



fact sheet

ABORIGINAL CULTURE AND HERITAGE



New South Wales
Aboriginal Land Council

Aboriginal Heritage Impact Permits (AHIPs)

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This Fact Sheet outlines the laws surrounding Aboriginal Heritage Impact Permits, when they are required, and in what circumstances they are issued.

This is one of a series of Fact Sheets which have been developed for Local Aboriginal Land Councils (LALCs) by the NSW Aboriginal Land Council (NSWALC). Copies of the Fact Sheets are available from www.alc.org.au or by calling the NSWALC Policy and Programs Unit on 02 9689 4444.

Please Note: While all care has been taken in the preparation of these Fact Sheets, they are not a substitute for legal advice in individual cases. The information in this Fact Sheet is current as of February 2015.

What are Aboriginal Heritage Impact Permits?

Aboriginal Heritage Impact Permits (AHIPs) are permits that allow a person to harm Aboriginal objects or places. They are a key mechanism within the Aboriginal culture and heritage management regime of the *National Parks and Wildlife Act 1974 (NPW Act)*.ⁱ

An AHIP may be required for developments including major construction works such as the building of highways, or more small scale works such as building houses or where land clearing activities are required.

AHIPs are currently issued by the Chief Executive of the NSW Office of Environment and Heritage (OEH) under section 90 of the NPW Act.

For information about how permits have been issued by OEH in recent years, refer to the NSWALC submission – *More than Flora and Fauna* – which is available at www.alc.org.au.

If you think that Aboriginal objects or places are being harmed urgently contact the NSW Office of Environment and Heritage on 131 555 or 02 9995 5000.

Changes to the legislation: Previously, the *National Parks and Wildlife Act* required two permits for the majority of activities – one for the initial survey work and the second for the activity itself. New provisions that came into force on **1 October 2010** collapsed these requirements into a single permit process.

A permit is no longer required to look for Aboriginal objects providing the search is in accordance with the *Code of Practice for Archaeological Investigation NSW*. Archaeological test excavations that follow this code do not require an AHIP.

AHIPs can also now be issued in relation to specified parcels of land and deal with multistage developments.

When is an AHIP required?

To avoid prosecution, proponents wishing to undertake activities that are likely to cause harm to Aboriginal objects that are known to be present or are likely to be present should apply for an AHIP.

Proponents are supposed to follow the steps in the *Due Diligence Code of Practice for the Protection of Aboriginal objects in NSW*, or another approved code, if they are unsure if Aboriginal objects are present and their activity is not an exempt or low impact activity, and may cause harm that is not negligible or trivial.

Note: The NPW Regulation sets out exemptions to the due diligence process.

The NPW Act also contains additional exemptions that outline when an AHIP may not be required, such as for emergency fire fighting or traditional Aboriginal

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cultural activities that are not carried out for commercial purposes.

Who decides whether or not to issue an AHIP?

The Chief Executive of OEH has responsibility for issuing AHIPs after assessing whether a proposed activity will impact on an Aboriginal object or place. In practice, the Chief Executive delegates the processing of AHIPs to OEH staff working in its Environment Protection and Regulation Group.

How many AHIPs are issued?

State-wide data about the issuing of AHIPs was made publicly available on the OEH website from October 2010 as a result of the legislative changes.ⁱⁱ However, previous figures had indicated that an average of 3 AHIPs were being issued every week.

Are Aboriginal people consulted about potential harm to Culture and Heritage?

New sections in the *National Parks and Wildlife Regulation* require that an applicant for an AHIP must consult with the local Aboriginal community and report on the results of the consultation to OEH.

LALCs should be consulted unless the area is subject to an approved determination of Native Title. For more info see NSWALC's Consultation Fact Sheets.

What must be considered before an AHIP is granted or refused?

The decision to issue an AHIP is based on a number of factors outlined in section 90K of the NPW Act.

The list of factors includes 'the results of any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place that are the subject of the permit' and 'the social and economic consequences of making the decision'.

Do AHIPs allow for conservation and protection outcomes?

Sometimes, the Chief Executive may issue an AHIP with certain conditions. Such conditions may include requirements for proponents to undertake certain activities such as developing Aboriginal Heritage Management Plans, salvaging artefacts, or only undertaking development in certain areas.

Do all developments require an AHIP?

Where a proponent is sure their activity will not harm an Aboriginal object or place, or the activity is listed as an 'exempt' activity, such as emergency fire fighting, then an AHIP may not be necessary.

Some laws can 'switch off' requirements to protect culture and heritage in *National Parks and Wildlife Act* such as major developments assessed under the

Environmental Planning and Assessment Act 1979. However the Chief Executive of the Department of Planning often requires proponents to assess Aboriginal culture and heritage impacts.

Can AHIPs be changed?

Yes. Changes to the NPW Act include provisions for OEH to vary, transfer or suspend an AHIP.

AHIP variations may only be made on the application of the holder of the AHIP.

The Aboriginal community may only be given an opportunity to respond where the proposed variation will authorise a 'significant increase' in harm to the Aboriginal objects or Aboriginal places concerned. However, the type of consultation, unless outlined in specific agreement such as an Indigenous Land Use Agreement (ILUA), is at the discretion of the Chief Executive of OEH.

Appeals

There are no express rights for Aboriginal people to appeal the destruction of their culture and heritage.

In limited circumstances, cases may be brought against a decision by the Chief Executive to issue an AHIP in the Land and Environment Court.

To date only a small number of cases brought by Aboriginal people to stop an AHIP have been successful.ⁱⁱⁱ

By contrast, the NPW Act gives proponents rights to appeal several decisions that may be made by OEH in relation to an AHIP.

More information

Visit the 'Culture and Heritage' pages of the NSWALC website at www.alc.org.au or contact the NSWALC Policy and Programs Unit on 02 9689 4444.

The OEH Heritage Division can be contacted on 02 9995 5000.

Legal assistance

Please contact the Environmental Defender's Office on 02 92626989 or 1800 626 239 (free call).

ⁱ A current version of the *National Parks and Wildlife Act 1974* can be found at <http://www.legislation.nsw.gov.au> - Go to 'Browse', then 'Acts', then 'N'.

ⁱⁱ Public register of AHIPs available at www.environment.nsw.gov.au/licences/ahipregister.htm

ⁱⁱⁱ Visit the LawLink website for more information about cases involving Aboriginal heritage. www.lawlink.nsw.gov.au/lawlink/lec/ll_lev.nsf/pages/LEC_heritage