

Operational Policy: Protecting Aboriginal Cultural Heritage

Department of **Environment & Climate Change** NSW



The objective of this operational policy is to provide an operational framework for DECC's Aboriginal cultural heritage regulatory responsibilities, which is practical, legally appropriate and will foster consistency across the State.

Except where otherwise stated in this document, this policy replaces all existing documents and policies outlining DECC's Aboriginal cultural heritage operational policy.

WARNING: You cannot rely on a printed version of this document to be current.

Always check the Department of Environment and Climate Change website to ensure that you have the latest version.

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Acronyms

ACH	Aboriginal cultural heritage
AHIMS	Aboriginal Heritage Information Management System
AHIP	Aboriginal Heritage Impact Permit
APEC principles	Aboriginal people, the environment and conservation principles
CHD	Culture and Heritage Division
DAA	Department of Aboriginal Affairs
DEC	Department of Environment and Conservation (NSW) (former name of DECC)
DECC	Department of Environment and Climate Change NSW
DG	Director-General of DECC
DoP	Department of Planning
EPA	Environment Protection Authority (now part of DECC)
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EPRD	Environment Protection and Regulation Division (former name of EPRG)
EPRG	Environment Protection and Regulation Group
ESD	ecologically sustainable development
LEP	Local Environmental Plan
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NPW Regulation	National Parks and Wildlife Regulation 2002
NPWS	National Parks and Wildlife Service (now part of DECC)
PAWS	Parks and Wildlife Services [Intranet site] ¹
PWG	Parks and Wildlife Group
R&C Branch	Reform and Compliance Branch (EPRG)
REP	Regional Environmental Plan
ROOKS	Regulatory Officers Online Knowledge System ²
SEPP	State Environmental Planning Policy

¹ The PAWS website can be accessed by DECC staff at: <http://decnet/Intranet/publish1.nsf/content/Home>.

² DECC staff can access ROOKS at: <http://g200b/rooks/> (migrated DECC computers only).

Glossary

Aboriginal Heritage Impact Permits	<p>The statutory instruments that DECC issues under s.87 and/or s.90 of the <i>National Parks and Wildlife Act 1974</i> (NPW Act):</p> <ul style="list-style-type: none">• s.87 Aboriginal Heritage Impact Permits Required to disturb or move an Aboriginal object or disturb land for the purposes of discovering an Aboriginal object.• s.90 Aboriginal Heritage Impact Permits Required to destroy, damage or deface an Aboriginal object or Aboriginal place.
Aboriginal object	<p>A 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).</p>
Aboriginal place	<p>A 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.</p>
AHIP applicant	<p>A person applying for a s.87 or s.90 AHIP, under the NPW Act.</p>
Impact	<p>Refers to those impacts listed under s.86 and/or s.90 of the NPW Act, i.e. knowing damage, destruction, defacement of Aboriginal objects and Aboriginal places (s.90); disturbance, movement etc. of Aboriginal objects (s.86).</p>
Minister	<p>Minister administering the NPW Act, i.e. the Minister for Climate Change, Environment and Water.</p>
Our clients / stakeholders	<p>AHIP applicants, proponents, local councils, the Department of Planning; particular client or stakeholder will depend on the nature of the proposal or issue being dealt with by DECC.</p>

This guide is an internal DECC document written to provide guidance to DECC staff only. It is not written to provide guidance to external parties and should not be used for this purpose or any other purpose. This guide will be subject to an internal review and the information contained within it may change.

1 About this policy

1.1 Intended audience

This operational policy is an internal DECC document, written for an internal audience. The document will be most relevant to the Environment Protection and Regulation Group (EPRG) Operations Division staff as it focuses on the regulation of Aboriginal cultural heritage by EPRG. Culture and Heritage Division (CHD) operational staff, Parks and Wildlife Group (PWG) staff and Legal Services Branch staff should also find some aspects of the policy useful.

1.2 Policy objective

The objective of this operational policy is to provide an operational framework for EPRG's in regulation of Aboriginal cultural heritage that is practical and legally appropriate and will foster consistency across the State.

1.3 Policy scope

This operational policy is a broad document that sets out the key policies that EPRG will apply when regulating the protection of Aboriginal cultural heritage. It is not intended to be exhaustive or detailed, but is rather an overarching document that leaves room for more detailed policies and procedures to be developed as required.

1.4 Intended outcomes

Over time, DECC expects the following outcomes as this operational policy is implemented within EPRG (and as further policies are developed to support it):

1. DECC devotes more time and resources to significant Aboriginal cultural heritage issues.
2. DECC reduces its administrative load and reduces the regulatory burden on its stakeholders.
3. DECC applies and effectively communicates our policies for protecting Aboriginal cultural heritage in a consistent way in its day-to-day work.

1.5 Links to other policies, procedures and guidelines

[Appendix A](#) provides an overview of the policy framework for Aboriginal cultural heritage protection. A list of relevant documents can also be found 'Further reading' (page 18)

This operational policy currently sits under DECC's *Cultural Heritage Strategic Policy*, which identifies broad directions for the protection and management of cultural heritage within DECC. This operational policy is also influenced by a number of other NSW Government and DECC policies (see section 3.1 'Guiding policies and principles', p 6).

This policy is also supported by a suite of policies, procedures and guidelines that set out more specific detail on aspects of Aboriginal cultural heritage protection (some of which are under revision or are yet to be developed). These detailed policies and guidelines are referenced throughout this document where relevant.

DECC is currently undertaking a substantial amount of work that is relevant to and will support the broad policies outlined in this document. Much of this work needs to be finalised before some of these policies can be fully implemented. See 'Work in Progress: Improving ACH Regulation Project' (available on [ROOKS](#)).

1.6 Review and update

This operational policy may need to be updated if:

- revisions are necessary in the course of early implementation
- legislative changes affect it, or
- there is significant policy change.

This operational policy will otherwise be routinely reviewed by Reform and Compliance Branch (EPRG):

- initially after 12 months of implementation, and
- then routinely every three years.

These reviews will evaluate the extent to which this operational policy has achieved its intended objective and outcomes.

2 Background information

2.1 Relevant legislation

[Appendix B](#) provides a detailed overview of the legislative framework for the protection of Aboriginal cultural heritage. The following subsections provide a brief summary.

2.1.1 National Parks and Wildlife Act 1974

The NPW Act, administered by DECC, is the primary legislation for the protection of Aboriginal cultural heritage in NSW. 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, s.85 of the NPW Act states that the Director-General (DG) is responsible for the protection of Aboriginal objects and 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 providing offences for unauthorised impacts. Aboriginal Heritage Impact Permits (AHIPs) are required for impacts to Aboriginal objects and places. AHIPs are issued under s.87 and/or s.90 of the NPW Act.

Although the NPW Act gives a high level of protection to known Aboriginal objects, recent court decisions have reinforced that Part 6 gives the DG express powers to consent to the damage, destruction or defacement of Aboriginal objects by development activities. 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).

2.1.2 Other Acts

Various State and Commonwealth assessment and planning processes are also relevant to Aboriginal cultural heritage. DECC has responsibilities in some of these areas. Most obviously, DECC 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 in Commonwealth legislation.

2.2 Aboriginal cultural heritage

The following description of Aboriginal cultural heritage is taken from DECC's *Guidelines for Aboriginal Cultural Heritage Impact Assessment & Community Consultation* for Part 3A developments (available on [ROOKS](#)).

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 physical (tangible) or non-physical (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 people have occupied the NSW landscape for at least 50 000 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, an activity that impacts on the landscape may impact on Aboriginal cultural heritage.

As with the heritage of all peoples, Aboriginal cultural heritage provides essential links between the past and present for Aboriginal people. It is an essential part of Aboriginal identity.

2.3 DECC's responsibilities

As mentioned in 2.1 above, the DG is responsible for protecting Aboriginal objects and places in NSW, particularly those on land reserved under the NPW Act. All DECC groups and divisions work towards meeting the DG's responsibilities under the Act.

CHD, PWG, EPRG and Legal Services Branch (LSB) have special obligations. They aim to work together to conserve and protect Aboriginal cultural heritage in a way that builds effective relationships and results in an efficient use of skills and resources. Working together is critical to achieving DECC's Aboriginal cultural heritage priorities and ensures effective and consistent delivery against DECC's obligations under the Act.

EPRG and CHD have developed a draft Partnership Agreement to clarify roles, avoid unnecessary duplication and identify areas where shared resourcing is beneficial. The Agreement identifies the lead division for any particular activity; that is, the division that will be accountable and responsible, on behalf of DECC. It also provides information about how the divisions will support each other. CHD and EPRG have a joint lead role for some priorities. See 'Work in Progress: Improving ACH Regulation Project' (available on [ROOKS](#)).

This Operational Policy focuses on the responsibilities of EPRG *only*.

2.4 EPRG's role

Broadly speaking, EPRG is responsible for delivering credible, strategic regulation across a wide variety of environment protection and conservation issues, including Aboriginal cultural heritage.³ We have a specific approval role in relation to Aboriginal cultural heritage when considering and determining applications for AHIPs. The AHIP process requires the assessment and evaluation of the Aboriginal heritage values of the Aboriginal object or place that may be potentially impacted upon by activities associated with development or other work. The consideration and determination of AHIPs are important processes which provide a significant degree of protection for Aboriginal objects and places.

As part of our role in considering and determining AHIPs, we might also have to follow certain procedures under the EP&A Act, such as:

- providing expert advice to the Department of Planning (DoP) on major projects subject to Part 3A of the EP&A Act (Part 3A suspends the need for an AHIP application)
- providing General Terms of Approval to DoP for integrated development subject to Part 4 of the EP&A Act (s.90 AHIPs only)
- being a 'determining authority' when an application is subject to Part 5 of the EP&A Act.

We also focus on:

- informing and advising DoP and councils on other environmental and land-use planning matters such as environmental planning instruments⁴
- investigating breaches of the NPW Act and undertaking strategic enforcement
- developing partnerships with other bodies to make best use of our skills and resources
- continually improving our regulatory processes.

³ *EPRD Divisional Plan 2006–2008*.

⁴ Environmental planning instruments: e.g. State Environmental Planning Policies (SEPPs), Local Environmental Plans (LEPs), Regional Environmental Plans (REPs).

Further information:

- *Guide to Determining and Issuing AHIPs* (available on [ROOKS](#))

See also 'Work in Progress: Improving ACH Regulation Project' (available on [ROOKS](#)).

2.5 Improving how we regulate

The NSW Government is committed to ensuring that regulation is appropriate, effective and efficient, with the objective of maximising net benefit to the community and minimising regulatory burden and red tape.⁵

DECC has long recognised that reform of Aboriginal cultural heritage approvals and assessment processes is required. As part of our commitments under the NSW Aboriginal Affairs Plan *Two Ways Together*, DECC will be reviewing the NPW Act and other relevant legislation to focus more strongly on the conservation of Aboriginal heritage rather than solely on the conservation of Aboriginal objects and gazetted Aboriginal places.⁶

In addition, DECC is currently undertaking an extensive regulatory improvement project⁷ to improve the administration of existing legislation. This cross-divisional process is being led by EPRG. These improvements seek to ensure consistency and reduce the administrative load on staff while reducing the regulatory burden on stakeholders.

This operational policy is an important step in the regulatory improvement process, as it sets up the broad policies that EPRG will apply when regulating the protection of Aboriginal cultural heritage. Other guidance is also being reviewed and developed to improve our regulatory activities (see 'Work in Progress: Improving ACH Regulation Project'; available on [ROOKS](#)).

The regulatory improvement project is also consistent with the following corporate objectives and priorities:

- **DECC Corporate Plan 2008–2012**

Goal 3: Integrated landscape management for long-term ecological, social and economic stability

Outcome 5: Aboriginal culture and heritage protected and revitalised

Priority 19: Strengthen and modernise approaches for the protection of Aboriginal cultural heritage.

- **EPRD Divisional Plan 2006–2008**

Priority 3: Continue to improve outcomes for Aboriginal heritage by reforming how we do our business.

- **Cultural Heritage Strategic Policy**

Focus # 2: Raising standards for heritage conservation

Objective: DECC continually strives to improve its cultural heritage management and protection capacity.

Policy 2.2: Continual improvement of internal procedures – DECC will continue to develop and update standard operating procedures to address cultural heritage issues across all of its activities and pursue legislative change where appropriate.

⁵ NSW Government (2007) *Policy Statement: Final Government Response to IPART's Investigation into the Burden of Regulation and Improving Regulatory Efficiency*, 13 February 2007 (available on Department of Premier and Cabinet [website](#)).

⁶ The NPW Act does not provide automatic protection for areas that have no physical evidence of Aboriginal occupation or use, such as spiritual places or natural resource areas, unless they have been declared as an Aboriginal place.

⁷ The *Improving Aboriginal Cultural Heritage Regulation Project*.

3 Protecting Aboriginal cultural heritage

This section outlines the broad policies that guide the way EPRG staff (and DECC staff more generally) work to ensure that we regulate the protection of Aboriginal cultural heritage in a credible, appropriate and effective way.

3.1 Guiding policies and principles

Policy 1

We will seek to understand and take care to apply government and DECC policies and principles that guide the protection of Aboriginal cultural heritage when carrying out our regulatory activities.

These policies include:

- NSW Aboriginal Affairs Plan, *Two Ways Together* (available on the [DAA website](#))
- *DECC Guarantee of Service* (available on the [DECC website](#))
- *DECC Aboriginal People, the Environment and Conservation Principles* (available on [DECCnet](#))
- *DECC Aboriginal Community Engagement Framework* (available on [DECCnet](#))
- *DEC Cultural Heritage Strategic Policy* (available on [DECCnet](#))
- *DECC Aboriginal Heritage Conservation Policy* (in development) – see ‘Work in Progress: Improving ACH Regulation Project’ (available on [ROOKS](#))
- *EPRD Operating Principles* (in [Appendix C](#) and available on [ROOKS](#))

Figure 1. Guiding Policies



[Appendix A](#) provides a broader diagram of the policy framework for the protection of Aboriginal cultural heritage and includes a brief description of the key policies mentioned above.

The policies outlined in this document will help DECC to achieve these guiding policies and principles. References to guiding policies and principles are made throughout this document to show consistency with those policies. See also 'Work in Progress: Improving ACH Regulation Project' (available on [ROOKS](#)).

3.2 Conserving significant Aboriginal cultural heritage

An object of the NPW Act is the 'conservation of objects places and features ... of cultural value within the landscape, including ... places, objects and features of significance to Aboriginal people ...' (s.2A(1)(b)(i)).

We recognise that Aboriginal people should be the primary determinants of the significance of Aboriginal heritage values. The knowledge and values of the Aboriginal community are vital components of the assessment process.

We will consider all relevant information, including the views of the Aboriginal community about significance, when we make decisions.

Policy 2

We will ensure that our clients and stakeholders⁸ have adequately involved Aboriginal people in identifying and determining the significance of Aboriginal heritage values (see also section 3.7: 'Ensuring that consultation has been appropriate').

Policy 3

In all areas of our work, we will strive for good conservation outcomes. In particular, we are primarily concerned with the conservation and protection of Aboriginal cultural heritage that is of significance to Aboriginal people.

Policy 4

We will be strategic, effective and innovative in our approach to conserving and protecting significant Aboriginal cultural heritage.

Policy 5

When considering AHIP applications, providing advice on environmental planning matters, or considering enforcement action, we will aim to balance potential conservation outcomes with the objectives of the proposal.

These policies are also consistent with the following guiding policies and principles:

- APEC (Aboriginal people, the environment and conservation) principles (see [Appendix A](#))
- Cultural Heritage Strategic Policy (see [Appendix A](#)):

Principle 1.1 – Community values associated with cultural heritage are diverse and will continue to evolve. Communities are the primary determinants of those values for which they have a cultural association.

Principle 2.6 – Effective heritage management requires knowledge of values or cultural significance. Cultural significance is best protected by a sequence of collecting and analysing information before making decisions.

- EPRD Operating Principles (see [Appendix C](#)):
 - # 1 – Anticipate, find and solve important problems
 - # 2 – Set outcomes-focused regulatory requirements
 - # 4 – Recognise our use of discretion

⁸ AHIP applicants, proponents, local councils, DoP.

An *Aboriginal Heritage Conservation Policy* is in development – see ‘Work in Progress: Improving ACH Regulation Project’ (available on [ROOKS](#)).

3.3 Developing partnerships and enhancing communication

Effective partnerships and communication (within DECC, with Aboriginal communities and with our clients and stakeholders) are essential for promoting good working relationships, establishing trust and delivering on our customer service responsibilities as a government agency.

Importantly, as discussed in the APEC principles, we recognise that Aboriginal people are rights-holders and not merely stakeholders, and that we should set the standard for effective engagement with Aboriginal people.

Policy 6

We will partner with Aboriginal communities to foster a two-way understanding of DECC requirements and processes for Aboriginal heritage protection and of Aboriginal heritage values.

Policy 7

We will enhance our communication (e.g. our advice, liaison and information sharing) with internal and external stakeholders to develop a greater understanding and appreciation of Aboriginal heritage values.

Policy 8

We will communicate effectively with our clients and stakeholders to ensure an understanding of and adherence to DECC’s requirements for Aboriginal cultural heritage protection.

Policy 9

We will work within and across EPRG divisions and branches to support each other, share expertise and build communication networks. We will also partner with other DECC divisions to more effectively reach common goals of Aboriginal cultural heritage conservation and protection.

A draft EPRG/CHD Partnership Agreement has been developed – see ‘Work in Progress: Improving ACH Regulation Project’ (available on [ROOKS](#)).

Policy 10

We are committed to meeting government and DECC standards for customer service by considering AHIPs and other environmental planning matters in a timely manner and ensuring that our decision-making processes are consistent across EPRG branches.

These policies are also consistent with the following guiding policies and principles:

- Two Ways Together (see [Appendix A](#)):
New ways of doing business with Aboriginal people – focus area: government’s role in enhancing the capacity of communities
- APEC Principles (see [Appendix A](#))
- Cultural Heritage Strategic Policy (see [Appendix A](#)):
Principle 1.3 – Whilst consultation with communities is a step in involving people in heritage management and protection, greater benefits will flow to both DECC and communities through effective engagement and partnerships.
Policy 1.3 – DECC will involve relevant communities in the management and protection of their cultural heritage where practical. This will involve our staff actively responding to community needs and desires and assisting communities in achieving their aspirations.
- EPRD Operating Principles (see [Appendix C](#)):
3 – Ensure stakeholders understand that compliance is necessary
5 – Maximise our impact
9 – Provide support and guidance for staff
10 – Teamwork and communication
- DECC Guarantee of Service (see [Appendix A](#))

3.4 Focusing our efforts

All EPRG regional branches (Operations Division) employ highly skilled Aboriginal heritage professionals who are involved with a variety of important heritage conservation work, including negotiating and processing AHIP applications and providing advice on environmental planning matters. This work can involve considerable time, effort and resources (see also section 2.4 ‘EPRG’s role’).

We are able to exercise regulatory discretion by using our professional judgment to concentrate on the most important issues.

Policy 11

Using our professional judgement, we will focus our efforts based on:

- the overall assessment of significance of Aboriginal objects and places
- the nature of the proposed impacts
- the potential for good conservation outcomes.

Policy 12

We can increase the effectiveness of our efforts by getting involved in the early stages of projects and proposals (e.g. before an AHIP application is lodged). Where we have this opportunity, we will concentrate on negotiating good conservation outcomes and reiterate requirements and appropriate approaches for heritage management. In some cases, our negotiations may mean that the proponent can entirely avoid impacts to Aboriginal cultural heritage.

Policy 13

In assessing AHIP applications, we will apply the following approaches in balancing our use of resources:

- The overall assessment of significance of the Aboriginal objects and places will be the primary factor in deciding how detailed our evaluation of each AHIP application will be.
- Once significance has been established, the proposed impact to the Aboriginal objects and places will become a factor in deciding how detailed our AHIPs should be.
- We will advise AHIP applicants (and potential applicants) where AHIPs are unnecessary (i.e. are not required) or refuse unnecessary applications. We will not issue a s.90 AHIPs as an ‘insurance policy’.

The *Guide to Determining and Issuing AHIPs* (available on [ROOKS](#)) explains how to apply this approach.

These policies are also consistent with the following guiding policies and principles:

- EPRD Operating Principles (see [Appendix C](#)):
 - # 4 – Recognise our use of discretion
 - #5 – Maximise our impact

3.5 Ensuring that we have adequate information

We cannot make effective decisions or provide effective advice on Aboriginal cultural heritage matters without the right information.

Policy 14

To obtain adequate information to allow us to provide advice or make a determination, we will ensure that our clients and stakeholders are aware of and follow DECC’s requirements for Aboriginal cultural heritage impact assessment, consultation and other relevant processes (where they are applicable).

Policy 15

We will require (or advise or request) that our clients and stakeholders supplement inadequate reports, plans and impact assessments with the information we need in order to make an informed decision or to give advice.

These policies are also consistent with the following guiding policies and principles:

- EPRD Operating Principles (see [Appendix C](#)):
 - # 3 – Ensure stakeholders understand that compliance is necessary

Further information:

- *Guide to Determining and Issuing AHIPs* (available on [ROOKS](#))
- *Internal DEC Guidance on Part 3A of the EP&A Act* (available on [ROOKS](#))

This guide explains how to advise DoP when required information has not been provided – see sections 5.2.2 ‘Determining DEC’s recommended EARs’; 6.1 Pre-exhibition review’; 6.2.1 Preparing DEC’s submission on the exhibited EA’; 7.2 DEC’s advice on DoP’s Draft Report’.

Guidance is being developed to help applicants to submit adequate AHIP applications – see ‘Work in Progress: Improving ACH Regulation Project’ (available on [ROOKS](#)).

3.6 Ensuring that assessments are balanced

An object of the NPW Act is the ‘conservation of objects places and features ... of *cultural value* within the landscape, including ... places, objects and features of *significance to Aboriginal people* ...’ (s.2A(1)(b)(i)).

It is important that all aspects of Aboriginal heritage be considered in assessment, conservation and management processes. Effective heritage management requires a balanced approach to gathering information about Aboriginal heritage associations, values and significance. It is important that archaeological and technical assessment and information be appropriately balanced with an assessment of cultural values as determined by the relevant Aboriginal community.

Policy 16

We will require (or advise or request) that our clients and stakeholders appropriately balance their assessment of cultural, technical and scientific values as part of any Aboriginal heritage impact assessment.

This policy is also consistent with the following guiding policies and principles:

- Cultural Heritage Strategic Policy (see [Appendix A](#))

Principle 1.1 – Community values associated with cultural heritage are diverse and will continue to evolve. Communities are the primary determinants of those values for which they have a cultural association.

Guidance is being prepared to help AHIP applicants to achieve an appropriate balance between the cultural and technical aspects of their impact assessment – see ‘Work in Progress: Improving ACH Regulation Project’ (available on [ROOKS](#)).

3.7 Ensuring that consultation has been appropriate

We acknowledge that it is primarily Aboriginal people who should determine the significance of Aboriginal heritage values. Therefore, consultation with Aboriginal communities is important for effective management and protection of Aboriginal cultural heritage.

We will consider all relevant information, including the views of the Aboriginal community about significance, when we make decisions.

Policy 17

We will encourage early and ongoing engagement between all relevant stakeholders including the representative Aboriginal community(ies) This includes engagement during project planning and assessment, particularly with those Aboriginal people who have a cultural association (traditional, historical or contemporary) with the area.

Policy 18

We will ensure that AHIP applicants have adequately consulted with the Aboriginal community on each AHIP application we receive, i.e. that they have followed DECC’s *Interim Community Consultation Requirements for Applicants*. We will not make a determination on AHIP applications where there has been inadequate consultation and negotiation with the Aboriginal community(ies).

The *Interim Requirements* are under review – see ‘Work in Progress: Improving ACH Regulation Project’ (available on [ROOKS](#)).

Policy 19

When providing advice to DoP (e.g. for a Part 3A major project or a SEPP) or a local council (i.e. local planning instrument) on Aboriginal heritage matters, we will consider whether there has been

adequate consultation with the Aboriginal community. In relation to Part 3A major project applications, we will ensure that consultation is consistent with the relevant Part 3A guidelines.⁹

These policies are also consistent with the following guiding policies and principles:

- APEC Principles (see [Appendix A](#))
- Cultural Heritage Strategic Policy (see [Appendix A](#))

Principle 1.5 – Aboriginal people have inherent rights as the first peoples of Australia to self-determination and to maintain their language, culture and identity. These rights were never ceded. These rights also include the recognition of their values and interests in the environment of NSW.

Principle 1.1 – Community values associated with cultural heritage are diverse and will continue to evolve. Communities are the primary determinants of those values for which they have a cultural association.

- EPRD Operating Principles (see [Appendix C](#)):

3 – Ensure stakeholders understand that compliance is necessary

Further information:

- *Interim Community Consultation Requirements for Applicants* (available on the [DECC website](#))
- *Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (for Part 3A major projects; available on [ROOKS](#))

3.8 Ensuring that impacts are avoided or reduced

DECC needs to balance the sometimes competing tensions between development activities and environment protection when we make decisions. Although the NPW Act gives a high level of protection to known Aboriginal objects, recent court decisions have reinforced that Part 6 gives the DG express powers to consent to the damage, destruction or defacement of Aboriginal objects by development activities. The powers in Part 6 are not inconsistent with the objects of the Act or a requirement to give effect to ESD.

Policy 20

Impacts to significant Aboriginal objects and places should always be avoided wherever possible. We will promote the development (or amendment) of proposals to avoid impacts and therefore avoid the need for s.90 AHIPs.¹⁰

Policy 21

Where impacts to Aboriginal objects and places cannot be avoided, we will require the proponent or AHIP applicant to develop (or amend) proposals so as to reduce the extent and severity of impacts to significant Aboriginal objects and places through the use of reasonable and feasible measures. Any measures proposed should be negotiated between the proponent or AHIP applicant and the Aboriginal community.

⁹ Proponents of Part 3A major project applications are required to follow the consultation process set out in the (draft) *Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (available on [ROOKS](#)). These guidelines require the proponent to follow DECC's *Interim Community Consultation Requirements*.

¹⁰ A s.87 AHIP may be required to identify objects so that serious impacts can be avoided by the implementation of appropriate avoidance strategies (e.g. redesign of the project). Applications may also be refused (see Policy 26 and Policy 27).

Policy 22

Once all avoidance, minimisation and mitigation options have been adequately explored, we may also consider the appropriateness of any proposed actions having potential Aboriginal cultural heritage benefit.¹¹ Any actions proposed should be negotiated between the proponent or AHIP applicant and the Aboriginal community.

These actions should be applied in line with the principles of ESD. For a description of how ESD should be applied to Aboriginal cultural heritage, see Appendix B: Legislative framework ‘

¹¹ ‘This could involve such things as the provision of a keeping place for Aboriginal objects; construction of a cultural centre and interpretive signage; land set aside for cultural purposes; access to land or places of cultural significance.

Principles of ecologically sustainable development' (p 26).

Guidance for applicants is being prepared that outlines the importance of avoiding and reducing impacts – see 'Work in Progress: Improving ACH Regulation Project' (available on [ROOKS](#)).

3.9 Making reasonable decisions and providing reasonable advice

Regulatory decisions should be made by applying technical expertise and professional judgment, and by adhering to administrative law principles (i.e. acting with commonsense, fairness and within legal power).

Considering and documenting key matters helps to ensure consistency in our approach and provides certainty for our clients and stakeholders.

Policy 23

Under most circumstances, EPRG staff would be expected to follow and apply all relevant internal policies and guidelines in regard to Aboriginal cultural heritage approvals and advice. We will document reasons for any departure from these policies.

Policy 24

We will document all our decisions and advice, along with reasons and the actions and outcomes required.

Policy 25

We will communicate our decisions and advice to our clients and stakeholders so that they understand how our decision was reached and what is expected or recommended.

These policies are also consistent with the following guiding policies and principles:

- EPRD Operating Principles (see [Appendix C](#)):
 - # 4 – Recognise our use of discretion
 - # 6 – Document our decisions and actions

Further information:

- *Guide to Determining and Issuing AHIPs* (available on [ROOKS](#))
- *Legal Eye 13/03: Legal Principles For Decision Makers* (available on [DECCnet](#))

3.10 Refusing AHIPs or recommending planning refusal

Policy 26

We will refuse to issue AHIPs where there are serious heritage conservation or protection issues; i.e., where there is potential for unacceptable impacts to significant Aboriginal objects or places.¹² Where an outright refusal of an AHIP is not appropriate, we will limit impacts through the conditions of the AHIP.

Policy 27

Where possible, we will work with willing landholders to explore opportunities to secure those areas where we have refused (or limited via conditions) AHIPs (based on Policy 26 above) against future impacts (e.g. by negotiating voluntary conservation agreements or seeking Aboriginal Place nominations; investigating incentive funding opportunities from Catchment Management Authorities).

These policies should also be applied where we are providing advice to DoP or a local council on Aboriginal cultural heritage issues; e.g. when providing advice to DoP in relation to a Part 3A major project (i.e. we would recommend that approval not be granted, or be severely limited) or when commenting on environmental planning instruments.

These policies are also consistent with the following *guiding policies and principles*:

- EPRD Operating Principles (see [Appendix C](#)):
 - # 4 – Recognise our use of discretion
 - #5 – Maximise our impact

Further Information:

- *Guide to Determining and Issuing AHIPs* (available on [ROOKS](#))

3.11 Compliance and enforcement

DECC has specific responsibilities and powers under the NPW Act for the conservation and protection of Aboriginal cultural heritage.

We are also responsible for ensuring the integrity of the regulatory systems that we administer. It is important that the community have confidence that we are undertaking our regulatory duties in a competent manner.

Policy 28

We will effectively respond to alleged breaches of Part 6 of the NPW Act and ensure compliance with AHIPs and other statutory instruments.

Policy 29

We recognise that we have a number of tools available to carry out our compliance and enforcement activities, and we will use the right tool¹³ for the right purpose.

¹² DECC cannot refuse to issue an AHIP in regard to an application for which it has already issued General Terms of Approval (if an AHIP application is made within 3 years).

¹³ These tools include AHIP conditions; authorised officer powers; inspections; compliance audits; warning letters; penalty notices; stop work orders and interim protection orders; investigations; prosecutions; injunctions.

These policies are also consistent with the following guiding policies and principles:

- EPRD Operating Principles (see [Appendix C](#)):
 - # 7 – Measure and report performance
 - # 8 – Apply the right tool for the right problem at the right time

A compliance and enforcement strategy has been drafted – see ‘Work in Progress: Improving ACH Regulation Project’ (available on [ROOKS](#)).

Further information:

- *EPRD Approach to Investigations and Prosecutions* (available on [ROOKS](#))
- *Powers of Authorised Officers: a guide to your powers under environment protection legislation*, (available on the [DECC website](#))
- *Compliance Audit Handbook* (available on the [DECC website](#))
- *EPA Prosecution Guidelines* (available on the [DECC website](#))
- *NPWS Prosecution Policy*
- Specialist Investigations Unit intranet page (on [DECCnet](#))

3.11.1 Regulation of DECC activities

It is important that we set high standards for our own activities and comply with the spirit, not just the letter, of the law. DECC activities that may impact on Aboriginal cultural heritage are carried out mainly by CHD (e.g. Aboriginal Heritage Conservation Program, undertaken in accordance with a s.86 authorisation) and PWG (e.g. park management, including activities relating to marine parks and Aboriginal-owned [Part 4A] lands, undertaken in accordance with a s.87 or s.90 AHIP issued by EPRG).

There are procedures in place to ensure that DECC activities requiring AHIPs are assessed at arm’s length from the area of the Department that is carrying out the activity. This is a key role for EPRG.

Policy 30

We expect DECC divisions to comply with the relevant provisions of the NPW Act when carrying out activities on land and waters they manage (PWG) and when carrying out Aboriginal cultural heritage conservation works across the State (CHD).

Policy 31

We will assess DECC applications for AHIPs in the same manner and with at least the same rigour as external applications.

Policy 32

We will work closely with CHD and PWG staff undertaking Aboriginal heritage conservation works (under s.86 authorisations) to make sure that their activities comply with all legal requirements and DECC policies on the protection of Aboriginal cultural heritage.

Policies and guidance in relation to staff use of s.86 authorisation for Aboriginal heritage conservation works are being prepared – see ‘Work in Progress: Improving ACH Regulation Project’ (available on [ROOKS](#)).

Further information:

- *Staff Notice 06/05: EPA Regulation of DEC and SCA Activities*, available on [DECCnet](#)
This notice details the measures that have been put in place to ensure that DECC is a credible regulator. Although the protocol outlined relates specifically to EPA matters, the same general principles should be applied to NPW Act matters.
- Premier's Memorandum (1997) No. 97-26: *Litigation Involving Government Authorities* (available on the Department of Premier and Cabinet [website](#))
- *Guide to Determining and Issuing AHIPs* (available on [ROOKS](#))
The Guide includes a Part 6 (NPW Act) legal interpretation table that outlines the circumstances in which it is appropriate for staff to use a s.86 authorisation for conservation works or other activities.

Further reading

DEC / DECC/ NPWS / EPA guidelines

DEC (2006) *Aboriginal people, the environment and conservation* (available on [DECCnet](#)) [internal]

DECC (2007) *An Aboriginal Community Consultation Framework for DECC* (available on [DECCnet](#)) [internal]

DEC (2006) *Compliance Audit Handbook* (available on the [DECC website](#)) [internal/external]

DEC (2006) *Cultural Heritage Strategic Policy* (available on [DECCnet](#)) [internal]

DEC (2004) *EPRD Approach to Investigations and Prosecutions* (available on [ROOKS](#)) [internal]

DEC (2006) *EPRD Divisional Plan 2006–2008* [internal]

DEC (2005) *EPRD Operating Principles* ([Appendix C](#); also available on [ROOKS](#)) [internal]

DECC (2007) *Guarantee of Service* (available on the [DECC website](#))

DECC (2008) *Guide to Determining and Issuing AHIPs* (available on [ROOKS](#)) [internal]

DECC (2008) *Aboriginal Places. DECC Guidelines for the Assessment and Gazettal of Aboriginal Places under Section 84 of the National Parks and Wildlife Act 1974.* (available on PAWS shortly) [internal]

DECC (2008) *Proponents Guidelines for the Review of Environmental Factors* (available on [the DECC website](#)) [external]

DECC (2008) *Determination Guidelines for the Review of Environmental Factors* (available on DECCnet shortly) [internal]

DEC (for Department of Planning) (2005 draft) *Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (for Part 3A major projects; in draft form, but DoP distributes it to proponents; also available on [ROOKS](#)) [external]

DEC (2006) *Internal DEC Guidance on Part 3A of the Environmental Planning and Assessment Act 1979*, 19 April 2006 (Available on [ROOKS](#)) [internal]

DEC (2004) *Interim Community Consultation Requirements for Applicants* (under revision by EPRG; available on the [DECC website](#)) [external]

EPA (2004) *EPA Prosecution Guidelines* (available on the [DECC website](#))

NPWS (2003) *Construction Assessment and Approvals Procedure* (available on [PAWS](#)) [internal]

NPWS (2004) *Guide to Approvals: cultural heritage places, buildings, landscapes and moveable heritage items on NPWS estate* [internal]

NPWS (1997) *Prosecution Policy* [internal]

Legal Eyes and staff notices

Legal Eye 13/03 *Legal Principles for Decision Makers* (available on [DECCnet](#))

Staff Notice 06/05: *EPA Regulation of DEC and SCA Activities* (available on [DECCnet](#))

Legal Eye 07/04: *Changes to ACH Approval Requirements under Part 3A of the EP&A Act* (available on [DECCnet](#))

Legal Eye 07/16: *Environmental Planning and Assessment Act 1979: How is the Act relevant to DECC?* (available on [DECCnet](#))

Legal Eye 07/17: *Environmental Planning and Assessment Act 1979: How do I work out which assessment process applies to a proposal?* (available on [DECCnet](#))

Legal Eye 07/18: *Environmental Planning and Assessment Act 1979: Application of Part 5 of the Act to DECC as a proponent* (available on [DECCnet](#))

Legal Eye 07/19: *Environmental Planning and Assessment Act 1979: Overview of Part 5 of the Act as it applies to DECC as a regulator* (available on [DECCnet](#))

Legal Eye 07/20: *Environmental Planning and Assessment Act 1979: Overview of Part 4 of the Act – development that requires consent* (available on [DECCnet](#))

Legal Eye 07/21: *Environmental Planning and Assessment Act 1979: Integrated Development in Part 4 of the Act* (available on [DECCnet](#))

Legal Eye 07/22: *Environmental Planning and Assessment Act 1979: Major projects and critical infrastructure assessment process under Part 3A of the Act* (available on [DECCnet](#))

Legislation

Legislation available on the *NSW Legislation website*:

Environmental Planning and Assessment Act 1979

Heritage Act 1977

National Parks and Wildlife Act 1974

National Parks and Wildlife Regulation 2000

Protection of the Environment Administration Act 1991

Protection of the Environment Operations Act 1997

Other

DECC (2008) *Corporate Plan 2008–2012* (available on the [DECC website](#))

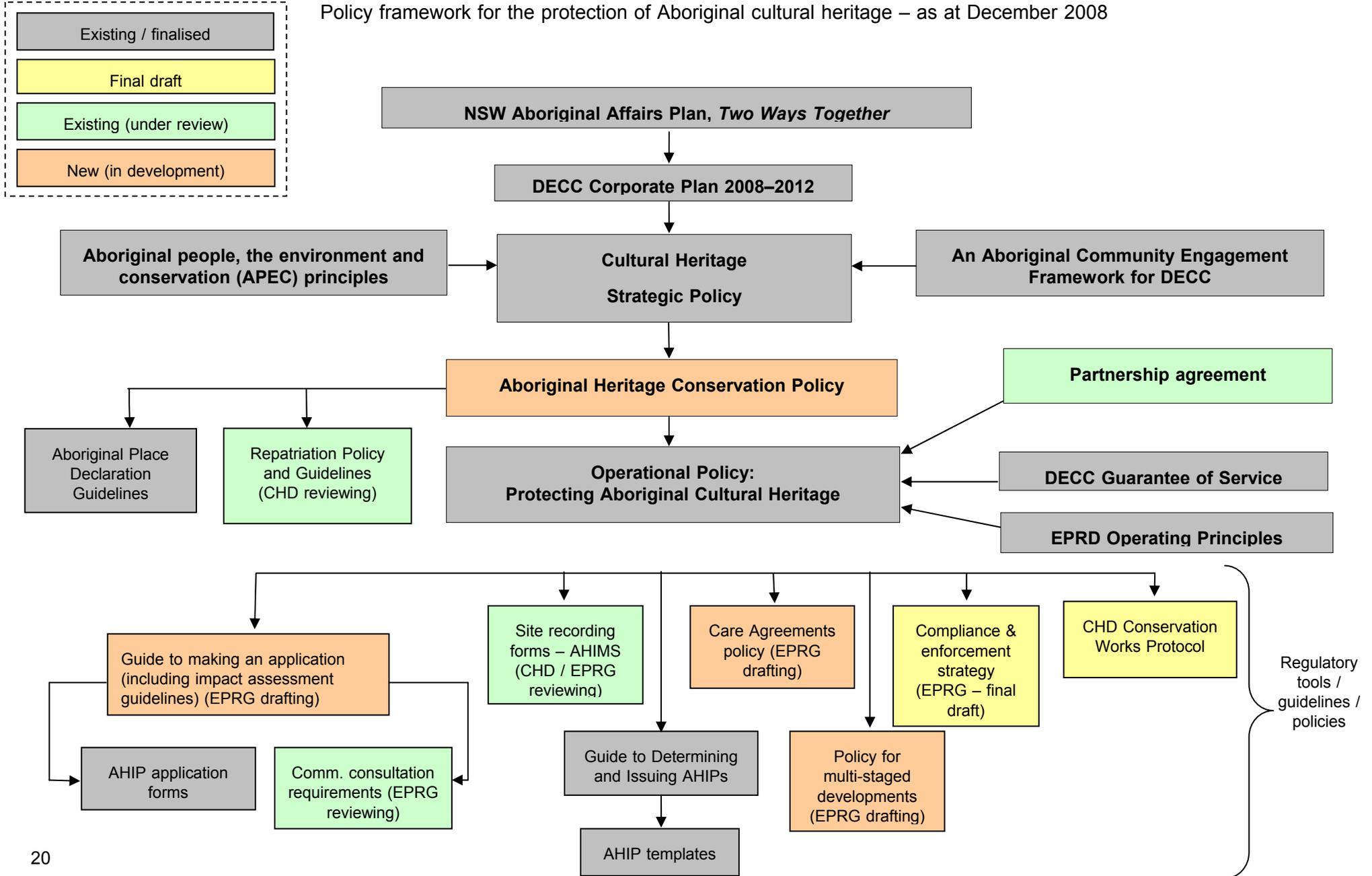
NSW Government (2007) *Policy Statement: Final Government Response to IPART's Investigation into the Burden of Regulation and Improving Regulatory Efficiency*, 13 February 2007 (available on the Department of Premier and Cabinet [website](#))

NSW Government (2003) *Two Ways Together. NSW Aboriginal Affairs Plan 2003–2012* (available on the [DAA website](#))

Premier's Memorandum (1997) No. 97-26: *Litigation Involving Government Authorities* (available on the Department of Premier and Cabinet [website](#))

Appendix A: Policy framework

Policy framework for the protection of Aboriginal cultural heritage – as at December 2008



NSW Aboriginal Affairs Plan *Two Ways Together*

The NSW Aboriginal Affairs Plan *Two Ways Together* is a 10-year (2003–2012) whole-of-government policy to improve the lives of Aboriginal people and their communities.

The vision of the Plan is that Aboriginal people, the NSW Government and government agencies work together, with joint responsibility, to plan and deliver solutions that meet community needs.

The overall objectives of the Plan are:

- to develop committed partnerships between Aboriginal people and Government, and
- to improve the social, economic, cultural and emotional wellbeing of Aboriginal people in NSW.

The Plan reinforces the commitment of the NSW Government to Aboriginal self-determination, and expresses respect for the diverse cultures of Aboriginal peoples in NSW.

The Plan has two core elements:

- *Making Services Work* – establishing *what* business needs to be done
- *New Ways of Doing Business with Aboriginal People* – establishing *how* business will be done.

Further information:

- Two Ways Together, NSW Aboriginal Affairs Plan (available on the [DAA website](#))
- Two Ways Together, Regional Reports (available on the [DAA website](#))
- DEC Two Ways Together Implementation Plan (available on [DECCnet](#))
- Aboriginal Affairs Reference Group, cross-divisional senior representatives (contact the Executive Officer, Aboriginal Affairs, CHD).

DECC Guarantee of Service

A DECC Guarantee of Service has been developed by the Strategy, Communication and Governance Division. The Guarantee lists and describes four guiding service principles that our clients may expect on all occasions, namely, respect, helpfulness, responsiveness and continuous improvement.

It also lists a set of service standards relating to telephone calls, general correspondence, emails, accommodation and tour bookings, wheelchair-friendly parks and reserves, information centres and obtaining information.

A more comprehensive Guarantee of Service is planned.

Further information: Contact the Corporate Planning and Reporting Section of the Strategy, Communication and Governance Division.

APEC principles

Five principles have been developed to incorporate the rights and interests of Aboriginal people into the work of DECC. The principles set a standard for staff to adopt when they conduct business with Aboriginal people. They apply only within the current legislative framework and to the areas over which DECC has control.

Further information: APEC principles (internal DECC document available on [DECCnet](#)).

An Aboriginal Community Engagement Framework for DECC

The Aboriginal Community Engagement Framework was drafted in 2006–07 to inform and guide DECC staff, consultants and contractors in the process and practices for engaging the Aboriginal community in all areas of its work. The Framework has relevance to all DECC divisions, and recognises that Aboriginal community consultation is an important consideration in all of the Department's activities. The Framework is an internal document that is designed to help staff in undertaking consultation with Aboriginal communities. It is not designed or intended to be used for Aboriginal heritage regulation, which has its own specific set of consultation requirements.

Further information: Aboriginal Community Engagement Framework (internal DECC document available on [DECCnet](#)).

Cultural Heritage Strategic Policy

This policy informs and guides DECC staff, consultants and contractors in DECC's principles for managing its cultural heritage responsibilities. The policy is a high-level document aimed at informing the development of other policies within DECC. Where specific policies do not exist, staff should use the general principles and policy statements in the Cultural Heritage Strategic Policy to establish a general policy position. Staff should also use the Policy to inform processes for strategic planning of cultural heritage.

Three focus areas for the policy have been identified to reflect the strategic direction for cultural heritage management and protection within DECC:

1. fostering connections with heritage
2. raising standards for heritage conservation
3. understanding heritage in its context.

A separate implementation plan will identify key actions that will be integral to aligning DECC's cultural heritage management and protection practices with the principles and policies in the Cultural Heritage Strategic Policy.

Further information: Cultural Heritage Strategic Policy (available on [DECCnet](#)).

EPRD Operating Principles

The EPRD Operating Principles guide how we carry out our regulatory activities. They provide a solid foundation for a consistent approach to our work and are key elements of all credible and robust regulatory programs. The Operating Principles should be applied consistently when requirements are determined so that decisions are appropriate, transparent and defensible.

Further information: EPRD Operating Principles ([Appendix C](#) and available on [ROOKS](#)).

Appendix B: Legislative framework

National Parks and Wildlife Act 1974

The NPW Act is the primary legislation protecting Aboriginal objects and places in NSW. DECC administers the Act.

The National Parks and Wildlife Regulation 2002 (NPW Regulation) gives effect to some of the provisions contained within the NPW Act.

One of the objectives 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)).

Protection of Aboriginal objects and places

Under s.85 of the NPW Act, the DG of DECC is responsible for the protection of Aboriginal objects and places in NSW. In particular, the DG is responsible for the preservation and protection of any Aboriginal objects or places on any land reserved under the NPW Act, and for the proper restoration of any such land that has been disturbed or excavated for the purpose of discovering an Aboriginal object.

Part 6 of the NPW Act protects Aboriginal cultural heritage by prescribing offences for disturbance and destruction of Aboriginal objects and places.

An **Aboriginal object** is defined as *'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).

Aboriginal remains means (s.5):

'... the body or the remains of the body of a deceased Aboriginal, but does not include:

'(a) a body or the remains of a body buried in a cemetery in which non-Aboriginals are also buried, or

'(b) a body or the remains of a body dealt with or to be dealt with in accordance with a law of the State relating to medical treatment or the examination, for forensic or other purposes, of the bodies of deceased persons'.

An **Aboriginal place** is a place which has been so declared by the Minister administering the NPW Act, by order in the Gazette, because the Minister believes that the place is or was of special significance to Aboriginal culture. It may or may not contain Aboriginal objects (s.84).

The NPW Act does not, however, provide automatic protection for areas that have no physical evidence of Aboriginal occupation or use, such as spiritual places or natural resource areas, unless they have been declared as an Aboriginal place.

Property of the Crown – s.83(1)

All Aboriginal objects are considered to be ‘property of the Crown’ other than those which:

- (a) were located in private collections before 13 April 1970¹⁴ and have not been since 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).

Aboriginal objects can also be acquired by the Crown on or after 13 April 1970 under s.89 or Part 11 of the NPW Act and become the property of the Crown.

Criminal offences

• Section 86

It is an offence under s.86 of the NPW Act to do any of the following things without first obtaining a permit under s.87 (i.e. a s.87 AHIP):

- disturb or excavate any land, or cause any land to be disturbed or excavated, for the purpose of discovering an Aboriginal object
- disturb or move on any land an Aboriginal object that is the property of the Crown, other than an Aboriginal object that is in the custody or under the control of the Australian Museum Trust
- take possession of an Aboriginal object that is in a national park, historic site, state conservation area, regional park, nature reserve, karst conservation reserve or Aboriginal area
- remove an Aboriginal object from a national park, historic site, state conservation area, regional park, nature reserve, karst conservation reserve or Aboriginal area
- erect or maintain, in a national park, historic site, state conservation area, regional park, nature reserve, karst conservation reserve or Aboriginal area, a building or structure for the safe custody, storage or exhibition of any Aboriginal object
- breach a condition of a permit issued under s.87.

• Section 90

Under s.90 of the NPW Act, it is an offence to do any of the following things without consent from the DG (i.e. a s.90 AHIP):

- knowingly destroy, damage or deface an Aboriginal object or Aboriginal place
- knowingly cause or permit the destruction, damage or defacement of an Aboriginal object or Aboriginal place.

• Section 91

It is an offence for a person who is aware of the location of an Aboriginal object to fail to notify the DG of DECC in the ‘prescribed manner’.¹⁵

¹⁴ Objects became the property of the Crown on 13 April 1970, the date of commencement of s.33D of the *National Parks and Wildlife Act 1967*, the predecessor to the 1974 Act.

¹⁵ Clause 91 of the NPW Regulation states that the ‘prescribed manner’ is a written notice in a form approved by the DG; i.e. the 1998 and 2001 Site Recording Forms (CHD have been asked to make these forms available on DECCnet).

- **Section 156A**

It is an offence under s.156A to damage any object or place of cultural value on or in land reserved or acquired under the NPW Act.

Transfer of Aboriginal objects

Under s.85A, the DG may 'dispose' of Aboriginal objects that are the property of the Crown:

- by returning the objects to the Aboriginal owner(s) entitled to and willing to accept possession, custody or control of them in accordance with Aboriginal tradition (s.85A(1)(a)) or
- by otherwise dealing with the Aboriginal objects in accordance with any reasonable directions of the Aboriginal owner(s) (s.85A(1)(b)), or
- if there are no Aboriginal owners, by transferring the objects to an Aboriginal person¹⁶ or an organisation representing Aboriginal people for safekeeping (s.85A(1)(c) and cl.88 NPW Reg).¹⁷

Stop work orders

Part 6A, Division 1 of the NPW Act allows the DG of DECC to issue stop work orders in relation to an action that is likely to significantly affect an Aboriginal object or place (s.91AA).

The DG may order that an action stop or not go ahead within the vicinity of the Aboriginal object or place. A stop work order lasts 40 days. (s.91AA(1)).

Stop work orders:

- can be appealed, in writing, to the Minister
- cannot be issued in relation to a development or activity approved under the EP&A Act.

Interim protection orders

Part 6A, Division 2, of the NPW Act also allows the DG of DECC to recommend to the Minister that he or she make an Interim Protection Order in relation to an area of land with cultural significance (s.91A(a)). This may include the prohibition or regulation of:

'... the carrying on ... of any activity that may affect the preservation, protection or maintenance of the land or any ... Aboriginal object or place on or within the land.' (cl.92(2)(f) NPW Regulation).

Interim protection orders:

- remain in place for two years and can be appealed, in writing, to the Land and Environment Court
- may not be issued in relation to critical infrastructure projects (a category of Major Project under Part 3A of the EP&A Act).

¹⁶ 'Aboriginal person' is defined in s.4(1) of the *Aboriginal Land Rights Act 1983*.

¹⁷ In practice, transfers under s.85A(1)(c) are done via a Care Agreement between DECC and the Aboriginal person or community.

Principles of ecologically sustainable development

An object of the NPW Act is to conserve places, objects and features of significance to Aboriginal people (s.2A(1)(b)(i)). This is to be achieved by applying the principles of ecologically sustainable development (ESD) (s.2A(2)).

ESD (defined in s.6 of the *Protection of the Environment Administration Act 1991*) requires the integration of *economic* and *environmental* considerations (including cultural heritage) in the decision-making process. In regard to Aboriginal cultural heritage, ESD can be achieved by applying the principle of intergenerational equity and the precautionary principle.

Intergenerational equity

Intergenerational equity is the principle whereby the present generation should ensure the health, diversity and productivity of the environment for the benefit of future generations.

In terms of Aboriginal heritage, intergenerational equity can be considered in terms of the cumulative impacts to Aboriginal objects and places in a region. If few Aboriginal objects and places remain in a region (for example, because of impacts under previous AHIPs), fewer opportunities remain for future generations of Aboriginal people to enjoy the cultural benefits of those Aboriginal objects and places.

Information about the integrity, rarity or representativeness of the Aboriginal objects and places proposed to be impacted, and how they illustrate the occupation and use of land by Aboriginal people across the region, will be relevant to the consideration of intergenerational equity and the understanding of the cumulative impacts of a proposal.

Where there is uncertainty, the precautionary principle should also be followed (see below).

The precautionary principle

The precautionary principle states that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

In applying the precautionary principle, decisions should be guided by:

- a careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment
- an assessment of the risk-weighted consequences of various options.

The precautionary principle is relevant to DECC's consideration of potential impacts to Aboriginal cultural heritage where:

- the proposal involves a risk of serious or irreversible damage to Aboriginal objects or places or to the value of those objects or places, and
- there is uncertainty about the Aboriginal cultural heritage values or scientific or archaeological values, including in relation to the integrity, rarity or representativeness of the Aboriginal objects or places proposed to be impacted.

Where this is the case, a precautionary approach should be taken and all cost-effective measures implemented to prevent or reduce damage to the objects/place.

Environmental Planning and Assessment Act 1979

The EP&A Act provides planning controls and requirements for environmental assessment in the development approval process. It also establishes the framework for Aboriginal heritage values to be formally assessed in land use planning and development consent processes. Under this Act, the definition of 'environment' includes cultural heritage.

Part 3 – Environmental planning instruments

Part 3 of the EP&A Act establishes three types of environmental planning instruments:

- State Environmental Planning Policies (SEPPs) (Division 2)
- Regional Environmental Plans (REPs) (Division 3)
- Local Environmental Plans (LEPs) (Division 4)

The provisions of these instruments are legally binding on the Government and developers. They provide an overall plan and vision for development into the future.

State Environmental Planning Policies (SEPPs)

SEPPs deal with issues significant to the State and people of NSW. They are made by the Minister for Planning. Currently no SEPPs relate specifically to the protection of Aboriginal cultural heritage.

Regional Environmental Plans (REPs)

REPs are prepared by the DoP and are approved by the Minister for Planning. REPs cover issues such as urban growth, commercial centres, extractive industries, recreational needs, rural lands, and heritage and conservation. REPs provide the framework for detailed local planning by councils.

Some REPs that include provisions to protect Aboriginal cultural heritage include:

- Jervis Bay REP 1996
- Homebush Bay Area REP (No. 24) 1993
- Parramatta REP (No. 28) 1999
- Western Division REP (No. 1) – Extractive Industries 1999.

Local Environmental Plans (LEPs)

LEPs are prepared by local councils and approved by the Minister for Planning. LEPs may relate to the whole or part of the local government area. LEPs divide the area they cover into 'zones' (such as residential, industrial, commercial etc.) to help guide planning decisions.

Councils preparing a draft LEP that affects an Aboriginal object or place must include provisions to facilitate conservation of that object or place (see current s.117 direction No. 2.3 – Heritage Conservation, which replaced s.117 direction No. 9 – Conservation and Management of Environmental and Indigenous Heritage, 2005).

Amendments to the EP&A Act include requirements for councils to use a standard LEP template when developing their LEPs (*Standard Instrument (Local Environmental Plans) Order 2006*). A compulsory clause is included in the standard LEP template (cl.35) for heritage conservation, specifically for the conservation of places of Aboriginal heritage significance (i.e. development consent is required for disturbing or excavating a heritage conservation area that is a place of Aboriginal heritage significance – cl.35(2)(e)).

Development control plans are also used to help achieve the objectives of the LEP by providing specific, comprehensive requirements for certain types of development or locations (e.g. for heritage precincts).

Part 3A – Major projects and infrastructure

Major Projects approved under Part 3A of the EP&A Act do not require NPW Act AHIPs from DECC. Part 6 offences related to those provisions do not apply (see Legal Eyes 05/09 and 07/04).

However, proponents are required to follow the draft *Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (July 2005; available on [ROOKS](#)) when seeking approval under the Part 3A process. The guidelines were developed by DECC and detail the assessment and consultation requirements that need to be followed when Aboriginal cultural heritage is an issue under the Part 3A process.

Stop work orders (s.91AA of NPW Act) cannot be issued in relation to anything *essential for the carrying out of an approved Major Project*.

Interim protection orders (s.91A NPW Act) cannot be issued for critical infrastructure projects, but may still be issued in relation to other major projects.

Part 4 – Developments

Developments that require development consent (from a council or the Minister for Planning) are assessed under Part 4 of the EP&A Act. Types of developments include ‘complying’, ‘designated’, ‘integrated’, ‘other local’, ‘exempt development’ and ‘other development not requiring consent’.

Complying development

Complying development is routine development that is certified in accordance with specified, predetermined development standards and is approved by a complying development certificate. It can be certified by either a local council or an accredited certifier. SEPP No. 4 – *Development Without Consent and Miscellaneous Exempt and Complying Development* (SEPP 4) defines what is complying development. It applies to any council that does not have an LEP (which includes complying development provisions).

However, if Aboriginal objects are identified (e.g. through an AHIMS¹⁸ search, survey work or cultural knowledge) or the proponent or landholder otherwise knows about Aboriginal objects on their land that might be affected, an AHIP may still be required, and the proponent or landholder must apply to DECC to impact on those objects.

Designated development

Designated developments are generally developments with high environmental impact and are listed in Schedule 3 of the EP&A Regulation 2000. Designated developments include industries that have a high potential to pollute, large-scale developments and developments that are located near sensitive environmental areas, such as wetlands. If a proposal is a designated development, an environmental impact statement (EIS) will need to accompany the development application.

If the need for a s.90 AHIP is known before the development application is made, or the development is on land declared as an Aboriginal place, the development will also be assessed as integrated development (see below).

Integrated development

Integrated development is development that requires consent in addition to other approvals as identified in s.91(1) (e.g. AHIP under s.90 of the NPW Act). If the development is also designated, an EIS must be prepared. Otherwise, a Statement of Environmental Effects must accompany the application.

If a Part 4 development proposal triggers the need for a s.90 AHIP (i.e. the proposal is likely to impact upon an Aboriginal object or place), the proposal will be assessed as integrated development. However, this is only the case where:

¹⁸ Aboriginal Heritage Information Management System.

- the Aboriginal object is known to exist on the land when the development application is made, or
- the land is an Aboriginal place when the development application is made.

In such situations, the DG is an approval body and must provide General Terms of Approval to the consent authority, and any development consent must be consistent with those terms.

If the DG refuses to grant an approval (in this case, a s.90 AHIP), the consent authority must refuse to grant the development consent. If the DG fails to inform the consent authority of whether an approval will be granted within the relevant statutory time-frame, the consent authority may go ahead and decide whether or not to grant development consent.

The applicant must seek approval from DECC within three years of the date of development consent. DECC must grant an approval that is consistent with the development consent.

If an Aboriginal object is discovered *after* the development application is made, the development will not necessarily be assessed as an integrated development (i.e. the discovery will not mean that the development is now treated as integrated). This means that the applicant will need to apply to DECC separately or the applicant may choose to resubmit the development application.

The requirement for a s.87 AHIP does not trigger integrated development, but such an AHIP may be required in the course of obtaining integrated development approval.

Other local development

Other local development is development requiring consent that is not complying, designated or integrated. The development application may need to be accompanied by a Statement of Environmental Effects (depending on the likely environmental impacts of the development).

Development that does not need consent

A proposed development is 'exempt development' or 'other development not requiring consent' if it has only a minimal impact on the local environment (e.g. small fences, barbecues and pergolas) *and* is classified as such in the relevant LEP or SEPP 4. Development consent is not required as long as it complies with the requirements in the LEP or SEPP 4.

However, if Aboriginal objects are identified (e.g. through an AHIMS search, survey work or cultural knowledge) or the proponent or landholder otherwise knows about Aboriginal objects on their land that might be affected, an AHIP may still be required, and the proponent or landholder must apply to DECC separately to impact on those objects.

Prohibited development

Development can be prohibited in environmental planning instruments in relation to a type of development or an area of land.

Part 5 – Activities

Development consent is not required for certain activities, such as for the construction of roads or electricity infrastructure on behalf of government agencies or statutory authorities. These activities are assessed under Part 5 of the EP&A Act.

The Minister or authority responsible for deciding whether to proceed with an activity is called the 'determining authority'. There may be more than one determining authority. If a s.87 or s.90 AHIP (NPW Act) is required, DECC will be a determining authority.

Where Part 5 applies, a determining authority will need to consider a number of factors, including the environmental impact of the activity and whether an EIS is required (i.e. if the activity is likely to have a significant effect on the environment).

Further information

Further information on the EP&A Act can be found in the following DECC policies and Legal Eyes:

Policies

- DEC (2006) *Internal DEC Guidance on Part 3A of the Environmental Planning and Assessment Act 1979* (available on [ROOKS](#))
- DECC (2008) *Proponents Guidelines for the Review of Environmental Factors* (available on [the DECC website](#)) [external]
- NPWS (2003) *Construction Assessment and Approvals Procedure* (available on [PAWS](#))
- NPWS (2004) *Guide to Approvals: cultural heritage places, buildings, landscapes and moveable heritage items on NPWS estate*

Legal Eyes (available on [DECCnet](#))

- 2007/16 – *Environmental Planning and Assessment Act 1979: How is the Act relevant to DECC?*
- 2007/17 – *Environmental Planning and Assessment Act 1979: How do I work out which assessment process applies to a proposal?*
- 2007/18 – *Environmental Planning and Assessment Act 1979: Application of Part 5 of the Act to DECC as a proponent*
- 2007/19 – *Environmental Planning and Assessment Act 1979: Overview of Part 5 of the Act as it applies to DECC as a regulator*
- 2007/20 – *Environmental Planning and Assessment Act 1979: Overview of Part 4 of the Act – development that requires consent*
- 2007/21 – *Environmental Planning and Assessment Act 1979: Integrated Development in Part 4 of the Act*
- 2007/22 – *Environmental Planning and Assessment Act 1979: Major projects and critical infrastructure assessment process under Part 3A of the Act*
- Legal Eye 07/04: *Changes to ACH approval requirements under Part 3A of the EP&A Act*

The Heritage Act 1977

The Heritage Act protects the State's natural and cultural heritage. Aboriginal places or objects that are formally recognised as having high cultural value are listed on the State Heritage Register. A s.60 approval from the Heritage Council is required in order to carry out a s.57(1) activity (alter, damage, move etc.) on a listed item. This approval is additional to any AHIP that may be required under the NPW Act.

Commonwealth legislation

- The *Australian Heritage Council Act 2003* provides for the listing of cultural heritage places on the register of the National Estate.
- The *Protection of Moveable Cultural Heritage Act 1986* controls the import and export of human remains and Aboriginal cultural items.

- The *Environment Protection and Biodiversity Conservation Act 1999* provides for the Australian implementation of the World Heritage Convention in Australia and provides for the listing and protection of places on the National Heritage List (e.g. Brewarrina fish traps).
- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is intended to provide additional protection from injury or desecration of artifacts and areas which are of particular significance to the Aboriginal peoples and traditions. The Act protects 'significant Aboriginal areas' and 'significant Aboriginal objects'. A 'significant' area or object is one of particular significance to indigenous people in accordance with Aboriginal or Torres Strait Islander tradition. The Act also includes obligations for notification of human remains.
- The *Native Title Act 1993* provides a legislative framework for the recognition and protection of common law native title rights. In certain circumstances, registered native title holders and claimants have a right to negotiate in relation to the protection and management of heritage areas or sites within the lands and waters covered by their native title claim. The NSW *Native Title Act 1994* supports this legislation.

Commonwealth legislation can be found on the *Australian Legal Information Institute* [website](#).

Appendix C: EPRD operating principles

OUR VALUES

As individual staff, work teams and as a department we seek to:

- **Protect the environment** - We are strongly committed to protecting the environment.
- **Respect Aboriginal culture and heritage** - We respect Aboriginal knowledge and culture, both traditional and contemporary, and encourage and support the involvement of Aboriginal people in our work.
- **Be transparent** - We are open, accessible and accountable to the community and each other.
- **Act with integrity** - We are ethical, impartial and honest.
- **Act professionally** - We treat our colleagues, our many external partners and other members of the community with respect. We base our decisions on facts, objective standards and analysis, consistent with community values. We value our diversity of ideas and skills as the basis of selecting the best approach. Once a decision is made, we make a commitment to delivering that decision.
- **Work collaboratively** - We collaborate with our colleagues and our external partners to deliver our goals.
- **Be innovative** - We foster creative and inspirational thinking, and encourage learning and improvement

OUR OPERATING PRINCIPLES

The Operating Principles will guide the way we carry out our regulatory activities. They provide a solid foundation for a consistent approach to our work and are a key element of all credible and robust regulatory programs. You should apply the Operating Principles consistently when determining requirements in a particular situation so that your decisions are appropriate, transparent and defensible.

Regulation is multifaceted and the term is used in these principles in its broadest sense. We recognise that our regulatory program includes science, social insight, financial analysis, risk assessment, education and guidance (for ourselves and others), good decision-making frameworks, economic incentives, offences and penalties and a credible compliance program incorporating strategic enforcement. Regulation is not just about enforcement – which is the application of legal tools to ensure compliance with a defined set of requirements or to apply a sanction.

1. Anticipate, find and solve important problems

We will apply our skills and knowledge to identify, prioritise, and resolve environmental, conservation and cultural heritage problems, taking into account risks to obtain achievable, measurable and cost effective solutions. We will be innovative and effective in tackling important problems and implement systems to minimise effort on less important ones.

2. Set outcomes focused regulatory requirements

Our requirements will be linked to achievable environmental, conservation and cultural heritage objectives that can be monitored, easy to understand, widely accepted and unambiguous.

3. Ensure stakeholders understand that compliance is necessary

We will ensure that stakeholders (which includes the community) are aware of their statutory responsibilities/requirements and that we will take appropriate regulatory actions when needed. We will educate stakeholders about their roles and responsibilities and ensure action is taken where there is non-compliance.

4. Recognise our use of discretion

We acknowledge the need to make choices to achieve the DEC's goals and objectives and that discretion is an important and necessary component of our regulatory approach. We should apply discretion in a rational and demonstrably justifiable way. We must also accept responsibility for the choices we make and be prepared to be challenged over our decisions.

5. Maximise our impact

We can achieve a 'multiplier effect' by influencing and empowering the community, key stakeholders and other agencies to achieve a more healthy and sustainable environment. We can do this through strategic action beyond our direct statutory role (e.g. non-regulatory tools) as well as through the considered application of our statutory responsibilities.

6. Document our decisions and actions

We must document our decisions, objectives, actions and outcomes in the most efficient way. These should be publicly accessible and available where appropriate. We should communicate proactively and in a way that is easily understood so that our stakeholders understand our rationale and reasoning.

7. Measure and report performance

We should measure the success of our work using a broad mix of indicators and quality summaries to improve our performance and effectiveness and to encourage others to improve their performance. Public reporting should show stakeholders how we allocate and balance our resources on the important issues, how we prevent environmental harm and how we achieve compliance using the best mix of tools. Reporting should encourage clear articulation of relationships between the state of the environment, our selection of regulatory and non-regulatory tools and environmental improvements and conservation outcomes resulting from their application.

8. Apply the right tool for the right problem at the right time

An adaptive management approach recognises that there is no 'one size fits all' response. We should select regulatory and non-regulatory tools to achieve positive environmental and conservation outcomes at the time and for the problem at hand. In other words, a 'fit for purpose' response. We should also avoid exaggerated swings in our approach as they can result in adverse delayed effects, are confusing for stakeholders and can be hard to reverse.

9. Provide support and guidance for staff

We will provide and maintain a high standard of support, guidance, training and resourcing for our staff so that they can operate safely, efficiently and effectively, with high ethical standards and professionalism under changing circumstances. We will achieve this through both formal and informal processes that empower individuals to solve problems and make decisions in the context of uncertainty.

10. Teamwork and Communication

We will develop and utilise teams within and across branches to maximise the effectiveness of our work and to build strong communication networks. In doing this we recognise that required expertise might have to be sought or provided from other Branches and Divisions or external sources.