consider whether it is possible for an AHIP holder to achieve a proposed condition, especially if the condition requires them to be responsible for the actions of a third party.

Conditions should not restate the law

As a general rule, it should not be necessary to use a condition that requires an AHIP holder to comply with legislation administered by OEH.

5. Managing AHIPs post-approval

A range of tools is available for managing AHIPs in the post-approval stage. AHIPs can be varied, transferred and surrendered by application. OEH can also vary, suspend and revoke AHIPs directly in certain circumstances.

The procedures for these post-approval AHIP processes closely mirror the AHIP application discussed in Section 3 of this guide. There are application forms, notice templates, a public register and AHIMS steps for most processes.

EPRG officers also have a post-approval role in relation to:

- following the correct procedure for releasing copies of AHIPs and notices to members of the public (if requested)
- receiving and reviewing any final reports required by an AHIP
- responding to alleged breaches of AHIPs.

5.1 Releasing AHIPs and notices to the public

The *Government Information (Public Access) Act 2009* (GIPA Act) replaced the *Freedom of Information Act 1989* on 1 July 2010. One of the aims of the GIPA Act is to ensure that government is open, accountable, fair and effective by authorising and encouraging the proactive public release of government information by agencies. OEH needs to balance this with the need to restrict the release of culturally sensitive information.

As only 'details' of AHIPs (such as AHIP holder name, LGA, actions that will cause harm, etc.) are placed on the public register, members of the public may request a copy of the actual AHIP.²⁹ However, the AHIP (as recorded on AHIMS) may contain 'restricted information' about Aboriginal sites for cultural heritage reasons.

As discussed in Section 4.2.6, the AHIP template has been designed to enable all restricted information about Aboriginal sites to be collated in a Restricted AHIMS sites appendix at the back of the AHIP.

Informal release of AHIPs

Where an informal request for a copy of an AHIP is made by a third party, it is OEH policy to provide the AHIP **without** the information contained in the Restricted AHIMS sites appendix. The procedure is:

1. EPRG office receives an informal request³⁰ for a copy of an AHIP from a third party.
2. EPRG officer reviews the AHIP to see if any restricted sites are listed in the appendix:
if there are, the appendix is removed from the AHIP (with assistance from the ISEMS Help Desk if required)
if not, the whole AHIP may be provided.
3. The EPRG Branch Director must always approve the release of an AHIP.³¹
4. If the person subsequently requests a copy of the excluded appendix, they must be advised that it is not OEH policy to release this information informally and that they should make a formal application under s.9 of the GIPA Act.

²⁹ Note AHIP holders and the RAPs are always provided with full copies of AHIPs.

³⁰ Informal requests may be verbal or written and no reason needs to be given. However asking the person to make their request in writing may assist in its processing (for example, to be clear exactly which AHIP is being sought, etc.). Any requests need to be documented and kept on the file.

³¹ The AHIP holder does not need to be advised of the release.

Formal applications under GIPA

If OEH receives a formal application for access to a copy of an AHIP under s.9 of the GIPA Act, the applicant has a 'legally enforceable right to be provided with access to the information unless there is an overriding public interest against disclosure of the information'.

Formal access applications are dealt with by the Right to Information/Privacy (RTIP) Officers in the OEH Corporate Governance Branch. These officers need to weigh up whether there is a public interest consideration against disclosure of information, using the factors listed in the table in s.14 of the GIPA Act.

For the purposes of AHIPs, the relevant consideration is whether disclosure of the information could reasonably be expected to 'prejudice the conservation of any place or object of natural, cultural or heritage value, or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge' (s.14, GIPA Act). This decision is made by the RTIP Officers, based on advice from the relevant areas of EPRG and CCHD.

Note at this point, it is the role of CCHD AHIMS staff to consider the access restriction and to contact the 'Nominated trustee' and/or 'Knowledge holder' listed on the AHIMS site recording form to discuss the request. CCHD AHIMS staff will advise the RTIP Officers accordingly.

The procedure for EPRG is:

1. EPRG office receives a formal access application for an AHIP under s.9 of the GIPA Act.
2. The EPRG officer immediately:
 - advises their manager of the application (if they are not already aware)
 - contacts an RTIP Officer and sends the application for processing³²
 - advises the RTIP Officer if the applicant has already been supplied with a copy of the AHIP with the restricted information removed – Where this has not occurred, the RTIP Officer can ask the applicant if this would be sufficient and suggest the applicant withdraw the formal application and make it an informal request. If the applicant is agreeable, the RTIP Officer will refer the request back to EPRG for consideration as an informal request. If it has been supplied, RTIP moves to step 3.
3. RTIP Officer issues an email request to the EPRG officer for the full records to be provided to allow their consideration of whether disclosure of the restricted information would 'prejudice ... conservation ... or reveal any information ... [on] ... Aboriginal or Torres Strait Islander traditional knowledge' and any other considerations that are relevant in line with s.14 of the GIPA Act.
4. When determining the s.9 application, the RTIP Officer takes into account EPRG and CCHD advice.

The GIPA Act (s.76) also allows OEH to provide additional information to an applicant in response to a formal request. This may be appropriate to give an applicant sufficient information for their needs without jeopardising restricted information. Where a Branch Director thinks this is appropriate, they should advise the RTIP Officer and provide the additional information for issue to the applicant.

Other AHIP-related notices

The same general policy and process is followed for any informal or formal requests for copies of other notices, such as AHIP variations, transfers, surrenders, suspensions and revocations.

³² RTIP Officers are located in the GIPA & Privacy Unit (Corporate Governance Branch): for contact names and phone numbers of the officers, type the keyword 'GIPA' into the EHub staff directory search field

5.2 Receiving and reviewing reports

Reports

As mentioned in Section 4.2, the AHIP template includes a number of *optional* 'notification and reporting' conditions that can be used to require an AHIP holder to report to the EPRG office on actions carried out under the permit (such as providing a salvage excavation report by a certain date).

When these reports are received, OEH will:

1. review the report and check that the report meets the requirements of the conditions that were set in the AHIP and determine whether any follow-up is required
2. check that the report includes a statement confirming that all Aboriginal site impact recording forms have been submitted to the AHIMS Registrar (see below)
3. using the 'Actions' tab, update the AHIMS permit record to show that the AHIP has been actioned, that is, the report was received and has been prepared in accordance with the AHIP conditions.

A copy of the report must be sent to the AHIMS Registrar to be uploaded onto AHIMS.

Aboriginal site impact recording form

There is a *mandatory* 'notification and reporting condition' in the AHIP template that requires an AHIP holder to complete and send to the AHIMS Registrar an Aboriginal site impact recording (ASIR) form for each AHIMS site (identified in Schedules B and C).

Any ASIR forms received directly should be sent immediately to the AHIMS Registrar for processing.

AHIP holders are required to include a statement in their final report that the relevant ASIR forms have been submitted to the registrar (see above).

5.3 Responding to alleged breaches of AHIPs

An AHIP holder (or former holder) is guilty of an offence under s.90J of the NPW Act where anyone contravenes a condition of their AHIP (or AHIP surrender, suspension or revocation notice).

However they are not guilty of an offence under s.90J if they can establish that the following occurred:

- contravention of the condition was caused by a person not associated with the AHIP holder³³ at the time the condition was contravened, and
- the holder took all reasonable steps to prevent the contravention of the condition (s.90J(3)).

A range of regulatory actions is available for EPRG staff to respond to alleged breaches of an AHIP. These include information and education; warning letters; investigations; compliance audits; penalty notices; prosecutions; stop work orders; interim protection orders; remediation directions; court orders; and suspension and revocation of AHIPs. To find out more about these tools, go to 'Compliance and enforcement tools' in the references and further reading of this guide.

Each EPRG branch has different procedures and expertise in relation to investigations. All regulatory actions, including investigations, need to be approved by the manager or unit head (as the decision-maker). It is important that investigations are conducted professionally in an appropriate manner and within OEH's powers under the NPW Act, the OEH Compliance Policy,³⁴

³³ Section 90J(3) NPW Act states 'A person is associated with the holder for the purposes of paragraph (b) (but without limiting any other circumstances of association) if the person is an employee, agent, licensee, contractor or sub-contractor of the holder.'

³⁴ At time of publication, this policy was in draft.

and the [Prosecution Guidelines](#) to avoid compromising both the actions of the agency and the evidence.

While some operations officers have expertise in investigation, there are also branch specialist investigators, who can advise on how to undertake an investigation. In the event of a more complex or controversial offence, LSB's Specialist Investigation Unit (SIU) can also assist.

5.4 AHIP variations

Variation of an AHIP includes substituting, omitting or amending an existing condition or imposing a new one (s.90D(2) of the NPW Act).

In some circumstances OEH will require a new AHIP application. For example, the [variation application form](#) and [Applying for an AHIP: Guide for applicants](#) state that a new AHIP application is necessary where:

- the area of land covered by an AHIP increases and was not part of the consultation at the time of the initial AHIP application
- test excavation is being carried out under an AHIP and it has been determined that further harm cannot be avoided.³⁵

AHIPs can be varied on the application of an AHIP holder (Section 5.4.1) and very minor variations can also be made directly by OEH (Section 5.4.2).

5.4.1 Variations initiated by AHIP holders

AHIP holders can apply to OEH for a variation to their AHIPs (s.90D(3) of the NPW Act).

Before requesting a variation, AHIP holders are encouraged to discuss their proposal with the OEH regional office, as explained in the [variation application form](#) and [Applying for an AHIP: Guide for applicants](#). This is important so OEH can:

- advise the AHIP holder if a variation is appropriate or a new AHIP is required (Section 3.2)
- advise the AHIP holder of the correct procedure where a transfer and a variation is being sought (OEH policy is for separate variation and transfer processes – Section 5 below)
- prescribe requirements for consultation where necessary (see below)
- provide general advice in relation to the variation.

Requirements for consultation

Where a proposed variation to an AHIP authorises a significant increase in harm to Aboriginal objects or places, cl.80E of the NPW Regulation states that the DG of DPC is to require the applicant to carry out further consultation (in addition to the consultation that occurred for the original AHIP).

What constitutes a 'significant increase in harm' is determined on a case-by-case basis and will depend on the nature of the harm proposed by the variation. For example, OEH may require additional consultation where the variation will:

- increase the level of harm to Aboriginal objects or places from that already authorised in the AHIP
- harm an Aboriginal object or place that was not identified as being harmed in the original application for the AHIP.

³⁵ In the majority of circumstances, however, OEH expects that test excavation will be carried out in accordance with the [Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW](#) and not under an AHIP.

Clause 80E requires that this consultation must follow one of the following processes:

- an agreed modified or alternative Aboriginal community consultation process as described in cl.80C(10), NPW Regulation³⁶
- a community consultation process considered appropriate by the DG in the circumstances³⁷

In relation to the final dot point above, the decision-maker determines appropriate consultation processes case-by-case and these could include:

- consultation with those Aboriginal people who had registered an interest in the original assessment process (use of the RAP list from the original consultation process would avoid the need for additional notification)
- limiting consultation to the local Aboriginal land council and/or registered native title claimants and/or other known knowledge holders in the area of a project
- the process set out in cl.80C of the NPW Regulation (and further explained in the [Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010](#), which is the process required for the issue of a new AHIP)

In all cases the consultation process must be documented in the AHIP variation determination report, along with reasons for using that process.

As stated above, AHIP holders are encouraged to talk to OEH before applying for a variation to determine any consultation requirements in advance as this is required to be completed before an AHIP variation application is submitted.

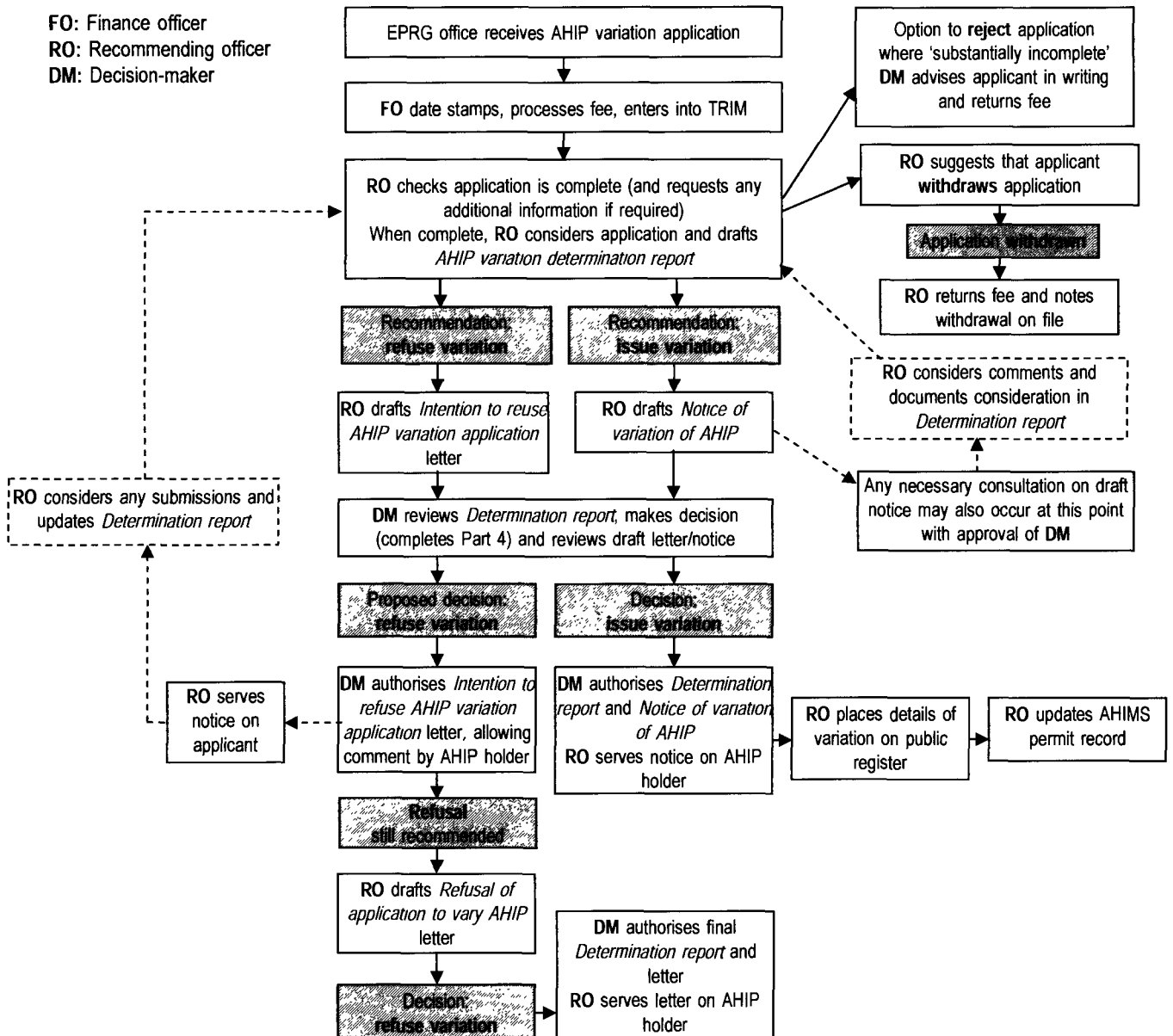
³⁶ Under cl.80C(10) of the NPW Regulation, an agreement is one of the following:

- ‘(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 [OEH].’

³⁷ This power is currently delegated to EPRG Environment Officer Class 13 and above: refer to [Delegation of Director-general and Minister's Functions: Supplementary instrument of delegation of ministerial functions – 30 June 2010](#) on EHub

Process: variations initiated by AHIP holders

FO: Finance officer
RO: Recommending officer
DM: Decision-maker



The flowchart above depicts the process for AHIP variations initiated by AHIP holders.

Checking application is complete

When OEH receives an AHIP variation application, the recommending officer must check the following:

- Has the application has been made on the approved AHIP variation application form?
- Has the form been signed by the AHIP holder(s)?
- Has the correct fee been paid?
- Has all the required information been provided, as noted on the form (such as explanation of the variation being sought and any additional harm that may be required, location details, etc.)?
- Has the applicant complied with any other OEH requests that were a pre-requisite to lodging the application (check the file for any correspondence)?

- Have the results of consultation – any submissions and applicant responses to the issues raised in the submissions – been included with the application (applicable where consultation on the variation is required under cl.80E of the NPW Regulation)?
- Is development consent under the EP&A Act or other approval required (such as Part 5 of the EP&A Act, etc.)?

In relation to this final dot point, it is important to establish whether the original AHIP was issued as part of an integrated development approval (IDA) under the EP&A Act within the previous three years. If it has, any variation and conditions of the AHIP must be consistent with the development consent.³⁸

A *Notice to supply further information* may be sent if further information is necessary and relevant to the application (see Section 3.3.6).

The recommending officer may recommend that the decision-maker reject the application because it is substantially incomplete (Section 3.3.4).

AHIP variation determination report

The recommending officer considers the AHIP variation application by addressing the s.90K 'factors to be considered' and completing an *AHIP variation determination report* in ISEMS. Section 2.4 outlines the purpose and structure of determination reports, including advice about how to complete a report. See also [Guidance for Considering Section 90K Factors](#) (available on EHub only).

Completing the determination report also allows the decision-maker to sign off on the proposed text for the public register.

Refusing a variation application

The process for refusing an AHIP variation application mirrors the process for refusing an AHIP application (see Section 3.4.2, which outlines the main steps).

The areas of difference are:

- An additional ground for refusal is where it is appropriate to issue a new AHIP as opposed to varying an existing one (Section 5.4 introduction, above)
- Where refusal is proposed, an *Intention to refuse AHIP variation application* letter (on ISEMS) is sent to the AHIP holder, allowing them to make submissions before a final decision is reached.
- A *Refusal of application to vary an AHIP* letter (on ISEMS) is sent to the AHIP holder if the final decision is to refuse the variation.
- There is no need to provide details of the refusal on the public register.
- There is no need to update the AHIMS permit record.

Granting a variation application: Notice of variation of AHIP

OEHS grants a variation by notice in writing to the AHIP holder in accordance with s.90D(5) of the NPW Act. The recommending officer prepares the draft *Notice of variation of AHIP* in ISEMS. The notice template is designed to describe the change to the original AHIP and includes user instructions that assist in the drafting.

The original AHIP remains unchanged in ISEMS: it is an archived document. A note on the variation notice requires that it must be read in conjunction with the original AHIP.

In the 'Background' section of the notice, the recommending officer explains why OEHS is granting the variation. Under the next section 'Variation of AHIP', they include the relevant conditions and information that needs to be reworded (as guided by the template). The variation takes effect on the date the notice is issued. If the date for the variation to commence is different from the date of issue, the start date should be entered in the condition of the notice.

³⁸ Section 93(4), *Environmental Planning and Assessment Act 1979*: An approval body cannot vary the terms of an approval granted for integrated development for which development consent has been granted before the expiration, lapsing or first renewal of the approval, whichever first occurs, other than to make variations that are not inconsistent with the development consent.

When varying a condition of an older AHIP that pre-dates the changes to the NPW Act that commenced in October 2010, it is not necessary to update the whole AHIP to be consistent with the amended legislation (e.g. terminology, references to the legislation, etc.).³⁹

Authorising and serving

The decision-maker completes Part 4 of the determination report and authorises the AHIP and the letter/notice in ISEMS. The recommending officer 'issues' and 'serves' the notice in ISEMS and serves the notice on the AHIP holder (Section 3.4.4). More information on working with ISEMS notices can be found in Appendix A of this guide.

Placing details on the public register

The recommending officer records the variation on the public register as soon as practicable after serving the *Notice of variation of AHIP*. They will need to complete Part B of the web-form, using the text for this purpose contained on the front of the *AHIP variation determination report*. See Section 2.5 for more information on the public register.

Updating AHIMS

Recommending officers also update the permit record in AHIMS, using the 'comments' tab to record the variation details.

For general information about using the permit module in AHIMS, refer to Section 13 of the AHIMS User Training Manual, which is available by contacting Information Systems and Assessment Section, CCHD.

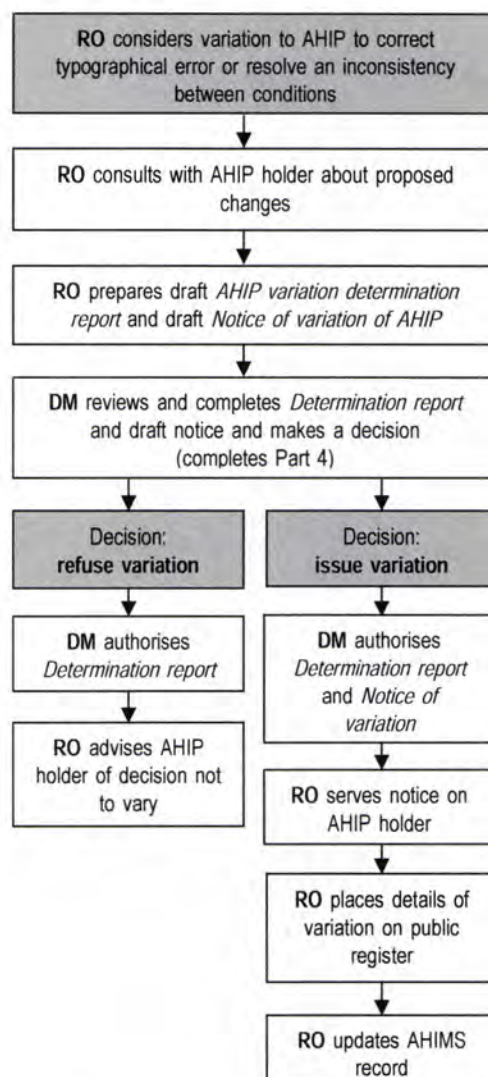
5.4.2 Variations initiated by OEH

The only circumstances in which OEH can initiate an AHIP variation are to correct a typographical error or resolve an inconsistency between conditions (s.90D(3)).

³⁹ Schedule 3(65) of the NPW Act states that a s.87 permit or s.90 consent issued before commencement of the *NPW Amendment Act 2010*, is taken to be an AHIP issued under s.90 of the current NPW Act.

Process: variations initiated by OEH

RO: Recommending officer
DM: Decision-maker



The flowchart above depicts the process for an OEH-initiated variation to an AHIP.

Consultation with AHIP holder

It is OEH policy to discuss any variation with an AHIP holder before sending them a notice to vary their permit. This is not a formal consultation process as the variation is minor and, as a courtesy, a phone call or email to the AHIP holder will suffice. All communications must be documented on file and referred to in the *AHIP variation determination report*.

AHIP variation determination report

Even though the proposed variation is very minor, recommending officers must still address the s.90K 'factors to consider' and complete an *AHIP variation determination report* in ISEMS. Section 2.4 outlines the purpose and structure of determination reports, including how to complete one.

Consideration of the s.90K factors will, however, be brief as the proposed changes will be very minor: see [Guidance for Considering Section 90K Factors](#) (available on EHub only).

Completing the determination also allows the decision-maker to sign off on the proposed text for the public register.

Deciding not to vary

Where it is decided not to vary an AHIP, the recommending officer advises the AHIP holder. A phone call or email is sufficient with details kept on file.

There is no need to update the public register or AHIMS where there is no variation to an AHIP.

Deciding to vary: Notice of variation of AHIP

The recommending officer prepares a draft *Notice of variation of AHIP* in ISEMS. A variation is effected by OEH sending the notice to the AHIP holder (s.90D(5), NPW Act). The notice template is designed to describe the change to the original AHIP and includes user instructions that assist in the drafting.

In the 'Background' section of the notice, the recommending officer explains why OEH is initiating a variation. Under the next section 'Variation of AHIP', they include the relevant conditions and information that needs to be reworded (as guided by the template). The variation takes effect on the date the notice is issued. If the date for the variation to commence is different from the date of issue, the start date should be entered in the condition of the notice.

When varying a condition of an older AHIP that pre-dates the changes to the NPW Act that commenced in October 2010, it is not necessary to update the whole AHIP to be consistent with the amended legislation (e.g. terminology, references to the legislation, etc.).

Authorising and serving

The decision-maker completes Part 4 of the determination report and authorises the AHIP and the letter/notice in ISEMS. The recommending officer 'issues' and 'serves' the notice in ISEMS and serves the notice on the AHIP holder (Section 3.4.4). More information on working with ISEMS notices can be found in Appendix A of this guide.

Placing details on the public register

The recommending officer records the variation on the public register as soon as practicable after serving the *Notice of variation of AHIP*. They will need to complete Part B of the web-form, using the text for this purpose contained on the front of the *AHIP variation determination report*. See Section 2.5 for more information on the public register.

Updating AHIMS

Recommending officers also update the permit record in AHIMS, using the 'comments' tab to record the variation details.

For general information about using the permit module in AHIMS, refer to Section 13 of the AHIMS User Training Manual, which is available by contacting Information Systems and Assessment Section, CCHD.

5.4.3 Unusual situations

Varying AHIPs not in ISEMS

For pre-ISEMS AHIPs not in the system, recommending officers need to select a different template notice in ISEMS: *AHIPs – Variations – AHIPs issued pre-ISEMS*. The tokens and links have been removed as there are no automated links because the permit is not in the ISEMS system. The procedure for issuing the notice will remain the same as described in Section 5.4.1.

Complex variations

Generally an *AHIP variation notice* simply describes changes to the original AHIP and therefore needs to be read in conjunction with it. However in rare circumstances, a more complex or extensive variation may need to be issued.

In these situations, it may be confusing to describe the change to each condition relating back to the original AHIP. If this is the case a 'new' AHIP can be created in ISEMS to incorporate the changed conditions into the AHIP itself. It will still be necessary to issue a notice to the AHIP holder for the variation to take effect.

In order to do this, recommending officers need to:

1. Ask the ISEMS Help Desk to set up a new AHIP in ISEMS by dropping in the complete original AHIP text – the system will then assign it a new AHIP number.⁴⁰
2. In the 'Background' of the AHIP, refer to the previous AHIP number, so that it is clear that the two numbers relate to the one AHIP and describe the purpose of the variation.
3. Make any necessary changes to the AHIP.
4. Create an *AHIP variation notice* that outlines what the changes are in general terms (without using the suggested format of documenting each condition change as specified in the template). The notice must refer to both the varied AHIP and the original AHIP – which must be attached – and note that the varied AHIP supersedes the original AHIP.

It is suggested that recommending officers ask LSB to review the notice and attachments prior to issuing them.

5.5 AHIP transfers

An application to transfer an AHIP to another person can be made under s.90B of the NPW Act.

Where approved, the AHIP is transferred into a new AHIP holder's name and they then assume all the responsibilities and obligations under the AHIP conditions. As before, the new holder must be a legal entity (Section 4.2.1).

Circumstances where OEHL cannot refuse a transfer

Under s.90R of the NPW Act, OEHL cannot refuse an application to transfer an AHIP and in granting the application cannot vary any of the AHIP conditions where all of the following apply:

- the AHIP relates to a specified parcel of land
- the transfer application was made in accordance with s.90B on the approved form and signed by the proposed AHIP holder
- the AHIP holder has given written consent to the transfer as required under s.90E.

OEHL policy: separate variation and transfer processes

Under s.90D(4) of the NPW Act, an AHIP can be varied at any time during its currency, including when it is being transferred to another person. Because of the limitations of s.90R (see above), this means that in practice an AHIP variation notice would need to be issued at the same time as a transfer notice.

However, it is OEHL policy not to accept and process a transfer and a variation at the same time. This is because a variation has to be applied for by the AHIP holder and it can be confusing who is asking for the variation when a transfer is being applied for simultaneously. Therefore, an AHIP variation application will either need to be submitted to OEHL prior to a transfer by the current AHIP holder **or** by the new AHIP holder after OEHL has granted a transfer.

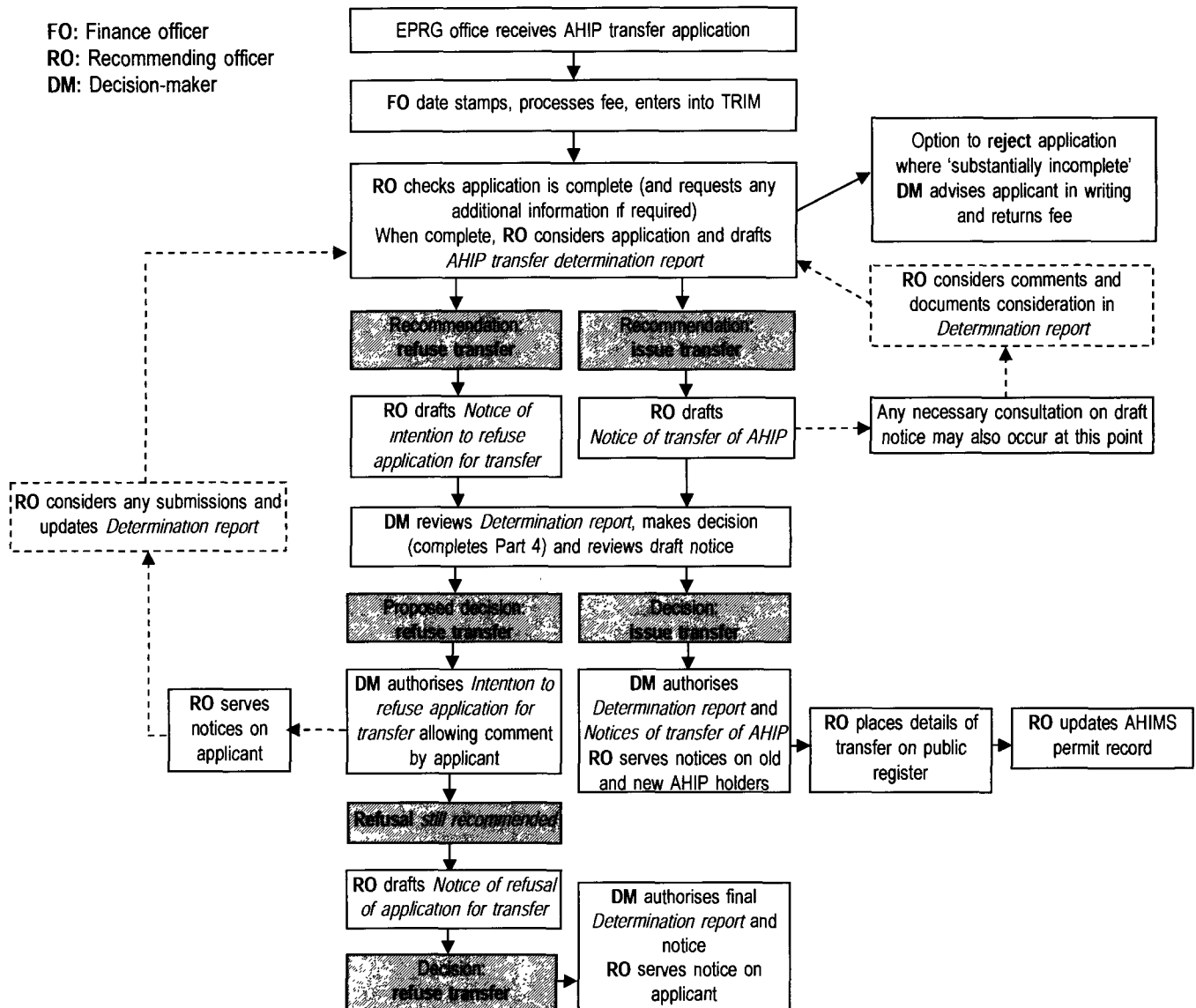
Potential applicants should be aware of this policy documented in [Applying for an AHIP: Guide for applicants](#) and on the AHIP variation and transfer forms.

If, for any reason the decision-maker wishes to effect a variation and transfer simultaneously, it is recommended that they seek advice from LSB. They will need to issue both a transfer and variation notice and check whether the applicant requesting the variation is the AHIP holder.

⁴⁰ Due to the limitations of ISEMS, an old AHIP cannot be amended because, once it is issued, it is unable to be altered in the system. A 'new' AHIP will need to be created if it is to reflect the new conditions and amendments as the result of a complex variation and this will be automatically assigned a new number.

Process: AHIP transfers

FO: Finance officer
RO: Recommending officer
DM: Decision-maker



The flowchart above depicts the process for AHIP transfers.

Time frames: simple transfers coinciding with the sale of land

Under question 2 of the AHIP transfer form the applicant is able to request a date for the transfer of an AHIP where s.90R requirements are met (simple transfer). This is to accommodate situations where the applicant wants the AHIP transfer to coincide with the sale of land. Ordinarily the time period for the sale of land is 42 days from the date of exchange of contracts until the date of settlement. This is shorter than the 60-day deemed refusal period for an AHIP (Section 2.6.2).

The AHIP transfer form instructs applicants to apply at least 30 days prior to the nominated date for the sale of the land so OEH is able to process the application on time. Despite the 60-day deemed refusal period, where an applicant in a *simple* transfer has nominated a transfer date at question 2, OEH will endeavour to make a decision about the transfer application within **30 days**. A transfer cannot be done retrospectively.

Figure 2 depicts an example of a simple transfer, where the applicant has requested the AHIP transfer to coincide with the sale of land. Note, the appeal period will start the day after the applicant is given notice of OEH's decision, via notice, whenever this is.

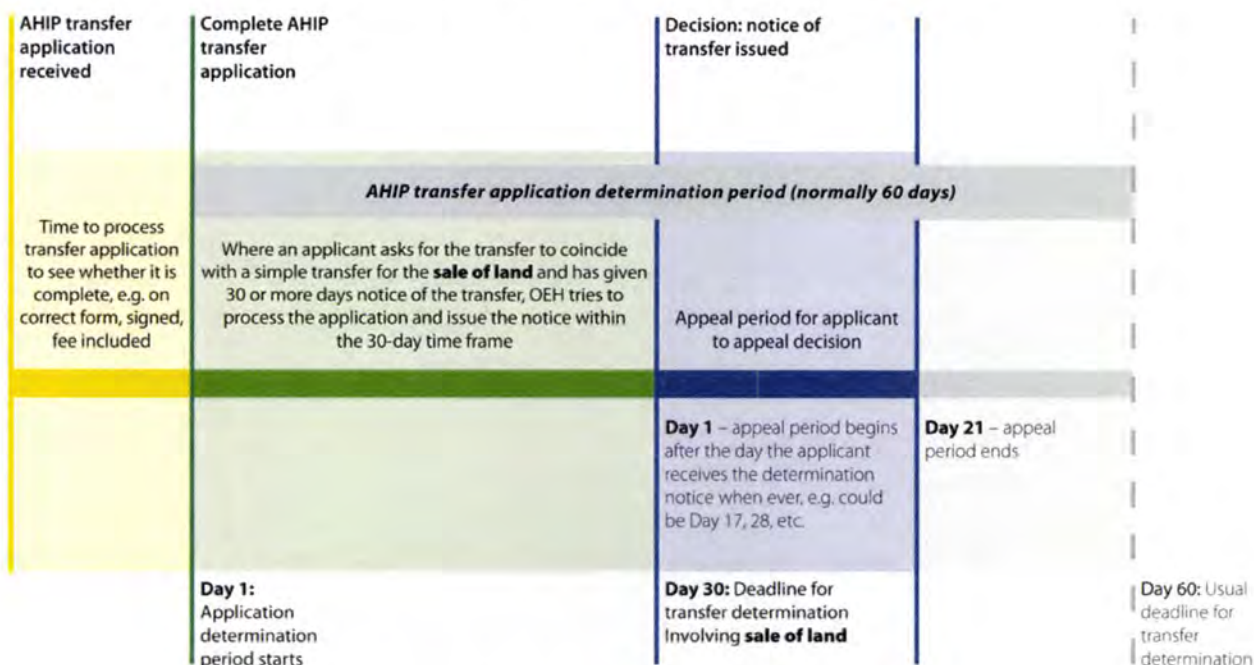


Figure 2: Timeline for processing a simple AHIP transfer application which coincides with the sale of land

Checking application is complete

When OEH receives an AHIP transfer application, the recommending officer must check the following:

- Has the application been made on the approved AHIP transfer application form?
- Has the form been signed by both the current and proposed AHIP holder?
- Has the correct fee been paid?
- Has all the required information been provided, as noted on the form (such as contact details of the new AHIP holder, their project manager and archaeologist where applicable)?

The applicant can be either the current or proposed AHIP holder. See section 1.3 of the AHIP transfer application form, to determine who the applicant is.

A *Notice to supply further information* may be sent if further information is necessary and relevant to the application (see Section 3.3.6).

The recommending officer may recommend that the decision-maker reject the application because it is substantially incomplete (Section 3.3.4).

AHIP transfer determination report

The recommending officer considers the AHIP transfer application by addressing the s.90K 'factors to be considered' and completing an *AHIP transfer determination report* in ISEMS.

If the application falls under s.90R of the NPW Act and OEH therefore cannot refuse the transfer, the recommending officer completes section 2.1 of the determination report and indicates that the other factors in s.90K are not applicable.

Section 2.4 outlines the purpose and structure of determination reports, including advice about how to complete a report. See also [Guidance for Considering Section 90K Factors](#) (available on EHub only).

Completing the determination report also allows the decision-maker to sign-off on the proposed text for the public register.

Refusing a transfer application

The process for refusing an AHIP transfer application mirrors the process for refusing an AHIP application (see Section 3.4.2, which outlines the main steps).

The areas of difference are:

- There are very limited grounds for refusal (see above).
- Where refusal is proposed, a *Notice of intention to refuse application for transfer* (on ISEMS) is sent to the applicant, allowing them to make submissions before a final decision is reached.
- A *Refusal of application for transfer* (on ISEMS) is sent to the applicant if the final decision is to refuse the variation.
- There is no need to provide details of the refusal on the public register.
- There is no need to update the AHIMS permit record.

Granting a transfer application: Notice of transfer of AHIP

Under s.90C(2) of the NPW Act, an application for the transfer of an AHIP is granted by the transfer of the AHIP. The transfer of the AHIP occurs by notice in writing to the old and new AHIP holders (s.90(4)).

A *Notice of transfer of AHIP* is served on both the previous and new AHIP holder. The new holder also receives a copy of the AHIP.

Authorising and serving

The decision-maker completes Part 4 of the determination report and authorises the transfer and the notice in ISEMS. The recommending officer 'issues' and 'serves' the notice in ISEMS and serves the notice on the old and new AHIP holders (Section 3.4.4). More information on working with ISEMS notices can be found in Appendix A of this guide.

Placing details on the public register

The recommending officer records the transfer on the public register as soon as practicable after serving the *Notice of transfer of AHIP* on the old and new AHIP holders. They will need to complete Part B of the web-form, using the text for this purpose contained on the front of the *AHIP transfer determination report*. See Section 2.5 for more information on the public register.

Updating AHIMS

Recommending officers also update the permit record in AHIMS, using the 'Comments' tab to record the transfer details.

For general information about using the permit module in AHIMS, refer to Section 13 of the AHIMS User Training Manual, which is available by contacting Information Systems and Assessment Section, CCHD.

Transferring AHIPs not in ISEMS

When transferring an older AHIP not issued through ISEMS, recommending officers will need to follow these additional steps:

1. Search ISEMS to determine whether the new and old AHIP holders are in the system. If not, create new accountable parties in ISEMS. See Appendix A for more information on doing this.
2. Draft the *AHIP transfer notices* for the new and previous AHIP holder. The 'Linked notice number' will need to be manually inserted and the tokens deleted.
3. Create a new AHIP in ISEMS. A new AHIP number will be generated by the system.
4. Ask the ISEMS Help Desk to drop the complete original AHIP text into the newly created AHIP document ('notice') on ISEMS.
5. In the 'Background' section of the AHIP, refer to the previous AHIP number so it will be clear that the two AHIP numbers relate to the one AHIP. Also note the reason was due to a transfer.

5.6 AHIP surrenders

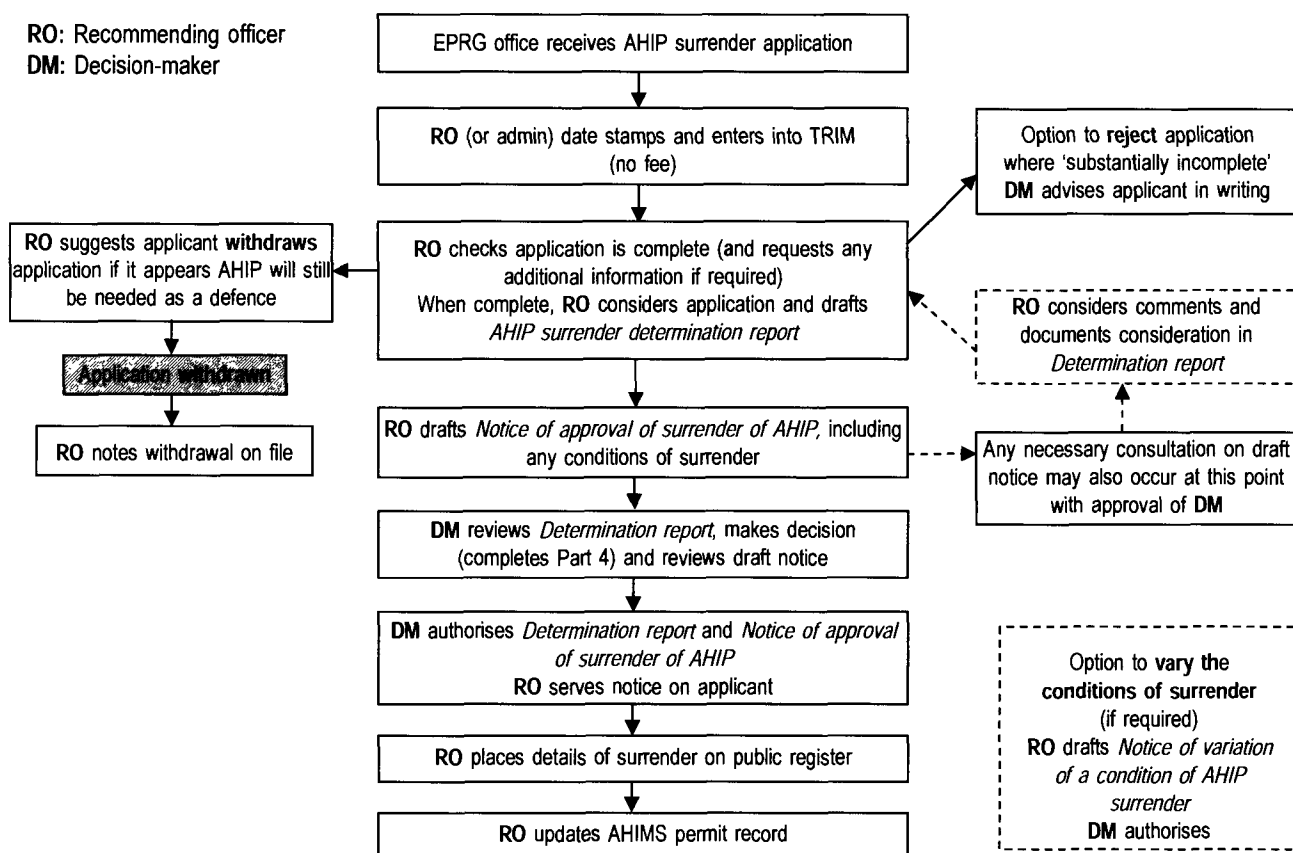
An AHIP holder can apply to OEH to surrender their AHIP (s.90H of the NPW Act) by using the AHIP surrender application form.

Because an AHIP is a defence against prosecution for certain offences under the NPW Act, permit holders should stop all activities that may harm Aboriginal objects or declared Aboriginal places (as per the relevant AHIP) before considering surrendering their AHIP. This advice appears on OEH's website.

There is rarely a benefit in an AHIP holder giving up their permit. In most circumstances, it is more practical to simply let the AHIP expire. The exception may be in circumstances where the holder wishes to surrender their AHIP and apply for a new one to replace it. However, in this situation, it may be simpler (from an administrative perspective) for the applicant to make just one application (for a new AHIP) and OEH to revoke the existing AHIP (if required).

There is no refund of fees where an AHIP is surrendered.

Process: AHIP surrenders



The flowchart above depicts the process for AHIP surrenders.

Checking application is complete

When OEH receives an AHIP surrender application, the recommending officer must check the following:

- Has the application been made on the approved AHIP surrender application form?
- Has the form been signed by the AHIP holder(s)?
- Has the correct fee been paid?
- Has all the required information been provided, as noted on the form (such as reasons why the AHIP holder is surrendering their permit)?

Note that no fees apply to AHIP surrenders.

A *Notice to supply further information* may be sent if further information is necessary and relevant to the application (see Section 3.3.6).

The recommending officer may recommend that the decision-maker reject the application because it is substantially incomplete (Section 3.3.4).

AHIP surrender determination report

The recommending officer considers the AHIP surrender application by addressing the s.90K 'factors to be considered' and completing an *AHIP surrender determination report* in ISEMS.

Section 2.4 outlines the purpose and structure of determination reports, including advice about how to complete a report. See also [*Guidance for Considering Section 90K Factors*](#) (available on EHub only).

Completing the determination report also allows the decision-maker to sign off on the proposed text for the public register.

Refusing a surrender application

Because an AHIP is a defence against prosecution for certain offences under the NPW Act, OEH would not normally refuse a surrender application. It is the prerogative of the AHIP holder if they wish to give up that defence. Furthermore, as AHIP fees are not refundable at surrender and AHIPs are for a specific time period, it is generally expected an AHIP holder would retain their AHIP for the life of the permit.

OEH may, however, advise the AHIP holder to withdraw their surrender application if their rationale for doing so is misguided.

No templates have been prepared for refusing a surrender application as it is anticipated that:

- the number of surrender applications will be very low
- the number of potential refusals of surrender applications would be even lower.

The Continuous Improvement Unit (CIU) (see Section 6.1) can provide advice on the rare need to refuse a surrender.

Granting a surrender application: Notice of approval of surrender of AHIP

To grant the surrender application, the recommending officer prepares a draft *Notice of approval of surrender of AHIP* in ISEMS.

Conditions can also be attached to the surrender notice (s.90I) and these may include (but are not limited to) any conditions to which the AHIP was subject immediately before it was surrendered.

The ISEMS notice template provides for the inclusion of such conditions if required.

Authorising and serving

The decision-maker completes Part 4 of the determination report and authorises the surrender and the notice in ISEMS. The recommending officer 'issues' and 'serves' the notice in ISEMS and serves the notice on the applicant (Section 3.4.4). More information on working with ISEMS notices can be found in Appendix A of this guide.

Placing details on the public register

The recommending officer records the surrender on the public register as soon as practicable after serving the *Notice of approval of surrender of AHIP* on the AHIP holder. They will need to complete Part B of the web-form, using the text for this purpose contained on the front of the *AHIP surrender determination report*. See Section 2.5 for more information on the public register.

Updating AHIMS

Recommending officers also update the permit record in AHIMS, using the 'comments' tab to record the surrender details.

For general information about using the permit module in AHIMS, refer to Section 13 of the AHIMS User Training Manual, which is available by contacting Information Systems and Assessment Section, CCHD.

Changing the conditions of a surrender notice

OEH may also impose new conditions on a surrender notice or vary or revoke any existing conditions that applied (s.90I(3)). This must be done in writing via a *Notice of variation of a condition of AHIP surrender* in ISEMS.

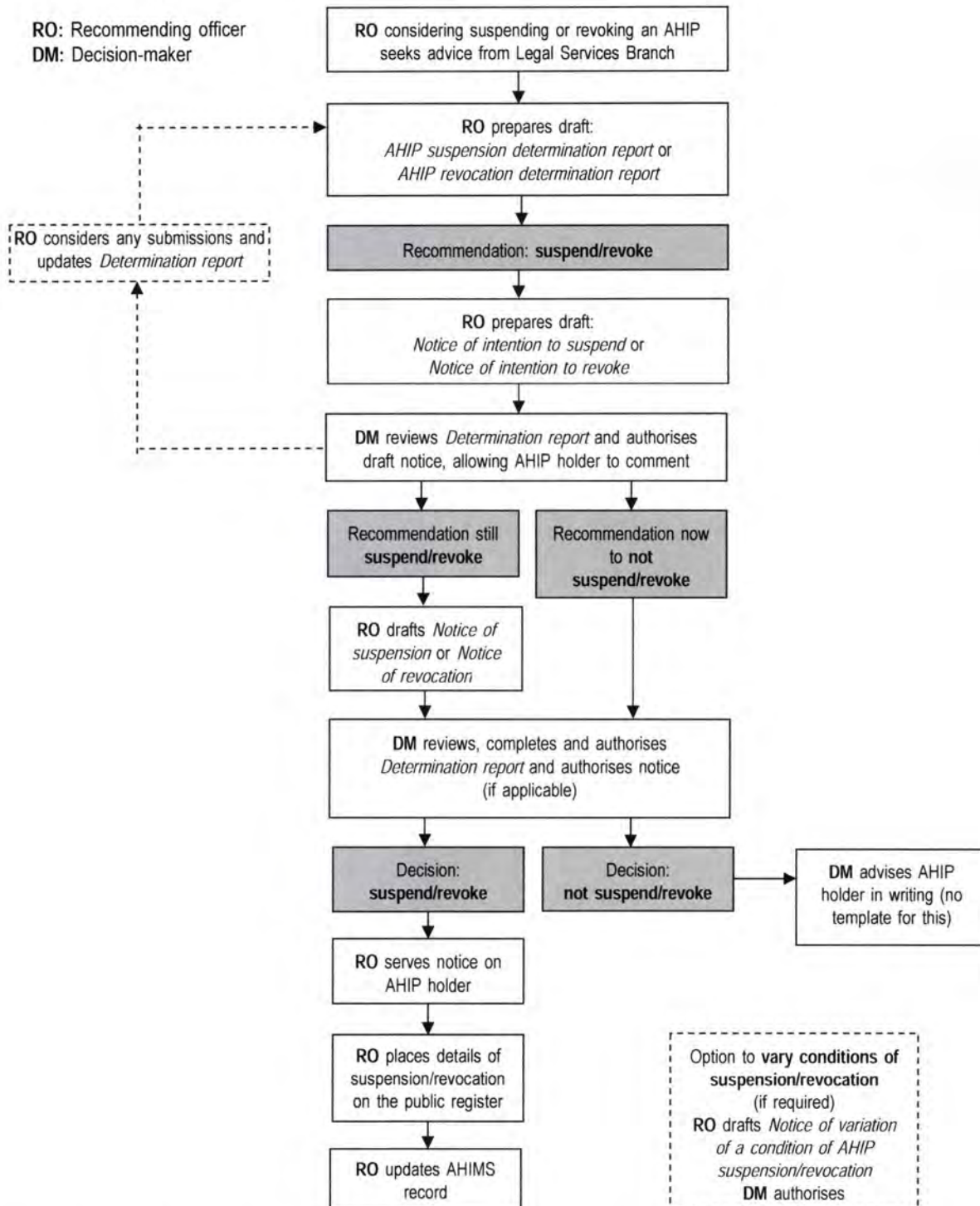
In the 'Background' section of the notice, the recommending officer describes why the surrender conditions are being varied. Under 'Variation of surrender condition', they can also insert a description of the condition/schedule/paragraph/text that is to be amended with page numbers. They should ensure that the text in the notice is exactly the same as the condition that is being changed.

5.7 AHIP suspensions and revocations

OEH has the power to suspend or revoke an AHIP under s.90G of the NPW Act. The processes for suspending or revoking an AHIP are identical. Suspensions may be for a specified period or until specified conditions are fulfilled or until further order by the DG. Recommended officers should always seek advice from Legal Services Branch when considering suspending or revoking an AHIP (Section 6.3).

No fees are refundable on the suspension or revocation of a permit.

Process: AHIP suspensions and revocations



The flowchart above depicts the process for suspending or revoking an AHIP.

AHIP suspension/revocation determination report

The recommending officer prepares either an *AHIP suspension determination report* or *AHIP revocation determination report* in ISEMS, addressing the s.90K 'factors to be considered'. Section 2.4 outlines the purpose and structure of determination reports, including advice about how to complete a report. See also [Guidance for Considering Section 90K Factors](#) (available on EHub only).

Section 90G(6) of the NPW Act states the reasons for suspending or revoking an AHIP may include (but are not limited to) the following:

- the holder of the AHIP obtained the permit improperly
- a condition of the AHIP was contravened
- the activities covered by the AHIP were completed or are no longer being carried on.

Completing the determination report also allows the decision-maker to sign-off on the proposed text for the public register.

Notice of intention to suspend/revoke

The recommending officer also prepares either a draft *Notice of intention to suspend AHIP* or draft *Notice of intention to revoke AHIP* in ISEMS, stating the reasons for the intention. The purpose of this notice is to allow the AHIP holder a reasonable opportunity to respond to the proposed suspension/revocation before OEH makes a final decision. The decision-maker must review both the determination report and draft notice and authorise the notice if appropriate.

Considering submissions and updating the determination report

Once the AHIP holder's submission has been received (or the time for making submissions has expired), the recommending officer makes their final recommendation on whether the AHIP will be suspended or revoked. They must take into account any issues raised in the AHIP holder's submission (in response to the notice) and note these in the determination report. They may also add further detail to Part 2 of the determination report.

Deciding not to suspend or revoke an AHIP

After receiving submissions on the *Notice of intention to suspend/revoke*, the decision-maker may decide not to take either of these actions. This needs to be documented and justified in the determination report.

The decision-maker must notify the AHIP holder in writing of their decision. There is no template for this, so it is important that the advice refers to the reasons for the decision and any relevant issues raised in the AHIP holder's submission.

It is not necessary to provide details on the public register or update the AHIMS permit record when it is decided not to suspend or revoke an AHIP.

Notice of suspension/revocation

Where the recommendation is still to suspend or revoke the AHIP, the recommending officer prepares a draft *Notice of suspension of AHIP* or draft *Notice of revocation of AHIP* for consideration by the decision-maker. This must refer to the reasons for the decision and make reference to any relevant issues raised in the AHIP holder's submission.

Under s.90G(3) of the NPW Act, a suspension may be for a specified period or until the fulfilment of specified conditions or until further order of the DG.

Also under s.90I of the NPW Act, OEH may, by notice in writing, impose conditions on the suspension or revocation of an AHIP. Those conditions may include (but are not limited to) any conditions to which the AHIP was subject immediately before it was suspended or revoked.

The notice templates provide for the inclusion of these conditions and time frames if required.

Suspension and revocations operate immediately from the date the notice is issued unless otherwise specified in the notice.

Authorising and serving

The decision-maker completes Part 4 of the determination report and authorises the suspension or revocation and the notice in ISEMS. The recommending officer 'issues' and 'serves' the notice in ISEMS and serves the notice on the applicant (Section 3.4.4). More information on working with ISEMS notices can be found in Appendix A of this guide.

Placing details on the public register

The recommending officer records the suspension or revocation on the public register as soon as practicable after serving the notice on the AHIP holder. They will need to complete Part B of the web-form, using the text for this purpose contained on the front of the *AHIP suspension determination report* or *AHIP revocation determination report*. See Section 2.5 for more information on the public register.

Updating AHIMS

Recommending officers also update the permit record in AHIMS, using the 'comments' tab to record the suspension or revocation details.

For general information about using the permit module in AHIMS, refer to Section 13 of the AHIMS User Training Manual, which is available by contacting Information Systems and Assessment Section, CCHD.

Changing the conditions of an AHIP suspension or revocation notice

OEH may also impose new conditions on a suspension or revocation notice, or vary or revoke any existing conditions that applied (s.90I(3)). This must be done in writing via a *Notice of variation of a condition of AHIP Suspension* or *Notice of variation of a condition of AHIP revocation*, both notices are in ISEMS.

Under s.90I(3)f the NPW Act, the DG may, by notice in writing, impose new conditions on a suspension or revocation notice or vary or revoke any existing conditions.

This is achieved by completing the template *Notice of variation of a condition of an AHIP suspension* or *Notice of variation of a condition of an AHIP revocation* in ISEMS. In the 'Background' section of the notice, the recommending officer states why the suspension or revocation conditions are being varied. Under 'Variation of suspension/revocation condition', they also insert a description of the condition/schedule/paragraph/text that is to be amended with page numbers.

They should ensure that the text in the notice is exactly the same as the condition that is being changed.

6. Seeking further assistance

For any of the AHIP processes, where an issue or question arises that cannot be resolved at the branch level, advice or assistance should be sought from the units below.

6.1 Continuous Improvement Unit

The Continuous Improvement Unit (CIU) is able to provide assistance with:

- interpreting OEH policy
- providing advice on operational procedures
- developing new policy or procedures where gaps are identified
- dealing with issues that have application beyond the regional level.

For minor matters, call or email CIU staff working on Aboriginal cultural heritage matters directly. For more substantial matters, email the Head of CIU, setting out the issue, background, request for advice and any time constraints (such as when the information is required and why).

6.2 ISEMS Help Desk

The ISEMS Help Desk is the go-to for any queries about using ISEMS or problems with creating or managing a notice in ISEMS. Contact the Help Desk by email or phone.

Appendix A has some hints and tips for completing ISEMS notices and the [ISEMS Guide to Notices](#) (available on EHub only) also provides more detailed and general advice about creating and managing notices in the system.

6.3 Legal Services Branch

Contact Legal Services Branch (LSB) for any legal questions or assistance or advice in relation to a specific matter that cannot be resolved at branch level.

LSB is able to assist with:

- interpreting the legislation
- providing advice on administrative/common law principles that guide government action, such as procedural fairness
- concerns relating to the enforceability of an AHIP condition
- advice on dealing with contentious issues
- advice where there is potential for OEH's decision to be challenged.

For minor matters, first consult 'Frequently Asked Questions' and 'Legal Eyes' on the [Legal Advice](#) EHub page. For quick and straightforward queries that cannot be answered locally, consider contacting the [duty solicitor](#).

For more substantial matters, the decision-maker should approve and forward a request for legal advice. Requests should be forwarded to the Manager Legislation and Advice and clearly set out the issue, background, request for advice and any time constraints (such as when the information is required and why). Allow for a two-week turnaround on legal advice.

More detailed information about the process for requesting legal advice can be found in [Legal Eye 2008/02: Requesting advice and using lawyers effectively](#).

Appendix A: Hints and tips on completing ISEMS notices

Using tokens

Tokens are automatic text linked to information in various data sets within ISEMS, such as the AHIP holder's name, registered address, etc.

The ISEMS AHIP templates for managing AHIPs post-approval (such as variations, transfers, etc.) are designed to link to the original AHIP. By entering in the original AHIP notice number, most of the AHIP details (AHIP holder name, address, etc.) will be auto-populated via the system.

It is important not to alter or delete any text in the notice with this highlighting as it may stop the authorisation process.

Colour highlighting in the templates

In all the templates various pieces of text are highlighted in different colours, as follows:

- **Grey highlighting** indicates 'system tokens', as discussed above. It is important not to alter or delete any text in the notice with this highlighting as it may stop the authorisation process.
- **Purple highlighting** indicates that direct editing is required.
- **Yellow highlighting** indicates an instruction that must be followed by the drafter.
- It is important to ensure that all **purple** and **yellow** highlighting and any drafting instructions are removed before the notice is sent out.

Good recordkeeping

It is imperative that ISEMS is as accurate and true a record as the system allows. Some pointers, which are sometimes overlooked are:

AHIPs for Aboriginal places

When creating an AHIP, a check box asks the user to click on it where the AHIP relates to an Aboriginal place. Ensure that the Aboriginal place box is checked to record in ISEMS that the permit applies to an Aboriginal place.

Accountable parties

- Before creating an accountable party in ISEMS, check to see whether it does not already exist in the system. This will avoid multiple entries for the one party.
- The accountable party has to be a [legal entity](#).
- To get the correct name, a search at [ASICS](#) or [Fair Trading NSW](#) is necessary.
- The accountable party name must be copied as it appears on the ASIC website: no abbreviations, full stops in the right place, correct spelling and in the following order with punctuation –
family name; given name(s)
- It is not possible to create an accountable party without an ABN number. If the accountable party is a legal entity but does not have an ABN (so does not appear in an ASICS search), an accountable party can be created by the Regulatory Compliance Support Unit: email poeo.licensing@environment.nsw.gov.au.

Changing the notice status after it has been authorised

After a notice has been authorised, it is important to change the status of the notice to 'issued' and then 'served', once these steps have been completed, to reflect the history of the notice properly.

Where to get further help

- ISEMS Help Desk (see Section 6.2).
- ISEMS Online Help: When using ISEMS, hit F1 to bring up the online help menu.
- [*ISEMS Guide to Notices*](#) for step-by-step guidance on creating and managing notices in ISEMS (available on EHub).
- Regulatory Compliance Support Unit: poeo.licensing@environment.nsw.gov.au

References and further reading

OEH policies and guidelines

Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010 (DECCW 2010):
www.environment.nsw.gov.au/licences/consultation.htm

Aboriginal Places: DECC guidelines for the assessment and gazettal of Aboriginal Places under section 84 of the National Parks and Wildlife Act 1974 (DECC 2008): under review – contact CCHD for a copy of this guide [internal audience]

Applying for an Aboriginal Heritage Impact Permit: Guide for applicants (OEH 2011):
www.environment.nsw.gov.au/licences/applyforahip.htm

Code of Ethical Conduct (DECC 2007): www.environment.nsw.gov.au/whoweare/ethics.htm

Code of Practice for the Archaeological Investigation of Aboriginal Objects in NSW (DECCW 2010):
www.environment.nsw.gov.au/licences/archinvestigations.htm

Determination Guidelines for the Review of Environmental Factors (DECCW 2011):
deccnet/epa/REFGuidelines.htm [internal audience]

EPRG Operating Principles (DECCW 2010): ehub/organisation/EPRG/index.htmh [internal audience]

EPRG Work Plan 2010–2011 (DECCW 2010): ehub/organisation/EPRG/index.htm [internal audience]

Guidance for Considering Section 90K Factors (OEH 2011): ehub/regulation/ach.htm [internal audience]

Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW (OEH 2011): www.environment.nsw.gov.au/licences/investassessreport.htm

Guidelines for Managing External Complaints and Allegations (DEC 2006):
ehub/governance/externalcomplaintsandallegations.htm [internal audience]

Operational Policy: Protecting Aboriginal cultural heritage (OEH 2011):
www.environment.nsw.gov.au/licences/internalachpolicy.htm

Powers of Authorised Officers: A guide to your powers under environment protection legislation (DEC 2006): www.environment.nsw.gov.au/mao/powersao.htm

Proponents Guidelines for the Review of Environmental Factors (DECCW 2011):
www.environment.nsw.gov.au/protectedareas/developmntadjoiningdecc.htm

OEH online resources

OEH webpages

- AHIPs: www.environment.nsw.gov.au/licences/Section87Section90.htm
- AHIP application forms: www.environment.nsw.gov.au/licences/AHIPforms.htm
- AHIMS: www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm
- Public register (details of approved AHIPs and other AHIP-related matters): www.environment.nsw.gov.au/licences/ahipregister.htm
- Regulation of Aboriginal cultural heritage: www.environment.nsw.gov.au/licences/achregulation.htm

EHub webpages (internal)

- Aboriginal cultural heritage (EPRG): ehub/regulation/ach.htm
- Delegations (LSB): ehub/legal/delegations.htm
- Environmental planning and assessment (PWG/EPRG): deccnet/epa/

- Legal Eyes (LSB):
 - [*2001/11 – Environmental incidents involving corporations and the concept of vicarious liability*](#)
 - [*2003/03 – Licences and notices may only be issued to a legal entity. Contracts may only be signed by a legal entity. Who or what is that?*](#)
 - [*2004/08 – Service of notices, licences and other statutory instruments only by Registered Post*](#)
 - [*2005/05 – Drafting enforceable legal instruments*](#)
 - [*2008/10 – Checklist for decision-makers*](#)
 - [*2008/11 – Legal principles for decision-makers*](#)
 - [*2008/12 – Difference between judicial review and merit appeals*](#)
 - [*2009/08 – How do co-management agreements affect projects and decisions made across DECC?*](#)

Compliance and enforcement tools

Warning letters

- Guidelines, other, warning letter: ehub/regulation/guidelines.htm

Investigations

- Specialist Investigations Unit (SIU) webpage (includes guidelines and pro-formas and information on SIU, such as search and seizure, OEH official caution letter, warrant application, EPRG/SIU Joint Investigation Management Plan): ehub/legal/legalandinvestigations.htm
- EPRG Approach to Investigations and Prosecutions: ehub/legal/investigations.htm

Compliance audits

- EHub compliance webpage (guidance on compliance audits and assessing responses to non-compliance; POEO-centric but still applicable to Aboriginal cultural heritage regulation): ehub/regulation/compliance.htm

Penalty notices

- Guidelines, other, penalty notice: ehub/regulation/guidelines.htm
- EPA Prosecution Guidelines (Section E which discusses penalty notices): www.environment.nsw.gov.au/legislation/prosguide/prosecutionguidelines_sectionE.htm
- Legal Eyes: ehub/legal/legaleyes.htm
 - [*1997/10 – Increase in penalty units*](#)
 - [*2002/12 – Penalty notice payment options and IPB codes*](#)
 - [*2006/11 – Using the correct Fixed Penalty Handbook to issue penalty notices*](#)
- NPW Act fixed penalty handbook (for penalty codes):
Most current version of the handbook: ehub/legal/officers.htm and also at ehub/legal/investigations.htm (as at 6 November 2010 – the handbook is updated regularly)
[*Legal Eye 2010/03 – New procedures for issuing official cautions and conducting internal reviews of penalty notices*](#)

Remediation directions

- Appendix A1 in *Operational Policy: Protecting Aboriginal cultural heritage* – www.environment.nsw.gov.au/licences/internalachpolicy.htm
- [*Legal Eye 2011/05: Guide to issuing remediation directions under the National Parks and Wildlife Act 1974*](#) (currently addresses threatened species but still relevant to Aboriginal cultural heritage due to the overlap of the legislation for remediation directions for this area as well as threatened species)

Prosecutions

- EPA Prosecution Guidelines: www.environment.nsw.gov.au/legislation/prosguid.htm

Stop work orders

- [*Legal Eye 2011/09: Stop work orders under the NPW Act and TSC Act*](#)
- Appendix A1 in *Operational Policy: Protecting Aboriginal cultural heritage* – www.environment.nsw.gov.au/licences/internalachpolicy.htm

Interim Protection Orders

- Appendix A1 in *Operational Policy: Protecting Aboriginal cultural heritage* – www.environment.nsw.gov.au/licences/internalachpolicy.htm
- Seek advice from Legal Services Branch

Powers of authorised officers

- EHub authorised and enforcement officers webpage: ehub/legal/officers.htm
- *Powers of Authorised Officers* (POEO-centric but still helpful, as now POEO powers have been adopted for administering the NPW Act): www.environment.nsw.gov.au/mao/powersao.htm
- [*Legal Eye 2008/01: Restrictions on OEH authorised officers entering and searching residential premises*](#)

Risk management

- EHub risk management webpage (includes guidelines for managing external complaints and allegations): ehub/governance/riskmgt.htm

External publications/websites

Australian Securities and Investments Commission (for company searches): www.asic.gov.au

Legislation

- [*Environmental Planning and Assessment Act 1979*](#)
- [*National Parks and Wildlife Act 1974*](#)
- [*National Parks and Wildlife Regulation 2009*](#)
- [*Protection of the Environment Administration Act 1991*](#)
- [*Protection of the Environment Operations Act 1997*](#)



**Environment,
Climate Change
& Water**

**Due Diligence Code of Practice
for the Protection of Aboriginal Objects
in New South Wales**

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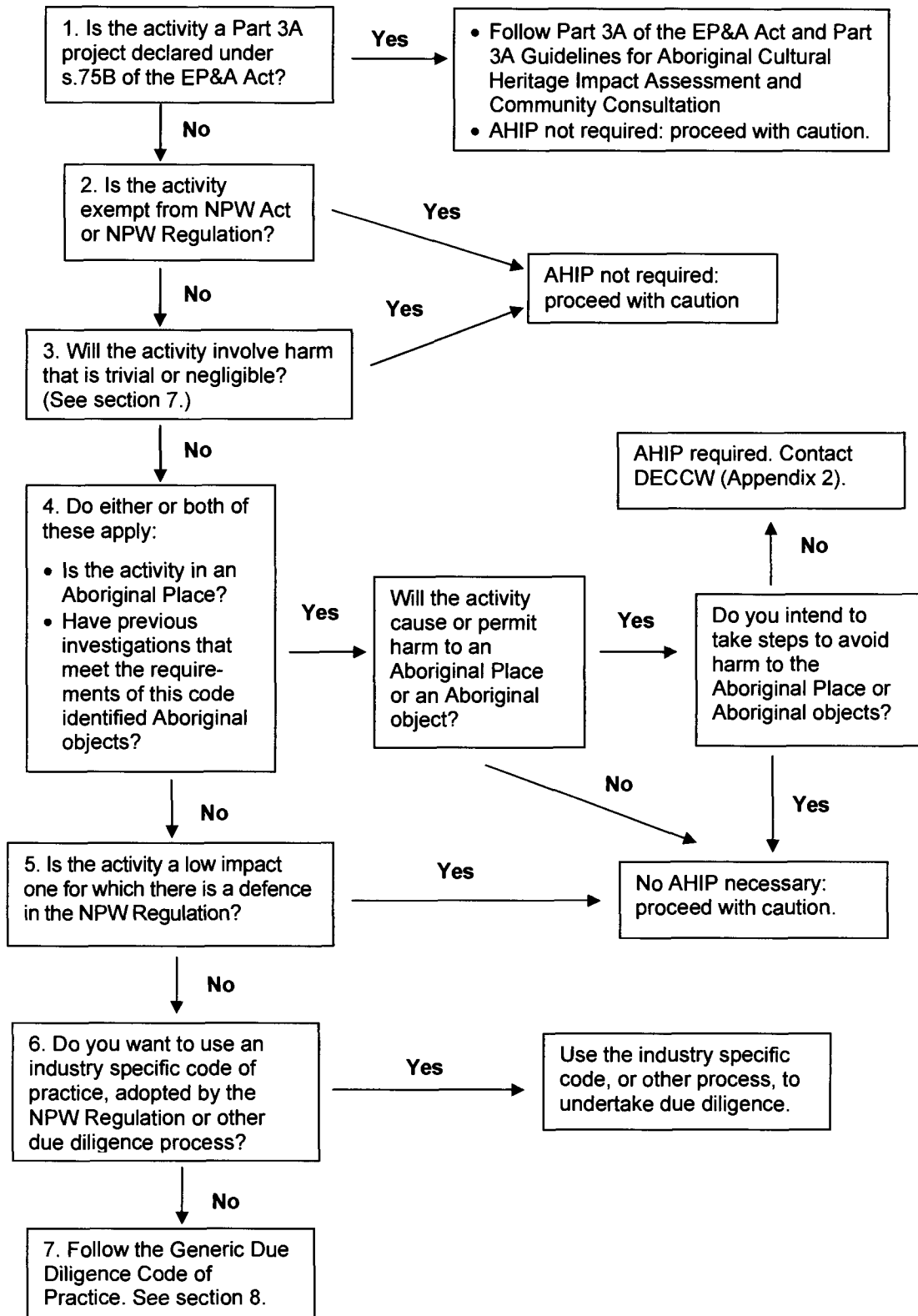
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1 Do you need to use this due diligence code?



2 Purpose of this code of practice

This code of practice is to assist individuals and organisations to exercise due diligence when carrying out activities that may harm Aboriginal objects and to determine whether they should apply for consent in the form of an Aboriginal Heritage Impact Permit (AHIP).

The *National Parks and Wildlife Act 1974* (NPW Act) provides that a person 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 unknowingly harm an object without an AHIP.

The NPW Act allows for a generic code of practice to explain what due diligence means. Carefully following this code of practice, which is adopted by the National Parks and Wildlife Regulation 2009 (NPW Regulation) made under the NPW Act, would be regarded as 'due diligence'. This code of practice can be used for all activities across all environments.

This code sets out the reasonable and practicable steps which individuals and organisations need to take in order to:

- 1 identify whether or not Aboriginal objects are, or are likely to be, present in an area
- 2 determine whether or not their activities are likely to harm Aboriginal objects (if present)
- 3 determine whether an AHIP application is required.

If Aboriginal objects are present or likely to be present **and** an activity will harm those objects, then an AHIP application will be required. Information about the permits and how to apply for them can be obtained through the Department of Environment, Climate Change and Water (DECCW) website at www.environment.nsw.gov.au/licences/index.htm.

3 Who should use this code?

Section 1 explains if you need to follow the due diligence process described in this code. This code can be used by individuals or organisations who are contemplating undertaking activities which could harm Aboriginal objects. This code will provide a process whereby a reasonable determination can be made as to whether or not Aboriginal objects will be harmed by an activity, whether further investigation is warranted and whether the activity requires an AHIP application.

If through this or any other process that meets the standards of this code, such as an environmental impact assessment, you have already taken reasonable steps to identify Aboriginal objects in an area subject to a proposed activity and it is already known that Aboriginal objects will be harmed or are likely to be harmed by an activity, then an application should be made for an AHIP.

4 How does the code link to other planning processes?

4.1 Development under Part 4 EP&A Act and activities under Part 5 EP&A Act

Consideration of the potential impacts of development on Aboriginal heritage is a key part of the environmental impact assessment process under the *Environmental Planning and Assessment Act 1979* (EP&A Act). The standards in this code can be used or adapted by proponents to inform the initial assessment of the environmental impacts of an activity on Aboriginal heritage. An environmental impact assessment which meets all of the requirements of this code will satisfy the due diligence test. Alternatively, you could adapt the requirements of this code, provided it still meets the ordinary meaning of exercising due diligence (see section 7.7).

If it is found through this initial assessment process that Aboriginal objects will or are likely to be harmed, then further investigation and impact assessment will be required to prepare information about the types of objects and the nature of the harm. This is further explained at step 5 in section 8. If you are going to harm a known Aboriginal object you will need to apply for an AHIP. In this situation, the need to obtain the AHIP is in addition to any approval under the EP&A Act (unless the project is subject to Part 3A EP&A Act).

4.2 Major projects under Part 3A EP&A Act

If your activity is a declared Part 3A project under s.75B of the EP&A Act you should refer to the 2005 (draft) *Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (as amended from time to time). These guidelines are available from the Department of Planning (see section 7).

4.3 Exempt and complying development under the EP&A Act

The due diligence process can still apply to an activity that is exempt or complying development within the meaning of the EP&A Act. However, if the exempt or complying development is a low impact activity as defined by the NPW Regulation then you may have a defence under the NPW Act and do not need to follow due diligence in carrying out the activity. Refer to section 7.

5 Do I need to consult?

Consultation with the Aboriginal community is not a formal requirement of the due diligence process. However, proponents may wish to consider undertaking consultation if it will assist in informing decision-making.

The following organisations can assist with identifying Aboriginal people who may hold cultural knowledge relevant to determining the significance of Aboriginal objects and or places:

- the relevant DECCW EPRG regional office (see Appendix 2)
- the relevant Local Aboriginal Land Council(s)¹
- the Registrar, *Aboriginal Land Rights Act 1983*, for a list of Aboriginal owners²
- the National Native Title Tribunal for a list of registered native title claimants, native title holders and registered Indigenous Land Use Agreements³

¹ www.alc.org.au

² www.oralra.nsw.gov.au

- NTSCorp Limited⁴
- the relevant local council(s)
- the relevant catchment management authorities for contact details of any established Aboriginal reference group.

If at any point an application is made for an AHIP then the consultation must be undertaken in accordance with the requirements in cl.80C of the NPW Regulation.

These requirements may also be followed where there is uncertainty about potential harm to Aboriginal objects and Aboriginal Places and you are undertaking an investigation and assessment of Aboriginal cultural heritage.

6 What are the advantages of due diligence?

In the context of protecting Aboriginal cultural heritage, due diligence involves taking *reasonable and practicable measures* to determine whether your actions will harm an Aboriginal object and, if so, what measures can be taken to avoid that harm.

There are several advantages to having a due diligence process for assessing potential harm to Aboriginal objects in that it:

- assists in avoiding unintended harm to Aboriginal objects
- provides certainty to land managers and developers about appropriate measures for them to take
- encourages a precautionary approach
- provides a defence against prosecution if the process is followed
- results in more effective conservation outcomes for Aboriginal cultural heritage.

7 Do you need to use this due diligence code?

Section 1 provides guidance on questions to ask to determine whether you need to follow this due diligence process.

7.1 Is the activity a declared project under Part 3A of the EP&A Act?

Where a project is seeking approval under Part 3A you need to identify, in the project application or concept plan application and any accompanying Preliminary Environmental Assessment, if the project will harm Aboriginal objects. If your project is a declared Part 3A project under s.75B of the EP&A Act, and you have been issued the Director General's requirements in relation to Aboriginal objects, you do not need to apply for an AHIP to harm Aboriginal objects under the NPW Act provided you follow these Director General's requirements and any conditions of approval.

You should refer to the 2005 (draft) *Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (as amended from time to time). These guidelines are available from the Department of Planning.

The above does not apply:

³ www.nntt.gov.au

⁴ www.ntscorp.com.au

- where a project was approved under Division 4 of Part 5 (now repealed) of the EP&A Act – in this situation an AHIP will be required if the activity proposes to harm Aboriginal objects
- where a project is approved under Part 3A of the EP&A Act but subsequent applications are sent back to the consent authority (usually a local council) to determine under Part 4 of the EP&A Act (for example, some staged development or concept plan approvals) – in this situation any Aboriginal heritage matters not already covered by the Part 3A approval may still require an AHIP.

In these situations you should follow the steps in section 8 or some other due diligence process.

7.2 Is the activity an exempt activity listed in the National Parks and Wildlife Act or other legislation?

The NPW Act provides exemptions to the offences of harming Aboriginal objects and Aboriginal Places in certain circumstances. These are for:

- Aboriginal people and their dependants when carrying out non-commercial traditional cultural activities
- any emergency fire fighting or bush fire hazard reduction work within the meaning of the *Rural Fires Act 1997* that is authorised or required to be carried out under that Act
- emergency activities carried out under the *State Emergency and Rescue Management Act 1989* that are reasonably necessary in order to avoid an actual or imminent threat to life or property
- works by, or directed by, authorised DECCW officers to protect or conserve Aboriginal objects
- anything specifically required or permitted under the express terms of a conservation agreement entered into under Division 12 of Part 4 of the NPW Act.

7.3 Will the activity involve harm that is trivial or negligible?

Section 86 of the NPW Act sets out a number of offences about 'harm' to an Aboriginal object. Harm means any act or omission that:

- destroys, defaces, or damages the object
- moves the object from the land on which it had been situated
- causes or permits the object to be harmed.

Harm does not include something that is trivial or negligible. Examples of what might be a trivial or negligible act are picking up and replacing a small stone artefact, breaking a small Aboriginal object below the surface when you are gardening, crushing a small Aboriginal object when you walk on or off a track, picnicking, camping or other similar recreational activities.

7.4 Is the activity in an Aboriginal Place or are you already aware of Aboriginal objects on the land?

Aboriginal places

Aboriginal Places are declared by the Minister under s.84 of the NPW Act. The location of Aboriginal Places is made available to the public via the government gazette (available through the NSW Department of Services, Technology and

Administration). The places are also listed on the DECCW website. The due diligence defence is not available for activities which harm Aboriginal places. If you wish to undertake an activity which may harm an Aboriginal place, you must apply for an AHIP.

Known Aboriginal objects

If as a result of previous investigations that meet the requirements of this code you already know that Aboriginal objects are in the area and that harm to these objects cannot be avoided, then you need to apply for an AHIP. If the previous investigation includes a search on the Aboriginal Heritage and Information Management System (AHIMS) database (maintained by DECCW's Country, Culture and Heritage Division) which is over 12 months old you must search AHIMS again to ensure that the information is still current.

7.5 Is the activity a low impact activity for which there is a defence in the Regulation?

The NPW Regulation removes the need to follow the due diligence process if you are carrying out a specifically defined low impact activity. As a result, you are not required to follow this code or any other due diligence process if your activity is listed below. It is important to note that this defence does not apply to situations where you already know there is an Aboriginal object. This defence does not authorise harm to known Aboriginal objects.

The following low impact activities are prescribed in the NPW Regulation as a defence against the strict liability s86 (2) offence.

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

- (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,*
 - (v) the construction of irrigation infrastructure, ground water bores or flood mitigation works,*
 - (vi) 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 meaning of harm an objects 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 ground water 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 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 anything referred to in paragraphs (a)-(g).*

If your activity is included in this list you are not required to go through the due diligence process. Proceed with caution, and if Aboriginal objects are later found when you are carrying out your activity, you must stop work, notify DECCW and apply for an AHIP if you intend to harm those known objects.

If your activity is not on this list go to 7.6.

7.6 Do you want to use an industry specific code of practice?

The NPW Act also provides that due diligence may be exercised by complying with a code of practice which is adopted under the NPW Regulation. These codes provide due diligence guidance tailored for specific types of activities or industries. Codes which have been adopted are the:

- Plantation and Reafforestation Code (being the Appendix to the Plantations and Reafforestation (Code) Regulation 2001) as in force on 15 June 2010
- Private Native Forestry Code of Practice approved by the Minister for Climate Change and the Environment and published in the Gazette on 8 February 2008⁵
- 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 your activity is subject to an industry specific code that has been adopted by the NPW Regulation, you can follow that code instead of the requirements of this generic code.

Other industry associations may wish to develop codes of practice and DECCW will consider their adoption on a case by case basis.

If your activity is not subject to an industry specific code, go to section 8.

7.7 Do you wish to follow your own procedure?

You can follow your own due diligence process and manage your own risk.

Due diligence amounts to taking reasonable and practicable steps to protect Aboriginal objects. This generic code provides one process for satisfying the due diligence requirements of the NPW Act.

It is not mandatory to follow this code. An individual or corporation can take other measures, provided that such measures are objectively reasonable and practicable and meet the ordinary meaning of exercising due diligence.

⁵ www.environment.nsw.gov.au/pnff/index.htm

For example, if your proposed activity requires environmental impact assessment under the EP&A Act which includes appropriate Aboriginal cultural heritage assessment, then due diligence could be exercised through that assessment rather than through a separate assessment that specifically follows the steps in this code. A Statement of Environmental Effects (SEE), a Review of Environmental Factors (REF) or an Environmental Impact Statement (EIS) under Part 4 or Part 5 of the EP&A Act can be used to satisfy the due diligence process if it adequately addresses Aboriginal cultural heritage issues.

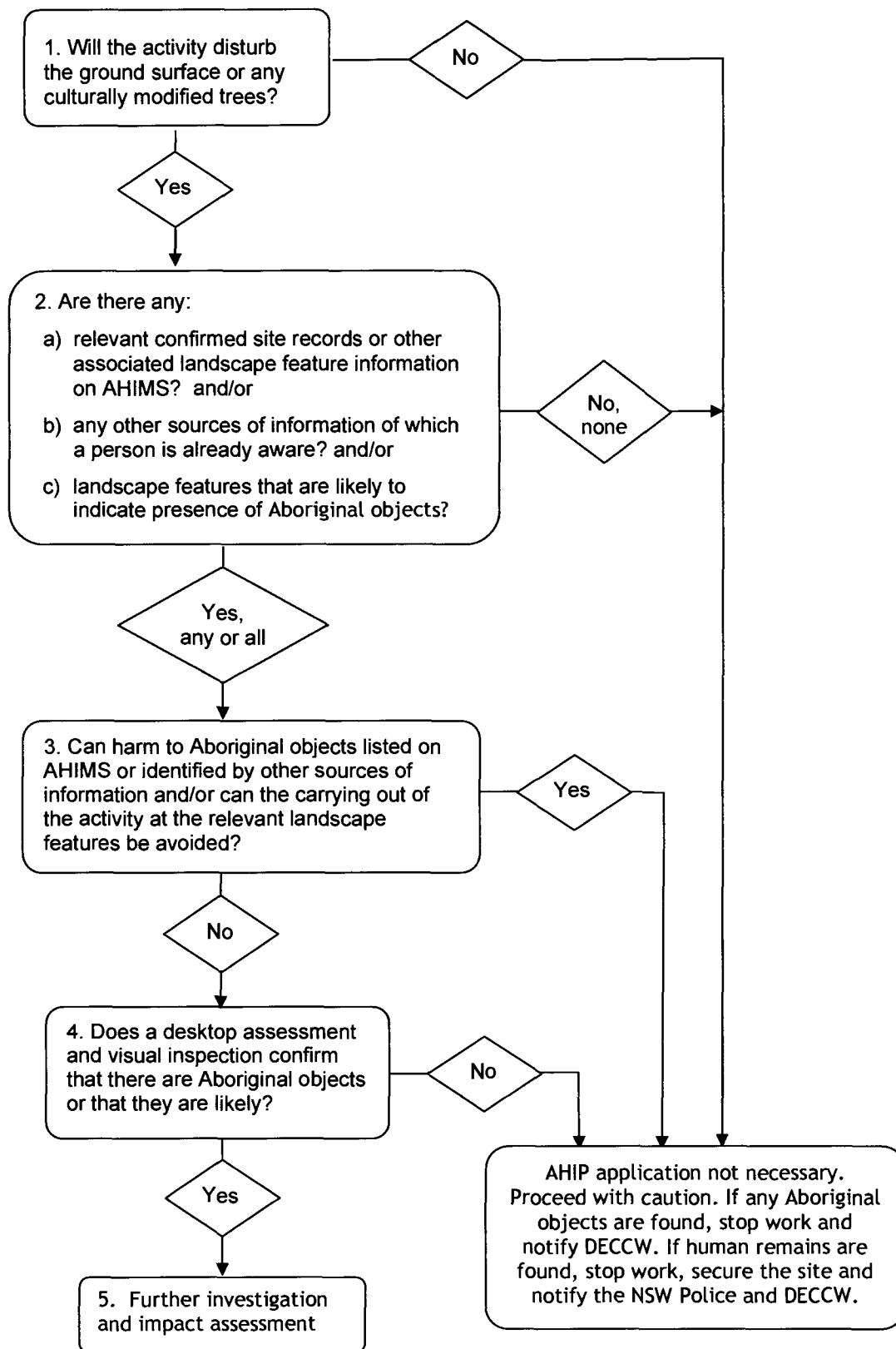
It is important that your due diligence measures are documented clearly and that these records are kept.

DECCW will not approve or certify a person's compliance with their due diligence requirements carried out under this or any other code. This is the responsibility of the company or individual doing the activity.

7.8 Follow the due diligence code of practice

If none of the above steps apply to your activity, to establish due diligence you must proceed through the generic due diligence process outlined in the flowchart in section 8 and explained further in that section.

8 The generic due diligence process



Step 1. Will the activity disturb the ground surface?

The first question to ask in the due diligence process is, Will the activity disturb the ground surface or any culturally modified trees? If an activity will disturb the ground surface there is a higher likelihood that Aboriginal objects will be harmed.

Disturbance of the ground surface is often significant when machinery is used to dig, grade, bulldoze, scrap, plough, or drill the ground surface for the purpose of, for example, building a structure or removing vegetation.

If your activity will not disturb the ground surface or any culturally modified trees then you can proceed with caution without applying for an AHIP.

If the activity will disturb the ground surface or any culturally modified trees then check the AHIMS database – step 2a.

Step 2a. Search the AHIMS database and use any other sources of information of which you are already aware

You should search the AHIMS database and check whether any Aboriginal sites have been recorded in the area where you are proposing to carry out your activity. There may also be additional landscape or other contextual information, relevant to the area of your proposed activity on AHIMS.

Information on AHIMS searches is available on DECCW's website.⁶

The initial web-based search of AHIMS is free and you will be able to print the results of your search for record keeping purposes. For the purposes of due diligence you may rely on the search results for 12 months. (See section 10 for record keeping recommendations for the due diligence process.)

If the results of the initial AHIMS search indicate that AHIMS contains information about recorded Aboriginal objects in the area of your proposed activity you must obtain copies of those records. Contact the AHIMS registrar by faxing the request form or submitting the request form over the internet. Costs may apply depending on the type of information you are asking for. There may also be restrictions in providing culturally sensitive information.

After obtaining records from AHIMS of any recorded Aboriginal objects you should confirm that these objects can be located in the area where your activity is proposed. If you think the information on AHIMS is not up to date or is inaccurate you should contact the AHIMS registrar on 02 9585 6471, 02 9585 6345 or 02 9585 6157 for further advice.

If you are aware of any other sources of information, you need to use these to identify whether or not Aboriginal objects are likely to be present in the area. Other sources of information can include previous studies, reports or surveys which you have commissioned or are otherwise aware of.

Go to step 2b.

Step 2b. Activities in areas where landscape features indicate the presence of Aboriginal objects

Regardless of whether your AHIMS search indicates known Aboriginal objects, you still need to consider whether Aboriginal objects are likely to be in the area of the proposed activity having regard to the following landscape features.

⁶ www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm

Aboriginal objects are often associated with particular landscape features as a result of Aboriginal people's use of those features in their everyday lives and for traditional cultural activities. Examples of such landscape features are rock shelters, sand dunes, waterways, waterholes and wetlands. Therefore it is essential to determine whether the site contains landscape features that indicate the likely existence of Aboriginal objects.

Consequently, if your proposed activity is:

- within 200m of waters⁷, or
- located within a sand dune system⁸, or
- located on a ridge top, ridge line or headland, or
- located within 200m below or above a cliff face, or
- within 20m of or in a cave, rock shelter, or a cave mouth

and is on land that is not disturbed land (see Definitions) then you must go to step 3.

If after completing steps 2a and 2b it is reasonable to conclude that there are no known Aboriginal objects or a low probability of objects occurring in the area of the proposed activity, you can proceed with caution without applying for an AHIP.

Step 3. Can you avoid harm to the object or disturbance of the landscape feature?

This step only applies if your activity is on land that is not disturbed land or contains known Aboriginal objects.

Where as a result of step 2a you think it is likely that there are Aboriginal objects present in the area of the proposed activity, you need to decide whether you can avoid the harm to those objects.

Where as a result of step 2b you have concluded that the landscape features listed are present, you need to decide whether you can move your activity away from the area with the landscape feature(s) so as to avoid disturbing any Aboriginal objects which may be present.

Possible solutions may include reducing the area of a building footprint, changing its orientation, re-positioning built elements, re-routing infrastructure trenching or incorporating a no-development area into the site design.

If you can't avoid harm to the object or disturbance of the landscape feature(s) you must go to step 4.

If you can avoid harm to the object and disturbance of the landscape feature(s) you can proceed with caution without applying for an AHIP.

Step 4: Desktop assessment and visual inspection

This step only applies if your activity is on land that is not disturbed land or contains known Aboriginal objects.

⁷ 'Waters' means the whole or any part of: any river, stream, lake, lagoon, swamp, wetlands, natural watercourse, tidal waters (including the sea). Note: the boundary of tidal waters is defined as the high water mark.

⁸ Refers to sand ridges and sand hills formed by the wind, usually found in desert regions, near a lake or in coastal areas. In areas of western NSW, windblown dunes can occur along the eastern edges of ephemeral lakes (called lunettes dunes). They can also occur along the banks of rivers.

The assessment process is primarily a desktop exercise that involves examination and collation of the readily available information. The assessment must consider the area of the proposed activity as a whole, not just particular areas where any Aboriginal objects have been recorded on AHIMS or areas where landscape features are located.

At a minimum the information reviewed as part of the desktop assessment should include existing knowledge of Aboriginal cultural heritage gleaned from previous heritage studies or reports for the area, including any archaeological studies on AHIMS. There may be some restrictions in providing culturally sensitive information to you. Where this is the case DECCW will provide advice on how to proceed.

You must undertake a visual inspection of the area to see if Aboriginal objects can be identified or are likely to be present below the surface. This visual inspection must be done by a person with expertise in locating and identifying Aboriginal objects. This person with expertise could be an Aboriginal person or landholder with experience in locating and identifying Aboriginal objects or a consultant with appropriate qualifications or training in locating and identifying Aboriginal objects.

Where either the desktop assessment or visual inspection indicates that there are (or are likely to be) Aboriginal objects in the area of the proposed activity, more detailed investigation and impact assessment will be required. This will need to be done by a person with expertise in Aboriginal cultural heritage management. Go to step 5.

Where the desktop assessment or visual inspection does not indicate that there are (or are likely to be) Aboriginal objects, you can proceed with caution without an AHIP application.

Step 5. Further investigations and impact assessment

DECCW's website has further information about how to do a detailed investigation and impact assessment and the procedures for applying for an AHIP.

If after this detailed investigation and impact assessment you decide that harm will occur to Aboriginal objects then an AHIP application must be made.

For information that is required to support an application for an AHIP (including impact assessment and community consultation) and other relevant information see www.environment.nsw.gov.au/conservation/aboriginalculture.htm#whattodo.

All AHIP applicants must undertake consultation in accordance with clause 80C of the NPW Regulation. These requirements may also be followed where there is uncertainty about potential harm and you are undertaking a cultural heritage assessment.

If you decide an AHIP application is not necessary

If you have followed this code and at any point have reasonably decided that an AHIP application is not necessary either because Aboriginal objects are not present or, if they are present, harm to those objects can be avoided, you can proceed with caution.

If, however, while undertaking your activity you find an Aboriginal object you must stop work and notify DECCW and you may need to apply for an AHIP. Some works may not be able to resume until you have been granted an AHIP and you follow the

conditions of the AHIP. Further investigation may be required depending on the type of Aboriginal object that is found.

If human skeletal remains are found during the activity, you must stop work immediately, secure the area to prevent unauthorised access and contact NSW Police and DECCW.

The NPW Act requires that, if a person finds an Aboriginal object on land and the object is not already recorded on AHIMS, they are legally bound under s.89A of the NPW Act to notify DECCW as soon as possible of the object's location. This requirement applies to all people and to all situations, including when you are following this code.

If a person finds an Aboriginal object which is not recorded on AHIMS, they should contact DECCW as soon as practicable. Notification procedures can be found at: www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm

The due diligence process is shown diagrammatically at the beginning of this section.

9 What do I do with the results of due diligence?

Once you have gone through the due diligence process and you want to go ahead with your activity, you have several options including:

- 1 proceeding with the activity without an AHIP if you have found no evidence of Aboriginal objects using this due diligence code
- 2 amending the proposed activity to avoid harming Aboriginal objects then proceed without applying for an AHIP
- 3 applying for an AHIP, and if an AHIP is granted, following the AHIP conditions as you proceed with the activity.

The decision about which option to choose is the responsibility of the proponent using the information obtained through exercising due diligence.

10 Record keeping

Under the NPW Act, a person has a defence to any prosecution alleging harm to an Aboriginal object if they show that they exercised due diligence to identify Aboriginal objects and reasonably decided that no Aboriginal objects would be harmed.

Consequently it is strongly recommended that a person keep a record of the actions they took and the decisions they made in following the due diligence process.

11 Some background and contextual information

11.1 Aboriginal people and their cultural heritage

Aboriginal people have occupied the NSW landscape for at least 40,000 years. The evidence and important cultural meanings relating to this occupation are present throughout the landscape, as well as in documents and in the memories, stories and associations of Aboriginal people. Therefore, activities that disturb the landscape may impact on Aboriginal cultural heritage.

Aboriginal cultural heritage consists of places and items that are of significance to Aboriginal people because of their traditions, observances, customs, beliefs and history. It is evidence of the lives of Aboriginal people right up to the present. Aboriginal cultural heritage is dynamic and may comprise tangible or intangible elements. As such, it includes things made and used in earlier times, such as stone tools, art sites and ceremonial or burial grounds, as well as more recent evidence such as old mission buildings, massacre sites and cemeteries. Aboriginal cultural heritage is also represented in documents and in the memories, stories and associations of Aboriginal people.

11.2 DECCW's responsibilities for protecting Aboriginal cultural heritage

Under the NPW Act DECCW is responsible for protecting Aboriginal objects and Aboriginal Places throughout NSW. The objects of the NPW Act must be given effect whenever the Minister, the Director General or any member of staff of DECCW carries out their functions under the NPW Act. The objects of the NPW Act include:

... the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to: places, objects and features of significance to Aboriginal people...2A(1)(b)(i)

The NPW Act also states that the objects of the Act are to be achieved by applying the principles of ecologically sustainable development 2A(2).

DECCW is responsible for protecting Aboriginal objects and Aboriginal Places by assessing the impacts of proposed activities on Aboriginal objects and Aboriginal Places and only allowing acceptable impacts to occur. DECCW assesses applications for AHIPs to harm Aboriginal objects and Places, and includes conditions in AHIPs to minimise damage to or disturbance of those objects and Places. DECCW is also responsible for assessing proposals for Aboriginal Places and making recommendations to the Minister to declare Aboriginal Places to protect both their tangible and intangible values.

DECCW works closely with Aboriginal communities on conservation works for Aboriginal cultural heritage, such as the protection and restoration of Aboriginal objects such as rock art, middens, burials and culturally modified trees, and is also involved in the repatriation of Aboriginal human remains.

11.3 What is an Aboriginal object?

This code applies only to Aboriginal objects as defined in the NPW Act (see Definitions). Appendix 1 provides some examples and guidance on objects. Examples of Aboriginal objects include, but are not limited to:

- human skeletal remains
- Aboriginal culturally modified trees
- middens
- rock art (paintings and engravings)
- stone artefacts
- raised earth rings
- grinding grooves
- rock shelters
- earth mounds
- hearths
- stone arrangements.

12 Offences for harming Aboriginal objects

Section 86 of the NPW Act sets out a number of offences about 'harm' or desecration to an Aboriginal object. Harm means any act or omission that:

- destroys, defaces or damages the object
- moves the object from the land on which it had been situated, or
- causes or permits the object to be harmed.

Harm does not include something that is trivial or negligible. Examples of what might be a trivial or negligible act are picking up and replacing a small stone artefact, breaking a small Aboriginal object below the surface when you are gardening, or crushing a small Aboriginal object when you walk on a track.

There are now two types of offences for harming an Aboriginal object:

- 1 an offence of harming or desecrating an object which a person knows is an Aboriginal object (a 'knowing offence')
- 2 an offence of harming an object whether or not a person knows it is an Aboriginal object (a 'strict liability offence').

The maximum penalty for the knowing offence is \$550,000 or \$275,000 (depending on whether there are aggravating circumstances) and 1 or 2 years' goal for an individual. For a corporation the maximum penalty for the knowing offence is \$1.1 million. The maximum penalty for the strict liability offence is \$110,000 or \$55,000 (depending whether there are aggravating circumstances) for an individual or \$220,000 for a corporation.

12.1 Defences or exemptions for harming Aboriginal objects

The NPW Act and NPW Regulation provide several defences and exemptions for both types of offence relating to harm to an Aboriginal object. Some of these defences and exemptions are explained in the diagram in section 1. The due diligence defence for the strict liability offence is explained in section 8. It is also a defence if a person holds a current AHIP and complies with the conditions of the AHIP.

In addition to the defences in the NPW Act and NPW Regulation the general defence of 'honest and reasonable mistake' would also apply to the strict liability offence.

13 Authorship and Certification of Code

The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW has been prepared by the Department of Environment, Climate Change and Water NSW.

This code complies with all the requirements of the Minimum Standards for Codes of Practice for the Protection of Aboriginal Objects in NSW gazetted on 10 September 2010.



Lisa Corbyn
Director General
DECCW
13 September 2010

Definitions

Aboriginal Heritage Impact Permit	a permit issued by the Director General of DECCW (or their delegate) allowing a person to desecrate or harm an Aboriginal Place or Aboriginal objects.
Aboriginal object (as defined in the NPW Act)	any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises NSW, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.
Aboriginal Place (as defined in the NPW Act)	a place declared under s.84 of the NPW Act that, in the opinion of the Minister, is or was of special significance to Aboriginal culture. Information about the location of Aboriginal Places in NSW can be found on the DECCW website at www.environment.nsw.gov.au/nswcultureheritage/PlacesOfSignificance.htm.
Aboriginal culturally modified tree (as defined in the NPW Regulation)	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: • the deliberate removal, by traditional methods, of bark or wood from the tree, or • the deliberate modification, by traditional methods, of the wood of the tree.
activity	a project, development, activity or work (this term is used in its ordinary meaning, and does not just refer to an activity as defined by Part 5 EP&A Act).
disturbed land or land already disturbed by previous activity	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. Examples include ploughing, construction of rural infrastructure (such as dams and fences), construction of roads, trails and tracks (including fire trails and tracks and walking tracks), clearing vegetation, construction of buildings and the erection of other structures, 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) and construction of earthworks.
due diligence	taking reasonable and practical steps to determine whether a person's actions will harm an Aboriginal object and, if so, what measures can be taken to avoid that harm .
harm an Aboriginal object (as defined in the NPW Act)	• destroy, deface, damage an object • move an object from the land on which it is situated • cause or permit an object to be harmed.
Minister	Minister administering the NPW Act

Acronyms and abbreviations

AHIMS	Aboriginal Heritage Information Management System
AHIP	Aboriginal Heritage Impact Permit
DECCW	Department of Environment, Climate Change and Water NSW
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NPW Regulation	National Parks and Wildlife Regulation 2009

Appendix 1: Examples of Aboriginal objects

Stone artefacts are a common type of Aboriginal object, and include stone tools, spear points, surface scatters, grinding stones, ground-edge axes and other implements that were used for a variety of purposes, such as in the preparation of food or to make nets, baskets and other tools. Stone artefacts often have sharp edges, or are of a stone type that is different from the natural rock in the area.

Another type of stone artefact is a ground-edge axe, which can come in different shapes, but are usually round or oval. They are sometimes rounded and narrow at one end, and slightly broader and straighter at the cutting edge.

Because stone artefacts do not rot or rust they are often the primary physical evidence of Aboriginal occupation in a particular area. They can also provide important information about past Aboriginal people's settlement patterns, lifestyle and other connections, such as trade.

The presence of stone artefacts in an area may indicate that either a place was previously used by Aboriginal people, or that the area continues to be a place of significance, which may include sensitive sites, such as men's or women's areas which may require a buffer zone to maintain. In some cases it will be appropriate to consider removing stone artefacts from where they are found (salvage), following advice from DECCW and Aboriginal groups.

Stone artefacts are often small, so they can be difficult to protect. Erosion and weathering caused by activities such as ditch digging and ploughing can disturb stone artefacts. They can also be broken when trampled by animals, or when run over by vehicles.



Stone artefacts. Mark Flanders/DECCW

Surface artefact scatters are the material remains of Aboriginal people's activities. Scatter sites usually contain stone artefacts, but other material such as charcoal, animal bone, shell and ochre may also be present. The size of scatters may vary from one square metre to larger areas, and may contain from a few to thousands of artefacts.

Stone artefacts can be found almost anywhere Aboriginal people camped or lived, particularly around occupation sites, in sand dunes, rock shelters, caves, on ridges and near watercourses. Ground-axe edges may also be found near axe-grinding grooves or quarries.

Oven or hearth sites are the remains of a domestic open fireplace. Domestic open fireplaces have been used in populated places throughout Australia to provide warmth and lighting. They are also used for cooking food and sometimes to signal from one group to another.

These hearths are roughly circular piles of burnt clay or heat fractured rock with associated charcoal fragments, burnt bone, shell and stone artefacts.



Hearth site. Stephen Meredith

Rock art includes paintings and drawings that generally occur in rock overhangs, caves and shelters. Stencils of hands, paintings or drawings of animal or people and animal tracks are common and have often been created using ochre, white pipeclay or charcoal.

Engravings commonly occur on open, flat surfaces of rock such as on sandstone outcrops, although some are found on vertical rock faces and in rock shelters. Examples of engravings include outlines of people or animals, but may also include patterns, tracks and lines.

Rock art is of high cultural significance to Aboriginal people, and many sites are still regarded as sacred or of ceremonial significance. Rock art sites are important links to the past for Aboriginal people today. They can also provide important information about the daily life and culture of Aboriginal people before European contact, and many sites are hundreds or thousands of years old.

Rock art sites can be easily damaged as they can be prone to erosion and vandalism. Touching rock art or disturbing a shelter floor in the immediate vicinity of the rock art can cause damage, as can movement on or over surfaces with rock art. Sites may also suffer from vegetation growth or removal. Effective management of rock art sites can include drainage, fencing, graffiti removal, and visitor control.



Mutawintji hand stencils. Pat Laughton/DECCW

Shell middens are commonly made up of the remains of edible shellfish, and could be the result of a single meal or many meals at the same location over many years. A midden may also contain fish and animal bones, stone tools, or charcoal. They can vary in size and depth. Middens are sometimes associated with burials.

Middens can be found on headlands, sandy beaches and dunes, around estuaries, swamps and tidal stretches of creeks and rivers, and along the banks of inland rivers, creeks and lands. Middens may also be found in the open or in rock shelters.

Middens can indicate that a place was, and may continue to be, a key meeting place of significance. Middens can also provide information about the environment that existed when Aboriginal people collected the shellfish, such as changes in species, and tools or raw materials that were used. Middens which contain burials are particularly significant.

Middens are amongst the most fragile cultural sites. They can be exposed by wind or degraded by human and animal activity. Effective management of midden sites may include stabilising the surface, such as by encouraging vegetation cover, or by restricting access to the site by erecting fencing.



Shell midden. Warren Mayers/DECCW

Axe grinding grooves are oval shaped indentations generally on flat and soft rock surfaces, such as sandstone outcrops. Aboriginal people made the grooves when shaping and sharpening stone axes by grinding them against the rock. Grooves can vary in size, shape and number. Sites with 20 to 60 grooves are not uncommon and some sites have more than 200.

Axe grinding grooves are important because they provide information about Aboriginal stone tool technology. They are often found along the edges of creeks, lakes or swamps as water was needed to keep the stone clean and cool. In areas where suitable outcrops of rock were not available, transportable pieces of stone were used for sharpening or grinding tools. Axe-grinding grooves provide important information about how stone tools were made.

As sandstone is relatively soft, it is prone to weathering, erosion and trampling by animals. Human activities such as mining, road infrastructure, damming, clearing, ploughing and construction can also destroy these sites. Management options can include stock and erosion control.



Axe grinding stones. Hilton Naden/DECCW

Aboriginal culturally modified (scarred and carved) trees are trees that show the scars caused by the removal of bark or wood for the making of, for example, canoes, vessels, boomerangs, shelters and medicines. The shape and size of the scar may indicate the purpose for which the bark or wood was removed from the tree. In some regions of NSW, trees were carved with intricate patterns and designs for ceremonial purposes, or to mark country boundaries or burials.

Carved trees associated with burial sites are usually in groups of two or more trees. Carved trees associated with ceremonial grounds may have also been used for educational purposes. Scarred and carved trees occur in various locations across NSW.

Scarred and carved trees are significant to the descendants of the Aboriginal people living today. They are becoming rarer in NSW as the trees decay, are burnt or are destroyed.

It is important to note that the defence to a prosecution contained in Clause 80B of the NPW Regulation relating to certain low impact activities does not apply in relation to any harm to an Aboriginal culturally modified tree. Ensuring that Aboriginal culturally modified trees are not harmed will likely include ensuring that effective buffer zones are used, as their significance is often part of the broader landscape.



Carrington scarred tree. Warren Mayers/DECCW

Quarry sites are sites where Aboriginal people manufactured stone tools or collected ochre for painting and decoration. Quarry sites may be found in areas of rock outcrops and can be identified by the presence of artefacts such as flaked stone. Quarry sites vary in size. They may be one or two flaked boulders or a single pit, but can also incorporate many large outcrops over large areas.

As stone was an important resource for Aboriginal people, quarries are often associated with other nearby Aboriginal sites and cultural material. In NSW a variety of stone types was quarried for particular purposes. Quarries also provide information about trade routes and other activities.

Human activities such as mining, road building, damming, clearing and construction can disturb or destroy Aboriginal quarries. Natural processes such as weathering and erosion can also cause the gradual breakdown of stone outcrops.

Aboriginal quarries can be protected by management actions such as by controlling stock and managing erosion.



Daruka axe quarry, Tamworth. Bruce Cohen/DECCW

Stone arrangements are found at places where Aboriginal people have positioned stones deliberately to form shapes or patterns, and can include large circular or linear arrangements, piles of stones, rock markers or more elaborate groupings that can depict animals or other designs. Aboriginal people also use stone arrangements for other purposes, such as for fish traps.

Stone arrangements have significant cultural heritage value because they are usually related to ceremonies, such as meetings or marriages. **Bora rings**, which are one or more raised earth rings, were used for male initiations. They are generally rare due to their vulnerability to disturbance. The stones are long lasting, but their arrangements can be damaged or destroyed. If stones are disturbed, the pattern and its significance may be lost. Ploughing, brush cutting, logging and large grazing animals can also cause disturbance.

Management options around Aboriginal stone arrangements can include stock, weed and erosion control.



Stone arrangement. M Sharp/DECCW

Burials include one of a variety of customs that Aboriginal people had for honouring the dead and laying them to rest; they were among the first people in the world to use cremation. However, Aboriginal burials may be found in a variety of landscapes throughout NSW, although most frequently they are found in middens, sand dunes, lunettes, bordering dunes and other sandy or soft sedimentary soils. Activities such as sand mining, stock grazing, ripping rabbit warrens, ploughing, trail bike riding and four-wheel car driving can devastate burial sites. Aboriginal ancestral remains are very sensitive and significant to Aboriginal people.

Landscape features and natural sacred sites are regarded as highly sacred sites to Aboriginal people. Such features include mountains, waterholes, caves, and rock formations. In addition, the flora and fauna that inhabit these landscapes also carry Aboriginal cultural significance. In some cases, an inspection of the immediate area will show no physical evidence of prior occupation or usage by Aboriginal people.

Further information about Aboriginal sites in NSW

Aboriginal scarred trees in New South Wales, a field manual (DEC and Andrew Long 2005), www.environment.nsw.gov.au/conservation/AboriginalScarredTrees.htm.

Lost but not forgotten: a guide to methods of identifying Aboriginal unmarked graves (NPWS 2003, www.environment.nsw.gov.au/nswcultureheritage/LostButNotForgotten.htm

Cultural landscapes and park management: a literature snapshot. A report for the cultural landscapes: connecting history, heritage and reserve management research project (Department of Environment and Climate Change 2008), www.environment.nsw.gov.au/resources/cultureheritage/07137cultlandresearch.pdf

Aboriginal culturally significant landscapes in the Hunter-Central Rivers Region, Hunter-Central Rivers CMA guide 2009, www.hcr.cma.nsw.gov.au/uploads/res/Publications/acsl.pdf

Site Identification, Victorian Mini Poster Series, Department of Planning and Community Development 2008, www.aboriginalaffairs.vic.gov.au/web7/aavmain.nsf/headingpagesdisplay/publications+forms+and+resourcesaav+mini-poster+series

Appendix 2: Contact details for DECCW EPRG Regional Offices

Metropolitan

Department of Environment, Climate Change and Water
Planning and Aboriginal Heritage Section
PO Box 668
Parramatta NSW 2124
Phone: (02) 9995 5000
Fax: (02) 9995 6900

North East

Department of Environment, Climate Change and Water
Planning and Aboriginal Heritage Section
Locked Bag 914
Coffs Harbour NSW 2450
Phone: (02) 6651 5946
Fax: (02) 6651 6187

North West

Department of Environment, Climate Change and Water
Environment and Conservation Programs
PO Box 2111
Dubbo NSW 2830
Phone: (02) 6883 5330
Fax: (02) 6884 9382

South

Department of Environment, Climate Change and Water
Landscape and Aboriginal Heritage Protection Section
PO Box 733
Queanbeyan NSW 2620
Phone: (02) 6229 7000
Fax: (02) 6229 7001

A map of DECCW EPRG branch boundaries is provided on the next page.

