

Operational Policy:
Protecting Aboriginal cultural heritage

Version 2

The objective of this policy is to provide an operational framework for the regulation of Aboriginal cultural heritage by the Office of Environment and Heritage (OEH) that is practical, legally appropriate, and fosters consistency across the state.

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Acronyms

AANSW	Aboriginal Affairs NSW (formerly Department of Aboriginal Affairs)
AHIMS	Aboriginal Heritage Information Management System
AHIP	Aboriginal Heritage Impact Permit
APEC principles	Aboriginal people, the environment and conservation principles
CCHD	Country, Culture and Heritage Division (within OEH)
EHub	OEH intranet site (available to OEH staff only)
DG	Director-General of Premier and Cabinet
P&I	Department of Planning and Infrastructure
DPC	Department of Premier and Cabinet
EPA	Environment Protection Authority (part of OEH)
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EPRG	Environment Protection and Regulation Group (within OEH)
ESD	Ecologically sustainable development
LEP	Local environmental plan
LSB	Legal Services Branch (within OEH)
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NPW Regulation	National Parks and Wildlife Regulation 2009
OEH	Office of Environment and Heritage NSW, Department of Premier and Cabinet
PWG	Parks and Wildlife Group (within OEH)
SEPP	State environmental planning policy

Glossary

Aboriginal Heritage Impact Permit (AHIP)	Statutory instrument issued by OEH under section 90 of the <i>National Parks and Wildlife Act 1974</i> (NPW Act) to manage harm or potential harm to Aboriginal objects and places
Aboriginal object	Statutory term meaning ‘... any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains’ (s.5, NPW Act)
Aboriginal place	Statutory term meaning any place declared to be an Aboriginal place (under s.84 of the NPW Act) by the Minister administering the NPW Act, by order published in the Gazette, because the Minister is of the opinion that the place is or was of special significance with respect to Aboriginal culture. It may or may not contain Aboriginal objects.
AHIP applicant	Person applying for an AHIP under the NPW Act
Harm	Statutory term meaning ‘... any act or omission that destroys, defaces or damages an object or place or, in relation to an object, moves the object from the land on which it had been situated’ (s.5, NPW Act)
Minister	Minister administering the NPW Act, i.e. the Minister for the Environment
Our clients/ stakeholders	AHIP applicants, proponents, local councils and the Department of Planning and Infrastructure: the particular client or stakeholder will depend on the nature of the proposal or issue being dealt with by OEH.

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

1. About this policy

1.1 Intended audience

This operational policy is an internal OEH document, prepared for use by the agency's staff. The document will be most relevant for Environment Protection and Regulation Group (EPRG) staff within OEH as it focuses on the regulation of Aboriginal cultural heritage by EPRG. Country, Culture and Heritage Division (CCHD) operational staff, Parks and Wildlife Group (PWG) staff and Legal Services Branch (LSB) staff should also find some aspects of the policy useful.

1.2 Policy objective

The objective of this policy is to provide an operational framework for OEH regulation of Aboriginal cultural heritage that is practical, legally appropriate, and fosters consistency across the state.

1.3 Policy scope

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

1.4 Intended outcomes

The intended outcomes of the implementation of this operational policy and supporting policies and guidelines within EPRG are that:

- OEH continues to focus its time and resources on more significant Aboriginal cultural heritage issues.
- OEH continues to reduce its administrative load and the regulatory burden on its stakeholders.
- OEH continues to consistently apply and effectively communicate its policies for protecting Aboriginal cultural heritage in its day-to-day work.

1.5 Review and update

This operational policy may need to be updated where:

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

The policy will otherwise be routinely reviewed by OEH's Reform and Compliance Branch every three years. The next review is expected in mid-2014.

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

2. Background information

2.1 Aboriginal cultural heritage

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

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

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

Aboriginal cultural heritage is not confined to sites. It also includes people's memories, storylines, ceremonies, language and 'ways of doing things' that continue to enrich local knowledge about the cultural landscape. It involves teaching and educating younger generations. It is also about learning and looking after cultural traditions and places, and passing on knowledge. It is enduring but also changing. It is ancient but also new.

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

2.2 Relevant legislation

Appendix A provides a detailed overview of the legislative framework for the protection of Aboriginal cultural heritage in NSW. The following sections provide a brief summary.

2.2.1 National Parks and Wildlife Act 1974

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

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

Specifically, under s.85 of the NPW Act, the Director-General (DG) of Premier and Cabinet 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 establishing offences of harm. 'Harm' is defined to mean destroying, defacing or damaging an Aboriginal object or Aboriginal place, or moving an Aboriginal object from the land. There are a number of defences to, and exemptions from, the offence of harming an Aboriginal object or place.

Although the NPW Act gives a high level of protection to Aboriginal objects and places, recent court decisions have confirmed that Part 6 gives the DG express powers to permit harm through 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).

2.2.2 Other Acts

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

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

In the meantime, the Government is developing an alternative assessment regime for projects of genuine State significance that will be implemented following the repeal of Part 3A. The Department of Planning and Infrastructure's (P&I) [major projects assessments system](#) webpage has details on these transitional arrangements and the alternative assessment regime. Links to the guides, information on the transitional arrangements and the repeal of Part 3A are also available on an [EHub page](#).

2.3 Related policies

This operational policy currently sits under OEH's Cultural Heritage Strategic Policy, which identifies broad directions for the way OEH protects and manages cultural heritage.

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

These include:

- NSW Aboriginal Affairs Plan, [Two Ways Together](#) (NSW Government) (available on the AANSW website)
- OEH [Corporate Plan](#) (DECCW 2010 Update)
- OEH [Aboriginal people, the environment and conservation principles](#) (the 'APEC principles')
- OEH [Cultural Heritage Strategic Policy](#) (available on EHub only)
- OEH [Aboriginal Community Engagement Framework](#) (available on EHub only)
- EPRG [Operating Principles](#) (available on EHub and in Appendix C)
- OEH [Guarantee of Service](#)



Figure 1: Current guiding policies and principles

Appendix B presents a more detailed diagram of the policy framework for the protection of Aboriginal cultural heritage in NSW and includes a brief description of the key policies and principles mentioned above.

The policies outlined in this document will help OEH to meet these guiding policies and principles. References to guiding policies and principles are made throughout this document to show consistency with those policies.

2.4 OEH responsibilities

As mentioned in Section 2.2, the DG of DPC is responsible for protecting Aboriginal objects and places in NSW, particularly those on land reserved under the NPW Act. All OEH groups and divisions work towards meeting the DG’s responsibilities under the Act.

Within OEH, the Country, Culture and Heritage Division (CCHD), Parks and Wildlife Group (PWG), Environment Protection and Regulation Group (EPRG) and Legal Services Branch (LSB) have special obligations. We aim to work together to conserve and protect Aboriginal cultural heritage in a way that builds effective relationships and results in an efficient use of skills and resources. Working together is critical to achieving OEH’s Aboriginal cultural heritage priorities and ensures effective and consistent delivery against OEH obligations under the Act.

This operational policy focuses on the responsibilities of EPRG **only**.

2.5 EPRG role

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

In addition to our role of considering and determining AHIPs, we also have obligations under the EP&A Act where Aboriginal cultural heritage issues are a consideration, such as:

- providing expert advice to the Department of Planning and Infrastructure (P&I) on State Significant Development and State Significant Infrastructure projects under the EP&A Act

- providing General Terms of Approval to P&I or the relevant council for integrated development subject to Part 4 of the EP&A Act
- being a 'determining authority' when an application is subject to Part 5 of the EP&A Act.

We also focus on:

- informing and advising P&I and councils on other environmental and land-use planning matters, such as environmental planning instruments¹
- investigating breaches of the NPW Act and undertaking strategic enforcement
- developing partnerships with other bodies to make the best use of our skills and resources
- continually improving our regulatory processes.

Further information

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

3. Protecting Aboriginal cultural heritage

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

3.1 Recognising the rights and interests of Aboriginal people in their cultural heritage

Policy 1

We recognise and acknowledge that Aboriginal people are the primary determinants of the cultural significance of their heritage.

Policy 2

We acknowledge, accept and will act on the principles that Aboriginal people:

- are the primary source of information about the value of their heritage and how this is best protected and conserved
- must have an active role in any Aboriginal cultural heritage planning process
- must have early input into the assessment of the cultural significance of their heritage and its management so they can continue to fulfill their obligations towards their heritage
- must control the way in which cultural knowledge and other information relating specifically to their heritage is used, as this may be an integral aspect of its heritage value.

¹ Environmental planning instruments include state environmental planning policies (SEPPs) and local environmental plans (LEPs).

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

- APEC (Aboriginal people, the environment and conservation) principles (see Appendix B)
- Cultural Heritage Strategic Policy (see Appendix B) –
Principle 1.1 – Community values associated with cultural heritage are diverse and will continue to evolve. Communities are the primary determinants of those values for which they have a cultural association.
Principle 1.5 – Aboriginal people have inherent rights as the first peoples of Australia to self-determination and to maintain their language, culture and identity. These rights were never ceded. These rights also include the recognition of their values and interests in the environment of NSW.

3.2 Conserving significant Aboriginal cultural heritage

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

Policy 3

Our priority is the conservation and protection of significant Aboriginal cultural heritage, particularly that which is of significance to Aboriginal people.

Policy 4

In all areas of our work, we will strive for good conservation outcomes. We will be strategic, effective and innovative in our approach to conserving and protecting significant Aboriginal cultural heritage.

Policy 5

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

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

- APEC principles (see Appendix B)
- Cultural Heritage Strategic Policy (see Appendix B) –
Principle 1.1 – Community values associated with cultural heritage are diverse and will continue to evolve. Communities are the primary determinants of those values for which they have a cultural association.
Principle 2.6 – Effective heritage management requires knowledge of values or cultural significance. Cultural significance is best protected by a sequence of collecting and analysing information before making decisions.
- EPRG Operating Principles (see Appendix C) –
#1 – Anticipate, find and solve important problems
#2 – Set outcomes-focused regulatory requirements
#4 – Recognise our use of discretion

3.3 Developing partnerships and enhancing communication

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

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

Also of relevance, is that one of the DG's functions under the NPW Act is to 'promote opportunities for partnerships and agreements between Aboriginal people and landowners and managers in relation to places, objects and features of significance to Aboriginal people (whether on land reserved or acquired under this Act or not)' (s.8(4A)).

Policy 6

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

Policy 7

We will enhance communication (such as advice, liaison and information-sharing) with internal and external stakeholders to develop a greater understanding and appreciation of Aboriginal cultural heritage values.

Policy 8

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

Policy 9

As part of our regulatory functions, we will look for opportunities to promote and support the establishment of partnerships, agreements and other mechanisms that aim to protect and conserve significant Aboriginal cultural heritage values.

Policy 10

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

Policy 11

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

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

- *Two Ways Together* (see Appendix B) –

New ways of doing business with Aboriginal people – focus area: government’s role in enhancing the capacity of communities

- APEC principles (see Appendix B)
- Cultural Heritage Strategic Policy (see Appendix B) –

Principle 1.3 – While consultation with communities is a step in involving people in heritage management and protection, greater benefits will flow to both OEH and communities through effective engagement and partnerships.

Policy 1.3 – OEH will involve relevant communities in the management and protection of their cultural heritage where practical. This will involve our staff actively responding to community needs and desires and assisting communities in achieving their aspirations.

- EPRG Operating Principles (see Appendix C) –

#3 – Ensure stakeholders understand that compliance is necessary

#5 – Maximise our impact

#9 – Provide support and guidance for staff

#10 – Teamwork and communication

- OEH Guarantee of Service (see Appendix B) – ‘Responsiveness’ principle

3.4 Focusing our efforts

All EPRG regional branches employ highly skilled Aboriginal heritage professionals who are involved with a variety of important heritage conservation work, including negotiating and processing AHIP applications and providing advice on environmental planning matters. This work can involve considerable time, effort and resources (see also Section 2.5 EPRG role).

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

Policy 12

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

- the overall assessment of significance of Aboriginal objects and places²
- the nature of the proposed harm
- the potential for good conservation outcomes.

Policy 13

We can increase the effectiveness of our efforts by getting involved in the early stages of projects and proposals (e.g. before an AHIP application is lodged). Where we have this opportunity, we will concentrate on negotiating good conservation outcomes and reiterate requirements and appropriate

² For example, the overall assessment of significance of Aboriginal objects and places will be the primary factor in deciding how detailed our evaluation of each AHIP application will be.

approaches for heritage management. In some cases, our negotiations may mean that the proponent can entirely avoid harm to Aboriginal cultural heritage.

Policy 14

We will advise AHIP applicants (and potential applicants) where AHIPs are not required. We will not issue AHIPs as an 'insurance policy'.

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

- EPRG Operating Principles (see Appendix C) –
 - #4 – Recognise our use of discretion
 - #5 – Maximise our impact

Further information

- [Applying for an Aboriginal Heritage Impact Permit: Guide for applicants](#)
- [Guide to AHIP Processes and Decision-making](#)

3.5 Ensuring we have adequate information

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

Policy 15

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

Policy 16

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

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

- EPRG Operating Principles (see Appendix C) –
 - #3 – Ensure stakeholders understand that compliance is necessary

Further information

- [Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW](#)
- [Applying for an Aboriginal Heritage Impact Permit: Guide for applicants](#)
- [Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010](#)
- [Guide to AHIP Processes and Decision-making](#)

- OEH [Guidance on Part 3A of the EP&A Act](#) (available on EHub only)³

3.6 Ensuring balanced assessments of Aboriginal cultural heritage

An understanding of what makes a place culturally significant and why enables appropriate decisions to be made about the management of that place. This is why it is crucial to identify the full range of values across a study area – social, historic, scientific and aesthetic – and that the significance of those values is assessed. These are the four values identified in *The Burra Charter* (Australian ICOMOS 1999).

The investigation and assessment of Aboriginal cultural heritage should make use of all relevant disciplines and not be thought of as a component of archaeological assessment or investigation.

Policy 17

We will require (or, where appropriate, advise or request) that our clients and stakeholders appropriately balance their investigation and assessment of Aboriginal cultural heritage, ensuring that the full range of values – social, historic, scientific and aesthetic – is identified and assessed.

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

- Cultural Heritage Strategic Policy (see Appendix B) –
Principle 2.1 – The processes articulated in the Australia ICOMOS Burra Charter 1999 for the conservation of cultural heritage represent current best practice in heritage conservation.
Principle 2.6 – Effective heritage management requires knowledge of values or cultural significance. Cultural significance is best protected by a sequence of collecting and analysing information before making decisions.

Further information

- [Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW](#)
- [Applying for an Aboriginal Heritage Impact Permit: Guide for applicants](#)
- Australian ICOMOS (1999) [The Burra Charter: The Australia ICOMOS charter for places of cultural significance](#) (available on the ICOMOS website)
- Australian ICOMOS (1988) [Guidelines to the Burra Charter: Cultural significance](#) (available on the ICOMOS website).

3.7 Ensuring consultation has been appropriate

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

Consultation with Aboriginal people who hold cultural knowledge about an area, object or place is an integral part of the process of identifying, conserving and managing Aboriginal cultural heritage.

³ Note Part 3A of the EP&A Act has been repealed. Transitional arrangements are in place for those projects which were already in the major projects assessment system under Part 3A.

When making decisions about AHIPs, OEH is required to consider a range of factors, including ‘the results of any consultation by the applicant with Aboriginal people ...’ (s.90K(1)(f)). Clause 80C of the NPW Regulation sets out the requirements of consultation, which are further explained in OEH’s [Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010](#).

Policy 18

We will encourage early and ongoing engagement between our clients/stakeholders and Aboriginal people. This includes engagement during project planning and assessment, particularly with those Aboriginal people who hold cultural knowledge about an area.

Policy 19

We will ensure that AHIP applicants have provided an adequate opportunity for Aboriginal people to be consulted through the process of investigating, assessing and working out how to manage the harm from proposed activities.⁴

Policy 20

When providing advice to P&I on Aboriginal cultural heritage associated with a State significant development or infrastructure project or SEPP or local councils on local planning instruments, we will consider whether there has been adequate consultation with Aboriginal people. In relation to former Part 3A major project applications still being assessed, we will ensure that consultation is consistent with P&I’s Part 3A guidelines and OEH’s [Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010](#).⁵

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

- APEC principles (see Appendix B)
- Cultural Heritage Strategic Policy (see Appendix B) –

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

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

- EPRG Operating Principles (see Appendix C) –
#3 – Ensure stakeholders understand that compliance is necessary

⁴ In accordance with the requirements set out in clause 80C of the NPW Regulation, which are further explained in OEH’s [Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010](#)

⁵ Proponents of Part 3A major project applications are required to follow the consultation process set out in the (draft) [Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation](#) provided by P&I directly to proponents and also available on [EHub](#) for the reference of OEH staff. Note Part 3A of the EP&A Act has been repealed. Transitional arrangements are in place for those projects which were already in the major projects assessment system under Part 3A.

Further information

- [Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010](#)
- [Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation](#) (for Part 3A major projects; available on EHub)

3.8 Ensuring harm is avoided or minimised

OEH needs to balance the sometimes competing tensions between development activities and environment protection when we make decisions. Although the NPW Act gives a high level of protection to Aboriginal objects and places, recent court decisions have confirmed that Part 6 gives the DG express powers to consent to the harm of Aboriginal objects and places by development activities. The powers in Part 6 are not inconsistent with the objects of the Act or the principles of ecologically sustainable development (ESD).⁶

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

Policy 21

We will require all likely harm to Aboriginal objects and places to be quantified and assessed. This assessment must include a consideration of the principles of ESD, in particular the precautionary principle and the principle of intergenerational equity.

Policy 22

We will require all practical measures to be taken to avoid harm to Aboriginal objects and places. We will encourage the development or re-design of proposals to avoid harm and therefore avoid the need for an AHIP.⁷

Policy 23

We will encourage well-defined, measurable, achievable and sustainable conservation outcomes in order to protect significant Aboriginal cultural heritage values.⁸

Policy 24

Where options for avoiding harm and providing conservation outcomes have been exhausted, we will require the proponent or AHIP applicant to investigate management strategies to minimise the extent and severity of the harm, in consultation with Aboriginal people.

⁶ An object of the NPW Act is to conserve places, objects and features of significance to Aboriginal people (s.2A(1)(b)(i)). This is to be achieved by applying the principles of ESD (s.2A(2)).

⁷ These might include reducing the area of a building footprint, changing its orientation, re-positioning building elements, re-routing infrastructure trenching, or incorporating a no-development area into the design of a proposed activity.

⁸ Suitable outcomes might include declaration of an Aboriginal place; voluntary conservation agreement; a legal covenant; and acquisition or reservation of land as an Aboriginal area.

Policy 25

Once all options to avoid or minimise harm have been adequately explored, we may also consider the appropriateness of any proposed actions having potential benefit for Aboriginal cultural heritage.⁹ The proponent or AHIP applicant must consult with Aboriginal people about any proposed actions.

These policies should also be applied where we are providing advice to P&I or a local council on Aboriginal cultural heritage issues.¹⁰

Further information

- [Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW](#)
- [Applying for an Aboriginal Heritage Impact Permit: Guide for applicants](#)
- Appendix A provides more detail about the principles of ESD.

3.9 Making reasonable decisions and providing reasonable advice

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

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

Policy 26

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

Policy 27

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

Policy 28

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

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

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

⁹ This could involve such things as the provision of a keeping place for Aboriginal objects; construction of a cultural centre and interpretive signage; land set aside for cultural purposes; and access to land or places of cultural significance.

¹⁰ For example, when providing advice to P&I in relation to State significant developments or infrastructure or commenting on environmental planning instruments

Further information

- [Guide to AHIP Processes and Decision-making](#)
- [Guidance for Section 90K Heads of Consideration](#) (available on EHub only)
- [Legal Eye 2008/11: Legal principles for decision-makers](#) (available on EHub only)

3.10 Refusing AHIPs or recommending planning refusal

Policy 29

We will not issue AHIPs for the desecration of Aboriginal objects or places.¹¹

Policy 30

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

Policy 31

Where possible, we will work with willing landholders to explore opportunities to secure conservation outcomes against future harm for those areas where we have refused AHIPs or limited them via conditions (based on Policy 30 above).¹²

These policies should also be applied where we are providing advice to P&I or a local council on Aboriginal cultural heritage issues.¹³

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

- EPRG Operating Principles (see Appendix C) –
 - #4 – Recognise our use of discretion
 - #5 – Maximise our impact

Further Information

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

3.11 Compliance and enforcement

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

¹¹ S.87(1)(a) of the NPW Act provides a defence to prosecution where ‘the harm or desecration concerned was authorised by an Aboriginal heritage impact permit ...’ However, OEH will only consider issuing AHIPs in relation to ‘harm’ and not ‘desecration’.

¹² For example, by negotiating voluntary conservation agreements or seeking Aboriginal place nominations; or investigating incentive funding opportunities from catchment management authorities

¹³ For example, when commenting on environmental planning instruments

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

Policy 32

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

Policy 33

We recognise that a number of tools are available to carry out our compliance and enforcement activities and we will use the right tool for the right purpose.¹⁴

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

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

Further information

- [EPRD Approach to Investigations and Prosecutions](#) (available on EHub only)
- [Powers of Authorised Officers: A guide to your powers under environment protection legislation](#)
- [Compliance Audit Handbook](#)
- [EPA Prosecution Guidelines](#)
- [Specialist Investigations Unit](#) (available on EHub only)

3.11.1 Regulation of OEH activities

It is important that we set high standards for our own activities and comply with the spirit, not just the letter, of the law. OEH activities that may potentially harm Aboriginal cultural heritage are carried out mainly by CCHD (such as the Aboriginal Heritage Conservation Program)¹⁵ and PWG (such as park management activities, including activities relating to Aboriginal-owned [Part 4A] lands and activities undertaken in accordance with an AHIP issued by EPRG).

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

Policy 34

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

¹⁴ These tools include AHIP conditions; the power of authorised officers; inspections; compliance audits; warning letters; penalty notices; stop work orders; interim protection orders; remediation directions; investigations; prosecutions; and injunctions.

¹⁵ In accordance with the exemption under s.87A(a) of the NPW Act for OEH conservation or protection works of Aboriginal objects and places

Policy 35

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

Policy 36

We will work closely with CCHD and PWG staff undertaking Aboriginal heritage conservation works to make sure that their activities comply with all legal requirements and OEH policies on the protection of Aboriginal cultural heritage.

Further information

- [Staff Notice 06/05: EPA regulation of DEC and SCA activities](#) details the measures in place to ensure that OEH is a credible regulator. Although the protocol outlined relates specifically to EPA matters, the same general principles should be applied to NPW Act matters (available on EHub only).
- [Premier's Memorandum No. 97-26: Litigation Involving Government Authorities](#) (available on the Department of Premier and Cabinet website)
- [Guide to AHIP Processes and Decision-making](#)

Further reading

OEH publications

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

Aboriginal people, the environment and conservation principles (DEC 2006):
www.environment.nsw.gov.au/whoweare/apecprinciples.htm

Aboriginal Places: DECC guidelines for the assessment and gazettal of Aboriginal Places under section 84 of the National Parks and Wildlife Act 1974 (DECC 2008):
deccnet/cultureheritage/aboriginal/AboriginalPlacedecassessqlines.htm [internal audience]

An Aboriginal Community Engagement Framework for DECC (DECC 2007):
deccnet/cultureheritage/aboriginal/AboriginalCommunityEngagementFramework.htm [internal audience]

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

Compliance Audit Handbook (DEC 2006):
www.environment.nsw.gov.au/licensing/complianceaudit.htm

Cultural Heritage Strategic Policy (DEC 2006):
deccnet/cultureheritage/CulturalHeritageStrategicPolicy.htm [internal audience]

DECCW Corporate Plan 2010 Update (DECCW 2010):
www.environment.nsw.gov.au/whoweare/plan.htm

DECCW Guarantee of Service (DECCW 2010): www.environment.nsw.gov.au/whoweare/gos.htm

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

EPA Prosecution Guidelines (EPA 2004): www.environment.nsw.gov.au/legal/prosguide/index.htm

EPRD Approach to Investigations and Prosecutions (DEC 2004): ehub/legal/investigations.htm
[internal audience]

EPRG Operating Principles (DECCW 2010): Appendix C and ehub/organisation/EPRG/index.htm
[internal audience]

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

Guide to Aboriginal Heritage Impact Permit Processes and Decision-making (Version 2) (OEH 2011): www.environment.nsw.gov.au/licences/internalachpolicy.htm

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

Guidance for Section 90K Heads of Consideration (OEH 2011): ehub/regulation/ach.htm

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

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

Legal Eyes and staff notices: internal

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

[Staff Notice 06/05: EPA regulation of DEC and SCA activities](#)

[Legal Eyes on NSW planning law](#)

Other relevant OEH web and intranet pages

Regulation of Aboriginal cultural heritage webpage (EPRG):
www.environment.nsw.gov.au/licences/achregulation.htm

Specialist Investigations Unit EHub page (LSB): deccnet/legal/investigations.htm

Aboriginal cultural heritage EHub page (EPRG): deccnet/regulation/ach.htm

Environmental planning and assessment EHub page (PWG/EPRG): deccnet/epa/

Legislation

[Environmental Planning and Assessment Act 1979](#)

[Heritage Act 1977](#)

[National Parks and Wildlife Act 1974](#)

[National Parks and Wildlife Regulation 2009](#)

[Protection of the Environment Administration Act 1991](#)

[Protection of the Environment Operations Act 1997](#)

Other

Australian ICOMOS (1988) *Guidelines to the Burra Charter: Cultural significance*
australia.icomos.org/publications/charters/

Australian ICOMOS (1999) *The Burra Charter: The Australia ICOMOS charter for places of cultural significance*: australia.icomos.org/publications/charters/

Department of Planning (2005) *Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* for Part 3A major projects being assessed as part of [transitional arrangements](#) and provided in draft form by Department of Planning and Infrastructure directly to proponents and also available on EHub for OEH staff but not for distribution by them

NSW Government (2003) *Two Ways Together. NSW Aboriginal Affairs Plan 2003–2012*
www.daa.nsw.gov.au/policies/policy.html

Premier's Memorandum (1997) No. 97-26: *Litigation Involving Government Authorities*
www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/1997/m1997-26

Appendix A: Legislative framework

The following legislation provides the primary context for Aboriginal heritage management in NSW:

- *National Parks and Wildlife Act 1974* (NPW Act)
- *Environmental Planning and Assessment Act 1979* (EP&A Act)
- *Heritage Act 1977*.

Other relevant legislation includes the NSW *Aboriginal Land Rights Act 1983* and *Native Title Act 1994*, and the Commonwealth *Native Title Act 1993* and other Australian Government legislation.

A.1 National Parks and Wildlife Act 1974

The NPW Act is the primary legislation for the protection of many aspects of Aboriginal cultural heritage in NSW and is administered by OEH.

The National Parks and Wildlife Regulation 2009 (NPW Regulation) gives effect to some of the provisions contained within the NPW Act.

One of the objectives of the NPW Act is:

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

Protection of Aboriginal objects and places

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

Part 6 of the NPW Act provides specific protection for Aboriginal objects and places by making it an offence to harm or desecrate them (see below for more explanation of the Aboriginal cultural heritage offences in the Act).

An **Aboriginal object** is defined as *'any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains'* (s.5).

Aboriginal remains means:

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

- (a) a body or the remains of a body buried in a cemetery in which non-Aboriginals are also buried, or*
- (b) a body or the remains of a body dealt with or to be dealt with in accordance with a law of the State relating to medical treatment or the examination, for forensic or other purposes, of the bodies of deceased persons'* (s.5).

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

A [list of declared Aboriginal places](#) can be found on the OEH website.

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

Harm means ‘... any act or omission that destroys, defaces or damages an object or place or, in relation to an object, moves the object from the land on which it had been situated’ (s.5).

Aboriginal objects that are property of the Crown: s.83(1)

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

- (a) were located in private collections before 13 April 1970¹⁶ and have not been since abandoned
- (b) are ‘real property’ (i.e. objects such as rock art, rock carvings or scarred trees that are attached to private land and are legally considered part of that land).

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

Aboriginal cultural heritage offences

The NPW Act establishes a number of offences. Table A.1 lists the offences and penalties that apply to Aboriginal cultural heritage and exclusions, exemptions and defences to those offences.

Table A.1: Summary of Aboriginal cultural heritage offences

Offence	Maximum penalty: Individual	Maximum penalty: Corporation	PIN ¹⁷ amount	Exclusions, exemptions and defences in the NPW Act
Section 86(1) A person must not knowingly harm or desecrate an Aboriginal object	2500 penalty units (\$275,000) or imprisonment for 1 year or both 5000 penalty units (\$550,000) or imprisonment for 2 years or both (in circumstances of aggravation)	10,000 penalty units (\$1,100,000)	–	Exclusion: any act or omission excluded from the definition of ‘harm’ under s.5 Exemption: any works or activities listed under s.87A or s.87B Defence: Harm or desecration ¹⁸ was authorised by an AHIP, which was not contravened (s.87(1)).
Section 86(2) A person must not harm an Aboriginal object (strict liability)	500 penalty units (\$55,000) 1000 penalty units (\$110,000) (in circumstances of aggravation)	2000 penalty units (\$220,000)	\$1500	Exclusion: any act or omission excluded from the definition of ‘harm’ under s.5 Exemption: any works or activities listed under s.87A or s.87B Defences: <ul style="list-style-type: none"> • Harm or desecration¹⁸ was authorised by an AHIP, which was not contravened (s.87(1)). • The defendant exercised ‘due diligence’ and reasonably determined that no Aboriginal object would be harmed (s.87(2)). • The defendant was carrying out a ‘low impact activity’ (s.87(3)).

¹⁶ Objects became the property of the Crown on 13 April 1970, the date of commencement of s.33D of the *National Parks and Wildlife Act 1967*, the predecessor to the 1974 Act.

¹⁷ PIN = penalty infringement notice

¹⁸ Policy 29 is that OEHL will not issue an AHIP to desecrate an Aboriginal object or Aboriginal place.

Operational Policy: Protecting Aboriginal cultural heritage

Offence	Maximum penalty: Individual	Maximum penalty: Corporation	PIN ¹⁷ amount	Exclusions, exemptions and defences in the NPW Act
Section 86(4) A person must not harm or desecrate an Aboriginal place (strict liability)	5000 penalty units (\$550,000) or imprisonment for two years or both	10,000 penalty units (\$1,100,000)	\$3300	Exclusion: any act or omission that is excluded from the definition of 'harm' under s.5 Exemption: any works or activities listed under s.87A or s.87B Defence: Harm or desecration was authorised by an AHIP, which was not contravened (s.87(1)).
Section 89A Failure to notify OEH of the location of an Aboriginal object	100 penalty units (\$11,000); in the case of a continuing offence, a further maximum penalty of 10 penalty units (\$1100) for each day the offence continues	200 penalty units (\$22,000); in the case of a continuing offence, a further maximum penalty of 20 penalty units (\$2200) for each day the offence continues	\$300	Nil
Section 90J Contravention of any condition of an AHIP	1000 penalty units (\$110,000) or imprisonment for 6 months, or both; In the case of a continuing offence, a further penalty of 100 penalty units (\$11,000) for each day the offence continues	2000 penalty units (\$220,000); in the case of a continuing offence, a further penalty of 200 penalty units (\$22,000) for each day the offence continues	\$1500	Defence (s.90J(3)): <ul style="list-style-type: none"> The contravention was caused by another person, and The person was not associated with the holder of the AHIP at the time, and The holder took all reasonable steps to prevent the contravention.
Section 156A(c) Damage any object or place of cultural value on or in land reserved or acquired under the NPW Act	1000 penalty units (\$110,000) or 6 months imprisonment, or both	10,000 penalty units (\$1,100,000)	–	Defences: <ul style="list-style-type: none"> Damage was done in accordance with a consent or licence (s.156A(2)(a)&(b)) Valid EP&A Act approval (s.156A(2)(c)) Damage was necessary to avoid threat to life or property and was authorised under certain emergency Acts. No knowledge (s.156A(3)).

For further information about these offences and enforcement, see National Parks and Wildlife Amendment Act *Fact Sheet 3: Better law enforcement for the protection of Aboriginal heritage, national parks and threatened species in NSW* available on the [regulation of Aboriginal cultural heritage](#) OEH webpage (along with information on Aboriginal cultural heritage regulation generally).

Transfer of Aboriginal objects

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

- by returning the objects to the Aboriginal owner(s) entitled to and willing to accept possession, custody or control of them in accordance with Aboriginal tradition (s.85A(1)(a)), or

- by otherwise dealing with the Aboriginal objects in accordance with any reasonable directions of the Aboriginal owner(s) (s.85A(1)(b)), or
- if there are no Aboriginal owners, by transferring the objects to an Aboriginal person¹⁹ or an organisation representing Aboriginal people for safekeeping (s.85A(1)(c) and cl.99, NPW Regulation).²⁰

Stop work orders

The provisions for stop work orders are set out in sections 91AA to 91FF of the NPW Act.

The DG may issue stop work orders in relation to an action that is likely to significantly affect an Aboriginal object or place (s.91AA).

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

Stop work orders:

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

Interim protection orders

The provisions for interim protection orders are set out in sections 91A to 91I of the NPW Act.

The DG can recommend that the Minister make an interim protection order in relation to an area of land with cultural significance. This may include the prohibition or regulation of:

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

Interim protection orders:

- remain in place for two years and can be appealed, in writing, to the Land and Environment Court
- may not be issued in relation to critical infrastructure projects (a category of Major Project under Part 3A of the EP&A Act).²¹

Remediation directions

The provisions for remediation directions in relation to Aboriginal objects and places are set out in sections 91L to 91T of the NPW Act.

A direction to carry out remediation work can be an effective way of addressing the consequences of harm. Remediation directions can be issued instead of, or in addition to, the commencement of legal proceedings for a breach of the NPW Act.

Remediation directions can be issued to the current or former holder of land in relation to which a direction is issued or any other person the DG thinks is responsible for the damage or harm. The

¹⁹ 'Aboriginal person' is defined in s.4(1) of the *Aboriginal Land Rights Act 1983*.

²⁰ In practice, transfers under s.85A(1)(c) are done via a Care Agreement between OEH and the Aboriginal person or community.

²¹ Note Part 3A of the EP&A Act has been repealed. Transitional arrangements are in place for those projects which were already in the major projects assessment system under Part 3A.

recipient of a remediation direction has the right to have the decision to issue a remediation direction reviewed by a court within 30 days of receiving the direction. It is an offence:

- to not comply with a remediation direction (s.91Q)
- to delay or obstruct a person carrying out a remediation direction (s.91R).

The NPW Act includes a cost recovery provision which states that where the recipient of a remediation direction is not the person who caused the damage, the costs of complying with the direction can be recovered from the person who caused the relevant damage.

Principles of ecologically sustainable development

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

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

Intergenerational equity

The principle of intergenerational equity states that the present generation should make every effort to ensure the health, diversity and productivity of the environment – which includes cultural heritage – for the benefit of future generations.

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

Information about the significance of Aboriginal cultural heritage values associated with the Aboriginal objects and places proposed to be harmed will be relevant to the consideration of intergenerational equity and an understanding of the cumulative impacts of a proposal.

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

The precautionary principle

The precautionary principle states that the lack of full scientific certainty about the threat of harm should not be used as a reason for not taking measures to prevent harm from occurring.

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

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

The precautionary principle is relevant to OEH consideration of potential harm to Aboriginal cultural heritage where:

- the proposal involves a risk of serious or irreversible harm to Aboriginal objects or places or to the value of those objects or places, and
- there is a lot of uncertainty about the significance of Aboriginal cultural heritage values of the Aboriginal objects or places proposed to be harmed.

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

A.2 Environmental Planning and Assessment Act 1979

The EP&A Act, administered by the NSW Department of Planning and Infrastructure, provides planning controls and requirements for environmental assessment in the development approval process. It also establishes the framework for formal assessment of Aboriginal cultural heritage values in land-use planning and development consent processes.

Part 3: Environmental planning instruments

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

- state environmental planning policies (Division 2)
- local environmental plans (Division 4).

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

State environmental planning policies (SEPPs)

SEPPs deal with issues significant to the state and people of NSW. They are made by the Minister for Planning and Infrastructure. There are currently no SEPPs that relate specifically to the protection of Aboriginal cultural heritage.

Local environmental plans (LEPs)

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

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

In March 2006, the NSW Government gazetted a standard instrument for preparing new LEPs, also known as the 'LEP template'.²² The purpose of the LEP template is to ensure that local plans across NSW will use the same planning language, making it easier for communities to understand what is proposed for their local area. Councils are able to include localised planning objectives and provisions specific to their area, as well as determine zoning, additional land uses, heritage items, and development standards such as height and minimum lot sizes.

The LEP template includes a compulsory heritage conservation clause (cl.5.10) which specifies that development consent is required for:

- disturbing or excavating an archaeological site while knowing, or having reasonable cause to suspect, that the disturbance or excavation will or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed (cl.5.10(2)(d))
- disturbing or excavating a heritage conservation area that is a place of Aboriginal heritage significance (cl.5.10(2)(e)).

Terms, such as 'archaeological site' and 'place of Aboriginal heritage significance', are defined in the template dictionary and where identified may also be marked on maps that form part of an LEP.

²² See the [Standard Instrument: Principal Local Environmental Plan](#) available on the NSW Legislation website.

Development control plans (DCPs) prepared and approved by local councils are also used to help achieve the objectives of an LEP by providing specific, comprehensive requirements for certain types of development or locations (such as for heritage precincts).

Repeal of Part 3A: Major projects and infrastructure

Part 3A of the EP&A Act was repealed in May 2011. As a result, the NSW Government announced transitional arrangements for a number of projects for which assessment under Part 3A had already begun and which would continue to finality under the repealed system. OEH will be involved in the assessment of these projects and will need to determine how the transitional arrangements apply to them. P&I's [major projects assessments system](#) webpage has details on these transitional arrangements.

Briefly, for those projects that are still being assessed under Part 3A:

- A declared Part 3A major project under s.75B of the EP&A Act does not require an AHIP from OEH because the offences under Part 6 of the NPW Act do not apply to these projects (see [Legal Eyes 2005/09](#) and [2007/04](#)).
- Proponents are still required to follow the draft P&I [Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation](#) (available on EHub) when seeking approval under the Part 3A process. The guidelines, which were developed by P&I and OEH, detail the assessment and consultation requirements that need to be followed for Aboriginal cultural heritage under the Part 3A process.
- Stop work orders (s.91AA of the NPW Act) cannot be issued in relation to anything *essential* for the carrying out of an approved major project.
- Interim protection orders (s.91A, NPW Act) cannot be issued for critical infrastructure projects, but may be applied to other major projects.

State significant development and infrastructure

The NSW Government is currently developing an alternative assessment regime for projects of genuine State significance that will be implemented following the repeal of Part 3A.

Part 4: Developments

Developments that require development consent (from a council or the Minister for Planning and Infrastructure) are assessed under Part 4 of the EP&A Act. Part 4 developments are not exempt from the Aboriginal cultural heritage provisions and offences of the NPW Act.

Types of developments include 'complying', 'designated', 'integrated', 'other local', 'exempt development' and 'other development not requiring consent'.

Complying development

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

Designated development

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

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

Integrated development

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

If a Part 4 development proposal triggers the need for an AHIP (that is, the proposal is likely to harm an Aboriginal object or place), the proposal may be assessed as integrated development where:

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

In such situations, OEH is an approval body and must provide 'general terms of approval' to the consent authority, and any development consent must be consistent with those terms.

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

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

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

Other local development

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

Development that does not need consent

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

Prohibited development

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

Part 5: Activities

Development consent is not required for certain activities, such as the construction of roads or electricity infrastructure on behalf of government agencies or statutory authorities. These activities are assessed under Part 5 of the EP&A Act. Part 5 activities are not exempt from the Aboriginal cultural heritage provisions and offences in the NPW Act.

Where Part 5 applies, a two-step assessment process is followed by the 'determining authority', usually the Minister or another responsible authority. First, the determining authority must take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the activity. This is generally referred to as the review of environmental factors (REF). If the determining authority finds that the activity is likely to significantly affect the environment, an EIS must be prepared and publicly exhibited.

There may, however, be more than one determining authority. It is important to note that not every agency that has a role in issuing an approval for an activity (such as an AHIP) is required to be a determining authority for the REF. This is because s.110E of the EP&A Act provides that where a REF has been dealt with by one determining authority, other agencies do not separately need to do so. In practice, agencies responsible for issuing a statutory approval for an activity that has been subject to a REF will take its findings (and any determination and recommended conditions from the determining authority) into account when deciding whether to grant the necessary approval.

Further information

- [Information on the EP&A Act generally](#) can be found on the Department of Planning and Infrastructure website.
- Information that is more specific to OEHL can be found on the [Environmental Planning and Assessment](#) pages on EHub.
- A series of [Legal Eyes on NSW planning law](#) has also been prepared by Legal Services Branch and is available on EHub.

A.3 Heritage Act 1977

The *Heritage Act 1977*, administered by the NSW Department of Premier and Cabinet, protects the state's natural and cultural heritage. Aboriginal heritage is primarily protected under the NPW Act but may be subject to the provisions of the Heritage Act if the item is listed on the State Heritage Register or subject to an interim heritage order (IHO).

The Heritage Act established the NSW Heritage Council, which provides advice and recommendations to the Minister for Heritage. The Minister approves the listing of items and places on the State Heritage Register and can also prevent the destruction, demolition or alteration of items of potential heritage value through an IHO until the significance of the item has been assessed.

Further [information on the Heritage Act](#) can be found at the NSW legislation website.

A.4 Aboriginal Land Rights Act 1983

The NSW *Aboriginal Land Rights Act 1983* (ALR Act), administered by Aboriginal Affairs NSW, established the NSW Aboriginal Land Council (NSWALC) and local Aboriginal land councils (LALCs). The Act requires these bodies to:

- take action to protect the culture and heritage of Aboriginal persons in the council's area, subject to any other law
- promote awareness in the community of the culture and heritage of Aboriginal persons in the council's area.

These requirements recognise and acknowledge the statutory role and responsibilities of the NSWALC and LALCs.

The ALR Act also establishes the registrar whose functions include, but are not limited to, maintaining the Register of Aboriginal Land Claims and the Register of Aboriginal Owners.

Under the ALR Act, the Registrar is to give priority to the entry in the Register of the names of Aboriginal persons who have a cultural association with:

- lands listed in Schedule 14 to the NPW Act
- lands to which section 36A of the ALR Act applies.

Note Schedule 14 to the NPW Act lists lands of cultural significance to Aboriginal persons that are reserved or dedicated under that Act.

Section 36A of the ALR Act applies to lands that are the subject of a claim by one or more Aboriginal land councils and that the Minister responsible for Crown lands is satisfied would be claimable lands except for the fact that the lands are needed, or likely to be needed, for the essential public purpose of nature conservation.

Further [information about the ALR Act](#) can be found at the NSW legislation website.

A.5 Native title legislation

The *Native Title Act 1993* (Cwlth) provides the legislative framework to:

- recognise and protect native title
- establish ways in which future dealings affecting native title may proceed, and to set standards for those dealings, including providing certain procedural rights for registered native title claimants and native title holders in relation to acts which affect native title
- establish a mechanism for determining claims to native title
- provide for, or permit, the validation of past acts invalidated because of the existence of native title.

The NSW *Native Title Act 1994* was introduced to ensure that the laws of NSW are consistent with the Commonwealth legislation on future dealings and validates past and intermediate acts which may have been invalidated because of the existence of native title.

The National Native Title Tribunal has a number of functions under the Commonwealth Act, including maintaining the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements, and mediating native title claims.

Further information about the Commonwealth Act can be found on the *Australian Legal Information Institute* [website](#).

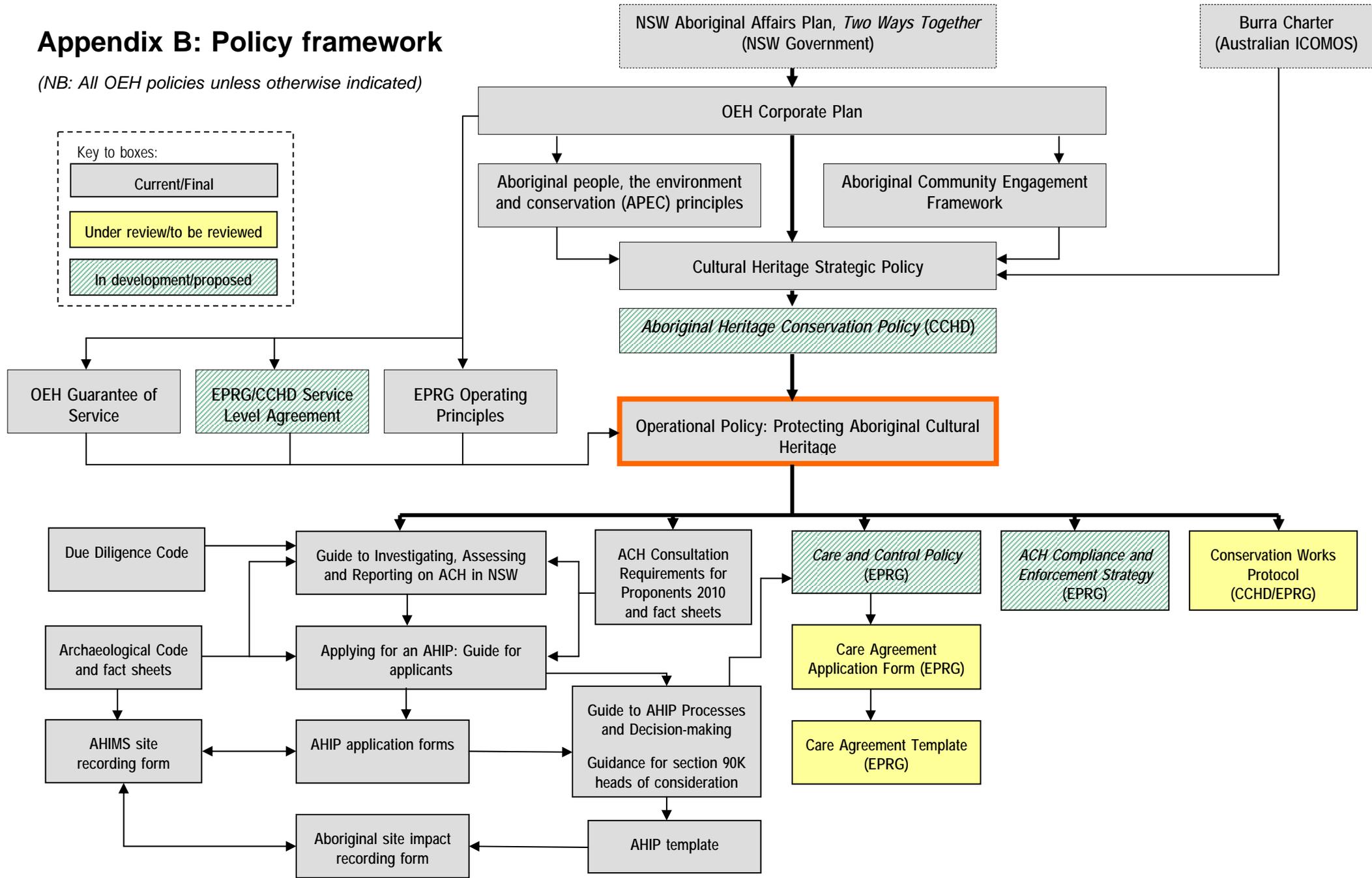
A.6 Other Acts

The Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* may be relevant if any item of Aboriginal heritage significance to an Aboriginal community is under threat of injury or desecration and state-based processes are unable to protect it. The *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) may also be relevant to some proposals, particularly where heritage values of national significance are present.

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

Appendix B: Policy framework

(NB: All OEH policies unless otherwise indicated)



Key to boxes:

- Current/Final
- Under review/to be reviewed
- In development/proposed

Additional detail about key overarching policies and principles

NSW Aboriginal Affairs Plan, *Two Ways Together*

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

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

The overall objectives of the plan are:

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

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

The plan has two core elements:

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

Further information

- [Two Ways Together](#), NSW Aboriginal Affairs Plan (available on the AANSW website)
- [Two Ways Together Regional Reports](#) (available on the AANSW website)
- OEH [Two Ways Together Implementation Plan](#) (available on EHub only)
- Contact the Manager Aboriginal Affairs Policy, Projects and Programs, CCHD.

Aboriginal people, the environment and conservation (APEC) principles

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

Further information

- [APEC principles](#)
- Contact the Policy and Planning Section in CCHD.

Aboriginal Community Engagement Framework

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

Further information

- [Aboriginal Community Engagement Framework](#) (available on EHub only)
- Contact the Policy and Planning Section in CCHD.

Cultural Heritage Strategic Policy

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

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

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

Further information

- [Cultural Heritage Strategic Policy](#) (available on EHub only)
- Contact the Policy and Planning Section in CCHD.

EPRG Operating Principles

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

Further information

- [EPRG Operating Principles](#) (Appendix C and available on EHub)
- Contact the Continuous Improvement Unit, EPRG.

OEH Guarantee of Service

The OEH Guarantee of Service lists and describes four guiding service principles that our clients can expect on all occasions, namely: respect; helpfulness; responsiveness; and continuous improvement.

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

Further information

- OEH [Guarantee of Service](#)
- Contact the Corporate Planning and Reporting Section of OEH's Policy, Economics and Governance Division.

Appendix C: EPRG operating principles

1. Anticipate, find and solve important problems

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

2. Set outcomes-focused regulatory requirements

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

3. Ensure stakeholders understand that compliance is necessary

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

4. Recognise our use of discretion

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

5. Maximise our impact

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

6. Document our decisions and actions

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

7. Measure and report performance

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

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

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

9. Provide support and guidance for staff

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

10. Teamwork and communication

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

Source: OEH 2010, [EPRG Operating Principles](#) (available on EHub only)