

# Guide to Determining and Issuing Aboriginal Heritage Impact Permits

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Department of **Environment & Climate Change** NSW



The objective of this guide is to ensure that DECC's decisions regarding Aboriginal Heritage Impact Permits (AHIPs) are transparent and defensible, and that any AHIPs issued are appropriate, reasonable and enforceable.

Except where otherwise stated in this document, this guide replaces all existing documents and policies relating to determining and issuing Aboriginal Heritage Impact Permits.

**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
AHIP	Aboriginal Heritage Impact Permit
AHIMS	Aboriginal Heritage Information Management System
CHD	Culture & Heritage Division
DECC	Department of Environment and Climate Change (formerly DEC)
DG	Director-General of DECC
EIA	Environmental Impact Assessment
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EPRG	Environment Protection & Regulation Group
ESD	ecologically sustainable development
GTA	general terms of approval
IDA	Integrated Development Assessment
ISEMS	Integrated Statutory Environmental Management System <sup>1</sup>
LSB	Legal Services Branch
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NPW Regulation	National Parks and Wildlife Regulation 2002
NPWS	National Parks & Wildlife Service (now part of DECC)
PAWS	Parks and Wildlife Service [Intranet site] <sup>2</sup>
POEA Act	<i>Protection of the Environment Administration Act 1991</i>
PWG	Parks & Wildlife Group
R&C Branch	Reform & Compliance Branch (EPRG)
ROOKS	Regulatory Officers Online Knowledge System <sup>3</sup>

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<sup>1</sup> ISEMS – a DECC database used to track documentation associated with licences, permits and any other legal notice or documentation.

<sup>2</sup> The PAWS website can be accessed by DECC staff at: <http://decnet/Intranet/publish1.nsf/content/Home>.

<sup>3</sup> Staff can access ROOKS at <http://g200b/rooks/> (migrated DECC computers). Aboriginal heritage documents are primarily located at <http://g200b/rooks/Categories/Environmental%20Compliance/Aboriginal%20Heritage/>

## Glossary

<b>Aboriginal Heritage Impact Permit (AHIP)</b>	<p>The statutory instruments that DECC issues under s.87 and/or s.90 of the NPW Act:</p> <ul style="list-style-type: none"><li>• <b>s.87 Aboriginal Heritage Impact Permits</b> Required to disturb or move an Aboriginal object or disturb land for the purposes of discovering an Aboriginal object</li><li>• <b>s.90 Aboriginal Heritage Impact Permits</b> Required to destroy, damage or deface an Aboriginal object or Aboriginal place.</li></ul>
<b>Aboriginal object</b>	<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>
<b>Aboriginal place</b>	<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>
<b>Aboriginal site</b>	<p>A location or area of land that contains or is associated with Aboriginal object(s).</p>
<b>Applicant</b>	<p>A person applying for a s.87 or s.90 AHIP, under the NPW Act.</p>
<b>Damage</b>	<p>In this guide, the term ‘damage’ also refers to ‘destroy’ and ‘deface’ (for the purposes of s.90).</p>
<b>Decision maker</b>	<p>Either the Director-General or DECC officer with delegated authority to issue or refuse an AHIP.</p>
<b>Impact</b>	<p>Refers to those impacts listed under s.86 and/or s.90 of the NPW Act; i.e. knowingly damage, destruction, defacement of Aboriginal objects and Aboriginal places (s.90); disturbance, movement etc. of Aboriginal objects (s.86).</p>
<b>Invasive analysis</b>	<p>An analysis of an Aboriginal object that damages the Aboriginal object.</p>
<b>Minister</b>	<p>Minister administering the NPW Act, i.e. the Minister for Climate Change, Environment and Water.</p>

**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).

Relevant provisions include s.86(b) and s.85A(1) (but not s.90).

**Recommending officer**

DECC officer(s) who initially evaluates an application and prepares an AHIP determination report for consideration by the decision maker.

**Registered local Aboriginal groups**

Those local Aboriginal groups (or individuals) who have registered an interest in accordance with DECC's *Interim Community Consultation Requirements for Applicants*.

**Safekeeping**

Care of Aboriginal objects by or on behalf of an Aboriginal person or organisation pursuant to s.85A(a)(c).

**Salvage and community collection**

**Salvage:** The recovery of Aboriginal objects in accordance with archaeological methodology. **Community collection:** The recovery of Aboriginal objects by representative(s) of the Aboriginal community.

**Subsurface investigation**

Systematic, archaeological investigation involving ground disturbance, carried out for the purpose of discovering an Aboriginal object.





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 guide

### 1.1 Intended audience

This guide is an internal DECC document, written for an internal audience. It is targeted at EPRG Planning and Aboriginal Heritage staff who process applications for Aboriginal Heritage Impact Permits (AHIPs). In the context of this guide, those staff are known as ‘recommending officers’ and ‘decision makers’.

The **recommending officer** is the EPRG officer who initially evaluates an application and prepares an AHIP determination report for consideration by the decision maker. This is usually the Branch’s:

- Archaeologist
- Aboriginal Heritage Planning Officer, and/or
- Senior Aboriginal Heritage Planning Officer.

The **decision maker** is the Director General (DG) or DECC officer who has the delegated authority<sup>4</sup> to issue or refuse an AHIP. This is usually the Branch’s:

- Director, and/or
- Planning and Aboriginal Heritage Manager.

### 1.2 Objective

The objective of this guide is to ensure that DECC’s decisions regarding AHIPs are transparent and defensible, and that any AHIPs issued are appropriate, reasonable and enforceable.

### 1.3 Scope

This guide sets out the process for:

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

#### Important note about AHIP determinations:

This guide identifies the factors you should consider on a routine basis when determining AHIP applications<sup>5</sup> and discusses how your consideration of these issues should be recorded. The guide is *not* intended to provide detailed information or guidance on *how* officers should consider these issues.

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<sup>4</sup> A list of delegated positions can be found on the ‘Delegations’ page of [DECCnet](#) (under Legal & Investigations) – refer to ‘Delegation of Director-General Functions’.

<sup>5</sup> See section 5 *Determining the AHIP application* (particularly 5.4.2).

## 1.4 Intended outcomes

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

- make and document decisions about AHIP applications, and
- issue and refuse AHIPs where required.

## 1.5 Links to other DECC policies

This guide supports EPRG's *Operational Policy: Protecting Aboriginal Cultural Heritage* (available on [ROOKS](#)) and should be read in conjunction with the AHIP determination report template in [Appendix D](#) (also available on ISEMS [Integrated Statutory Environmental Management System]).

DECC is currently undertaking a substantial amount of work that is relevant to and will support the broad policies outlined in this guide. 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](#)).

### 1.5.1 Important note about linkages with developing policies

This guide is a major deliverable of the cross-divisional Improving Aboriginal Cultural Heritage Regulation Project. This project is delivering a number of policies, procedures and guidelines (both internal and external) to improve the way that DECC protects Aboriginal cultural heritage through regulation. In some cases, elements of this guide may be difficult to fully implement while these accompanying documents are being developed. In the meantime, use your professional judgement and apply the principles of this guide until all documents are finalised.

This guide will be systematically reviewed on a regular basis (see section 1.6) to ensure that it remains up to date and consistent with other DECC policies and procedures as they are developed.

## 1.6 Review and update

This guide 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 guide will otherwise be reviewed by Reform & Compliance Branch (EPRG):

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

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

## 2 Background information

### 2.1 Relevant legislation

The EPRG *Operational Policy: Protecting Aboriginal Cultural Heritage* (available on [ROOKS](#)) provides a detailed overview of the legislative framework for the protection of Aboriginal cultural heritage (see Appendix B of the *Operational Policy*). 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 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, which is caused 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 What is an AHIP and when is one required?

An AHIP is the statutory instrument that DECC issues under sections 87 and/or 90 of the NPW Act. The AHIP application and determination process requires an assessment (by the applicant) and evaluation (by DECC) of the Aboriginal heritage values of Aboriginal objects and places potentially affected by impacts. This process ensures that Aboriginal objects and places are protected and conserved as required by s.2A(1)(b) of the NPW Act (see section 2.1.1 above).

Through the AHIP determination process, DECC officers review and evaluate AHIP applications to ensure that impacts to Aboriginal cultural heritage are avoided and/or reduced where possible and that opportunities for conservation have been adequately explored.

AHIPs allow impacts to Aboriginal objects and places, after adequate community consultation and a thorough assessment and evaluation process. The AHIP process is also a tool for pursuing and documenting the conservation of Aboriginal cultural heritage. For example, AHIPs can protect or exclude certain objects or areas from impacts.

Legal advice prepared for staff outlines when it is appropriate to use a s.87 AHIP, a s.90 AHIP or s.86 authorisation (see 'Legal Advice – Part 6 Interpretation Table' on [ROOKS](#)). It also outlines when it is appropriate to use a s.91 notification and a s.85A(1)(c) *Care Agreement* (although these agreements are not dealt with in detail by this guide).

## 2.2.1 Section 86 offences – disturbing, moving (etc.) Aboriginal objects

S.86 provides offences for certain impacts to Aboriginal objects:

**NPW Act extract:**

**86 Offences relating to Aboriginal objects**

*A person, other than the Director-General or a person authorised by the Director-General in that behalf, who:*

- (a) disturbs or excavates any land, or causes any land to be disturbed or excavated, for the purpose of discovering an Aboriginal object,*
- (b) disturbs or moves 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,*
- (c) takes 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,*
- (d) removes an Aboriginal object from a national park, historic site, state conservation area, regional park, nature reserve, karst conservation reserve or Aboriginal area, or*
- (e) erects or maintains, 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,*

*except in accordance with the terms and conditions of an unrevoked permit issued to the person under section 87, being terms and conditions having force and effect at the time the act or thing to which the permit relates is done, is guilty of an offence against this Act.*

Note that s.86(b) relates only to Aboriginal objects that are ‘property of the Crown’.<sup>6</sup>

## 2.2.2 Section 87 AHIPs

A s.87 AHIP is a defence to the offences under s.86 (see section 2.2.1 above).

S.87 AHIPs can be issued with or without site-specific conditions, and can be revoked or varied by the DG at any time. However, s.87 AHIPs cannot be transferred to another person. A new application (or written notice from the parties) will be required in order to revoke the s.87 AHIP and reissue it to a new s.87 AHIP holder. If the terms of a new application are the same as those of the original AHIP, the applicant can refer to the original consultation process. See also note in section 1.3.

It is an offence under s.87(3) to contravene the conditions of a s.87 AHIP.

The document ‘Legal Advice – Part 6 Interpretation Table’ (available on [ROOKS](#)) outlines the types of activities that should be regulated through the use of s.87.

## 2.2.3 Section 86 authorisation

The DG can authorise people (e.g. DECC staff) under s.86 to carry out activities, such as Aboriginal heritage conservation works, that would otherwise require a s.87 AHIP.

The document ‘Legal Advice – Part 6 Interpretation Table’ (available on [ROOKS](#)) outlines the types of activities that should be regulated through the use of a s.86 authorisation. See also section 2.2.2.

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<sup>6</sup> ‘Property of the Crown’ – see glossary (p vii).

## 2.2.4 Section 90 offences – damaging (etc.) Aboriginal objects or places

S.90 provides offences for certain impacts to Aboriginal objects and places:

**NPW Act extract:**

**90 Destruction etc. of Aboriginal objects or Aboriginal places**

(1) A person who, without first obtaining the consent of the Director-General, knowingly destroys, defaces or damages, or knowingly causes or permits the destruction or defacement of or damage to, an Aboriginal object or Aboriginal place is guilty of an offence against this Act.

Maximum penalty: 50 penalty units or imprisonment for 6 months, or both (or 200 penalty units in the case of a corporation).

Aboriginal objects and places can be damaged<sup>7</sup> both directly and indirectly as part of development works, conservation works, research or other activities. Certain activities may also indirectly damage Aboriginal objects and places located within or immediately beyond the area where the work is being carried out.

Examples of indirect damage are:

- damage to art in a shelter site from increased visitation
- damage to a site, landscape or cultural feature from mine subsidence
- damage from increased erosion, and
- changes in water flows affecting the value of a cultural site.

## 2.2.5 Section 90 AHIPs

A s.90 AHIP may be issued with or without site-specific conditions. S.90 AHIPs cannot be transferred to another person. An application (or written notice from the parties) will be required to revoke the s.90 AHIP and reissue it to a new s.90 AHIP holder. See also note in section 1.3.

S.90 AHIPs are usually applied for when:

- (1) Aboriginal object(s) have been identified (through survey work and/or cultural knowledge), and
- (2) the applicant (or DECC) concludes that Aboriginal objects will be or are likely to be damaged when certain activities are carried out.

It is EPRG policy that impacts to Aboriginal objects and places should be avoided or reduced wherever possible.<sup>8</sup> Accordingly, an applicant must demonstrate that all feasible options to avoid or reduce damage were considered.

The document 'Legal Advice – Part 6 Interpretation Table' (available on [ROOKS](#)) outlines the types of activities that should be regulated through the use of a s.90 AHIP.

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

## 2.2.6 Section 90 AHIPs for Aboriginal places

The purpose of an Aboriginal place declaration is to recognise and protect the special cultural significance of an area of land. It also gives a place protection under s.90 of the NPW Act, to prevent its damage without the consent of the DG.

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.

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<sup>7</sup> *Damage* – in this guide the term 'damage' also includes 'destroy' and 'deface'.

<sup>8</sup> Refer to *Operational Policy: regulating the protection of Aboriginal cultural heritage* (section 4.8).

On declaration of an Aboriginal place, the gazettal notice includes a summary statement of significance that highlights its cultural value. Gazettal notices can be accessed either:

- a) electronically, via the *Government Gazette*, on the Department of Commerce [website](#), or
- b) in hard copy, by contacting the Manager Reserve Establishment and Land Information Unit (PWG).

A full statement of significance is also prepared as part of the briefing note for the declaration. You can obtain the briefing note by contacting the CHD Regional Manager (Aboriginal Heritage Operations).

Management Plans for Aboriginal places may also be prepared. The purpose of a Management Plan is to set out the future uses for the place and how it will be managed. Management Plans may also identify what sorts of activities can be conducted in the area without requiring a s.90 AHIP.

It is not compulsory for Management Plans to be developed. However, you can check with the CHD Regional Manager (Aboriginal Heritage Operations) to see whether any have been prepared when determining AHIP applications for Aboriginal places.

Generally speaking, any activities that are consistent with the statement of significance or with any DECC-approved Management Plan prepared for the Aboriginal place would not require a s.90 AHIP, as the activity would not usually be considered to damage that place. Such activities could include (but would depend on each particular circumstance):

- 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 significance or any DECC-approved Management Plan prepared for the Aboriginal place may need a s.90 AHIP. Such activities could include (but would depend on each particular circumstance):

- proposed new walking or vehicle access tracks
- hazard reduction activities not referred to in the management plan
- subsurface investigations<sup>9</sup>
- other research that may involve damage to the Aboriginal place.

If the proposed activity will impact upon Aboriginal objects within the Aboriginal place in any way, then a s.87 or s.90 AHIP, or both, is usually required.

#### **Further information**

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

### **2.2.7 Note about transferring Aboriginal objects under s.85A(1)**

The DG may transfer Aboriginal objects that are property of the Crown<sup>10</sup>.

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<sup>9</sup> Subsurface investigations within an Aboriginal place may require both a s.87 AHIP (where excavating with the purpose of discovering an Aboriginal object) and a s.90 AHIP (for any damage, destruction or defacement to the Aboriginal place as a result of the excavation).

<sup>10</sup> 'Property of the Crown' – see glossary (p vii).

**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 owner<sup>11</sup> 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 regulations<sup>12</sup> for safekeeping.*

Whether or not there are any Aboriginal owners affects the DG's powers to act under s.85A(1)(a) and (b). As there are few registered Aboriginal owners at present, it is more common for transfers to be made to an Aboriginal organisation or person under s.85A(1)(c) (i.e. Care Agreements). These transfers should accommodate the possibility that future Aboriginal owners may seek a permanent return of the objects.

In some cases the transfer of Aboriginal objects for safekeeping to persons or entities other than an Aboriginal organisation or person (e.g. a regional museum) may be possible, but this should be done only with the endorsement of, or on behalf of, a relevant Aboriginal person or organisation. A permanent return of Aboriginal objects cannot occur unless the person is an Aboriginal owner.

Care Agreements are not AHIPs and should be issued separately from AHIPs (although both may be considered concurrently). The document 'Legal Advice – Part 6 Interpretation Table' (available on [ROOKS](#)) outlines the types of activities that should be regulated through the use of s.85A.

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

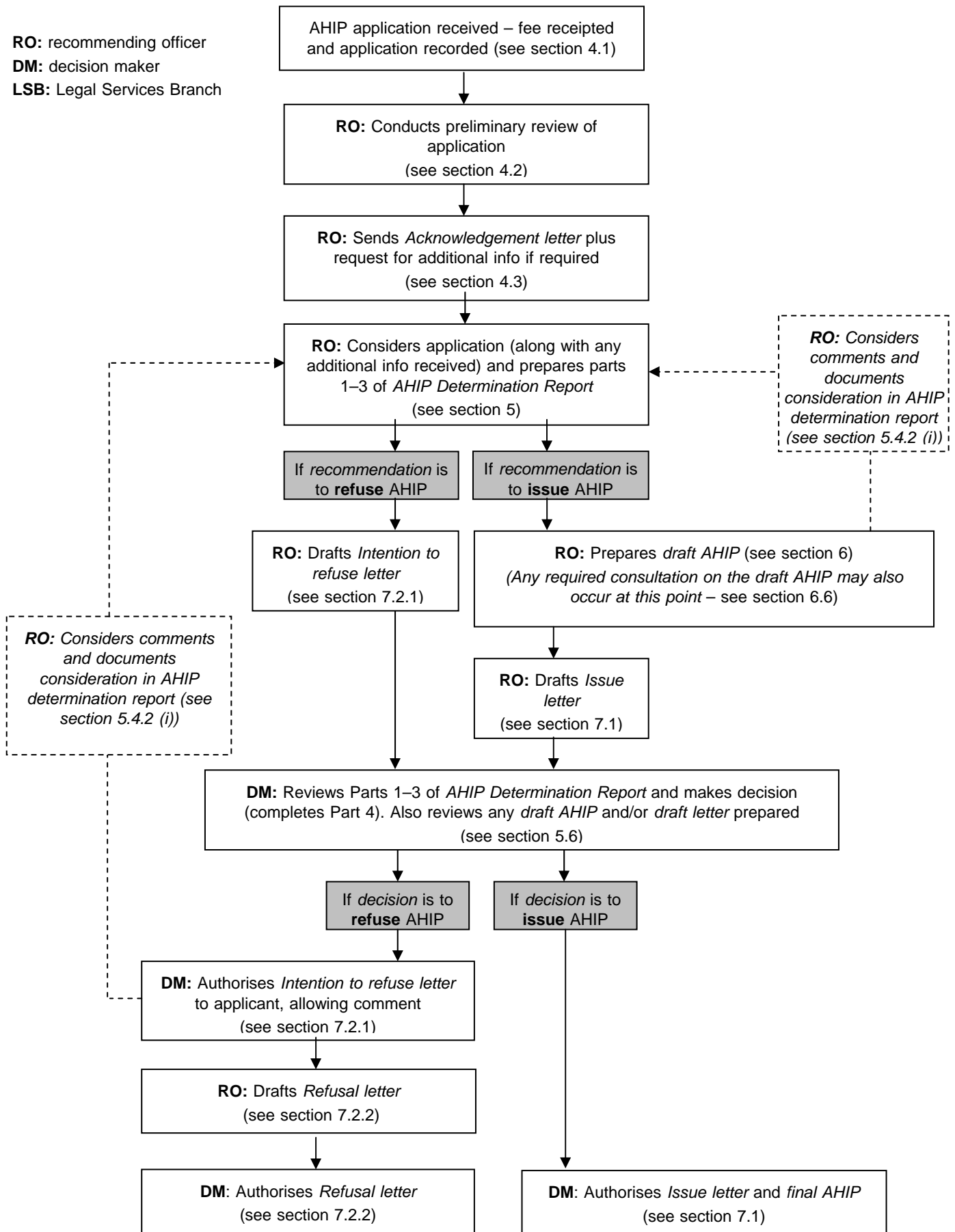
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<sup>11</sup> 'Aboriginal owner' – defined in s.4(1) of the *Aboriginal Land Rights Act 1983*.

<sup>12</sup> '... person, or a person of a class, prescribed by the regulations ...' – cl. 88 of the NPW Regulation prescribes that this can be (a) an Aboriginal person, (b) an organisation representing Aboriginal people. 'Aboriginal person' is defined in s.4(1) of the *Aboriginal Land Rights Act 1983*.

### 3 Flow chart for determining and issuing AHIPs

**RO:** recommending officer  
**DM:** decision maker  
**LSB:** Legal Services Branch





## 4 An AHIP application is received

### 4.1 Record the application and receipt the fee

Once the application and fee have been received, the recommending officer (or the administrative support officer) immediately receipts the fee and records the application (including supporting documents) by date-stamping all documents and entering a record into AHIMS (the Aboriginal Heritage Information Management System).

The correct account for AHIP fees is:

- Retained Revenue account: 'rendering of services' – General Ledger Code 8256: 'Fees – Consents (NPW Act)'. (NB: These fees are retained by EPRG.)

### 4.2 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 the preliminary review of the application to quickly determine whether the application is complete and adequate.

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

A preliminary review of an AHIP application would involve answering the following questions:

1	Has the application form been properly completed?	See 4.2.1
2	Has the correct fee been paid?	See 4.2.2
3	Has development consent been obtained (if necessary)?	See 4.2.3
4	Is the supporting information appropriate?	See 4.2.4
5	Is the AHIP necessary?	See 4.2.5

These questions are further discussed in the following subsections.

#### 4.2.1 Has the application form been properly completed?

All applications must be made in writing. Applicants must use the AHIP application forms on the [DECC website](#). This will allow applicants and recommending officers to check that all the necessary information has been provided. Under no circumstances will verbal applications be accepted.

*What is the applicant applying for?*

If the applicant is not clear about exactly what they are applying for, it can be difficult for DECC to adequately evaluate the application. This is especially the case when the applicant is applying for a combined s.87 and s.90 AHIP.

AHIP applications typically received by DECC include:

- applications for s.87 AHIPs (e.g. subsurface investigation; preliminary research; salvage and/or community collection) only
- applications for s.90 AHIPs (e.g. development works that will damage Aboriginal objects) only
- combined s.87 and s.90 AHIP applications (e.g. salvage of Aboriginal objects [s.87] and damage to the remaining [unsalvaged] objects [s.90])

The application may also be further complicated if a s.85A(1)(c) *Care Agreement* for the safekeeping of salvaged (or collected) objects is also being sought.

Check that the applicant is clear about what they are applying for.

*Is all supporting information attached?*

Check that all the supporting information listed on the form has been attached to the application.

*Is the authorisation appropriate?*

Finally, check that the application has been signed and dated by the appropriate person; that is, the person authorised to sign for the legal entity making the application (e.g. a director of a company). See also section 6.4.1 for more detail about legal entities.

The application cannot be considered if it is not signed and dated by the appropriate person.

#### **4.2.2 Has the correct fee been paid?**

If the applicant is required to pay an application fee, they must pay it when they submit their application. The application cannot be considered without the appropriate fee.

*Fee structure*

S.143 of the NPW Act allows DECC to charge fees for determining AHIP applications. All revenue raised from AHIPs is retained by EPRG.<sup>13</sup> The application fees for AHIPs are structured on a sliding scale:

<b>S.87 AHIPs</b>	<b>Fee</b>
Owner-occupied dwellings	\$25
All other s.87 AHIPs	\$100

<b>S.90 AHIPs</b>	<b>Fee</b>
Work to a 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 \$1 million	\$400
Work between \$1 million and \$2 million	\$750
Work between \$2 million and \$5 million	\$1000
Work over \$5 million	\$2000

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

*Waiving AHIP fees*

S.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.

Circumstances where a fee waiver may be appropriate include:

- where CHD or PWG staff apply for a s.87 AHIP to undertake Aboriginal heritage conservation works (i.e. if activities are not covered by a s.86 authorisation)

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<sup>13</sup> Retained revenue account: 'rendering of services' – General Ledger Code 8256: 'Fees – Consents (NPW Act)'.

- where an Aboriginal community group applies to undertake Aboriginal heritage conservation works on their country
- basic AHIP variations or transfers (i.e. that would involve minimal effort and no evaluation of new information by EPRG staff).

Circumstances where a fee waiver may not be appropriate include:

- where non-Aboriginal community groups or individuals apply for a s.87 AHIP to undertake Aboriginal heritage conservation works (except perhaps where the relevant Aboriginal community shows clear support)
- where anyone (including DECC applicants) applies for a s.90 AHIP.

In general, we require applicants to justify up front why their AHIP application fees should be waived. However, the recommending officer may recommend waiving a fee even if a waiver has not been requested (i.e. by recommending that the fee be refunded).

Record the reasons for waiving the fee on the file.

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

### **4.2.3 Has development consent been obtained?**

Where the proposal requires development consent, check that this has been obtained. A copy of the development consent should be submitted along with the application. This may assist you in:

- (a) making sure that the correct application fee has been paid (as you will have a better idea of the scale of the development)
- (b) understanding the exact nature of the likely impacts on the Aboriginal object(s) and place(s) proposed by the development. You will be in a stronger position to evaluate the AHIP application.

The AHIP application may be accepted, but as a general rule should not be issued before any necessary development consent has been obtained. You should advise the applicant if this is the case (see section 4.3).

If there are reasons why an AHIP should be issued before development consent, note these in the AHIP determination report (see section 5.4.2(g)).

*Note:* Some proposals do not need development consent but need to be assessed under Part 5 of the EP&A Act. If required, an assessment under Part 5 must be undertaken before an AHIP is issued.

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

### **4.2.4 Is the supporting information appropriate?**

Supporting information may include site cards, final survey reports and maps. If the application does not have the required information attached, the application cannot be evaluated: ask for additional information (see section 4.3). You must not consider applications containing draft reports.

*Note:* If an environmental impact assessment (EIA)<sup>14</sup> has been prepared in relation to a statutory planning matter, DECC should consider it. If an EIA is applicable and has not been submitted with the AHIP application, ask the applicant for a copy of it. The Aboriginal heritage assessment report will often be included as part of an EIA.

### **4.2.5 Is the AHIP necessary?**

It may become apparent at the preliminary review stage that the AHIP is not necessary. For example:

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<sup>14</sup> *Environmental impact assessment* – e.g. Environmental Impact Statement (EIS), Review of Environmental Factors (REF), Statement of Environmental Effects (SEE) etc.

- there will be no impact to Aboriginal objects
- the mitigation measures proposed will mean that impact to Aboriginal objects should not occur
- reasonable steps have been taken to locate an Aboriginal object registered on AHIMS, but the object cannot be found.

Where this is the case, it may be appropriate to recommend (in writing, with the decision maker's sign-off) that the applicant withdraw the application. The applicant should indicate in writing that they are withdrawing their application. Keep a copy of this correspondence on the file so that there is a clear record that the application did not proceed.

### **4.3 Send acknowledgement letter**

After the preliminary review of the application, the recommending officer sends an acknowledgement letter and requests any additional information that is required. This will ensure that DECC provides a response once an application is received. [Appendix E](#) contains an Acknowledgement letter template (letter 1); templates are also available on ISEMS. Templates are editable and may be tailored to suit specific circumstances.

#### Requesting additional information

Request additional information relating to an application if you consider it necessary in order to make a recommendation or decision. This request must be given in writing to the applicant and clearly specify the information required, including a due date. The amount of time that you allow will depend on the work involved in providing this information. You can negotiate this with the applicant before sending the letter.

You would have grounds for recommending that the application be refused if you do not receive the additional requested information within a reasonable time after further follow up (e.g. after you have sent an *Intention to refuse letter* – see section 7.2.1).

If the application is part of an Integrated Development Assessment (IDA) and additional information is required from the applicant, then 'stop the clock' procedures may apply. Generally, time limits that apply to IDAs 'stop' when you request the information (so long as you request the information within 25 days of receiving the application), and resume when you receive that information. For more information, refer to [Legal Eye No: 2004/04 Integrated Development](#) and any updates.

## 5 Determining the AHIP application

### 5.1 Principles for decision makers

Decisions must be reasonable, unbiased, impartial, transparent, accountable and independent. You must document *all* decisions and any actions and outcomes required. This will ensure that applicants and other stakeholders understand the decision and how it was reached. This is especially important if DECC's decisions are later challenged in court (see section 8: [Challenges to DECC decisions](#)).

It is particularly important that decisions be impartial, unbiased and independent. Bias can result when the decision maker has a conflict of interest (e.g. has a direct financial interest in the outcome of the decision).

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 is a reasonable suspicion that the decision maker will not be impartial because of an association that may be perceived to affect their impartiality; for example, a past or present family, professional or contractual association. This test is based on the principle that justice must not only be done, but it must also be seen to be done. If the decision maker is in this position, they should request that the application be reallocated to another decision maker for determination.

The decision maker should consider all reasonable options, including refusal of the application.

Decision makers should apply DECC's '*Principles for decision makers*' when determining AHIP applications. [Appendix A](#) discusses the broad principles for decision making and how they apply to the issuing of AHIPs. A decision-making checklist is provided in [Appendix B](#).

### 5.2 Documenting decisions – the AHIP determination report

The following sections cover the steps for recommending officers to follow when preparing AHIP determination reports.

Recommending officers must draft the AHIP 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. The AHIP determination report template at [Appendix D](#) (also available on ISEMS) has been developed to help you to duly consider and document all key matters. You might need to modify the template for unusual or unexpected circumstances.

The AHIP determination report template has four parts:

<a href="#">Part 1</a>	Background and documents considered	See section 5.3
<a href="#">Part 2</a>	Evaluation	See section 5.4
<a href="#">Part 3</a>	Recommendation	See section 5.5
<a href="#">Part 4</a>	Decision	See section 5.6

Although AHIP determination reports are not routinely released externally, they are publicly accessible documents under Freedom of Information legislation and may be called upon in legal proceedings. With this in mind, you should ensure that your AHIP determination report:

- is written in plain English
- is culturally sensitive
- is prepared in a manner for external release if subsequently required, and
- contains reasons for findings and decisions.

### 5.3 Background and documents considered (Part 1)

[Part 1](#) of the AHIP determination report template requires you to note the relevant background information and documents that need to be considered when evaluating the application in Part 2.

In particular, Part 1 of the template suggests that you:

- detail the background and purpose of the application, including:
  - the name of the applicant
  - the proposed timeframe for the AHIP
  - the nature and duration of any proposed development works, conservation work, research or other activity, including the length of the AHIP, if granted
  - whether a development consent or approval has been granted<sup>15</sup>
  - any other relevant background information
- list all documents provided with the application that were considered:
  - include the application, the Aboriginal heritage assessment report, archaeological or anthropological reports and any other documents (e.g. any EIA) accompanying the application
  - include the date received
- list all other documents that were taken into consideration, including any relevant DECC policies; for example:
  - any prior reports, regional studies and/or other historical documents relevant to the application that were included or identified and reviewed
  - any additional relevant reports, documents or research that were considered
  - any statement of significance or management plan associated with the Aboriginal place
  - any relevant DECC policies; for example:
    - DECC (2008) *EPRG Operational Policy – Protecting Aboriginal Cultural Heritage*
    - DECC (2008) *Guide to Determining and Issuing AHIPs*
    - DEC (2004) *Interim Community Consultation Requirements for Applicants*
    - NPWS (1997) *Aboriginal Cultural Heritage Standards and Guidelines Kit*
- list any written submissions received and considered in relation to the application (e.g. including any submissions that DECC received directly from the Aboriginal community); see also section 5.4.2(h).

### 5.4 Evaluation (Part 2)

[Part 2](#) of the AHIP determination report template requires the recommending officer to evaluate the factual information identified in Part 1, taking into account the ‘factors to consider’ (identified in section 5.4.2) where relevant.

You may need to modify the template for unusual or unexpected circumstances.

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<sup>15</sup> Any development consent should also be reviewed or considered, particularly the proposal details and any sections relating to Aboriginal heritage.

If the application relates to an integrated development approval (IDA) for which DECC has previously issued General Terms of Approval (GTAs) for s.90, then DECC cannot refuse to issue a s.90 AHIP, and the AHIP conditions cannot be inconsistent with the terms of the development approval. Similarly, any AHIPs issued following a Part 5 determination should not be inconsistent with the conditions of the determination.

### 5.4.1 How detailed does the evaluation need to be?

In Part 2 of the AHIP determination report (the evaluation), the recommending officer needs to address all issues in sufficient detail to allow the decision maker to properly determine whether to issue or refuse the AHIP application. That is, the recommending officer's evaluation should include sufficient detail to allow the decision maker to make a proper, informed decision.

That does not, however, mean that all AHIP applications will require the recommending officer to undertake a highly detailed written evaluation. There will be some circumstances where it will be appropriate for your written evaluation to be less detailed (see comparison of detail below).

The recommending officer should use their professional judgement and discretion when deciding how detailed Part 2 of an AHIP determination report should be for a particular matter.

*What do less-detailed and more-detailed written evaluations look like?*

A less-detailed written evaluation for Part 2 of the AHIP determination report may involve only a brief discussion of each of the 'factors to consider' listed in section 5.4.2 below. A more-detailed written evaluation may involve extensive discussion of each of the factors listed.

It is important to remember that the recommending officer may switch between a less- and more-detailed written evaluation at any time, if their opinion changes while considering the application.

*How do I decide how detailed my written evaluation in Part 2 should be?*

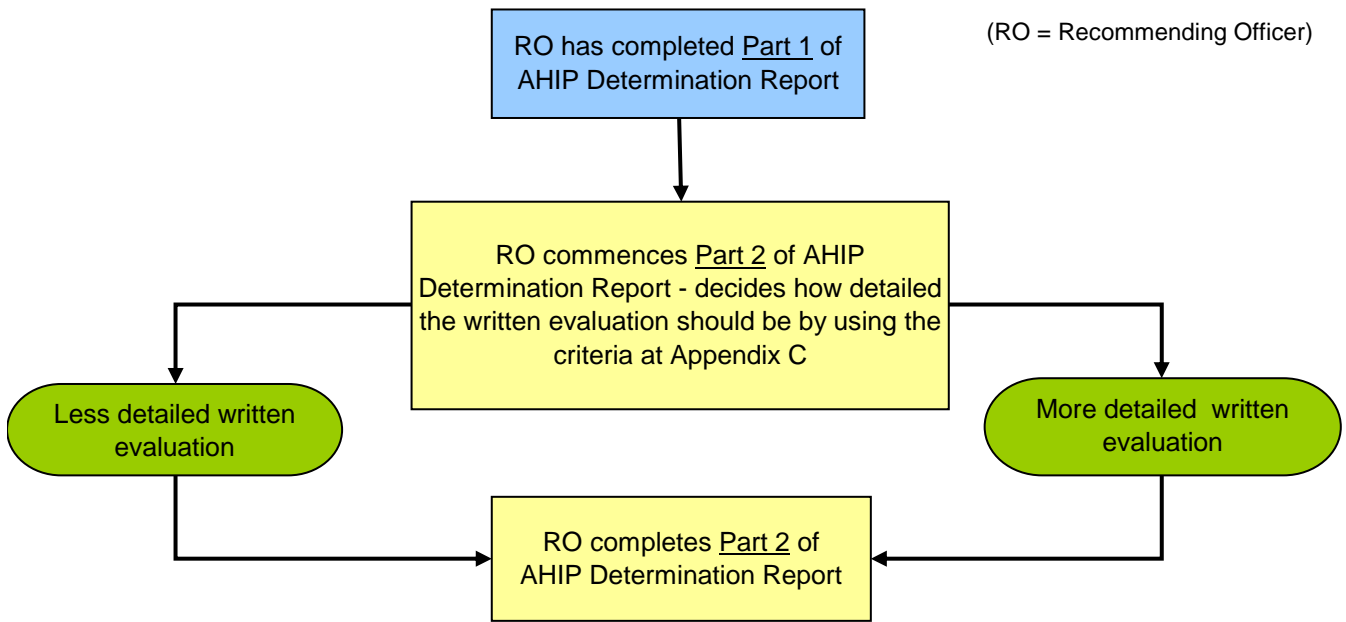
Criteria have been developed to help recommending officers to decide whether to do a more- or less-detailed written evaluation in Part 2. The following criteria are explained in [Appendix C](#):

1. Knowledge of Aboriginal objects in the landscape (is knowledge poor or good?).
2. Cultural significance (is significance higher, lower or in dispute?).
3. Archaeological significance (is significance higher or lower?).
4. Potential for controversy.
5. Extent of existing disturbance (i.e. is existing disturbance high, low, irrelevant?).
6. Intergenerational equity / precautionary principle (is the object rare or common; is there uncertainty?).
7. Conservation status of objects across DECC reserve system (is the object poorly conserved or adequately conserved, or is conservation status unknown?)

As a general rule you should do a *more-detailed* written evaluation for any AHIP applications involving:

- Aboriginal places
- more significant Aboriginal object(s)
- the potential for controversy.

**Flow chart of process for deciding how detailed your written evaluation should be.**



**5.4.2 Factors to consider when evaluating an AHIP application**

After you have decided how detailed your written evaluation should be, on the basis of the criteria in Appendix C (see discussion above), begin writing up your evaluation. Consider all relevant factors (or matters).

Although the NPW Act does not contain a specific list of factors that must be considered before a decision to issue an AHIP is made, the objects of the NPW Act, case law and DECC policies provide guidance on the types of matters that should be considered.

The following list of ‘factors to consider’ has been developed to help you in completing your written evaluation of the AHIP application in [Part 2](#) of the AHIP determination report. In your report, you should demonstrate that you have considered the following factors (where relevant):

<b>Factors to consider:</b>	
<b>(a)</b>	the adequacy of the application and accompanying information
<b>(b)</b>	the significance of the Aboriginal object or place
<b>(c)</b>	the likely impact of the proposal on the Aboriginal object or place
<b>(d)</b>	the adequacy of any proposed measures to avoid or reduce impacts
<b>(e)</b>	consultation with registered local Aboriginal groups
<b>(f)</b>	the principles of ESD
<b>(g)</b>	any applicable statutory planning matters related to the application
<b>(h)</b>	any issues raised in submissions
<b>(i)</b>	any other relevant matters

These factors are discussed in more detail below.

*Critical evaluation*

The applicant’s Aboriginal Cultural Heritage Assessment Report should provide all the information that you need in order to consider the factors listed here. The role of DECC is to *critically evaluate*



this information (i.e. you need to form a view about the appropriateness and correctness of the information contained in the report). Where it is warranted, you should request additional information in order to be able to adequately consider the application.

You will also need to evaluate other information, such as any submissions made directly to DECC. See also 'Work in Progress: Improving ACH Regulation Project' (available on [ROOKS](#)).

#### *Make clear conclusions and provide evidence for those conclusions*

For each of the factors considered, the AHIP determination report should make *clear statements* about the recommending officer's position on that matter. You should not merely restate assertions made by the applicant without some conclusion about your position.

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

#### *Consider relevant documents*

For each of the factors below, refer to all the documents you considered (those listed in [Part 1](#)) and how they helped to inform your opinion.

#### **(a) The adequacy of the application and accompanying information**

Under this heading, note:

- whether the application contains the information required in order to evaluate the potential impacts on known or probable Aboriginal objects and places
- whether the study area has been adequately identified
- whether this information has been compiled by a suitably qualified person.<sup>16</sup>

If the applicant has significantly modified their proposal since submitting their application, the applicant would need to submit additional information to DECC, including the results of further consultation with registered local Aboriginal groups.

#### **(b) The significance of the Aboriginal object(s) or place(s)**

An object of the NPW Act (s.2A(1)(b)) 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 ...'.

Under this heading, consider the actual and potential significance<sup>17</sup> (or value) of the Aboriginal objects or places within the landscape.

You must consider the cultural significance (or value) of the Aboriginal objects or places to Aboriginal people (i.e. those registered local Aboriginal groups consulted in accordance with the *Interim Community Consultation Requirements for Applicants* [DEC 2004]).

#### **(c) The likely impact of the proposal on the Aboriginal object(s) or place(s)**

Under this heading, consider the extent to which the proposal will directly or indirectly impact Aboriginal object(s) and place(s).

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

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<sup>16</sup> If any complaints, concerns or questions have been raised in regard to the qualifications of the person compiling the application, you should record how you considered this in your AHIP determination report.

<sup>17</sup> The term 'significance' is frequently used to encompass all aspects of significance. For example, in the *Burra Charter*, 'cultural significance' is described as the '... *aesthetic, historic, scientific, social or spiritual value for past, present or future generations. Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects. Places may have a range of values for different individuals or groups.*' This definition is used to refer to both Aboriginal and non-Aboriginal heritage.

**(d) Adequacy of any proposed measures to avoid or reduce impacts**

Under this heading, evaluate the adequacy of any proposed measures that will be taken to reduce impacts to Aboriginal object(s) or place(s) (or nearby land), and whether any additional measures are required.

Where it is relevant, state whether there are any reasonable and feasible measures that the applicant could adopt to avoid damage altogether and thus avoid the need for a s.90 AHIP.<sup>18</sup>

*Recommending site-specific conditions*

If additional measures are required, consider whether it is appropriate to recommend site-specific conditions (i.e. beyond standard conditions, relating specifically to area to be impacted) requiring the applicant to implement those additional measures. Refer to these conditions (e.g. by listing them or referencing their location in the draft AHIP) and document your reasons for recommending them (refer to section 6.4.5 for more information about drafting site-specific conditions).

If it is appropriate, also state whether the applicant has proposed any measures to restore or rehabilitate the area after the activity has been completed.

**(e) Consultation with registered local Aboriginal groups**

Under this heading, consider the views of the registered local Aboriginal groups and whether the applicant's consultation with those groups was adequate (i.e. in accordance with DECC's *Interim Community Consultation Requirements for Applicants*). Also consider how those views have been addressed in the development of the methodology, management and mitigation recommendations in the applicant's Aboriginal heritage assessment report.

If the applicant has significantly modified their application (e.g. as a result of DECC requiring additional mitigation measures), ensure that they have re-consulted the registered local Aboriginal groups regarding any changes.

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

**(f) 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)) by applying the principles of ESD (s.2A(2)).

EPRG's *Operational Policy: Protecting Aboriginal Cultural Heritage* (available on [ROOKS](#)) provides an overview of the legislative framework for the protection of Aboriginal cultural heritage, including the principles of ESD (refer to Appendix B).

Under this heading, evaluate how the principles of ESD have been addressed in the AHIP application. How has the applicant demonstrated that the proposal incorporates objectives and mechanisms for achieving ESD? Consider the following questions in your AHIP determination report:

- Has the applicant identified the cumulative impact of the proposal, e.g. the nature and extent of the Aboriginal object or place to be impacted in relation to other identified sites in the immediate area?
- Has the applicant sought to avoid, wherever practicable, serious or irreversible damage to significant Aboriginal object(s) or place(s)?
- Has the applicant assessed and weighed up the risks and consequences of various options?
- Has the applicant considered the costs and benefits of various options to future generations?

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<sup>18</sup> A s.87 AHIP may be required in order to identify objects so that serious impacts can be avoided through the implementation of appropriate avoidance strategies (e.g. redesign of the project).

- Has the applicant proposed any actions (either on or off site) which would help to promote inter-generational equity? (In some cases the proposal may be revised at the investigation stage to protect particularly significant objects.)

**Examples of actions to promote intergenerational equity:**

- Establishment of a conservation or exclusion area to conserve more significant objects for future generations and to allow the local Aboriginal community to retain an ongoing connection with the area.
- Involvement of Aboriginal people in managing the conservation area, allowing the transfer of cultural knowledge from one generation to the next.
- Establishment of a keeping place to conserve objects for future generations.

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.

The precautionary principle is relevant to your consideration of an AHIP application where:

- the proposal involves a risk of serious or irreversible damage to an Aboriginal object or place or to its value, and
- there is significant uncertainty about the Aboriginal cultural values or scientific or archaeological values, including the integrity, rarity or representativeness of the Aboriginal objects or place proposed to be impacted.

Where this is the case, take a precautionary approach.

It may be necessary to ask the applicant to provide further information to allow a proper consideration of these matters in your decision making.

In significant cases, you may recommend or decide that it is appropriate to refuse an application on ESD-related grounds. Speak to LSB before issuing a refusal on this basis.

**(g) Applicable statutory planning matters related to the application**

Under this heading, discuss how the AHIP application fits in with any broader statutory planning approval processes. For example:

- the proponent has development consent and is now applying for an AHIP
- the proposed development is being assessed under Part 4 of the EP&A Act as integrated development and DECC has been asked to provide General Terms of Approval (GTAs) in relation to a s.90 AHIP<sup>19</sup>
- DECC has previously provided GTAs for an integrated development application which has been approved by the consent authority, and now the proponent is applying for the s.90 AHIP
- the proposed activity is being assessed under Part 5 of the EP&A Act and DECC is the determining authority (i.e. is required to consider broader environmental issues under Part 5).

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

**(h) Issues raised in submissions**

Any submissions made directly to DECC in relation to the AHIP application (e.g. from an Aboriginal community group) must be considered.

Under this heading, document your consideration of any issues raised in these submissions, even if you consider them to be irrelevant. If you consider the issues to be irrelevant, state why.

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<sup>19</sup> When issuing (or refusing) GTAs, the DECC officer(s) should use the decision-making or determination process outlined in this Guide, even though an AHIP will not be issued at this stage. This is because a subsequent AHIP, when applied for, cannot be refused and cannot be inconsistent with the development approval obtained. So it is better to do the work at the GTA stage.

These submissions should also be listed in [Part 1](#) of the AHIP determination report.

**(i) Other relevant matters**

Under this heading, address any other relevant matters that you think should be noted in the AHIP determination report. For example, you could include a discussion about whether you provided a draft AHIP to the applicant and registered local Aboriginal groups<sup>20</sup> or an Intention to Refuse letter to the applicant, and whether any submissions were made in response (see sections 6.6 and 7.2.1 respectively).

## 5.5 Recommendation (Part 3)

[Part 3](#) of the AHIP determination report template allows the recommending officer to make recommendations on whether the AHIP should be refused or issued (subject to conditions). It requires you to:

- provide a recommendation to refuse or approve the AHIP application
- provide a summary of your evaluation of the application and conclusions
- list and attach the documents referred to in the AHIP determination report that are pertinent for the decision maker to review in detail before making a decision (this will assist in identifying the documents that were put before the decision maker at the time the decision was made in case it is challenged at a later stage)
- (if an AHIP is being issued) make a recommendation for issuing a streamlined or standard AHIP, with reasons (refer to section 6.2 for more information on these types of AHIPs and when they should be used)
- (if an AHIP is being issued) attach the draft AHIP (see section 6 for guidance on drafting AHIPs)
- (if applicable) list any recommended key site-specific AHIP conditions identified in Part 2 (see section 5.4.2(d))
- attach the appropriate template letter:
  - draft Issue letter (see section 7.1 for guidance and [Appendix E](#) for template letter 2; templates are also available on ISEMS)
  - draft Intention to Refuse letter (see section 7.2 for guidance and [Appendix E](#) for template letter 3)
  - draft Refusal letter (see section 7.2.2 for guidance and [Appendix E](#) for template letter 4)
- provide a list of all attachments to the AHIP determination report, and
- provide any additional recommendations which do not directly relate to the recommendation but are relevant for the decision maker to note (e.g. that an Aboriginal Place declaration be considered).

## 5.6 Decision (Part 4)

[Part 4](#) of the AHIP determination report template allows the decision maker to state their decision regarding the AHIP application. 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 whether it is appropriate to issue the AHIP. 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 (and appropriateness of) that recommendation and any proposed conditions.

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<sup>20</sup> Refer to glossary (p vii).

The decision maker does not need to read every page of every document that the recommending officer considered (e.g. lengthy consultants' reports). However, at a minimum, the decision maker should read and consider:

- the AHIP 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 recommending officer's recommendations, and
- the conditions of any proposed AHIP (if the recommendation is that an AHIP should be issued).

Where the decision maker agrees with the recommendations in the AHIP determination report, they should give reasons in [Part 4](#) of the report as to why they agree. Where the views of the decision maker differ from a recommendation in the AHIP determination report, they should also explain how and why this decision was reached.

## 5.7 Grounds for refusing an application

Circumstances in which DECC may refuse to issue an AHIP should be determined on a case-by-case basis.

### *Heritage conservation / protection issues*

You may refuse an AHIP application on heritage conservation or protection grounds. EPRG's *Operational Policy: Protecting Aboriginal Cultural Heritage* (available on [ROOKS](#)) states:

**Extract from Operational Policy:**

**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. Where an outright refusal of an AHIP is not appropriate, we will limit impacts through the conditions of the AHIP.*

Some instances when refusal (or a limited AHIP) may occur include:

- where the project design is unsympathetic to the Aboriginal cultural heritage values of an Aboriginal object(s) or place(s) and will involve extensive damage to significant Aboriginal object(s) or place(s)
- where impacts could be avoided by the adoption of 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 the region, or irreversibly impact on cultural identity
- where an identified Aboriginal object is known to be of national, state or regional significance
- where an identified Aboriginal object is of a type that is rare or cannot be readily accessed in the wider region
- where the Aboriginal object is of a type that is known to be poorly conserved in the reserve system
- where proposed works are inconsistent with the reasons for declaring an Aboriginal Place.

### *If an AHIP is unnecessary*

You should refuse an AHIP application if it is unnecessary. However, it is preferable (from an administrative perspective) to ask the applicant to withdraw the application in this case. Some instances where AHIPs may not be necessary include:

- where there will be no impact to the Aboriginal object (applying the 'de minimus' interpretation principles that 'the law does not concern itself with trifles')
- where the mitigation measures proposed should avoid impact to the Aboriginal object(s)

- where reasonable steps have been taken to locate an Aboriginal object(s) registered on AHIMS, but the object(s) cannot be found in the field.

It is preferable to identify early on whether an AHIP is necessary (i.e. when the recommending officer conducts their preliminary review of the application – see section 4.2.5).

#### *Requested information not supplied*

You should refuse an application where:

- additional information that you requested (that was essential for decision making) has not been provided within the timeframe specified<sup>21</sup>, and
- the applicant did not respond to further follow up (i.e. an Intention to Refuse letter was sent – see section 7.2.1).

#### *Notifying the applicant of your intention to refuse*

Where you intend to refuse an AHIP application, you must notify the applicant and provide them with an opportunity for comment before making a final decision. Do this by issuing an Intention to Refuse letter (see section 7.2.1 for more information). Any submissions received in response to this letter should be listed in [Part 1](#) of the AHIP determination report and evaluated in [Part 2](#) of the report under (i) (see section 5.2).

## **5.8 Consultation before making a final decision is not a requirement**

There are no requirements in the NPW Act to consult with an AHIP applicant or any other affected parties before a decision is made. Nor is this required as a matter of policy.

Any consultation needs to be decided on a case-by-case basis. For example, in some cases it may be appropriate to discuss the wording of a proposed AHIP condition with an applicant to ensure that the condition is worded in a way that is clear to both DECC and the proposed AHIP holder. (If DECC decides to consult with the applicant, the registered local Aboriginal groups may also need to be consulted – see also section 6.6.)

(If DECC adopts a standard practice with regard to consultation, even in the absence of a formal policy, this can give applicants and other parties legitimate expectations about DECC's 'usual' practice. This can then, in turn, create additional legal obligations for DECC with regard to consultation.)

See also section 6.6 about consulting on draft AHIPs.

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<sup>21</sup> However, if DECC obtains the requested information through some other means (e.g. a DECC officer locates the requested report through their own efforts), then you are not obliged to refuse the application. If this is the case, it must be documented in the AHIP Determination Report.

## 6 Drafting an AHIP

### 6.1 AHIP combinations

If the AHIP is to be granted, then the recommending officer will need to decide whether the development works, conservation work, research or other activity impacting on Aboriginal objects will be the subject of a single AHIP, a combined AHIP, or a series of AHIPs. Refer to the document 'Legal Advice – Part 6 Interpretation Table' (available on [ROOKS](#)) to decide when it is appropriate to use each type of AHIP.

The following AHIP combinations are possible:

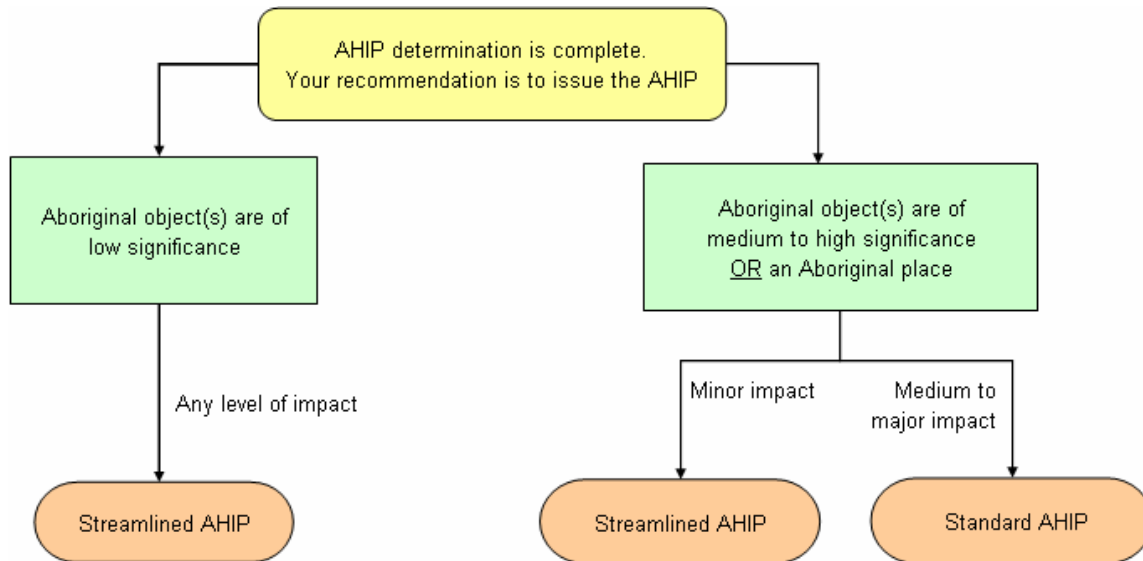
Type of AHIP	Examples of when to use this AHIP
<b>s.87</b> [s.86(a)]	Investigation involving excavation of land
<b>s.87</b> [s.86(a) and s.86(b)]	Investigation involving excavation and then salvage (and/or community collection)
<b>s.87</b> [s.86(a), s.86(b)] and <b>s.90</b>	Investigation involving excavation, then salvage (and/or community collection) and then damage of unsalvaged objects  (Would be used only when extensive investigation has already occurred, but some residual investigation of specific objects is still required before other activities)
<b>s.87</b> [s.86(b)] only	Salvage (and/or community collection) only, no damage
<b>s.87</b> [s.86(b)] and s.90	Salvage (and/or community collection) of some objects and then damage of remaining objects across all or part of the land  OR  Salvage (and/or community collection) and invasive analysis
<b>s.90</b> only	Damage of Aboriginal objects

### 6.2 Streamlined and standard AHIPs

Depending on the significance of the Aboriginal object(s) or place(s) that are the subject of the AHIP and the level of impact proposed, recommending officers have the option of recommending and drafting either a streamlined or a standard<sup>22</sup> AHIP. Use your professional judgement and discretion in choosing the type of AHIP. However, you must justify whichever AHIP you recommend, in your AHIP determination report (see section 5.5). A guide for choosing streamlined and standard AHIPs is provided below.

<sup>22</sup> A standard AHIP may include site-specific conditions if necessary.

## Flow chart showing how to choose a streamlined or standard AHIP.



### 6.2.1 Standard AHIPs

A standard AHIP is an option where the Aboriginal object(s) are of higher significance (or you are dealing with an Aboriginal place) and the impact will be of a moderate to major nature. The standard AHIP can include site-specific conditions.

Standard AHIP templates are available on ISEMS (see section 6.3).

### 6.2.2 Streamlined AHIPs

A streamlined AHIP is an option to consider where:

- the Aboriginal object(s) are of low significance
- the Aboriginal object(s) are of higher significance (or you are dealing with an Aboriginal place), but the proposed impact is minor (you may want to consider a standard AHIP if the impact to a significant Aboriginal object is borderline minor/moderate or you want to include site-specific conditions)
- the proposal is for Aboriginal cultural heritage conservation works (if you want to include site-specific conditions, use a standard AHIP).

A streamlined s.90 AHIP template is available on ISEMS (see section 6.3).

## 6.3 AHIP templates

AHIP templates have been developed to improve the consistency, clarity and effectiveness of AHIPs and to ensure that any activities that may require an AHIP are appropriately regulated. The AHIP templates have been designed to:

- ensure that common issues are consistently addressed across the state
- include standard conditions for AHIPs (as a general rule, standard conditions should not be modified, except in special circumstances)
- include some optional conditions that can be adopted (or further tailored), where warranted
- allow officers to include their own site-specific conditions where warranted
- focus on environmental and conservation outcomes.



To date, three of the most commonly used AHIP template combinations (of those listed in 6.1 above) have been prepared:

- s.86(a) and (b)
- s.86(b) and s.90
- s.90 only.

A streamlined s.90 AHIP template has also been prepared. These AHIP templates are available on ISEMS.

### 6.3.1 Standard AHIP templates

The standard AHIP template is a *starting point only* for recommending officers. You will need to consider the factual circumstances of each case to determine whether all the conditions in the template apply to your case.

The AHIP templates can be edited if officers need to:

- amend or delete template conditions (however, as a general rule, standard conditions should not be modified, except in special circumstances)
- add or substitute optional conditions
- add additional (site-specific) conditions (see section 6.4.5 below).

**Example:**

The AHIP template identifies human remains as protected objects. If the application proposes to move or damage human remains, then you would need to remove the conditions which would otherwise stop this and add conditions to ensure that the action occurs in an appropriate way (e.g. in accordance with a burial protocol, which forms part of the application).

The officer preparing the AHIP should ensure that the decision maker is aware of the changes where:

- standard conditions are deleted or modified, or
- additional conditions are included (i.e. site-specific conditions).

### 6.3.2 Streamlined AHIP templates

The streamlined s.90 AHIP template provides a less detailed AHIP to be used where the Aboriginal objects are of low significance or there will be very minor impacts (see section 6.2.2). The purposes of using the streamlined AHIP template are to reduce the administrative burden, to improve the efficiency of DECC staff drafting AHIPs and to reduce red tape for AHIP holders in the appropriate circumstances.

The streamlined AHIP template contains only basic conditions and requires minimal editing by the recommending officer. There is no option to add site-specific conditions.

## 6.4 Enforceability – important information to note when drafting

Legal Eye 2005/05 *Drafting Enforceable Legal Instruments* (available on [DECCnet](#)) provides guidance on how to draft enforceable instruments.

## 6.4.1 Identifying the correct AHIP holder – legal entities

### *Legal entities*

You must ensure that the ‘person’ to whom you are issuing the AHIP is a legal entity.

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 (e.g. Ministerial Corporations created by an Act). Business names, partnerships, joint ventures and non-statutory trusts are **not** legal entities. See Legal Eye 03/03 (available on [DECCnet](#)) for more information.

#### **Example:**

DECC 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 DECC would be issued in the name of ‘the State of New South Wales (Department of Environment and Climate Change)’ and not in the name of the department, the DG or a DECC employee.

### *Who has overall control of the project?*

EPRG’s policy is to issue an AHIP to the legal entity with overall responsibility for a project that impacts on Aboriginal object(s) or place(s). Where the impact 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, then it should be issued to the legal entity carrying on the research (e.g. a university).

There may be circumstances where responsibility for the development works, conservation work, research or other activity is equally shared 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 be held responsible for the actions of their consultants, as they issue instructions to their consultants.

### *Employers not employees*

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 DECC staff).

See also Legal Eye 11/01 (available on [DECCnet](#)), which further explains the concept of vicarious liability.

### *Companies*

If the AHIP is to be 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 (e.g. business names). You also need to include the correct service address for the company (see section 7.3 for more information on the service of documents).

### *Individuals*

If the AHIP is to be issued to an individual, use their full name (not their initials), as this will avoid confusion. 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 you are regarding names,

the better. Even a small spelling mistake in the name may erode the enforceability of the document.

#### **6.4.2 Identifying the correct land to which the AHIP applies**

The AHIP will need to clearly define the area it covers, including land where Aboriginal object(s) or place(s) are being impacted, as well as exclusion areas where no impact is allowed. (Land already protected, such as by a voluntary conservation agreement, does not need to be included.)

Land can be defined by noting its exact description (preferably a lot and deposited plan [DP] number). If it is necessary to refer to a map or plan (e.g. where a portion of land or many parcels of land are involved), include the title of the map or plan in the description of the premises and (ideally) specify where a copy of the map or plan is held.

#### **6.4.3 Specifying the coverage and scope of the AHIP**

The AHIP will need to be specific about what it covers. This could be achieved by clearly specifying the type and class of objects or the type of activity that will cause damage, or by using other descriptive methods. It is also possible, for example, to consent to damage but not destruction for some activities.

Where possible, the AHIP should closely reflect the application. If, for example, the application does not request a blanket consent to destroy all Aboriginal objects in a certain area, consider granting the AHIP subject to these limitations. Closely consider what the application is asking for.

Officers will need to nominate an appropriate time period for the AHIP. This is commonly 2–10 years for s.90 AHIPs and 3–12 months for s.87 AHIPs. Officers should justify their reasons for nominating the time period in their AHIP determination report. Ensure that the time period you nominate is not too short. If it is too short, the AHIP holder may need to seek an extension in the future (via a variation), which would involve extra administrative burden for DECC and more red tape for AHIP holders. Conversely, it would not generally be appropriate to nominate an excessively long period for the AHIP.

#### **6.4.4 Combining s.87 and s.90 AHIPs – clearly distinguish conditions**

Issuing a combined AHIP with intermingled s.87 and s.90 conditions can be unclear for applicants and can create practical problems with enforcement. Problems can arise from the fact that s.87 AHIPs and s.90 AHIPs are distinct and separate legal instruments. This is in contrast to a consent under the NPW Regulation, which is a single instrument that can be issued for a number of purposes.

There are practical problems with combining s.87 and s.90 AHIPs:

- Combined instruments can be often difficult for the applicant to interpret and comply with.
- There are separate offences relating to s.86 and s.90, so the AHIP needs to be very clear about whether something is a s.87 condition or a s.90 condition in the event that a breach is referred for enforcement action.
- A penalty notice can be issued for a breach of s.86 but not for a breach of s.90.
- There are ministerial appeal rights against s.90 conditions (s.90(3)), but not against s.87 conditions (see section 8.1).
- There is some overlap between s.86(b) and s.90 if the disturbance or movement of the Aboriginal objects will damage an object (provided there is evidence of knowledge). This also makes differentiation between s.87 and s.90 conditions difficult, and legally you would cover some things in both to ensure that the proper legal authority is given.

Conditions relating to the s.87 component of the AHIP must therefore be clearly distinguishable from the conditions relating to the s.90 component. This is why it is important to use the AHIP templates (see section 6.3).

To overcome some of the practical problems in combining s.87 and s.90 AHIPs, the combination AHIP template for s.86(b) and s.90 (available on ISEMS) can be used for:

- salvage (with or without community collection) of some Aboriginal objects (s.86(b)) and damage of remaining objects (s.90)
- salvage (with or without community collection) (s.86(b)) and invasive analysis (s.90) of Aboriginal objects.

You must discuss any plans to draft a combined AHIP with LSB if you will not be using the combined template provided.

**Contact:** Legal Services Branch ([legnotice@environment.nsw.gov.au](mailto:legnotice@environment.nsw.gov.au))

### 6.4.5 Drafting site-specific conditions

The s.87 and s.90 AHIP templates contain standard and optional conditions (see section 6.3). AHIPs may also be issued with site-specific conditions if required.

Site-specific conditions may serve a number of purposes; for example:

- to avoid impacts on particular Aboriginal objects in the vicinity of the activity
- to require measures to reduce impacts to the objects
- to ensure Aboriginal community participation in the activity (where agreed).

If you are recommending that an AHIP be issued subject to site-specific conditions, include brief reasons in the AHIP determination report as to why they were included and their purpose (see section 5.4.2).

Any site-specific conditions you include should be reasonable and not require the AHIP holder to carry out an action that is impractical or beyond their control. The principles and techniques to be applied are summarised below.

#### 1. *Conditions are legal requirements*

A condition is a legal requirement, an instruction detailing what the AHIP holder must do or how the conditions are to be interpreted. Failure to comply with the requirement is an offence (for s.87 AHIPs).

Compliance with a condition must be important enough to warrant placing the AHIP holder in a position where their failure 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'.

#### 2. *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. A condition that contains multiple instructions or that is trying to address multiple issues can cause confusion.

#### 3. *Conditions should be clear*

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

#### 4. *Conditions should be reasonable*

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

**Example:**

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

Conditions should not unnecessarily require the AHIP holder to prepare numerous reports during the course of a s.87 AHIP. It is EPRG's policy that in general, we will require one final assessment report to be provided on completion of the works specified in the s.87 AHIP. We will require additional reports only where they are critical to DECC's decision making or are required for information on AHIMS.

**5. Conditions should be practical**

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

**6. Conditions should not be unnecessarily prescriptive**

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

If the AHIP holder does use 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:**

One recent AHIP condition stated:

*'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 ten radiocarbon dates should be obtained from charcoal collected during excavation or from sieve residues.'*

The prescriptive nature of this condition, which requires up to ten radiocarbon dates to be collected, may unnecessarily put the proponent in non-compliance if more than ten 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-datable material was present during the excavation. To gather such evidence, the DECC 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.'*

**7. Conditions should not go beyond DECC's 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 (see also section 5.4.2(g)).

However, there need to be strong public and operational policy reasons for including these broader conditions. For example, a recent AHIP issued in the Lake Victoria area included threatened species conservation conditions.

You must contact LSB if you are considering including broad environmental conditions in your AHIP.

## 8. *Conditions should not impose an unnecessary responsibility*

Conditions should not force DECC to take on an unnecessary responsibility. Nor should conditions require input or agreement from, or action to be taken by, a third party to achieve compliance (e.g. council, other government departments or Aboriginal stakeholders). However, obligations may be imposed on the applicant's employees or on contractors for whom the applicant may be vicariously responsible (e.g. 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 a s.90 consent. It was alleged that the proponent had not complied with two conditions of the consent. The consent required that it negotiate with the community and establish an Aboriginal keeping place. However, the proponent claimed that it could not reach an agreement with the relevant Aboriginal community groups in time. The conditions were framed in the following terms:

- 1) The Aboriginal keeping place must be operative within 12 months of the issuing of this consent.
- 2) 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 Schedule C [to the consent].

The Court found that the proponent had committed a 'threatened breach' (not an actual breach) of the consent 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 the proponent to achieve the proposed condition, especially if the condition requires the proponent to be responsible for the actions of a third party.

## 9. *Conditions should not restate the law*

As a general rule, it should not be necessary to use a condition that requires the approval holder to comply with legislation administered by DECC. However, sometimes you may decide to include this for completeness so that all requirements are collected in one place; for example, including a condition for a s.87 AHIP stating that the AHIP does not authorise destruction of Aboriginal objects.

## **6.5 Obtaining legal advice**

LSB recommends that particularly complex or controversial draft AHIPs be forwarded to them for review at the Legal Notice Review email account (see below). This should be done before the draft AHIP is sent to the applicant for comment (if applicable; see section 6.6 below). If there are subsequent substantial changes, do this again before the final AHIP is issued.

Officers unfamiliar with using the AHIP templates can also seek legal review of the first few AHIPs that they draft to confirm that the templates are being used correctly. This should happen after their supervisor or a more experienced officer has reviewed the draft AHIP and agrees that legal review is needed.

### *Legal Notice Review*

To seek legal review, email the request, briefly indicating the background and key issues, to [legnotice@environment.nsw.gov.au](mailto:legnotice@environment.nsw.gov.au). Notices are usually reviewed within one week.

## **6.6 Undertake consultation on the draft AHIP, if applicable**

As mentioned in section 5.8, there is no legal or policy requirement to consult with an applicant or other affected parties when issuing an AHIP. However, if you decide that consultation with the AHIP applicant is necessary, you may also need to consult with the registered local Aboriginal groups<sup>23</sup> (and vice versa).

If a recommending officer decides to consult on the draft AHIP, they should consider whether they should first obtain the decision maker's endorsement to consult (e.g. where an AHIP application is particularly complex or controversial). The recommending officer should also consider whether it

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<sup>23</sup> Refer to glossary (p vii).

would be appropriate to obtain legal advice before starting any consultation (see section 6.5 above).

In circumstances where the decision maker consults with the AHIP applicant on a minor issue, the decision maker may consider that it is not necessary to consult with the registered local Aboriginal groups. If the consultation is about a more substantive issue, then the registered local Aboriginal groups should also be consulted. If you are unclear about whether or not to consult with local Aboriginal groups, then contact LSB.

There may be instances where the decision maker feels that it is more practical to consult on specific draft conditions, rather than on the whole draft AHIP. The same consultation policy as in the paragraph above applies as when providing the whole draft AHIP.

If you do decide to consult, you must ensure that the draft AHIP is clearly marked 'draft' (e.g. by using a watermark). You should allow 14 days for comments (unless there is a reason for increasing or decreasing this period). The covering letter must clearly specify a date by which comments must be received. If no comments are received by the due date (unless a request for an extension has been made and the request has been granted), it is appropriate to proceed with the application.

Record any submissions received in response to the draft AHIP in the AHIP determination report.<sup>24</sup>

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<sup>24</sup> Submissions should be listed in [Part 1](#) of the AHIP determination report and evaluated in [Part 2](#) under (i) (see section 5.2).

## 7 Notifying the applicant of DECC's decision

### 7.1 Granting an application

#### 7.1.1 Issue letter

If the AHIP application is approved, send an Issue letter to the applicant and attach the AHIP (making sure to remove any watermarks or references to the AHIP being a 'draft'). [Appendix E](#) provides a template for this letter (letter 2); templates are also available on ISEMS. Templates are fully editable and may be tailored to suit specific circumstances.

The recommending officer should draft the letter, attaching it to the AHIP determination report for approval by the decision maker (see section 5.5). The letter may include:

- the nature of the application
- (if necessary) a list of specific conditions that the AHIP holder should particularly note; for example, the requirement that the AHIP holder provide a copy of the AHIP to each local Aboriginal group (as defined in the Dictionary in the AHIP)<sup>25</sup>
- a note of the requirement to comply with the conditions and that penalties may be imposed by a court if a breach occurs
- a note of their appeal rights, if applicable (appeals apply only to s.90 applications or decisions).

Where separate instruments are required to be issued to the same person at the same time, both can be issued concurrently under one covering letter.

An AHIP or any conditions of an AHIP must not be granted verbally.

### 7.2 Refusing an application

#### 7.2.1 Intention to Refuse letter

Where a decision maker intends to refuse an application (see section 5.7), they should notify the applicant of the reasons for the proposed refusal. These reasons should be based on the recommendations in the draft AHIP determination report.

The decision maker should provide the applicant with an opportunity to make submissions in response to the notice before a final decision is made. An Intention to Refuse letter template is included at [Appendix E](#) (letter 3); templates are also available on ISEMS. Templates are fully editable and may be tailored to suit specific circumstances.

The recommending officer should draft the letter, attaching it to the AHIP determination report for approval by the decision maker (see section 5.5).

The recommending officer should list and evaluate any submissions received in response to this letter in the AHIP determination report (see section 5.4.2(i)).

#### 7.2.2 Refusal letter

If the decision maker has considered any submissions and decides to refuse the application, a Refusal letter should be sent. A template Refusal letter is provided in [Appendix E](#) (letter 4); templates are also available on ISEMS. Templates are fully editable and may be tailored to suit specific circumstances.

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<sup>25</sup> This condition is one of the outcomes of the consultation forums on the Interim Community Consultation Requirements for Applicants. In the forums, Aboriginal communities expressed concern that they are often not informed of the outcome of the AHIP application.



The recommending officer should draft the letter, attaching it to the AHIP determination report for approval by the decision maker (see section 5.5). The letter should:

- set out the nature of the application
- state the decision reached
- note appeal rights, if applicable
- be signed by the decision maker, noting their legal (delegated) authority to make the decision.

### **7.3 Service of documents**

AHIPs and letters can be served in one of two ways:

1. Where the AHIP applicant is an individual, the AHIP and letter can be served by:
  - personal delivery to the individual, or
  - registered post to the address stated in the application.
2. Where the AHIP applicant is a company, the AHIP and letter can be served by:
  - personal delivery to the company's registered office, or
  - registered post to the company's registered office.

To find the company's registered address, perform a basic company search on the Australian Securities and Investments Commission's website ([www.asic.gov.au/](http://www.asic.gov.au/)) or use an information broker.

Sending AHIPs and letters by Registered Post will ensure that the AHIP applicant has received the AHIP and letter and provides DECC with a record of receipt in the event that it is challenged in court. There is a small additional cost in sending AHIPs by Registered Post. Make sure that you place the Australia Post receipt securely in the appropriate file in case it is required in the future (e.g. in court proceedings).

For further information on serving instruments, refer to Legal Eye 2004/08 (available on [DECCnet](#)).

## 8 Challenges to DECC decisions

In some circumstances, applicants and/or third parties can challenge DECC's decision and/or findings. You should Contact LSB as soon as possible if you become aware of any potential litigation.

### 8.1 Merit appeals to the Minister (for s.90 AHIPs)

S.90(3) of the NPW Act enables a person to appeal to the Minister if they are dissatisfied with any condition or restriction contained in a s.90 AHIP or where an application for a s.90 AHIP is refused. If an application for a s.90 AHIP has not been determined by the DG within 60 days, the application is taken to have been refused for the purposes of the appeal.<sup>26</sup>

The Minister can determine an appeal by either:

- refusing to grant the appeal, or
- granting the appeal wholly or in part, and may give such directions in the matter as seem proper (s.90(4)).

The Minister has an obligation to freshly consider the merits of an application, including newly available information, and to make whatever decision he or she thinks best on those merits. This is known as a merits review or a merits appeal. The Minister acts as a fresh decision maker and can come to a decision that is different from that of the original decision maker. The Minister's decision on the appeal is final and is binding on both the DG and the applicant (s.90(5)).

There are no ministerial appeal provisions for s.87 AHIP applications.

### 8.2 Judicial review in the Land and Environment Court

The Land and Environment Court generally has the power to consider whether a decision under the NPW Act (including the issue of an AHIP, either s.87 or s.90) has been made legally (i.e. in accordance with the administrative law principles). Such judicial review may be requested by any person.

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

The court may set aside the decision if it finds that it was not made legally. Where a DECC decision is set aside by a court after a judicial review, a DECC decision maker will need to consider the application again and come to a fresh decision. The recommending officer and the decision maker should obtain detailed legal advice and ensure that they understand why the earlier decision was set aside by the court so that they do not repeat the previous mistake.

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<sup>26</sup> The 60-day deemed refusal timeframe should not include the time spent waiting for additional information from the applicant necessary in order to make a decision.

## References

### DECC policies and guidelines

DEC (2005) *EPRD Operating Principles* (available on [ROOKS](#)) [internal]

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

DECC (2007) *Operational Policy: Protecting Aboriginal Cultural Heritage* (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]

NPWS (1997) *Aboriginal Cultural Heritage Standards and Guidelines Kit* (available on the [DECC website](#)) [external]

### DECC online resources

Delegations home page (Legal and Investigations) (available on [DECCnet](#)) [internal]

AHIP application forms (available on the [DECC website](#) – under review) [external]

### Internal DECC Legal Eyes and other legal advice

Legal Eye 11/01 *Environmental Incidents Involving Corporations and the Concept of Vicarious Liability* (available on [DECCnet](#))

Legal Eye 03/03 *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 [DECCnet](#))

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

Legal Eye 2004/08 *Service of Notices, Licences and Other Statutory Instruments Only by Registered Post* (available on [DECCnet](#))

Legal Eye 2005/05 *Drafting Enforceable Legal Instruments* (available on [DECCnet](#))

*Legal Advice – Part 6 Interpretation Table* (2007) (available on [ROOKS](#))

### External publications / websites

Australian Securities and Investments Commission (ASIC) website: [www.asic.gov.au/](http://www.asic.gov.au/) (for company searches)

### Legislation

(Legislation is available on the *NSW Legislation website*)

*Environmental Planning and Assessment Act 1979*

*National Parks and Wildlife Act 1974*

National Parks and Wildlife Regulation 2002

*Protection of the Environment Administration Act 1991*



## **Appendix A: Principles for decision makers**

Decision makers should apply the following principles when considering AHIP applications. Refer to Legal Eye 13/03: *Legal Principles for Decision Makers* (available on [DECCnet](#)) for more information about these principles generally. A summary checklist in the Legal Eye is reproduced in [Appendix B](#).

### **Decisions must be impartial, unbiased and independent**

Bias is a factor when the decision maker has a conflict of interest (e.g. has a direct financial interest in the outcome of the decision).

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 is a reasonable suspicion that the decision maker will not be impartial because of an association that may be perceived to affect their impartiality; for example, a past or present family, professional or contractual association. This test is based on the principle that justice must not only be done, but it must also be seen to be done. If the decision maker is in this position, they must request that the application be reallocated to another decision maker for determination.

### **Decision makers must act within the scope of the statutory power**

S.87 AHIP conditions cannot grant consent to destroy for the purposes of s.90 of the NPW Act. This would be beyond the statutory power. The NPW Act provides separate provisions by which the destruction of Aboriginal objects can be permitted under s.90.

The decision maker may exercise the power to issue or refuse an AHIP only if he or she has the delegated authority to exercise that particular power. A delegation must be in writing and must be exercised in accordance with any conditions to which the delegation is subject (see the 'Delegations' page on [DECCnet](#) for the current instrument of delegation of DG powers).

### **Decisions must not be made for improper purposes or in bad faith**

The decision maker must exercise a statutory power for the purposes for which it has been conferred. For example, it would be improper for a decision maker to grant an unconditional AHIP to destroy all Aboriginal objects without some understanding of what was likely to be damaged, the likely significance of the objects and the necessity for the damage. The decision maker must:

- consider what is likely to be in the area (e.g. there has been a proper sample survey, which would give the DG a reasonable level of satisfaction as to what was likely to be there)
- impose conditions that deal with unknown matters (e.g. by imposing a condition specifically excluding the AHIP holder from damaging human remains or burials).

### **Decision maker must take into account all relevant considerations**

The decision maker must take into account each relevant issue on its own merits, giving it proper, genuine and realistic consideration, when deciding whether to grant or refuse an AHIP application.

The decision maker must not take into account irrelevant considerations. Irrelevant considerations may include things characterised as 'corrupt or entirely personal whimsical considerations, considerations which are unconnected with proper governmental administration' or unconnected with the functions or objectives of DECC or the legislation concerned.

### **Decisions must be reasonable**

A decision may be invalid if the decision is so unreasonable that no reasonable person or authority could ever have come to it. Examples of decisions which have been invalidated on this basis include:

- (a) where the decision maker has given excessive weight to an insignificant factor and failed to give sufficient weight to a factor of great significance
- (b) where the decision has no plausible justification
- (c) where the decision was based on a factual error.

## **Procedural fairness**

In making decisions affecting the rights, interests or legitimate expectations of a person, the decision maker has a general legal duty to act fairly, i.e. to accord procedural fairness. The DG is required to accord procedural fairness to affected parties, even if he or she relies on applicants to carry out the consultation. This duty extends to decisions relating to issuing or refusing a s.87 or s.90 AHIP and revoking or varying the AHIP.

A legitimate expectation may arise in one of three ways:

- (a) by the express or implied terms of, or implication derived from, the NPW Act
- (b) by a public statement or practice adopted by DECC
- (c) by an express promise, undertaking or representation by DECC (including any undertakings by applicants, e.g. that the applicant will follow applicable published community consultation requirements released by DECC) .

The existence of such expectations can affect whether there is a duty to accord procedural fairness at all, as well as the content of that duty.

The rules of procedural fairness may be excluded or partially excluded in limited circumstances. The need for urgent action would generally minimise rather than entirely exclude the need for procedural fairness.

## **Fair hearing rule**

The decision maker must afford an opportunity to be heard to each person whose rights, interests or legitimate expectations may be affected by the decision.

The *Interim Community Consultation Requirements* (DEC 2004) require the applicant to identify and consult those members of the Aboriginal community whose cultural heritage is being affected by the proposal. When evaluating the application, the decision maker must be satisfied that the consultation was adequate and genuine.

DECC's practice of consultation creates an expectation that members of the Aboriginal community would be consulted. Unless DECC has advised the Aboriginal community to the contrary (and has sought their views on this), the community will continue to have a legitimate expectation of consultation in relation to the proposal.

If any specific undertaking is made by DECC (or even applicants on behalf of DECC) in relation to consultation, it should be met. If the undertaking cannot be met, the relevant bodies should be advised that it will not be met and why, and be given an opportunity to comment on this before any decision is made not to meet it.

## Appendix B: Decision-making checklist

(From Legal Eye 13/03 – also available on [DECCnet](#))

### **Do I have the power to make this decision?**

1. Is my decision within the scope of the power given to me under the legislation?
2. Have I followed any procedural requirements set out in the legislation?
3. Do I have the necessary authorisation or delegation?
4. Am I exercising the power for the purpose Parliament intended in making the legislation?
5. (a) Have I taken into account all relevant considerations?  
(b) Have I ignored irrelevant considerations?
6. Is my decision reasonable?  
(a) Are the facts I based my decision on correct?  
(b) Have I given weight to different factors in accordance with their relative importance?  
(c) Can my decision be justified?
7. Is my decision supported by evidence (i.e. material that logically supports the relevant facts on which I have based my decision)?
8. Have I expressed my decision with certainty and clarity (i.e. will people affected by my decision be able to understand what they are required to do)?
9. Have I properly exercised the discretion given to me under the legislation?  
(a) Have I applied DECC policies and procedures in a flexible way that takes into account the circumstances of the individual case?  
(b) Have I made up my own mind about the decision?  
(c) Have I considered any recommendations or guidance provided to me?  
(d) Have I avoided making agreements or undertakings that I will exercise my discretion in a particular way?

### **Have I followed a decision-making process that is fair to people whose rights, interests or legitimate expectations are affected by the decision?**

1. Have I given affected people a chance to be heard before I make my decision?  
(a) Have I given notice of the action to be taken and a reasonable opportunity for affected parties to present their views? For example, have I sent a draft and provided a reasonable time for a response?  
(b) Have I informed affected people of any allegations against them and given them a chance to put their side of the story?  
(c) Have I informed affected people of any significant new information that comes to light after they have provided input and given them a chance to respond before I made my decision?
2. (a) Is my decision impartial and unbiased?  
(b) Is my decision free from the perception of potential bias?

## Appendix C: Criteria for determining the level of evaluation

### Criteria to help you decide whether to do a more-detailed or less-detailed written evaluation of an AHIP application involving Aboriginal objects

#### Important notes:

- These criteria are a guide only, to help recommending officers decide how detailed their written evaluation in Part 2 of the AHIP determination report should be. Recommending officers should ultimately use their professional judgement and seek additional advice or support if required.
- Where a degree of 'knowledge' or 'significance' is mentioned in the table over, this refers specifically to *DECC's opinion* about the degree of knowledge or significance (i.e. not someone else's opinion).
- As a general rule, you should do a *more-detailed* written evaluation for any AHIP applications involving:
  - Aboriginal Places
  - more significant Aboriginal objects
  - the potential for controversy.

**See over page for criteria table**



	<b>More-detailed written evaluation</b> (If ANY ONE of the criteria below is satisfied)	<b>Less-detailed written evaluation</b> (If ALL of the first four criteria below are satisfied)
		<b>Must be satisfied*</b>
<b>1. Knowledge of Aboriginal objects in the landscape</b>	Knowledge about Aboriginal objects in the landscape is poor – there have been no regional studies or prior investigations	Knowledge about Aboriginal objects in the landscape is good – high degree of confidence about known or likely Aboriginal objects from regional studies or prior investigations
	<b>and / or</b>	<b>Must be satisfied*</b>
<b>2. Cultural significance</b>	Aboriginal object(s) are of higher significance to the cultural identity and cultural practices of Aboriginal communities in the region  Loss of the Aboriginal object(s) is likely to considerably diminish the ability of Aboriginal communities to exercise Aboriginal cultural practices within the region or impact on cultural identity of Aboriginal communities in the region  OR  There is disagreement within the Aboriginal community about the cultural significance of the Aboriginal objects	The Aboriginal object(s) are of lower significance to the cultural identity and cultural practices of Aboriginal communities in the region (i.e. when considered in combination with other places or features and the Aboriginal heritage, history and stories of the region)
	<b>and / or</b>	<b>Must be satisfied*</b>
<b>3. Archaeological significance</b>	Identified Aboriginal objects are of national, state or regional archaeological significance	Aboriginal objects are known to be or are likely to be of lower archaeological significance
	<b>and / or</b>	<b>Must be satisfied*</b>
<b>4. Potential for controversy</b>	Controversy, opposition or potential litigation with regard to the AHIP application is anticipated	Controversy, opposition or potential litigation with regard to the AHIP application is not anticipated
	<b>and / or</b>	<b>Optional**</b>
<b>5. Extent of existing disturbance</b>	Aboriginal object(s) are intact within an undisturbed area  OR  Existing disturbance or evidence of change does not detract from the cultural or archaeological significance of the Aboriginal object(s) (see criteria 2 and 3)	Existing disturbance reduces or limits the cultural or archaeological significance of the Aboriginal object(s) (see criteria 2 and 3)
	<b>and / or</b>	<b>Optional**</b>
<b>6. Intergenerational equity / precautionary principle</b>	The Aboriginal objects are rare or cannot be readily accessed in the wider region  OR  There are other identified Aboriginal objects of comparable type in the wider region, but they are not common  OR  There is significant uncertainty about the integrity, rarity or representativeness of the Aboriginal objects	The Aboriginal objects are common locally and in the wider region  OR  The Aboriginal objects are rare in the immediate area but more common in the wider region
	<b>and / or</b>	<b>Optional**</b>
<b>7. Conservation status of objects across DECC reserve system</b>	The Aboriginal object type is poorly conserved in the reserve system  OR  The conservation status of comparable Aboriginal objects across the reserve system is unknown	The Aboriginal object type is known to be adequately conserved in the reserve system

\* *Must be satisfied*: This criterion must be satisfied to justify a less-detailed written evaluation.

\*\* *Optional*: This criterion *may* be used to help justify a less-detailed written evaluation.

## Appendix D: AHIP determination report template

This template is available on ISEMS.

### Aboriginal Heritage Impact Permit (AHIP) Determination Report

<delete the instrument not applicable> Aboriginal Heritage Impact Permit (AHIP) under s.87 and/or s.90 of the *National Parks and Wildlife Act 1974*

#### Part 1: Background and documents considered

(Guidance on completing Part 1 is given in section 5.3 of the *Guide to Determining and Issuing AHIPs*.)

Name of recommending officer:	
Name of decision maker:	
AHIMS reference number:	
File / folio number:	
Name of applicant:	
Name / location of proposal	
Date application received:	
Date(s) additional information received:	<include date(s) and details>

Background and purpose of the application (include dates):

- 
- 
- 

Documents provided with the application that were considered (include dates):

- 
- 
- 

Other documents that were taken into consideration (include dates):

- 
- 
- 

Written submissions received and considered by DECC in relation to the application (if applicable) (include dates):

- 
-

## **Part 2: Evaluation**

(Guidance on completing Part 2 is given in section 5.4 of the *Guide to Determining and Issuing AHIPs*.)

### **Factors considered:**

[Demonstrate that you have considered the following factors, where relevant. For each factor provide a clear conclusion about your position on the matter and provide evidence for that conclusion. Refer to any relevant documents that you have directly or indirectly considered in reaching your conclusion (reference these documents in your discussion).]

**(a) The adequacy of the application and accompanying information**

- 

**(b) The significance of the Aboriginal object(s) / place(s)**

- 

**(c) The likely impact of the proposal on the Aboriginal object(s) / place(s)**

- 

**(d) Adequacy of any proposed measures to avoid or reduce impacts**

- 

**(e) Consultation with registered local Aboriginal groups**

- 

**(f) Principles of ecologically sustainable development**

- 

**(g) Any applicable statutory planning matters related to the application**

- 

**(h) Any issues raised in submissions**

- 

**(i) Any other relevant matters**

-

## Part 3: Recommendation

(Guidance on completing Part 3 is given in section 5.5 of the *Guide to Determining and Issuing AHIPs*.)

It is recommended that <decision maker> <approve/refuse> the AHIP application based on the following:

- <insert a summary of your evaluation and conclusions identified in Part 2>

(if applicable) It is recommended that a <streamlined / standard> AHIP be issued for the following reasons:

- <include reasons>

(if applicable) Draft AHIP for the decision maker's consideration:

- The proposed draft AHIP is presented in attachment <insert attachment #>

(if applicable) Key site-specific AHIP conditions for the decision maker to consider:

- <identify and justify any key site-specific AHIP conditions>

Draft letter for the decision maker's consideration (delete letters below that are not applicable):

- (if applicable) The proposed draft Issue letter is presented in attachment <insert attachment #>
- (if applicable) The proposed draft Intention to Refuse letter is presented in attachment <insert attachment #>
- (if applicable) The proposed draft Refusal letter is presented in attachment <insert attachment #>

List of all attachments to this AHIP determination report:

- 

Additional recommendations:

- List any other recommendations which do not directly relate to the recommendation but are relevant for the decision maker to note (e.g. that an Aboriginal place declaration be considered)

1. Recommending officer:

<insert title and name and date>

2. <Any other signatory level approval required for this determination report – other than 'decision maker' (covered in Part 4 below)>

<insert title and name and date>

## **Part 4: Decision**

(Guidance on completing Part 4 is given in section 5.6 of the *Guide to Determining and Issuing AHIPs*.)

The AHIP application is <approved/refused> on the following grounds:

- <list reasons for approval/refusal; if different from recommendation in Part 3, explain why>
- 

(If decision / reasons are different from the recommendation in Part 3, explain how and why the decision was reached.)

**Decision maker:**

<insert title and name and date>

## Appendix E: Template letters

### Template letter 1: Acknowledgement

This template is available on ISEMS.

---

Your reference: <insert applicant's reference>

Our reference: AHIMS No. <insert AHIMS #> / <insert File / Folio No.>

Contact: <insert contact, phone number>

#### AHIP APPLICATION RECEIVED

#### —ADDITIONAL INFORMATION REQUESTED

Dear <salutation>

**RE: <Proposal>**

**The Department of Environment and Climate Change (DECC) has received your application for:**

- a s.87 Aboriginal Heritage Impact Permit
- a s.90 Aboriginal Heritage Impact Permit
- a combined s.87 and s.90 Aboriginal Heritage Impact Permit

**Date received:** <date>

**Description:**

<Insert brief description of application>

**Accompanying documents received:**

- <List documents attached to the application>

**Preliminary review:**

A preliminary review of your application has been undertaken to see whether all the necessary documentation has been included. It appears that all the necessary documentation <has/has not> been provided.

<Where application appears complete, include the following>

We will now review your application in more detail. If you have not provided enough information to allow us to make a decision, we will ask you for more information.

<Where application appears incomplete, include the following>

Please provide the following additional information by <date> to:

<Officer Name & Title>

<Section & Branch>

Department of Environment and Climate Change

<insert address>

- <Insert details of additional information required>

**We will not process your application until we receive this additional information. If we do not receive the information by the due date, we might refuse your application.**

If you have any questions or wish to discuss this matter further, please contact <DECC Officer> on <phone number>.

.....

<Decision Maker's Name>

<Decision Maker's Title>

<Office Location>

(by Delegation)

Date: <insert date>

## Template letter 2: Issue

This template is available on ISEMS.

---

Your reference: <insert applicant's reference>

Our reference: AHIMS No. <insert AHIMS #> / <insert File / Folio No.>

Contact: <insert contact, phone number>

### ABORIGINAL HERITAGE IMPACT PERMIT

Dear <salutation>

#### RE: <Proposal>

I refer to your application for an Aboriginal Heritage Impact Permit (AHIP) under <section 87 and/or section 90> of the *National Parks and Wildlife Act 1974* (NPW Act) and accompanying information provided for the <proposal> received by the NSW Department of Environment and Climate Change (DECC) on <date> and (where information has been received on different days) <date additional information received> respectively.

We have considered the application and supporting information provided and have decided to issue an AHIP subject to conditions. The AHIP is attached.

Please read the AHIP carefully and ensure that you comply with its conditions. In particular, please note the following conditions:

- <highlight any specific conditions the AHIP Holder should particularly note>

(For s.87 AHIPs only)

You should note that it is an offence under the NPW Act to fail to comply with the conditions of the AHIP. The maximum penalty that a court may impose on an <individual/corporation> for failing to comply with this AHIP is <if individual, \$11,000, if corporation, \$22,000>.

(For s.90 AHIPs only)

You should note that it is an offence under the NPW Act to knowingly destroy, deface or damage, or knowingly cause or permit the destruction, defacement or damage to, an Aboriginal object or Aboriginal place without consent. The maximum penalty that a court may impose on an <individual/corporation> for failing to comply with this AHIP is <if individual, \$5,500 and/or six months' imprisonment, if corporation, \$22,000>.

(For s.90 AHIPs only)

You may appeal to the Minister for Climate Change, Environment and Water if you are dissatisfied with any condition of this AHIP. You must appeal in writing and set out the basis for your appeal. The deadline for lodging the appeal is 28 days after the date at the bottom of this letter.

If you have any questions or wish to discuss this matter further, please contact <DECC Officer> on <phone number>.

.....  
<Decision Maker's Name>

<Decision Maker's Title>

<Office Location>

(by Delegation)

Date: <insert date>



## Template letter 3: Intention to refuse

This template is available on ISEMS.

---

Your reference: <insert applicant's reference>

Our reference: AHIMS No. <insert AHIMS #> / <insert File / Folio No.>

Contact: <insert contact, phone number>

### INTENTION TO REFUSE APPLICATION FOR AN ABORIGINAL HERITAGE IMPACT PERMIT

Dear <salutation>

**RE: <Proposal>**

I refer to your application for an Aboriginal Heritage Impact Permit (AHIP) under <section 87 and/or section 90> of the *National Parks and Wildlife Act 1974* and accompanying information provided for the <proposal> received by the NSW Department of Environment and Climate Change (DECC) on <date> and (where information has been received on different days) <date additional information received> respectively.

We have reviewed the AHIP application and the supporting information provided and intend to refuse the application for the following reasons:

1. <list the reasons from the AHIP Determination Report>
- 2.
- 3.

You are welcome to make a submission to DECC in relation to our intention to refuse your application. If you do so, you must make your submission in writing by <date> to:

<Officer Name & Title>

<Section & Branch>

Department of Environment and Climate Change

<insert address>

We will consider any submissions you make and will inform you in writing of our decision.

If you have any questions or wish to discuss this matter further, please contact <DECC Officer> on <phone number>.

.....

<Decision Maker's Name>

<Decision Maker's Title>

<Office Location>

(by Delegation)

Date: <insert date>

## Template letter 4: Refusal

This template is available on ISEMS.

---

Your reference: <insert applicant's reference>

Our reference: AHIMS No. <insert AHIMS #> / <insert File / Folio No.>

Contact: <insert Contact, phone number>

### REFUSAL OF APPLICATION FOR AN ABORIGINAL HERITAGE IMPACT PERMIT

Dear <salutation>

**RE: <Proposal>**

I refer to your application for an Aboriginal Heritage Impact Permit (AHIP) under <section 87 and/or section 90> of the *National Parks and Wildlife Act 1974* and accompanying information provided for the <proposal> received by the NSW Department of Environment and Climate Change (DECC) on <date> and (where information has been received on different days) <date additional information received> respectively.

We wrote to you on <date> to tell you of our intention to refuse your application.

(Choose the relevant statement) We did not receive any submission relating to the intended refusal of the application. (Or) We received your submission about the intended refusal of the application and have carefully considered it.

We refuse your application for the issue of an AHIP under <section 87 and/or section 90> of the *National Parks and Wildlife Act 1974* for the following reasons:

1. <list the reasons from 'intention to refuse application' letter and any additional reasons / justification from the applicant's submission in response to that letter>
- 2.
- 3.

(For s.90 AHIPs only)

You may appeal to the Minister for Climate Change, Environment and Water against this decision. You must appeal in writing and set out the basis for the appeal. The deadline for lodging the appeal is 28 days after the date at the bottom of this letter.

If you have any questions or wish to discuss this matter further, please contact <DECC Officer> on <phone number>.

.....

<Decision Maker's Name>

<Decision Maker's Title>

<Office Location>

(by Delegation)

Date: <insert date>