



Roads and Maritime Services
procedure for

Aboriginal

cultural heritage consultation
and investigation

November 2011

RMS/Pub. 11.012

ISBN 978 | 922040 18 3

 **PLEASE NOTE:**

This procedure applies to all development and activities concerning roads, road infrastructure and road related assets undertaken by Roads and Maritime Services.

For advice on how to manage known and potential impacts on Aboriginal cultural heritage as a result of maritime related activities, please contact the Senior Environmental Specialist (Heritage).

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Glossary

Set out below is a glossary of words and phrases used in this procedure.

Aboriginal person	Aboriginal person means a person who: (a) is a member of the Aboriginal race of Australia, and (b) identifies as an Aboriginal person, and (c) is accepted by the Aboriginal community as an Aboriginal person. (<i>Aboriginal Land Rights Act 1973</i>)
Aboriginal cultural heritage	The tangible (objects) and intangible (dreaming stories, songlines, and places) cultural practices and traditions associated with past and present-day Aboriginal communities.
Aboriginal focus group meeting	A meeting convened by RMS or its agents or contractors to consult with Aboriginal parties who have registered their interest to be consulted regarding a RMS project or activity.
Aboriginal land	Land identified in schedule 14 of the <i>National Parks and Wildlife Act 1974</i> as being of cultural significance to Aboriginal persons
Aboriginal object	Any deposit, object or material evidence (not being a handicraft made for sale), including Aboriginal remains, relating to the Aboriginal habitation of NSW. (<i>National Parks and Wildlife Act 1974</i>)
Aboriginal Owners	“Aboriginal owners of land” means the Aboriginal persons whose names are entered on the Register of Aboriginal Owners maintained under the <i>Aboriginal Lands Right Act 1983</i> because of the persons’ cultural association with particular land. (<i>Aboriginal Land Rights Act 1983</i> and <i>National Parks and Wildlife Act 1974</i>). Registration however does not confer any land title rights on that person.
Aboriginal parties	Aboriginal persons or organisations who have registered with the RMS to be consulted about a proposed RMS project or activity in accordance with OEH’s <i>Aboriginal cultural heritage consultation requirements for proponents 2010</i> .
Aboriginal place	Any place declared to be an Aboriginal place under Section 84 of the <i>National Parks and Wildlife Act 1974</i> because it is or was of special significance with respect to Aboriginal culture. A register of Aboriginal Places is available on the Office of Environment and Heritage website.
ACHA	Aboriginal cultural heritage advisor
AHIMS register	The Aboriginal heritage information management system register maintained by the Office of Environment and Heritage.



Aboriginal Heritage Impact Permit (AHIP)	A statutory permit issued to harm an Aboriginal object or place under Section 90 of the <i>National Parks and Wildlife Act 1974</i> .
Archaeological report	A report that assesses the archaeological significance of Aboriginal objects, and assesses known and potential project impacts. Archaeological reports may be prepared following (a) archaeological surveys, (b) archaeological test excavations and (c) archaeological salvage excavations.
Cultural heritage assessment report (CHAR)	<p>A report about Aboriginal objects and places likely to be impacted by an activity in accordance with Clause 80D of the National Parks and Wildlife Regulation 2009. A proponent must prepare the report (i) when seeking an AHIP from the NSW Office of Environment and Heritage; or (ii) where required when undertaking archaeological investigations in accordance with the <i>Code of practice for archaeological investigation of Aboriginal Objects in NSW 2010</i>; or (iii) for projects being assessed under Part 5.1 of the <i>Environmental Planning and Assessment Act 1979</i> where Aboriginal cultural heritage would be affected.</p> <p>The report is prepared in consultation with Aboriginal parties and may include an archaeological report and/or a detailed cultural assessment as an appendix. A cultural heritage assessment report must be completed for all projects that proceed to Stage 3 of this procedure, even if there would be no impact to objects and places.</p>
Cultural heritage constraints mapping	A report that broadly maps the archaeological and cultural values of a study area. This includes the results of a baseline archaeological assessment and cultural assessment.
Cultural knowledge holders	Aboriginal people identified by the registered Aboriginal parties who have specific knowledge about objects, places or cultural features. Cultural knowledge holders may be asked to provide information in the preparation of a cultural assessment.
DoPI	Department of Planning and Infrastructure (formerly the Department of Planning)
Detailed cultural assessment	A detailed cultural assessment may be prepared as part of Stage 2 cultural heritage constraints mapping or a Stage 3 cultural heritage assessment report. A detailed cultural assessment contains cultural information about a study area sourced from primary and secondary sources, including Aboriginal cultural knowledge holders.
Director General's Requirements (DGRs)	The formal environmental assessment requirements issued by the Director General of Planning and Infrastructure that provide the framework for the proponent's environmental assessment for a Part 5.1 application.



Disturbed land	Land that has been the subject of a human activity that has changed the land's surface, being changes that remain clear and observable. ¹
Environmental impact assessment (EIS)	The investigations carried out for, and the reports comprising 'environmental impact assessment' for projects being assessed under Division 4.1 of Part 4 and Part 5.1 of the <i>Environmental Planning and Assessment Act 1979</i> .
Harm	Harm, is defined by the <i>National Parks and Wildlife Act 1974</i> , includes destroying, defacing or damaging an object; to move an object from the land on which it is situated; or cause or permit an object to be harmed.
Indigenous land use agreement	An indigenous land use agreement is an agreement under Commonwealth law between a native title group and others about the use and management of land and waters. An indigenous land use agreement can be negotiated over areas where native title has, or has not yet, been determined to exist. They can be part of a native title determination, or settled separately from a native title claim. When registered with the Tribunal, indigenous land use agreements bind all parties and all native title holders to the terms of the agreement. (National Native title Tribunal)
Native Title claimant	Refers to Aboriginal people with a registered native title claim application under the <i>Native Title Act 1993</i> . Registered claims are listed on the Register of Native Title Claims.
Native Title holder	Refers to Aboriginal people who are registered as native title holders for a determined native title interest under the <i>Native Title Act 1993</i> .
OEH	Office of Environment and Heritage is a separate office within the NSW Department of Premier and Cabinet. It was formerly known as the Department of Environment, Climate Change and Water, and now includes the Heritage Branch.
Part 4 consent	Development consent granted by a consent authority to a development application that is not State significant development (SSD), under Part 4 of the <i>Environmental Planning and Assessment Act 1974</i> . Involves the preparation of either a Statement of Environmental Effects (SEE) or an Environmental Impact Statement (EIS).
Part 5 assessment	Relates to an activity that requires environmental assessment by a determining authority under Part 5 of the <i>Environmental Planning and Assessment Act 1979</i> . Usually involves the preparation and determination of a Review of Environmental Factors (REF).

¹ Regulation 80B(4) National Parks and Wildlife Regulation 2009 and OEH's *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW*, 2010, p 11



Project	Refers to planning, field investigations, development and construction of RMS' infrastructure projects, including minor works and maintenance activities.
Project manager	Person responsible for the development and/or implementation of any RMS project including maintenance (includes 'project development manager').
REF	A review of environmental factors. A report that documents the environmental impact assessment process for a Part 5 assessment, and is prepared to satisfy RMS' obligations under section 111 of the Environmental Planning and Assessment Act 1979.
RES	Regional environmental staff
RMS	Roads and Maritime Services
SEE	A 'statement of environmental effects' for a project being assessed as a development application under Part 4 of the <i>Environmental Planning and Assessment Act 1979</i> .
SES(H)	Senior Environmental Specialist (Heritage)
Site officer	An Aboriginal person contracted by RMS for the provision of archaeological field services. A site officer is expected to have completed the Aboriginal Sites Identification course provided by the NSW Office of Environment and Heritage or have equivalent demonstrable site identification experience.
Site survey	A survey undertaken by site officers and an archaeologist for the purpose of identifying known or potential Aboriginal objects and places.
Site visit	An inspection undertaken to familiarise Aboriginal parties with a study area and the proposed scope of works.
SSD	'State significant development' (SSD) requires development consent from the Minister for Planning and Infrastructure, their delegate or the Planning Assessment Commission (PAC) under Division 4.1 of Part 4 of the <i>Environmental Planning and Assessment Act 1979</i> . Involves the preparation of an Environmental Impact Statement (EIS).
SSI	'State significant infrastructure' (SSI) requires approval by the Minister for Planning and Infrastructure under Part 5.1 of the <i>Environmental Planning and Assessment Act 1979</i> . Involves the preparation and determination of an Environmental Impact Statement (EIS).



Trainee site officer	An Aboriginal person contracted for the provision of archaeological field services. A trainee site officer generally has less experience, skills and/or qualifications to undertake the required work compared with a site officer.
Waters	The whole or any part of any river, stream, lake, lagoon, swamp, wetlands, natural watercourse or tidal waters (including the sea) ² .

² OEH *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW*, 2010, p21



Chapter 1: Introduction

Roads and Maritime Services (RMS) recognises that the development and delivery of its projects has the potential to impact Aboriginal cultural heritage. This impact needs to be managed in a manner which meets its business, legislative and social responsibilities, while being culturally sensitive, appropriate, practical and cost-effective.

It is essential that before RMS projects commence, the potential impacts on Aboriginal cultural heritage are identified and managed appropriately. Effective consultation with Aboriginal people is an important step in the process of identifying and minimising cultural heritage impacts.

This procedure outlines a four stage process for investigating potential impacts to Aboriginal cultural heritage as a result of RMS' road planning, development, construction and maintenance activities. It includes a process of community consultation that aims to ensure that the role, function and views of Aboriginal people are considered and respected by RMS.

Undertaking Aboriginal community consultation and cultural heritage investigations, as well as seeking the appropriate legislative approvals, can be complex and time-consuming. Relevant regulations prescribe minimum consultation processes and timeframes that must be followed. Therefore this procedure must be commenced early in a project's development to help minimise potential delays and costs to projects.

This procedure guides you through the actions that are required to investigate impacts on Aboriginal cultural heritage, and to consult with the Aboriginal community.



Chapter 2: Aims

This procedure aims to:

- Assist RMS to meet its legislative responsibilities regarding consultation and investigation of the potential impacts of RMS' projects on Aboriginal cultural heritage.
- Ensure that RMS projects likely to affect Aboriginal cultural heritage receive the appropriate level of assessment and community involvement.
- Ensure that a suitable and consistent standard of cultural and archaeological assessment and reporting is met by RMS and its consultants on projects across NSW.
- Achieve best practice management associated with Aboriginal cultural heritage.
- Enable RMS to establish a due diligence defence for the strict liability offence of harming an Aboriginal object under the *National Parks and Wildlife Act 1974*.



Chapter 3: Implementation of this procedure

This procedure must be implemented for every RMS project that would disturb the ground surface or involve the removal of mature native vegetation. This includes any project to be assessed, or that is exempt from assessment, under the *Environmental Planning and Assessment Act 1979*.

It sets out a consultation process that is consistent with the NSW Office of Environment and Heritage (OEH) *Aboriginal cultural heritage consultation requirements for proponents 2010* and the National Parks and Wildlife Amendment Regulation 2009.

Implementation of this procedure will help RMS to meet its legal obligations concerning Aboriginal cultural heritage, and in particular to:

- Identify appropriate Aboriginal stakeholders for each project to assist with the early identification of potential cultural heritage issues.
- Consult with Aboriginal stakeholders regarding proposed RMS projects where potential cultural heritage impacts have been identified.
- Demonstrate due diligence when assessing potential harm to Aboriginal objects and places by RMS projects.
- Seek the appropriate approvals and permits where required when impacting on or interacting with Aboriginal objects and places.

This procedure includes:

- RMS' policy on payments to Aboriginal site officers and knowledge holders (Appendix A).
- A contact list of relevant RMS officers (Appendix B).
- The list of low impact activities prescribed in the National Parks and Wildlife Regulation 2009 (Appendix C).
- Guidance on preparing a cultural heritage assessment report (Appendix D)
- Guidance on engaging Aboriginal site officers (Appendix E)
- Resources to be used in the implementation of this procedure. These resources include checklists, template letters, model briefs and contracts for the provision of services for use in RMS projects (Appendix F).



Chapter 4: Legislative responsibilities

4.1 Relevant legislation

RMS has a responsibility under State and (where appropriate) Commonwealth legislation to consider and assess the impacts of its activities on the environment. This procedure addresses the requirements for assessing impacts on Aboriginal cultural heritage under the *National Parks and Wildlife Act 1974* and the *Environmental Planning and Assessment Act 1979*.

4.2 National Parks and Wildlife Act 1974 (NSW)

The principal legislation for the protection, conservation and management of Aboriginal objects and places in NSW is the *National Parks and Wildlife Act 1974*, administered by OEH.

An objective of the Act is to conserve Aboriginal objects, places or features of cultural value, including, but not limited to:

- Places, objects and features of significance to Aboriginal people.
- Places of social value to the people of NSW.
- Places of historic, architectural or scientific significance.

An 'Aboriginal object' is any deposit, object or material evidence (not being a handicraft made for sale), including Aboriginal remains, relating to the Aboriginal habitation of NSW, before or concurrent with occupation by non-Aboriginal people.

An 'Aboriginal place' is an area declared by the Minister administering the Act to be of special significance with respect to Aboriginal culture. An Aboriginal place does not have to contain physical evidence of occupation (such as Aboriginal objects).

4.2.1 Offences under Part 6 of the National Parks and Wildlife Act 1974 (NSW)

Section 86 of the Act provides for two offences relating to Aboriginal objects, and one offence concerning Aboriginal places

- Section 86(1) provides that a person must not harm or desecrate an object that the person knows is an Aboriginal object. This is an offence requiring proof of knowledge and may involve a maximum penalty of \$275,000 and/or 1 years imprisonment, or (in circumstances of aggravation) \$550,000 and/or two years imprisonment for individuals, or \$1,100,000 for corporations.
- Section 86(2) provides that a person must not harm an Aboriginal object. This is a strict liability offence where intent or knowledge does not need to be proved, only that the harm occurred. The maximum penalty for an individual is \$55,000 or \$110,000 in circumstances of aggravation. The maximum penalty for a corporation is \$220,000.
- Section 86(4) of the Act provides that a person must not harm or desecrate an Aboriginal place. This is also a strict liability offence where intent or knowledge does not need to be proved. The maximum penalty for an individual is \$550,000 and/or 2 years imprisonment or \$1,100,000 for a corporation.

Note that the definition of harm in the Act does not include something that is 'trivial or negligible'. The OEH *Due diligence code of practice for the protection of Aboriginal objects in NSW 2010* (see below) provides examples of what might constitute a trivial



or negligible act including picking up and replacing a small stone artefact, unknowingly breaking a small Aboriginal object below the ground surface when gardening or crushing a small stone artefact when walking on a track.

4.2.2 Exemptions under Part 6 of the National Parks and Wildlife Act 1974 (NSW)

The Act provides exemptions to the offences of harming Aboriginal objects and places in certain circumstances³. These are for:

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

4.2.3 Defences under Part 6 of the National Parks and Wildlife Act 1974 (NSW)

The Act and *National Parks and Wildlife Regulation 2009* provide a number of statutory defences that may apply where an Aboriginal object or place is harmed or desecrated in contravention of section 86. These include:

Aboriginal heritage impact permits (AHIP)

The Director General of OEH may issue a proponent with an AHIP under Section 90C of the Act to which authorises the harm of an Aboriginal object or place. AHIPs can be used to:

- Undertake sub-surface investigations
- Move or collect an object
- Harm object or place
- Harm object or place and undertake salvage.

An AHIP provides a defence against any offence relating to the harm of an Aboriginal object or place, provided that there have been no breaches of any of the conditions of the AHIP. All AHIP applications must be signed by RMS Chief Executive or authorised delegate prior to submission to OEH.

Due diligence

It is a defence to the strict liability offence of harming an Aboriginal object if it can be shown that the defendant exercised due diligence in determining whether their actions would cause harm and it was reasonably determined that no Aboriginal object would be harmed (Section 87(2)).

Note that the due diligence defence **does not apply to:**

³ Sections 87A and 87B of the Act



- Knowingly harming or desecrating an Aboriginal object;
- Harming or desecrating an Aboriginal place (with or without knowledge).

Due diligence may be established by following a person's own due diligence process, certain prescribed codes of practice or the generic OEH *Due diligence code of practice for the protection of Aboriginal objects in NSW 2010*. No prescribed due diligence code of practice currently applies to RMS. Rather than rely on the generic OEH due diligence code of practice, RMS has developed this procedure. This procedure constitutes RMS' due diligence process for the purposes of Section 87(2) of the Act. It is intended to provide, if followed, a due diligence defence for RMS against a possible strict liability prosecution if harm is caused to an Aboriginal object when carrying out road projects and activities.

Where the due diligence process indicates that an activity is likely to cause harm to an Aboriginal object, the harm should be avoided where practicable. Where this is not practicable, a person is required to apply for an AHIP.

Low impact activities

The National Parks and Wildlife Regulation 2009 lists ten categories of "low impact activities". Undertaking a low impact activity provides a defence against the strict liability offence of harming an Aboriginal object.

Note that the low impact activities defence **does not apply to:**

- Knowingly harming or desecrating an Aboriginal object;
- Harming or desecrating an Aboriginal place (with or without knowledge).

However, if an Aboriginal object is discovered in the course of undertaking any of the prescribed low impact activities, the object must not be harmed. It is an offence under Section 86(1) of the Act to knowingly harm an Aboriginal object. If an Aboriginal object is discovered, all works must cease, and an AHIP must be obtained if harm to the object cannot be avoided⁴.

RMS Environmental assessment procedure for routine and minor works outlines a range of exempt development that is consistent in scope with the low impact activities in the regulation.

Archaeological code of practice

The National Parks and Wildlife Regulation 2009 excludes from the definition of 'harm' under the Act, any act carried out in accordance with the *Code of practice for archaeological investigation of Aboriginal objects in NSW 2010*. The code allows a person to undertake archaeological test excavations without an AHIP provided that the excavations are carried out in accordance with the code. Where archaeological test excavations cannot be undertaken in accordance with the code, an AHIP must be obtained from OEH for the works⁵.

⁴ Under the *Environmental Planning and Assessment Act 1979*, Part 4.1 projects authorised with development consent and approved Part 5.1 projects are exempted from obtaining AHIPs. This also applies to any investigative or other activities that are required to be carried out for the purpose of complying with any environmental assessment requirements for approval to carry out the project or of a concept plan for the project.

⁵ *ibid*



Note that the Code does not apply to acts of desecration.

Honest and reasonable mistake

Section 86(5) of the Act states that the defence of “honest and reasonable mistake of fact” applies to the strict liability offences of:

- Harming an Aboriginal object, or
- Harming or desecrating an Aboriginal place.

The defence **does not apply** to the offence of **knowingly** harming or desecrating an Aboriginal object.

Despite the potential availability of this defence RMS requires all staff to follow this procedure. This will ensure that the risk inadvertently impacting on Aboriginal objects and places because of a mistake of fact is minimised.

4.2.4 Aboriginal community consultation requirements

Clause 80C of the National Parks and Wildlife Regulation 2009 imposes a legal requirement for Aboriginal community consultation to be undertaken when applying for an AHIP.

This consultation process is further described in OEH's *Aboriginal cultural heritage consultation requirements for proponents 2010*. Under the consultation requirements, when applying for an AHIP RMS must undertake a prescribed consultation process with (among others) Aboriginal people who hold cultural knowledge relevant to determining the cultural significance of Aboriginal objects and places. In determining whether to grant an application for an AHIP, the Director General is required to consider (among other things) the results of any consultation with Aboriginal people and whether that consultation substantially complied with requirements set out in the regulations.

4.3 Environmental Planning and Assessment Act 1979 (NSW)

The *Environmental Planning and Assessment Act 1979* provides a framework for environmental planning and assessment in NSW. The Act requires RMS to examine and take into account the impact or likely impact of its projects on the environment – including Aboriginal cultural heritage.

Planning assessment and authorisation to carry out RMS projects under the Act will generally proceed in one of the following four ways:

- Part 4 of the Act applies to the undertaking of development that is not State significant development or infrastructure. This type of development requires the consent of a consent authority (usually a local council or joint regional planning panel). Usually, RMS projects requiring Part 4 consent will fall within the “crown development” provisions of Division 4 of Part 4. RMS’ environmental impact assessment of a Part 4 project is documented in a statement of environmental effects (SEE). A SEE is submitted with the development application and may be incorporated into the development consent.
- Division 4.1 of Part 4 of the Act applies to development that is State significant development (SSD) as defined by a State Environmental Planning Policy. This type of development requires the consent of the Minister for Planning and Infrastructure (DoPI) or their delegate. RMS environmental impact assessment of a Division 4.1 project is documented in an environmental impact statement (EIS).



An EIS is submitted with the project application and may be incorporated into the development consent.

- Part 5 of the Act applies to activities where Part 4 consent is not required, but either some form of statutory approval is required from a public authority, or the activity is being carried out by a public authority. The environmental impact assessment of a Part 5 project is usually documented in a review of environmental factors (REF) and (internal RMS) determination to proceed with the activity.
- Part 5.1 of the Act applies to development that is State significant infrastructure (SSI) as defined by State Environmental Planning Policy (State and Regional Development) 2011. This type of development requires the approval of the Minister for Planning and Infrastructure or delegate. RMS' environmental impact assessment of a SSI project is documented in an EIS. An EIS is publicly exhibited by DoPI and may be incorporated into the approval.

If a project is a transitional Part 3A project, this procedure will apply in the same way as it does for a SSI project, You should consult with the Manager Environmental Planning and Assessment for specific assistance.

📌 Exemptions from the need to seek an AHIP

A range of approvals (including AHIPs) may not be required in the following instances:

- For SSD projects (Division 4.1 of Part 4) authorised by a development consent under Section 89J of the Act.
- For approved Part 5.1 projects under Section 115ZG of the Act.
- For approved transitional Part 3A projects. That is, any project for which a project approval was granted under the now repealed Part 3A provisions.

Where SSD consent or SSI approval is sought and environmental assessment requirements have been provided by the Director General of DoPI, RMS may not be required to obtain AHIPs. This is also the case for transitional Part 3A project applications. You should not assume that this exemption automatically applies. Please refer to the Manager Environmental Planning and Assessment to confirm whether a specific Part 4 SSD or Part 5.1 SSI project has this exemption. An AHIP is not required for a SSD project that has received consent or a SSI project that has received approval under the Act. For staged SSD that has received development consent or an approved staged SSI project, please refer to the Manager Environmental Planning and Assessment for confirmation on whether the exemption applies.

Even if an AHIP is not required for a Part 4 SSD or Part 5.1 SSI project (or a transitional Part 3A project), this procedure must still be followed. Note also that the Director General's formal environmental assessment requirements may impose additional or specific consultation or other requirements concerning Aboriginal cultural heritage. If this happens, please seek advice from regional environmental staff or Environment Branch.



4.4 Heritage Act 1977 (NSW)

The *Heritage Act 1977*, administered by the NSW Office of Environment and Heritage (OEH) protects NSW's natural and cultural heritage. Aboriginal heritage is primarily protected under the *National Parks and Wildlife Act 1974* but may also be subject to the provisions of the *Heritage Act 1977* if the item is listed on the State Heritage Register or subject to an interim heritage order⁶. In such cases, Aboriginal objects and places are protected under Section 60 of the Act and approval from the Heritage Council may also be required in addition to an AHIP. Note that section 60 approvals are not required for an approved Part 5.1 project.

4.5 Aboriginal Land Rights Act 1983 (NSW)

The NSW *Aboriginal Land Rights Act 1983*, administered by the Department of Human Services: Aboriginal Affairs NSW establishes the NSW Aboriginal Land Council and local Aboriginal land councils. 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.

The Act also establishes the Registrar whose functions include maintaining the Register of Aboriginal Land Claims and the Register of Aboriginal Owners. Registration as an Aboriginal owner does not confer land title rights but acknowledges the person's cultural association with the land.

Under the 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 *National Parks and Wildlife Act 1974*
- Lands to which Section 36A of the *Aboriginal Land Rights Act 1983* applies.⁷

4.6 Native title legislation

The *Native Title Act 1993* (Cwth) provides the legislative framework that:

- Recognises and protects native title.
- Establishes 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.
- Establishes the National Native Title Tribunal.

The National Native Title Tribunal has a number of functions under the 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.⁸ The NSW *Native Title Act 1994* was introduced to ensure that the laws of NSW are consistent with the *Commonwealth Native Title Act 1993*.

The Native Title Services Corporation (NTSCorp) provides professional services to support Aboriginal people and organisation in meeting the requirements of native title legislation. NTSCorp may be aware of Aboriginal stakeholders who have an interest in a specific area of land.

⁶ OEH, *Aboriginal cultural heritage consultation requirements for proponents* 2010, p 4

⁷ *ibid*

⁸ *Ibid*, p5



4.7 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cwlth)

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth) enables the Australian Government to respond to applications by or on behalf of Aboriginal persons to protect traditionally important areas and objects that are under threat. In determining whether to grant such protection, the Federal Minister must consider a range of specific matters, including whether state or territory laws have not provided effective protection. The government can make emergency and permanent declarations to protect significant Aboriginal areas, objects and classes of objects from threats of injury or desecration. The power to make declarations is meant to be used as a last resort, after the relevant processes of the state or territory have been exhausted.⁹

⁹ Refer to Department Sustainability, Environment, Water, Population and Communities: <http://www.environment.gov.au/heritage/laws/indigenous/index.html>



Chapter 5: Four stages for RMS staff to follow for the consultation and assessment process

5.1 Overview

This procedure involves four stages of consultation and investigation that assess known or potential impacts to Aboriginal cultural heritage. Projects that can avoid impacts to Aboriginal cultural heritage may only be required to complete some stages of this procedure. However, projects that would harm Aboriginal objects or places are required to complete all stages. An overview of the stages of this procedure is shown in the flowchart in Section 5.3.

The four stages of this procedure are:

- **Stage 1: Initial RMS assessment**
The aim of Stage 1 is to undertake a desktop risk assessment to determine whether a RMS project is likely to harm Aboriginal cultural heritage or not, and whether further assessment or investigation is required.
- **Stage 2: Further assessment and site survey**
The aim of Stage 2 is to undertake further assessment and a survey with specific Aboriginal stakeholders and an archaeologist to assess a project's potential to harm Aboriginal cultural heritage, and to determine whether formal Aboriginal community consultation and a cultural heritage assessment report is required.
- **Stage 3: Formal consultation and preparation of a cultural heritage assessment report.**
Where Stages 1 and 2 have led to the preliminary view that harm to Aboriginal objects or places will occur or is likely to occur, the statutory consultation process must take place and a cultural heritage assessment report must be prepared. Aboriginal parties must be involved in the preparation of the report in accordance with legislative requirements and OEH's *Aboriginal cultural heritage consultation requirements for proponents 2010*.

Stage 3 may also involve archaeological testing in accordance with an AHIP, the *Code of practice for archaeological investigation of Aboriginal objects in NSW 2010* or environmental assessment requirements issued by the Director General of DoPI for a Part 5.1 project application.
- **Stage 4: Implement project mitigation measures**
The aim of Stage 4 is to undertake any salvage and/or project implementation in accordance with an AHIP and/or a project approval or determination under the *Environmental Planning and Assessment Act 1979*.

Resources

- Appendix F – Resource 1: Activity checklist
- Appendix F – Resource 2: Statutory time constraints for the procedure

5.2 Application of these stages to the environmental impact assessment process

Exempt development (as defined under the *Environmental Planning and Assessment Act 1979* which does not require assessment under Part 4, Division 4.1 of Part 4, Part 5 or Part 5.1 of the *Environmental Planning and Assessment Act 1979*) must follow this procedure and address the relevant steps of the Environmental assessment procedure for routine and minor works.

For all other development, information gathered at Stages 1 to 3 can be incorporated in the environmental impact assessment documentation being prepared at that time. Depending on the size and complexity of the project, this documentation may take the form of a preliminary environmental investigation (PEI), an EIS for projects being assessed under Division 4.1 of Part 4 or 5.1 of the Act, a SEE for projects seeking consent under Part 4 of the Act, an environmental assessment for transitional Part 3A projects or an REF for projects being assessed and determined under Part 5 of the Act.

Where an EIS, SEE or REF is being prepared, and Stage 3 of this procedure has been triggered, the statutory Aboriginal cultural heritage consultation provisions must be followed and an Aboriginal cultural heritage assessment report **must** be prepared. Apart from satisfying legal requirements (including obligations to adequately assess cultural heritage impacts at the appropriate time in the assessment or determination process), there are other benefits in preparing a cultural heritage assessment report before an EIS, SEE or REF is determined, put on public display or submitted for adequacy. This ensures that cultural heritage management options based on an appropriate level of investigation are considered. This reduces uncertainty and risk for the project. It also avoids potential delays and increased costs to the project that may arise if the Aboriginal cultural heritage assessment process is not finalised prior to construction, planning and scheduling. It also reduces the risk of potential legal challenge.

If archaeological investigations are required at Stage 3 to understand the significance of Aboriginal objects, then they should be completed, and the results included in the cultural heritage assessment report **before** the environmental impact assessment is determined, put on public display or submitted for adequacy.

5.3 Exemption to allow for the delayed completion of the cultural heritage assessment report

In exceptional circumstances, the project EIS, SEE, or REF may be determined, put on public display or submitted for adequacy before finalising the cultural heritage assessment report, and any associated archaeological test excavations. However, this cannot be done if to do so would mean RMS could not comply with its statutory obligations under the *Environmental Planning and Assessment Act 1979*. As this approach involves a departure from the procedure, Chief Executive approval is required at the earliest opportunity. The procedure for seeking Chief Executive approval is as follows.

The project manager must contact the Senior Environmental Specialist (Heritage) at the earliest opportunity, and ideally before the EIS, SEE or REF is commenced. The Senior Environmental Specialist (Heritage) will then consult with the General Manager Environment Branch, Manager Aboriginal Programs, Manager Environmental Planning and Assessment, and Legal Branch to decide whether the cultural heritage assessment report (and any associated archaeological test



excavations) needs to be completed prior to the EIS, SEE or REF being determined, put on public display or submitted for adequacy.

If the exemption is considered to be appropriate, the General Manager Environment Branch will submit the proposal to the Chief Executive, and seek endorsement. It should not be assumed that the endorsement will be given. Unless the Chief Executive endorses the proposal, the cultural heritage assessment report and any associated archaeological test excavations will need to be undertaken before the environmental impact assessment is determined, put on public display or submitted for adequacy.

If supported by the Chief Executive the Senior Environmental Specialist (Heritage) will provide a strategy to the project team for finalising the environmental impact assessment process. This strategy will outline the minimum requirements to be addressed in the EIS, SEE or REF to ensure that the cultural heritage assessment is adequate for the purposes of the *Environmental Planning and Assessment Act 1979*. For SSD and SSI projects, consultation may also need to be undertaken with the DoPI and OEH on the proposed approach.

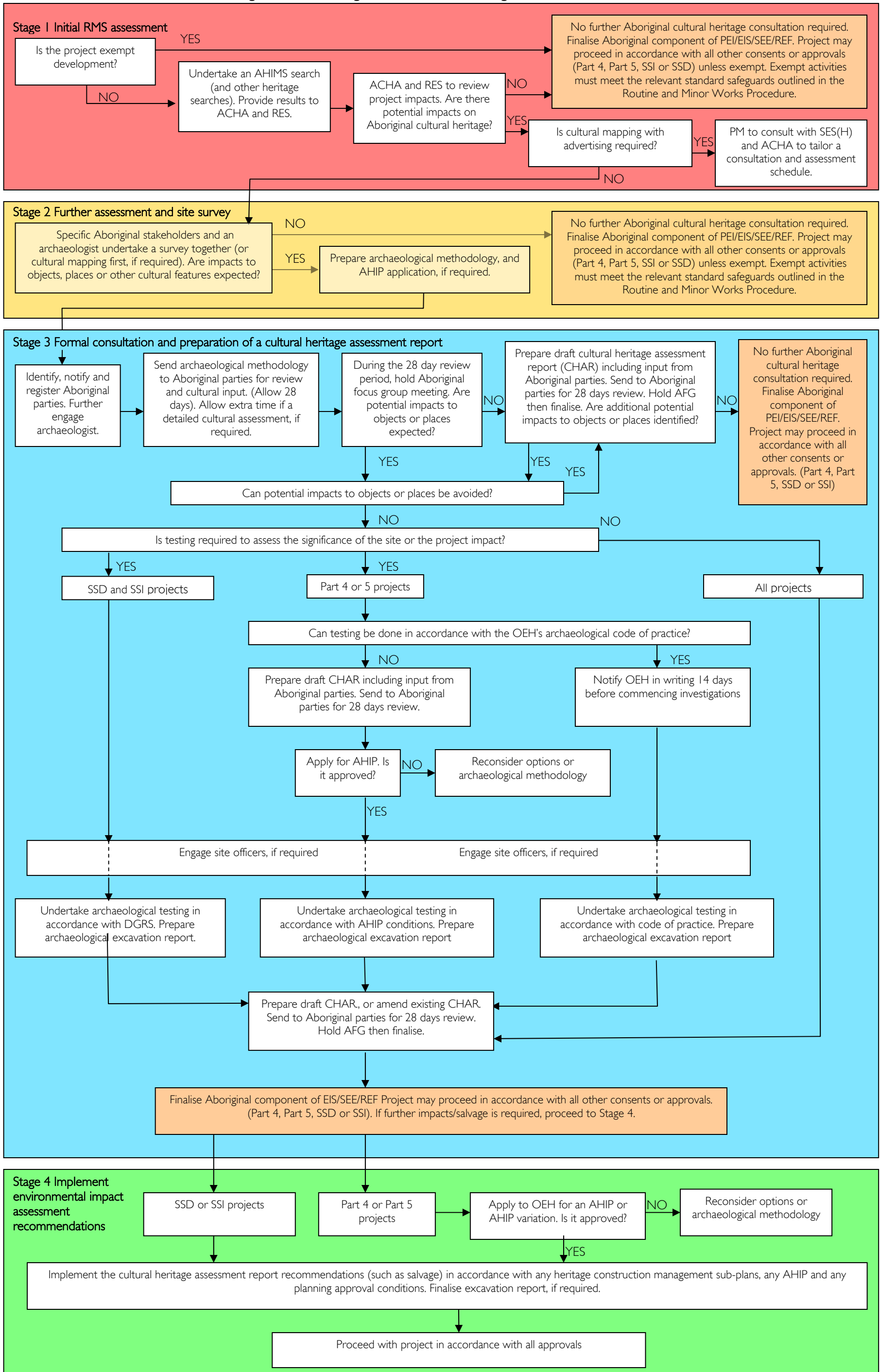
♯ Where an archaeological activity (such as salvage) is not being undertaken for the purpose of assessing environmental impact, the activity would be done after planning approval or a determination has been obtained.

For projects being assessed as SSD or SSI of the Act, salvage activities and site impacts (other than test excavations) would occur in accordance with the consent or approval conditions.

For Part 4 or Part 5 projects, salvage activities and site impacts (other than test excavations) would occur after the SEE is approved (for Part 4) or the REF is determined (for Part 5), and an AHIP has been obtained.



5.4 Flowchart for the Procedure for Aboriginal cultural heritage consultation and investigation



5.5 Stage 1 Initial RMS assessment

Aim

The aim of Stage 1 is to undertake a desktop risk assessment to determine whether a RMS project would potentially impact on Aboriginal cultural heritage and require further assessment or investigation. This includes impacts on Aboriginal lands, objects and places defined under the *National Parks and Wildlife Act 1974*, and intangible cultural heritage values.

👉 Stage 1 must be followed for any RMS activity that would disturb the ground surface or mature vegetation.

Ground disturbance includes digging, grading, bulldozing, scraping, drilling, building of a structure or removal of vegetation. Any activity that does not involve the disturbance of the ground surface is unlikely to impact Aboriginal objects or places. Such activities may proceed in accordance with all other relevant approvals and processes, which may include the Environmental assessment procedure for routine and minor works.

Vehicle movements over or across rock engravings may also result in harm to the object. Where a project is in close proximity to a rock engraving, particularly in the Sydney basin, Stage 1 of this procedure must be followed.

No ground disturbance including geotechnical investigations is to occur as part of any project unless the potential impacts to Aboriginal objects and places have been considered. Where known objects, places or potential archaeological deposits have been identified, these should be documented in the environmental impact assessment process, and measures taken to either avoid impact or proceed to Stage 2 of this procedure.

☑ Action 1- Determine whether the activity falls within Step 1 or Step 2 of the Environmental assessment procedure for routine and minor works

The project manager must refer to the Environmental assessment procedure for routine and minor works. For any project that clearly falls outside the scope of a routine or minor work, proceed directly to Action 2.

The Environmental assessment procedure for routine and minor works provides a risk assessment framework for assessing the potential environmental impact of routine and minor works carried out by RMS and its contractors.

Routine and minor works is categorised under the *Environmental Planning and Assessment Act 1979*, *State Environmental Planning Policy (Infrastructure) 2007* and the *Roads Act 1993* depending on its nature and impacts. This includes:

- Routine and minor works that are not activities or development under the *Environmental Planning and Assessment Act 1979*.
- Routine and minor works that are categorised as exempt development under the *Environmental Planning and Assessment Act 1979*.
- Routine and minor works that fall under Part 5 of the *Environmental Planning and*

Assessment Act 1979.

- Removal or lopping of trees and vegetation that is on or overhanging a public road for the purpose of removing a traffic hazard.

Routine and minor works, by their nature, are unlikely to have a significant impact on the environment and must meet the following requirements:

- They must occur within the disturbed zone of the road corridor (except for servicing vacant properties).
- They must be included on the routine and minor works activity checklist.
- They must all the relevant standard environmental safeguards.

Outcomes

Either:

1. The project falls within Step 1 or Step 2 of the Environmental assessment procedure for routine and minor works. That is, it is unlikely to harm Aboriginal cultural heritage. No Aboriginal cultural heritage consultation is required at this stage. The project may proceed in accordance with all other relevant approvals.

OR

2. The project is not in Step 1 or Step 2 of the Environmental assessment procedure for routine and minor works. Further assessment is required to determine whether the project may harm Aboriginal cultural heritage. Proceed to Action 2.

IMPORTANT!

Clause 80B of the National Parks and Wildlife Regulation 2009 prescribes a number of low impact activities that provide a defence to the strictly liability offence of harming an Aboriginal object. The rationale for this defence is that the designated “low impact” activities are unlikely to harm Aboriginal objects. Appendix C includes a full list of the low impact activities covered by the Regulation.

For the purposes of this procedure, a range of low impact activities most applicable to RMS are addressed in the Environmental assessment procedure for routine and minor works. Any activity or work determined to be exempt development under the Environmental assessment procedure for routine and minor works would satisfy a low impact activity defence.

The “low impact activities” defence does not apply if you know that an Aboriginal object is likely to be harmed. It is an offence under the *National Parks and Wildlife Act 1974* to proceed with a low impact activity if you know that it would harm an Aboriginal object or place.

For example, if works are proposed in an area that includes a known shell midden, scarred or carved tree, rock carving, stone artefact deposit, ceremonial area or potential archaeological deposit, it is likely that an Aboriginal object would be harmed and the clause 80B defence could not be invoked. Advice should be sought from the regional Aboriginal cultural heritage advisor and regional environmental staff in such circumstances. If a potential Aboriginal object is identified during the activity, all works must cease, and the appropriate approvals must be sought. Contact the regional Aboriginal cultural heritage advisor for assistance.

☑ Action 2– Undertake a search of AHIMS and the register of Aboriginal lands

The project manager must ensure that a search of the Aboriginal Heritage Information Management System (AHIMS) is done. The AHIMS is a database managed by OEH containing the location and description of known Aboriginal objects and places in NSW. The search should include a reasonable buffer, which may be dependant upon the scale of the project or activity. For example, small to medium sized projects may use a buffer of 100 metres, while larger projects may use a buffer of 1 kilometre.

The initial web-based Basic Search of AHIMS is free. If the results of the Basic Search indicate that objects or places occur within the project area, the project manager must ensure that an Extensive Search is carried out. Information on undertaking these searches is available on OEH's [website](#).

If an AHIMS search has previously been conducted for the project and the search is over 12 months old, a new search of the database must be conducted to ensure that the information obtained is still current. All records of AHIMS searches must be retained on the project file and detailed in the relevant environmental impact assessment documentation.

The project manager must also ensure that a search of Schedule 14 of the *National Parks and Wildlife Act 1974* is done. Land listed under Schedule 14 may not necessarily be defined as an Aboriginal place (see glossary); however it is land that is recognised by the Act as being of Aboriginal cultural significance.

👉 The project manager should also undertake a free web-based search of the Australian Heritage Database (managed by the Commonwealth Department of Sustainability, Environment, Water, Population and Communities) and the State Heritage Register (managed by OEH) to identify any further potential Aboriginal and non-Aboriginal heritage constraints for the project.

☑ Action 3 – Consult with Aboriginal cultural heritage advisor and regional environmental staff

The following information is to be provided to the regional Aboriginal cultural heritage advisor and regional environmental staff:

- The results of the AHIMS search and schedule 14 of the *National Parks and Wildlife Act 1974* search including site records (and any additional searches). The results should be provided as an overlay on a plan of the study area.
- Details of the scope and status of the proposed works.
- Details of the location of the project (including the proposed compound sites, service relocation and vehicle and plant access if known).
- A map of the project area covering the extent of works.
- Aerial photographs with contours (if available). A site visit may also be arranged for the Aboriginal cultural heritage advisor and environmental staff to better understand the scope of the works and to assess the study area.
- The work breakdown structure (WBS) number for the project.


Resources

- Appendix F – Resource 03: Stage 1 assessment checklist

Action 4 – Assess the potential harm to Aboriginal objects and places

In determining whether the project is likely to impact Aboriginal cultural heritage, the regional Aboriginal cultural heritage advisor and regional environmental staff must consider:

- Whether the project would affect known Aboriginal objects or places shown by the AHIMS search, and any additional searches.
- Whether high or low concentrations of known Aboriginal objects or places occur within the surrounding landscape as identified by the AHIMS search, and any additional searches.
- Whether the project is in a location where Aboriginal objects and places are likely to be located. (**See shaded box below**)
- Whether natural landforms likely to have significant Aboriginal cultural values are present.
- The extent of known disturbance to the study area.
- Observations from a site visit, if undertaken.
- Whether a sandstone outcrop or exposure is present on any land.

 Aboriginal objects are likely to occur on land that is not 'disturbed' and is:

- Within 200m of waters; or
- Located within a sand dune system; or
- Located on a ridge top, ridge line or headland; or
- Located within 200m below or above a cliff face; or
- Within 20m of, or in a cave, rock shelter or a cave mouth.
- Remnant, mature stands of vegetation.

Aboriginal rock engravings may occur on sandstone exposures or outcrops, particularly in the Sydney basin, **whether the land is disturbed or not.**

Resources

Appendix F – Resource 04: Stage 1 assessment outcome – template letter

Outcomes

The Aboriginal cultural heritage advisor and/or the regional environmental staff will advise the project manager, based on a consideration of the above information, about the following potential outcomes:

1. The project is unlikely to impact Aboriginal cultural heritage, or can be redesigned to avoid impact to Aboriginal cultural heritage. Aboriginal community consultation is not required. The project may proceed in accordance with the environmental impact assessment process and all other relevant approvals. This outcome must be documented in the project

PEI/EIS/SEE/REF or in accordance with the Environmental assessment procedure for routine and minor works.

OR

2. The project would harm, or has potential to harm, Aboriginal cultural heritage. A survey of the project area is required to determine the likely extent of impact by the project, and appropriate mitigation measures. Proceed to Stage 2.

OR

3. The project has potential to harm Aboriginal cultural heritage, but it is not feasible to undertake a survey due to the size or inaccessibility of the study area. This might be the case where multiple route options are under consideration. In such cases, the project would undertake a desktop-based cultural constraints mapping report to identify known tangible and intangible cultural heritage values. See the shaded box on page 25 for further details.

Cultural heritage constraints mapping

Cultural heritage constraints mapping may be undertaken where it is not feasible to undertake an archaeological survey due to the size or inaccessible nature of the study area. Constraints mapping may assist large or complex projects (particularly those that involve route selection) by providing general information about known archaeological values and intangible cultural values, and how these might be affected by the project.

Constraints mapping combines information gathered from the Aboriginal community and an archaeological baseline assessment prepared by an archaeologist.

- **Aboriginal community consultation**

The Aboriginal community would identify key cultural values or features within the study area. Cultural values may relate to known or potential archaeological sites, spiritual or ceremonial areas, natural resource zones, and areas of historical and social significance.

Generally, consultation would be undertaken with the key Aboriginal stakeholders listed at Stage 2, Action 1. However, the project manager may advertise and seek broader Aboriginal community involvement at this early stage. A benefit in undertaking an inclusive form of consultation at this early stage is that it provides an opportunity for other interested members of the Aboriginal community to be involved in the preliminary assessment phase for the project, and to contribute to route selection decision-making.

As early advertising represents a variation of the consultation process outlined in this procedure, it is recommended that the project manager consult with the Senior Environmental Specialist (Heritage) and the regional Aboriginal cultural heritage advisor to assist with tailoring a schedule for ongoing consultation and assessment for the project.

- **Archaeological baseline assessment**

The archaeological baseline assessment provides a general desktop overview of known and potential Aboriginal objects and places within the study area, and how these could be affected by the project.

Due to its limited scope, an archaeological baseline assessment does not satisfy OEH's assessment standards as outlined in the *Code of practice for archaeological investigation of Aboriginal objects in NSW 2010*. As such, a formal survey of the preferred route/project area may be required at a later date, as described in Stage 2 of this procedure.

Resources

- Appendix F – Resource 05: Aboriginal cultural heritage constraints mapping report - standard brief

5.6 Stage 2 Site survey and further assessment

Aim

The aim of Stage 2 is to test the preliminary findings made in stage 1 that a project may harm Aboriginal cultural heritage. This would generally be done through the completion of further desktop studies and a site survey. To do this, the project manager must engage with specific Aboriginal stakeholders and an archaeologist.

Action 1 – Identify key Aboriginal stakeholders

Identify key Aboriginal stakeholders to be consulted with. To do this, the Aboriginal cultural heritage advisor will:

- Search the National Native Title Register to identify any registered native title claimants or native title holders for the study area. This would include any group with an active Indigenous Land Use Agreement.
- Identify the local Aboriginal land councils within the study area. Where a local Aboriginal land council is under administration, the project manager is to contact the administrator.
- Search the Register of Aboriginal Owners established under the *Aboriginal Land Rights Act 1983*.

👉 If a native title holder is identified, the RMS' project team is not required to consult with other Aboriginal parties at this stage for the portion of land subject to the native title determination.

Action 2 – Engage Aboriginal stakeholders to undertake a site survey

The project manager and Aboriginal cultural heritage advisor will ensure that the Aboriginal stakeholders identified at Action 1 are engaged to identify known and potential Aboriginal cultural heritage features within the project area.

Each Aboriginal stakeholder identified at Action 1 would be invited to provide a site officer to do the survey. The archaeologist may indicate that additional site officers are required. In such cases, each stakeholder would be invited to provide additional site officers as appropriate. Unlike Stage 3 of this procedure, the Aboriginal stakeholders are not required to submit site officer applications forms to be considered for the Stage 2 survey.

The site officers nominated by their group to participate in the survey will be provided with a template cultural heritage survey report prior to doing the survey. The project manager should explain to the site officers that this stage of investigation (and their role in it) is separate to any formal statutory consultation which may take place in Stage 3 in accordance with OEH's consultation requirements. All participants in a survey must adhere to the relevant safe work method statement and wear appropriate personal protective equipment.

Resources

- Appendix F – Resource 06: Template invitation to Aboriginal stakeholders to undertake Stage 2 survey.
- Appendix F – Resource 07: Template Aboriginal stakeholder cultural heritage survey report.
- Appendix F – Resource 08: Agreement to provide services. Aboriginal Archaeological Investigations

Action 3 – Engage an archaeologist to undertake a site survey

The project manager will engage an archaeologist to prepare an Aboriginal archaeological (survey) report. This type of report is most applicable for assessing known or potential Aboriginal objects or places within a preferred route or corridor, and for assessing potential impacts arising from the project, and recommending appropriate mitigation measures.

Resource

- APPENDIX F – Resource 09: Aboriginal archaeological (survey) report – standard brief

Action 4 – Undertake the site survey

The archaeologist, Aboriginal stakeholders and the RMS' regional Aboriginal cultural heritage advisor must undertake the site survey together. The project manager must ensure that all participants in the survey are made aware of occupational health and safety procedures relevant to the survey area, such as safe work method statements or site induction procedures. The project manager must ensure that access to non-RMS owned land has been approved by the relevant landowner. If the landowner does not consent to access, the project manager should consult with regional property staff and also Legal Branch if required to ascertain whether statutory powers of entry to land under the Roads Act 1993 can be used. Unless the scope of the project area changes, the survey would not generally be repeated at a later stage of this procedure.

Action 5 – Aboriginal stakeholder(s) prepare cultural heritage survey report

The Aboriginal stakeholders will provide a cultural heritage survey report to RMS within an agreed timeframe (as negotiated depending upon the size and complexity of the project) advising on Aboriginal cultural heritage issues that may arise as a result of the proposed project. The cultural heritage survey report is a template document designed to assist Aboriginal stakeholders identify and record Aboriginal cultural values within a study area. Written responses must be kept on file. The project manager is to ensure that a copy of the report is provided to the archaeologist so that the information can be combined with the archaeological survey report.

Action 6 – Archaeologist prepares archaeological survey report, and AHIP application if required.

The archaeologist will prepare the draft archaeological (survey) report which would incorporate information provided by the Aboriginal stakeholder's cultural heritage

survey report This must be provided to RMS within an agreed timeframe (as negotiated depending upon the size and complexity of the project). The report must clearly state whether Aboriginal objects and places would be affected, or potentially affected by the project.

As part of the archaeological (survey) report, the archaeologist must prepare a draft archaeological methodology for impacting the Aboriginal objects and places. The methodology may allow for archaeological testing, salvage or project implementation without salvage. Where an AHIP would be required to implement the methodology, the archaeologist must also prepare an AHIP application. The methodology must state how many Aboriginal site officers would be required, if any.

👉 **What is an archaeological methodology?**

An archaeological report will make recommendations about the likely harm to Aboriginal cultural heritage resulting from a project, and how that harm is to be managed. The archaeological methodology describes how the recommendations will be implemented.

Generally, there are four types of recommendations:

1. *Harm to Aboriginal cultural heritage is likely and is unacceptable.* The scope of the project must be reconsidered to avoid or minimise harm. The proposed methodology may describe measures to avoid harm such as the use of buffer zones, no-go areas, signage, fencing or similar.
2. *Harm to Aboriginal cultural heritage is unlikely.* The proposed methodology may still recommend that mitigation measures be put in place to ensure that potential for harm is minimised. This may include the use of buffer zones, no-go areas, signage, fencing or similar.
3. *Further investigation is required to understand the nature and significance of the Aboriginal cultural heritage resource, and how this may be affected by the project.* The proposed methodology would describe how archaeological investigations are to occur.
4. *Harm to Aboriginal cultural heritage is likely and acceptable.* Depending on the degree of impact, and the significance of the Aboriginal cultural heritage resource, the proposed methodology may describe a salvage strategy, in which Aboriginal objects are collected prior to a site being impacted by the project.

Where archaeological investigation or salvage is proposed, the methodologies must describe how the site would be affected. This may include manual or machine excavation, tools to be used (including water tanks and sediment controls for wet sieving), test excavation strategies, salvage strategies, the location of test pits, the method and scope of proposed excavations, the method of recording, the storage of cultural material, the estimated team size (including the number of Aboriginal site officers required), the investigation timeframe, and strategies for post-excavation analysis, etc.

Where archaeological test excavations are proposed, the methodology must include valid research questions, and describe how the investigation would answer these questions. Where test excavation methodologies are consistent with OEH's *Code of practice for archaeological investigation of Aboriginal objects in NSW 2010*, AHIPs are not required to undertake the testing.

☑ Action 7 – RMS review of archaeological survey report and archaeological methodology

The project manager, regional environmental staff and Aboriginal cultural heritage advisor are to review and provide comment to the archaeologist on the draft archaeological report and methodology. The purpose of the review is to check whether the report accurately reflects and addresses the scope of the proposal.

☑ Action 8 – Aboriginal cultural heritage advisor and regional environmental staff will assess project impacts

The Aboriginal cultural heritage advisor and regional environmental staff will consider any impacts identified by the finalised archaeological survey report.

Outcomes

1. Where it is determined that the project would not impact Aboriginal objects or places, then an AHIP (or equivalent consultation and assessment for SSD or SSI projects) is not required. Where no other Aboriginal cultural heritage constraints are identified, the works may proceed without further regard to this procedure.

OR

2. Where, in the opinion of the Aboriginal cultural heritage advisor and regional environmental staff, there may be an impact on Aboriginal objects, places, or significant intangible Aboriginal cultural values, a cultural heritage assessment report must be prepared. Proceed to Stage 3.

☞ Where a project route selection or options analysis includes a value management study (or similar) involving external stakeholder participation, a representative from each Aboriginal group identified at Action 1 is to be invited. The Aboriginal cultural heritage advisor will attend these workshops as part of the project team.

Where broader, inclusive Aboriginal community consultation has taken place, representatives may be selected from the registered Aboriginal party group.

5.7 Stage 3 Formal consultation and preparation of a cultural heritage assessment report

Aim

To assist RMS to comply with its legislative obligations and OEHL's policy requirements regarding the:

- Assessment of potential project impacts on Aboriginal objects and places, and development of appropriate mitigation measures, in consultation with the Aboriginal community.
- Preparation of cultural heritage assessment reports for proposed projects and activities.
- Submission to OEHL of all prescribed documentation for AHIP applications, where required.

In the case of Part 4 or Part 5 projects, the cultural heritage assessment report will:

- Form the basis of the assessment of the potential impacts of the project on Aboriginal objects and places in consultation with the Aboriginal community; and
- Accompany any AHIP required for the project.

In the case of SSD and SSI projects, the cultural heritage assessment report will form the basis of the assessment of the potential impacts of the project on Aboriginal heritage. It must be prepared in consultation with the Aboriginal community for the purposes of any relevant environmental assessment requirements (generally these will be set out in the DGRs).

Background

A cultural heritage assessment report must be prepared for all projects (Part 4, SSD, Part 5 or SSI) that have been identified in Stage 2 as having the potential to impact on Aboriginal objects or places. The cultural heritage assessment report must include the results of the archaeological report with cultural input from the registered Aboriginal parties.

The findings of the cultural heritage assessment report will also form the basis of the Aboriginal cultural heritage section of the EIS (SSD and SSI projects), the SEE (Part 4 development) or the REF (Part 5 activities). A cultural heritage assessment report must accompany an application to OEHL for an AHIP.

The following Stage 3 actions are required to satisfy the statutory consultation process. They must be completed if a project has been assessed at stage 2 as having the potential to harm an Aboriginal object or place, unless an agreement of the following kind specifies an alternative Aboriginal community consultation process to be followed:

- A registered Indigenous Land Use Agreement under the *Native Title Act 1993*.
- A lease entered into under Part 4A of the *National Parks and Wildlife Act 1974*.
- An agreement entered into by the Chief Executive of OEHL and a board of management for land reserved under Part 4A of the Act.
- An agreement entered into between the Aboriginal community and OEHL.

IMPORTANT

As a general rule, **gaps in Aboriginal community consultation of 6 months or more will not constitute continuous consultation**. Project managers should therefore ensure that registered parties are kept informed of any delays to the project schedule. Failure to maintain a continuous consultation process may result in the need to readvertise for Aboriginal parties. Project managers should ensure that a copy of all correspondence between RMS and Aboriginal parties is kept on file as evidence of ongoing consultation.

Action 1 - Seek the names of Aboriginal people with cultural knowledge by letter or notify native title holders

a) If an approved determination of native title exists over the entire project area:

Proceed directly to Action 2.

b) If no approved determination of native title exists over the entire project area:

The regional Aboriginal cultural heritage advisor must write to the following organisations, seeking the details of Aboriginal people who may have an interest in the proposed project and who hold cultural knowledge about objects and places in the project area:

- The relevant OEH Environment Protection Regulation Group regional office
- The New South Wales Aboriginal Land Council
- The relevant local Aboriginal land council(s).
- The Registrar appointed under the *Aboriginal Land Rights Act 1983*
- The National Native Title Tribunal
- The Native Title Services Corporation Limited
- The local council(s) in the study area.
- The relevant catchment management authorities for contact details of any established Aboriginal reference group.

The RMS should allow at least 14 days for a response before proceeding to Action 2. A copy of all correspondence must be retained as evidence of the consultation process.

Resources

- Appendix F – Resource 10: Template letter seeking names of Aboriginal people who hold cultural knowledge about objects and places in the project area.

Action 2 - Notify Aboriginal people with cultural knowledge by letter

a) If an approved determination of native title exists over the entire project area:

Where there is an approved determination of title over the whole of the project area, consultation ***need only occur with the native title holders***. Notice must be given to:

- The registered native title body corporate for that land,
- If no such body corporate exists, the native title holders of that land.

Then proceed directly to Action 7.

Resources

- Appendix F – Resource 11: Template letter of notification to native title holders

b) If no approved determination of native title exists over the entire project area:

The regional Aboriginal cultural heritage advisor is to ensure that a letter of notification is sent to the relevant Aboriginal groups or persons identified by Action 1. RMS must allow 14 days for a response. Action 3 may be done concurrently with this action. A copy of all correspondence must be retained as evidence of the consultation process.

Resources

- Appendix F – Resource 12: Template letter of notification

Action 3 – Notify Aboriginal people with cultural knowledge by advertisement


If native title does not exist across the whole project area, RMS must place advertisements in the public notices section of the following newspapers for those areas of the project not covered by a native title determination:

- The Koori Mail (fortnightly publication).
- The National Indigenous Times (fortnightly publication).
- The local newspaper(s) within the project area.

RMS must allow a minimum of 14 days following the date of the last advertisement appearing for a response from any Aboriginal group or person wishing to register an interest. The project manager should confirm with the Aboriginal cultural heritage advisor and regional environmental staff whether the minimum response time provided is appropriate in the circumstances or should be extended. The time allowed should reflect the project's size and complexity. Action 2 may be done concurrently with this action.

Resources

- Appendix F – Resource 13: Template advertisement for print media.

 In addition, depending on the size of the project, the project manager may also make use of community and Aboriginal radio programs and place an invitation for consultation on the RMS website. Infrastructure Communications staff and the Aboriginal cultural heritage advisor may assist with this.

☑ Action 4 – Engage an archaeologist to implement the archaeological methodology and prepare a cultural heritage assessment report

The project manager must engage an archaeologist to implement the archaeological methodology prepared as a result of the survey. This will also include participation at Aboriginal focus group meetings and the preparation of a cultural heritage assessment report. Depending upon the scope of the methodology, the archaeologist may also be required to:

- Undertake archaeological investigations and prepare an archaeological survey report
- Undertake salvage excavations and prepare an archaeological salvage report
- Prepare an AHIP application.

Where the methodology prepared at Stage 2 recommends archaeological testing, engage an archaeologist under Resource 14. Where the methodology prepared at Stage 2 does not recommend archaeological testing, engage an archaeologist under Resource 15.

📖 Resources

- Appendix F – Resource 14: Aboriginal archaeological reporting (including test excavations) – standard brief
- Appendix F – Resource 15: Aboriginal archaeological reporting – standard brief

☑ Action 5 - Prepare register of Aboriginal parties

The Aboriginal cultural heritage advisor will prepare a register of Aboriginal parties who responded to the notification letters or advertisement. They will also respond to all registrants confirming receipt of their registration. The register must include all responses received, both verbal and written. The register should include:

- The name of each registrant. A registrant may be an individual or an organisation. Local Aboriginal land councils must register their interest as organisations rather than as individual members.
- The name and contact details for each registrant.
- The date of registration.

The Aboriginal cultural heritage advisor must inform all registered Aboriginal parties that their names will be forwarded to OEH and the local Aboriginal land council(s), unless they state that they do not want their details released.

📖 Resources

- Appendix F – Resource 16: Template letter – receipt of registration
- Appendix F – Resource 17: Template register of Aboriginal parties

☑ Action 6 – Send the names of registered parties to OEH and local Aboriginal land council(s)

The Aboriginal cultural heritage advisor must forward the names (only) of the registered Aboriginal parties (excluding the names of any person who stated that they do not want their details released), a copy of the advertisement and copies of the notification letters to the relevant OEH Environment Protection Regulation Group regional office and the relevant local Aboriginal land council(s) within 28 days of the closing date for registration. Note that the personal contact details of the registered parties (except for the names) are not to be provided to OEH or the local Aboriginal land council(s). The project team may accept late registrations. Speak to the Aboriginal cultural heritage advisor for advice on this matter. The names of any late registrants are also to be sent to OEH and the local Aboriginal land council(s).

☑ Action 7 – Send invitation to attend an Aboriginal focus group meeting and draft methodology for review

The project manager must ensure that all Aboriginal parties are invited to attend a focus group meeting to discuss the project and the draft methodology. The project manager must ensure that the draft archaeological methodology, relevant heritage reports, and site officer application form, where appropriate, are included with the invitation (Resource 18).

The Aboriginal parties will be given at least 28 days to review the archaeological methodology. During this period, the Aboriginal parties should review the results of the archaeological survey, the proposed archaeological methodology for undertaking further investigation or management of Aboriginal objects and places, and consider the likely impacts of the project.

This same 28 day period is also the opportunity for the Aboriginal parties to provide:

- Cultural knowledge that would assist RMS and OEH to understand the cultural significance of any objects or places which have been identified during Stages 1 and 2 and their cultural context.
- Details of any Aboriginal objects or places which have not been previously identified during Stages 1 and 2 which are known to the Aboriginal parties.

The Aboriginal parties may provide cultural knowledge and comments on the archaeological methodology at the Aboriginal focus group meetings, or through alternative means such as letters, email or telephone.

See shaded text box on page 36 for further information about cultural assessments.

📖 Resources

- Appendix F – Resource 18: Template invitation to participate in the heritage assessment process and to attend an Aboriginal focus group meeting.
- Appendix F – Resource 19: Aboriginal site officer application form.

☑ Action 8 - Hold an Aboriginal focus group meeting

The project manager and/or Aboriginal cultural heritage advisor must ensure that an Aboriginal focus group meeting is held and that all registered Aboriginal parties are invited. A focus group meeting would generally be held **seven to fourteen days** after

sending out the archaeological methodology. This will ensure that the Aboriginal parties have an appropriate opportunity to understand the scope of the project and archaeological methodology, prior to providing their comments to RMS. In certain circumstances, it may be more appropriate to explore an alternative to holding a meeting such as a video-link, teleconference or similar.

At the first Aboriginal focus group meeting the project manager (or their representative) must:

- Ensure that an appropriate Aboriginal person is invited to acknowledge the traditional owners of the study area at the commencement of the meeting.
- Provide an opportunity for RMS and the Aboriginal parties to clearly define their roles, functions and responsibilities. This is also an opportunity for participants to discuss how they want future meetings held, such as preferred times, venues, terms of reference, etc.
- Present an introduction and overview of the project, including a map/plan of the proposed project/study area.
- Outline the impact assessment process. Where consent for an SSD project or approval for an SSI project has been or is to be sought, the project manager (or their representative) will explain the EIS process and the Director General's environmental assessment requirements, if available.
- Discuss whether investigations are able to be done in accordance with the *Code of practice for archaeological investigation of Aboriginal objects in NSW 2010*. For Part 4 and Part 5 projects, investigations carried out complying with the code would not require an AHIP for this stage.
- Outline critical timelines and milestones for the completion of the assessment activities and the delivery of reports.
- Discuss the draft methodology for the preparation of the cultural heritage assessment report. This will require the archaeologist to present the results of the preliminary site survey and the draft archaeological methodology. That is, the proposed method for undertaking further archaeological investigations and/or mitigation management.
- Provide an opportunity for the Aboriginal parties to identify, raise and discuss their cultural concerns, perspectives and assessment requirements. Aboriginal parties may not wish to share information with other registered parties. Where this is the case, RMS will respect the sensitive nature of the information provided, and will use this information in a manner agreeable to the provider. (See the shaded text box on page 36 for more information on cultural assessments).
- Discuss the need for a site visit to familiarise the Aboriginal parties with the scope of the project and the potential impacts on the study area.
- If further archaeological fieldwork is required, invite the Aboriginal parties to nominate people (including self-nomination) to be considered for engagement in the following archaeological roles:
 1. Site officer.
 2. Trainee site officer.
- Advise the Aboriginal parties that participation as a registered party in the consultation process is separate to any engagement as a site officer. Payments will only be made to people who are engaged by RMS as Aboriginal site officers, or engaged by a consultant as a knowledge holder. Payment will not be made to Aboriginal parties as part of the general consultation process. Details regarding payments for the provision of services can be found in Appendix A.

Resources

- Appendix F – Resource 19: Aboriginal site officer application form.
- Appendix F – Resource 20: Template focus group meeting agenda

Detailed cultural assessments

The project manager must ensure that the Aboriginal parties are asked whether a detailed cultural assessment is required to determine the cultural significance of identified objects, places or features. Not all projects will require a detailed cultural assessment. For many projects, Aboriginal parties will simply identify the location of known and potential cultural heritage features, identify their significance, and assist RMS to manage the project impacts in an appropriate manner.

A detailed cultural assessment may be required where 'specialist' cultural knowledge is required from an appropriate Aboriginal cultural knowledge holder to assist in assessing and managing project impacts. For example, specialist knowledge may be required to understand the cultural values of a ceremonial area, the relationship between significant landscape features, or the size, extent or significance of a cultural heritage feature. The detailed cultural assessment may also assist with the development of appropriate management and mitigation measures.

Where a detailed cultural assessment is requested, the project manager may engage the archaeologist (or an independent consultant such as an anthropologist, historian or other relevant specialist) to liaise with appropriate cultural knowledge holders nominated by the Aboriginal parties. Cultural information may be gathered through interviews, oral histories and site visits, as well as secondary sources such as historical and ethnographic research.

The results of the detailed cultural assessment must be addressed in the cultural heritage assessment report, along with the result of any archaeological assessment.

RMS does not pay Aboriginal parties for their role in the statutory consultation process. Statutory consultation includes reviewing reports and methodologies, attending Aboriginal focus group meetings, and identifying Aboriginal objects, places and cultural features. However, nominated cultural knowledge holders may be paid by the consultant, on a one-off basis, for their time in providing cultural information for the purposes of preparing a cultural assessment (as opposed to reviewing that document).

Resources

- Appendix F – Resource 21: Model consultants brief to prepare a detailed cultural assessment.

Action 9 – Provide meeting minutes to Aboriginal parties

The project manager must ensure that a written summary of comments/minutes made at all Aboriginal focus group meetings is kept and made available to all

Aboriginal parties – not just those who attended. The summary should detail agreed outcomes, contentious issues and any actions that were raised.

☑ Action 10 – Finalise methodology

After the 28 day review period, the project manager must forward all comments received from the Aboriginal parties to the archaeologist. The comments must be considered and where appropriate be used to refine and finalise the archaeological methodology.

Outcomes

Outcomes will include:

1. Where it is determined that Aboriginal objects or places would not likely be harmed, a cultural heritage assessment report must still be prepared. (See Appendix D for the steps required to prepare a cultural heritage assessment report).

OR

2. Where it is determined that Aboriginal objects or places would be harmed, or would likely be harmed, the scope of the project should be reconsidered to avoid or minimise the extent of the impact. Where harm or likely harm to Aboriginal objects or places can be avoided, prepare and finalise a cultural heritage assessment report in accordance with Outcome 1. Works may proceed without further regard to this procedure. However, if harm or likely harm to Aboriginal objects or places cannot be avoided, see Outcome 3 or 4 for further guidance.

OR

3. There would be an impact to known Aboriginal objects and places, and archaeological investigations (i.e. test excavations) are not required to determine the extent of the impact or the significance of the objects or places. An Aboriginal cultural heritage assessment report must be prepared. (See Appendix D for the steps required to prepare a cultural heritage assessment report).

Note that these impacts and any related salvage activities would occur after the EIS, SEE or REF is finalised and project approval has been obtained, in accordance with any applicable conditions of approval. For Part 4 and Part 5 projects, an AHIP would be required for impacts to be caused during project implementation

OR

4. Impacts to Aboriginal objects and places would occur or are likely to occur, and further archaeological investigations (i.e. test excavations) are required to determine the significance of the objects and places and the nature or extent of any anticipated impacts Proceed to Action 11 below.

☑ Action 11 - Provide the archaeological methodology (and the cultural heritage assessment report where required) to Senior Environmental Specialist (Heritage)

☞ For Part 4 and Part 5 projects, archaeological investigations may be conducted without an AHIP if the excavations will not harm any known Aboriginal objects and are able to be undertaken in accordance with OEH's *Code of practice for archaeological investigation of Aboriginal objects in NSW 2010*. If the investigations will not meet the requirements of the code of practice, an AHIP must be obtained before the investigations are undertaken. Note in particular that the code of practice provides strict requirements for test excavations, and that failure to observe these may result in a potential prosecution should an Aboriginal object be harmed.

For SSD and SSI projects, archaeological investigations may not require an AHIP but any investigations must be undertaken in accordance with the Director General of DoPI's requirements.

a) For Part 4 or Part 5 projects following the Code of practice for archaeological investigation of Aboriginal objects in NSW 2010:

The project manager must provide a copy of the archaeological methodology/sampling strategy (which addresses all Aboriginal party comments) to the Senior Environmental Specialist (Heritage) for review. Refer to Resource 22 for a checklist of information that must be provided to the Senior Environmental Specialist (Heritage).

OR

b) For Part 4 or Part 5 projects seeking an AHIP to undertake archaeological investigations:

A cultural heritage assessment report must first be prepared. (See Appendix D for the steps required to prepare a cultural heritage assessment report). The archaeologist will provide a completed AHIP application and supporting documentation (including the cultural heritage assessment report) to the project manager. The supporting materials required are listed in a checklist in Section 5 of the [AHIP application](#).

The project manager is to raise a cheque and forward the completed AHIP application and supporting documentation to the Senior Environmental Specialist (Heritage), Environment Branch. The project manager must ensure that one hard copy version and one electronic version of the completed package are provided.

OR

c) For SSD and SSI projects:

The project manager must provide a copy of the archaeological methodology/sampling strategy (which addresses all Aboriginal party comments) to the Senior Environmental Specialist (Heritage) for review. Refer to Resource 22 for a checklist of information that must be provided to the Senior Environmental Specialist (Heritage).

Resource

- Appendix F – Resource 22: Checklist of supporting information required before undertaking archaeological test excavations
- [AHIP application](#)

Action 12 – Senior Environmental Specialist (Heritage) reviews archaeological methodology (and cultural heritage assessment report where required).

a) For Part 4 or Part 5 projects following the Code of practice for archaeological investigation Aboriginal objects in NSW 2010:

The Senior Environmental Specialist (Heritage) will review the archaeological methodology/sampling strategy for adequacy. Where the methodology/sampling strategy is inadequate, this must be addressed before proceeding to Action 13.

OR

b) For Part 4 or Part 5 projects seeking an AHIP to undertake archaeological investigations:

The Senior Environmental Specialist (Heritage) will check the AHIP application, the cultural heritage assessment report and supporting documentation for adequacy. If satisfied, they will forward the AHIP application to the Chief Executive Officer or the relevant delegated Director for sign-off. Where the AHIP application and/or supporting information is inadequate, this must be addressed before proceeding to Action 13.

OR

c) For SSD and SSI projects:

The Senior Environmental Specialist (Heritage) will review the archaeological methodology/sampling strategy for adequacy. Where the methodology/sampling strategy is inadequate, this must be addressed before proceeding to Action 14.

Action 13 - Notify OEH that the Code of practice for archaeological investigation Aboriginal objects in NSW 2010 will be followed OR submit an AHIP application to OEH

a) For Part 4 or Part 5 projects following the Code of practice for archaeological investigation of Aboriginal objects in NSW 2010:

The Senior Environmental Specialist (Heritage) will notify OEH of RMS' intention to follow the *code*.

OR

b) For Part 4 or Part 5 projects seeking an AHIP to undertake archaeological investigations:

Once the AHIP is signed by the Chief Executive Officer or the relevant delegated Director, the Senior Environmental Specialist (Heritage) will send the application to OEH for approval. Note that a copy of the final cultural heritage assessment report and AHIP application must be provided to the registered Aboriginal parties and the relevant local Aboriginal land council(s) (whether or not they are a registered party), within 14 days of submitting the application to OEH. See Appendix D on how to

prepare a cultural heritage assessment report.

☑ Action 14 – Engage Aboriginal site officers

Refer to Appendix E for the steps required to engage Aboriginal sites officers.

☑ Action 15 – Implement archaeological testing methodologies

a) For Part 4 or Part 5 projects following the Code of practice for archaeological investigation Aboriginal objects in NSW 2010:

The archaeological methodology may be implemented 14 days after notifying OEH.

OR


b) For Part 4 or Part 5 projects seeking an AHIP to undertake archaeological investigations:

Where an AHIP has been obtained after a processing period of 60 days, the archaeological methodology may be implemented subject to the AHIP conditions of approval.

OR

c) For SSD and SSI projects:

Implement the archaeological methodology.

 Under the *National Parks and Wildlife Act 1974*, a person is required to notify OEH within a reasonable time of the discovery of an Aboriginal object that is not already recorded on AHIMS. It is an offence to breach this obligation. The consultant's brief (Resource 14 and 15) directs the archaeologist to take this action as required.

☑ Action 16 - Prepare draft archaeological excavation report

Following the completion of the archaeological testing program, the archaeologist is to prepare a draft archaeological (excavation) report. This will include and/or address:

- A description of the location and scope of the proposed project (including ancillary works).
- A description of the study area, clearly indicating the assessed area (a map is to be included).
- The results of the previous archaeological (survey) report, the methodologies adopted, and the scientific values of any identified Aboriginal objects or places, and the likely impacts of the project having regard to the results of the assessment.
- A description of any social and cultural values (spiritual, traditional, historical or other) that the place or area has for the present-day Aboriginal community, where appropriate.
- An assessment of how the known or likely cultural heritage values would be affected by the proposal.
- Management and mitigation recommendations including the requirement for further AHIPs.
- For SSD and SSI projects, the relevant Director General of the DoPI's environmental assessment requirements (DGRs).

The project manager may ask the archaeologist to provide a preliminary summary

report pending completion of the full excavation report. This preliminary report may be used to address the Aboriginal cultural heritage section of the EIS, SEE or REF for the project.

☑ Action 17 – RMS review of archaeological report

Once prepared, the project manager, regional environmental staff and Aboriginal cultural heritage advisor are to review and provide comment on the draft archaeological (excavation) report.

☑ Action 18 – Archaeologist to finalise archaeological report

The archaeologist is to provide the project manager with a completed archaeological (excavation) report.

☑ Action 19 Prepare cultural heritage assessment report OR amend existing cultural heritage assessment report.

See Appendix D for the steps required to prepare a cultural heritage assessment report. Proceed in accordance with the relevant outcome.

5.8 Stage 4 Implement environmental impact assessment recommendations

Aim

To implement the cultural heritage assessment report recommendations developed in Stage 3, and obtain an AHIP, if required.

Background

Stage 4 applies to RMS' projects where planning approval has been obtained, based on the findings of the cultural heritage assessments and investigations undertaken in Stages 1 to 3.

Stage 4 must be undertaken where the Stage 3 outcomes identified that Aboriginal objects or places would be impacted by the project. For projects approved under Part 4 or determined under Part 5 of the *Environmental Planning and Assessment Act 1979*, this means that an AHIP is required to carry out the project. For SSD projects granted consent under Division 4.1 of Part 4 of the Act, or approved SSI projects under Part 5.1 of the Act, any further impacts or activities must be undertaken in accordance with the Minister for Department of Planning and Infrastructure's conditions of approval.

Any mitigation measures or safeguards from the cultural heritage assessment report must be included in any heritage management sub-plan of a construction environment management plan (CEMP) for the implementation phase of the project.

Action 1 - Provide the AHIP application to Senior Environmental Specialist (Heritage)

👉 **SSD and SSI** projects may skip this action and proceed directly to Action 4.

For Part 4 and Part 5 projects, the archaeologist will provide a completed AHIP application or AHIP variation application and supporting documentation to the project manager. The supporting materials required are documented in Part III of the [application](#). The project manager is to raise a cheque and forward the completed AHIP application and documentation (including the cultural heritage assessment report) to the Senior Environmental Specialist (Heritage), Environment Branch.

If an AHIP variation is sought, the Senior Environmental Specialist (Heritage) must consult with OEH to ensure that the scope of the variation is appropriate. If the proposed variation amounts to a totally new activity rather than a variation of an existing activity, then a new AHIP application may be required. The archaeologist should also check whether any specific consultation steps are required with the Aboriginal community. Any specified consultation steps must be completed before submitting the AHIP variation application.

Resources


- [AHIP application](#)

Action 2 – Senior Environmental Specialist (Heritage) reviews AHIP application

The Senior Environmental Specialist (Heritage) will check the AHIP application or AHIP variation application, the cultural heritage assessment report and supporting documentation for adequacy. If satisfied, they will forward the AHIP application to the Chief Executive Officer or the relevant Director delegate for sign-off.

Action 3 - Submit AHIP application to OEH and local Aboriginal land council(s)


Once the AHIP is signed by the Chief Executive or the relevant delegated Director, the Senior Environmental Specialist (Heritage) will send the application to OEH for approval.

 A copy of the final cultural heritage assessment report and AHIP application **must** be provided to the registered Aboriginal parties and the relevant local Aboriginal land council(s) (whether or not they are a registered party), **within 14 days** of submitting the application to OEH. AHIP applications are generally processed by OEH within a 60 day period.

Action 4 – Implement environmental impact assessment recommendations in accordance with the relevant approval

a) For Part 4 or Part 5 projects:

Impacts on Aboriginal objects must be done in accordance with the AHIP approval. Impacts may involve project construction only, or the completion of a program of archaeological salvage **prior** to the commencement of construction.

 A copy of the AHIP **must** be provided to the Senior Environmental Specialist (Heritage) to retain on file.

OR

b) For SSD and SSI projects:

Impacts on Aboriginal objects must be done in accordance with the project conditions of approval. Impacts may involve project construction only, or the completion of a program of archaeological salvage **prior** to the commencement of construction.

Things to consider when implementing the project

Project implementation must address any cultural heritage management sub-plans contained in the construction environmental management plan for the project. (See shaded text box on page 45 for more information).

Where the salvage of Aboriginal objects is required, you may need to engage Aboriginal site officers. Refer to Appendix E for the steps required to engage Aboriginal site officers and then proceed to Action 5.

Action 5 - Prepare the draft archaeological (salvage) report

Following the completion of the salvage program, the archaeologist is to prepare a draft archaeological salvage report.

Action 6 - RMS review of archaeological (salvage) report

Once prepared, the project manager, regional environmental staff and Aboriginal cultural heritage advisor are to review and provide comment on the draft report.

Action 7 – Finalise archaeological (salvage) report

Following a consideration of RMS' comments the archaeologist will provide the project manager with a final archaeological salvage report. A copy of the final report (including an executive summary in plain English) is to be provided to all Aboriginal parties.

Outcome

The project may proceed in accordance with the project approvals. For ongoing project advice regarding Aboriginal community consultation, refer to the regional Aboriginal cultural heritage advisor and regional environmental staff.

↳ Constraints and opportunities associated with project implementation

- **Construction Environmental Management Plans (CEMPs)**

CEMPs outline those management strategies that are required to manage and minimise impacts to the environment during project implementation. Cultural heritage management sub-plans provide specific guidance on how to manage impacts to Aboriginal cultural heritage, including consultation with the Aboriginal community. The cultural heritage management sub-plan must include any mitigation measures or safeguards contained in the cultural heritage assessment report produced in Stage 3 of this procedure. For advice on preparing a cultural heritage management sub-plan, contact the Senior Environmental Specialist (Heritage).

- **Ongoing Aboriginal community consultation**

RMS' requirement to formally consult with registered Aboriginal parties under Clause 80C of the National Parks and Wildlife Regulation 2009 can be considered to be satisfied after all consultation steps set out in the regulation have been carried out and all relevant commitments in the final cultural heritage assessment report have been met.

The project manager may seek ongoing Aboriginal community consultation during the implementation phase of the project to assist with minimising project impacts, or identifying unexpected finds. In such cases, the project team may be able to consult directly with the Aboriginal parties previously registered for the project.

For SSD and SSI projects, the conditions of approval or statement of commitments may also impose further consultation requirements.

- **Unexpected finds**

If any unanticipated impacts to Aboriginal objects or places are identified during the implementation of the project which are not covered by an existing AHIP approval, SSD consent or Part 5.1 SSI approval, relevant works must cease until further advice/approvals have been obtained. For any unexpected finds during project implementation, please refer to RMS' Unexpected archaeological finds procedure.

- **Project files**

The project manager must ensure that all environmental impact assessment documentation and all legislative approvals are retained on the project file. Apart from statutory record keeping obligations, this documentation may be required at a later date, and often provides a valuable resource for future projects.

Appendix A:

Payments relating to Aboriginal cultural heritage

This section sets out the RMS policy on payments related to Aboriginal cultural heritage. The table below identifies where payments may be made under this procedure.

Procedure section	Activity	Hourly rate ¹⁰	Expenses? ¹¹	Process	Contract with RMS required?
Stage 2	Preliminary site survey by local Aboriginal land council, native title claimant and/or Aboriginal owners (1/2 day minimum – ie 4 hours)	\$110 per hour (inc GST) – paid to the service provider.	Yes	Service provision	Yes
	Production of survey report stating any cultural constraints and recommendations.	\$500 (inc GST) (one off payment upon receipt of survey report). Paid to the service provider.	No	Service provision	Yes
Stages 3-4	Reviewing draft reports and methodologies; attending Aboriginal focus group meetings, and identifying cultural objects, places or features	NA	No	Consultation	No
	Provision of detailed cultural information by knowledge holders in the preparation of a detailed cultural assessment.	\$100 per hour (no GST). – paid to knowledge holders by consultant.	No	Service provision	No
	Site officers	\$110 (inc GST) – paid to the service provider	Yes	Service provision	Yes
	Trainee site officers	\$77 (inc GST) - paid to the service provider.			

¹⁰ The quoted hourly rate is the rate to be paid by the RTA to the Service Provider - not to the individual site officer/trainee site officer. The site officer/trainee site officer will be paid by the service provider at a rate agreed to by the service provider and the site officer/trainee site officer.

¹¹ Expenses will be reimbursed as per Item 8 of the Letter of Engagement

Appendix B:

Key RMS contacts

Officer	Region/Directorate	Contact number
Aboriginal cultural heritage advisors	Hunter region	(02) 4907 6408
	Northern region	(02) 6562 0051; 6604 9305
	Southern region	(02) 4221 2767
	South West region	(02) 6937 1647
	Sydney region	(02) 8849 2006
	Western region	(02) 6861 1658
Manager Aboriginal Programs	Aboriginal Programs	(02) 8849 2426
Senior environmental officers	Hunter region	(02) 4924 0281
	Northern region	(02) 6640 1072
	Southern region	(02) 4221 2765
	South West region	(02) 6938 1143
	Sydney region	(02) 8849 2516
	Western region	(02) 6861 1628
	Hume Highway	(02) 6923 3419
Environmental Services Manager	Pacific Highway	(02) 6640 1375
Client and Environment Liaison Manager	Road and Fleet Services	(02) 9598 7721
Senior Environmental Specialist (Heritage)	Environment Branch	(02) 8588 5754

Manager Environmental Planning and Assessment	Environment Branch	(02) 8588 5735
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Appendix C:

Low impact activities (refer to page 11)

Below is an excerpt of Clause 80B of the National Parks and Wildlife Regulation 2009 setting out “low impact activities”. In essence, a person carrying out a low impact activity has a statutory defence against the strict liability offence of harming an Aboriginal object (without knowledge). Low impact activities, by their nature, are unlikely to impact Aboriginal objects. Note this defence does not authorise harm to **known** Aboriginal objects.

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

(1) It is a defence to a prosecution for an offence under section 86 (2) of the Act, if the defendant establishes that the act or omission concerned:

(a) was maintenance work of the following kind on land that has been disturbed:

- (i) maintenance of existing roads, fire and other trails and tracks,
- (ii) maintenance of existing utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines), or

(b) was farming and land management work of the following kind on land that has been disturbed:

- (i) cropping and leaving paddocks fallow,
- (ii) the construction of water storage works (such as farm dams or water tanks),
- (iii) the construction of fences,
- (iv) the construction of irrigation infrastructure, groundwater bores or flood mitigation works,
- (v) the construction of erosion control or soil conservation works (such as contour banks), but not temporary silt fencing, or

(c) was farming and land management work that involved the maintenance of the following existing infrastructure:

- (i) grain, fibre or fertiliser storage areas,
- (ii) water storage works (such as farm dams or water tanks),
- (iii) irrigation infrastructure, ground water bores or flood mitigation works,
- (iv) fences,
- (v) erosion control or soil conservation works (such as contour banks), but not temporary silt fencing, or

(d) was the grazing of animals, or

(e) was an activity on land that has been disturbed that comprises exempt development or was the subject of a complying development certificate issued under the *Environmental Planning and Assessment Act 1979*, or

(f) was mining exploration work of the following kind on land that has been disturbed:

- (i) costeaning,
- (ii) bulk sampling,
- (iii) drilling, or

- (g) was work of the following kind:
- (i) geological mapping,
 - (ii) surface geophysical surveys (including gravity surveys, radiometric surveys, magnetic surveys and electrical surveys), but not including seismic surveys,
 - (iii) sub-surface geophysical surveys that involve downhole logging,
 - (iv) sampling and coring using hand-held equipment, except where carried out as part of an archaeological investigation, or

Note. Clause 3A of this Regulation provides that act carried out in accordance with the *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW* is excluded from meaning of **harm** an object or place for the purposes of the Act.

(h) was the removal of isolated, dead or dying vegetation, but only if there is minimal disturbance to the surrounding ground surface, or

(i) was work of the following kind on land that has been disturbed:

- (i) seismic surveying,
- (ii) the construction and maintenance of ground water monitoring bores, or

(j) was environmental rehabilitation work, including temporary silt fencing, tree planting, bush regeneration and weed removal, but not including erosion control or soil conservation works (such as contour banks).

(2) Subclause (1) does not apply in relation to harm to an Aboriginal culturally modified tree.

(3) In this clause, **Aboriginal culturally modified tree** means a tree that, before or concurrent with (or both) the occupation of the area in which the tree is located by persons of non-Aboriginal extraction, has been scarred, carved or modified by an Aboriginal person by:

(a) the deliberate removal, by traditional methods, of bark or wood from the tree, or

(b) the deliberate modification, by traditional methods, of the wood of the tree.

(4) For the purposes of this clause, land is **disturbed** if it has been the subject of a human activity that has changed the land's surface, being changes that remain clear and observable.

Note 1. Examples of activities that may have disturbed land include the following:

- (a) soil ploughing,
- (b) construction of rural infrastructure (such as dams and fences),
- (c) construction of roads, trails and tracks (including fire trails and tracks and walking tracks),
- (d) clearing of vegetation,
- (e) construction of buildings and the erection of other structures,
- (f) construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines, stormwater drainage and other similar infrastructure),
- (g) substantial grazing involving the construction of rural infrastructure,
- (h) construction of earthworks associated with any thing referred to in paragraphs (a)–(g).

Note 2. This clause creates a defence to the strict liability offence in section 86 (2) of the Act (being the offence of harming an Aboriginal object whether or not the person knows it is an Aboriginal object). The defence does not apply to the separate offence under section 86 (1) of the Act of harming or desecrating an object that a person knows is an Aboriginal object. If a person discovers an Aboriginal object in the course of

undertaking any of the activities listed above, the person should not harm the object—as the person may be committing an offence under section 86 (1) of the Act (the offence of knowingly harming an Aboriginal object)—and should obtain an Aboriginal heritage impact permit, if needed.”

Appendix D:

Preparing a cultural heritage assessment report

Background

A cultural heritage assessment report **must** be prepared for any project that has proceeded to Stage 3 of this procedure. It must document the outcomes of the investigation and consultation process, even if impacts to Aboriginal objects or places will be avoided. The cultural heritage assessment report must incorporate the results of any archaeological report (this may include a survey report and/or a test excavation report), the proposed archaeological methodology for any further impacts to Aboriginal object and places, input from the Aboriginal parties about the cultural values of objects and places within the project area (including a detailed cultural assessment where required), and the strategies for the management of the objects and places. The consultation required for, and preparation of, a cultural heritage assessment report are prescribed by statute and regulation for an AHIP, and may be required for SSD and SSI projects by the DGRs. See the shaded text box on page 55 for the statutory requirements of a cultural heritage assessment report.

The cultural heritage assessment report may be prepared at different points of Stage 3 depending on the nature of the project and the environmental assessment specific to a project. For example, projects that are unable to undertake Stage 3 test excavations in accordance with the *Code of practice for archaeological investigation of Aboriginal objects in NSW 2010* must prepare a cultural heritage assessment report before undertaking testing **AND** after completing the test excavations. In such cases, the report should be considered an evolving document that incorporates the additional information acquired through the consultation and investigation process.

A cultural heritage assessment report may contain cultural information of a sensitive nature. An EIS, SEE or REF or that is put on public display should not include any specific cultural information that the Aboriginal parties have stated is confidential or identify individuals contrary to their privacy requests. In such cases the project manager must ensure that a public version and a confidential version of the report is produced. Sensitive information is to be deleted from the public version – not blacked out. Otherwise, the usual privacy considerations apply.

Action 1- Prepare the draft cultural heritage assessment report

The archaeologist will prepare the draft cultural heritage assessment report. For Part 4 or Part 5 projects that would harm Aboriginal objects and places, an AHIP application must also be prepared. The report must show how the Aboriginal parties' input has been addressed in terms of influencing the development of the cultural heritage assessment report, in understanding the significance of objects and places, and the development of management or mitigation measures, as required. The report must also document why the objects and places cannot be avoided, and discuss why alternative options were not feasible or justified.

☑ Action 2 - RMS review of draft cultural heritage assessment report

The project manager, regional environmental staff and Aboriginal cultural heritage advisor will review and provide comment to the consultant on the draft cultural heritage assessment report (and AHIP application, if required).

☑ Action 3 - Aboriginal party review of draft cultural heritage assessment report

Once RMS is satisfied with the draft, all registered Aboriginal parties are to be sent the draft cultural heritage assessment report. Where there would be further impacts to Aboriginal objects and places, the report must include the methodology for these further impacts. They are then to be given 28 days to review the draft and provide any comments. Comments may be received either in writing or verbally. All comments received within this period are to be considered in finalising the cultural heritage assessment report. The final report must document and append all comments received and RMS responses to those comments.

Action 4 – Hold an Aboriginal focus group meeting

During the 28 day review period (Action 3), the project manager is to invite all Aboriginal parties to attend another Aboriginal focus group meeting to discuss the draft cultural heritage assessment report. The purpose of the meeting (and review period generally) is to ensure that the Aboriginal parties:

- Are made aware of the results of any archaeological investigations
- Have an opportunity to indicate whether their earlier comments have been appropriately addressed.
- Have an opportunity to identify or comment on the cultural significance of any Aboriginal objects and places, if relevant.
- Have an opportunity to contribute to, and comment on the proposed strategies or methodologies for managing impacts to Aboriginal cultural heritage.

Action 5 – Finalise the cultural heritage assessment report

Following a consideration of RMS' comments and received Aboriginal party comments, the archaeologist will provide the project manager with a final cultural heritage assessment report. A copy of the final cultural heritage assessment report (including the standard OEH report cover sheet) is to be provided to all Aboriginal parties.

📖 Resources

OEH Cultural heritage report cover sheet – web link <http://www.environment.nsw.gov.au/resources/cultureheritage/HeritageReportCoversheet.doc>

Outcomes

1. The cultural heritage assessment report identifies that there would be **no further impacts** to Aboriginal objects and places. The outcomes of the report are to be addressed in the EIS, SEE or REF for the project. Environment Branch must also review any SEE or REF that is to be put on public display, or any EIS being prepared for SSD or SSI projects. The project may proceed in accordance with the environmental impact assessment process and all other relevant approvals once obtained.

OR

2. The cultural heritage assessment report identifies that the project would have a **major impact** on significant Aboriginal objects and places that if feasible should be avoided or minimised. Consider project modifications to reduce or avoid this impact.

OR

3. **Archaeological testing is required.** An AHIP will be required for Part 4 or Part 5 projects that cannot undertake archaeological testing under the *Code of practice for archaeological investigation of Aboriginal objects in NSW 2010*. Proceed to Stage 3 Action 11 to complete the stages of testing.

OR

4. For all projects where **archaeological testing is not required** (or has already been completed) and impacts to Aboriginal objects or places are anticipated, the outcomes of the cultural heritage assessment report are to be addressed in the EIS, SEE or REF for the project. Environment Branch staff must review any SEE or REF that is to be put on public display, or any EIS being prepared under Part 5.1. The project may proceed in accordance with the environmental impact assessment process and all other relevant approvals once obtained. Proceed to Stage 4 to implement mitigation measures.

↳ Legislative requirements for a cultural heritage assessment report

Clause 80D (2) and (3) of the National Parks and Wildlife Regulation 2009 prescribes the requirements of a cultural heritage assessment report as follows:

80D (2) A cultural heritage assessment report is to deal with the following matters:

- (a) the significance of the Aboriginal objects or Aboriginal places that are the subject of the application,
- (b) the actual or likely harm to those Aboriginal objects or Aboriginal places from the proposed activity that is the subject of the application,
- (c) any practical measures that may be taken to protect and conserve those Aboriginal objects or Aboriginal places,
- (d) any practical measures that may be taken to avoid or mitigate any actual or likely harm to those Aboriginal objects or Aboriginal places.

80D (3) A cultural heritage assessment report must include:

- (a) if any submission has been received from a registered Aboriginal party under clause 80C (including any submission on the proposed methodology to be used in the preparation of the report and any submission on the draft report), a copy of the submission, and
- (b) the applicant's response to each such submission.

Appendix E:

Engaging site officers

Background

In consultation with RMS, the archaeologist will estimate in the archaeological methodology the number of Aboriginal site officers required to provide archaeological services.

All applicants for a site officer role must demonstrate that they have satisfactorily participated in previous archaeological fieldwork, and nominate the name of an archaeologist who can be contacted as a referee. Applicants for a trainee site officer role do not need to demonstrate previous archaeological experience.

RMS will assess applications and offer positions based on an individual's capability, availability, experience and cultural knowledge. In addition to a consideration of the key selection criteria, RMS may give preference to applicants who live locally.

The project manager is to ensure, where practicable, that male and female Aboriginal people are contracted to address any gender-specific cultural issues associated with the study area.

In order to maintain a consistent standard for the archaeological process, it is recommended that Aboriginal site officer roles not be rotated or substituted within a single project. However, a rostering system may be employed if determined to be appropriate by the project manager and the Aboriginal cultural heritage advisor.

Note that site officer applications are provided to the Aboriginal parties at Stage 3, Action 7

Action 1 – Review applications

The project manager and Aboriginal cultural heritage advisor will review the applications and select the successful candidates. Positions will be awarded based on the following:

- Site officer applications must satisfactorily meet the key selection criteria, including a reference check where required.
- The number of site officer positions awarded will be based on the archaeological methodology.

Action 2 – Notify successful and unsuccessful site officer applicants

Aboriginal site officer roles must be contracted to RMS through a corporate entity such as an Aboriginal land council, 'skill hire' or similar organisation. Contracts with individuals will not be entered into.

Each person that applied for a site officer or trainee site officer role is to be advised in writing whether or not they are to be offered a contract to provide these services.

If the successful applicant is employed by a corporation, then a copy of the contract to provide services and any other relevant policies must be sent to the corporation.


If the successful applicant is not employed by a corporation, then they must be engaged through a skill hire company. The project manager may engage a skill hire company by using RMS Form 916. A copy of the contract to provide services and any other relevant policies must be provided to the skill hire company. The skill hire company is to ensure that the site officer is provided with the relevant policy documentation.

Signed contracts are to be returned to RMS prior to further engagement.

Unsuccessful applicants are to be informed by letter, or other appropriate method, that their application has been unsuccessful on this occasion, or that they have been put on a stand-by list in case successful applicants do not accept their offers.

Resources

- Appendix F – Resource 08: Agreement to provide services: Aboriginal archaeological investigations.
- Appendix F – Resource 19: Aboriginal site officer application form.
- Appendix F – Resource 23: Template letter for unsuccessful site officer applicants.
- Intranet – See Form 916: Skill hire engagement and acknowledgement form

 The project manager must follow this procedure in relation to the contracting of Aboriginal site officers and ensure that all the relevant insurances are held when engaging workers to undertake fieldwork. The project manager is to ensure that all OH&S responsibilities are met by the participants.

Appendix F:

Resources

Resource	Title	Relevant stage
01	Activity checklist	All stages
02	Generic timeframe for the procedure	All stages
03	Stage 1 assessment checklist	Stage 1, Action3
04	Stage 1 assessment outcome – template letter	Stage 1, Action 4
05	Aboriginal cultural heritage constraints mapping report - standard brief	Stage 1, Action 4 (as required)
06	Template invitation to Aboriginal stakeholders to undertake Stage 2 survey	Stage 2, Action 2
07	Template Aboriginal stakeholder cultural heritage survey report	Stage 2, Action 2
08	Aboriginal site officer/Trainee site officer Letter of engagement.	Stage 2, Action 2; Stage 4, Action 4
09	Aboriginal archaeological survey report – standard brief	Stage 2, Action 3
10	Template letter seeking names of Aboriginal people who hold cultural knowledge about objects and places in the project area	Stage 3, Action 1

11	Template letter of notification to native title holders	Stage 3, Action 2
12	Template letter of notification	Stage 3, Action 2
13	Template advertisement for print media	Stage 3, Action 3
14	Aboriginal archaeological reporting (with test excavations)– standard brief	Stage 3, Action 4 (as required)
15	Aboriginal archaeological reporting – standard brief	Stage 3, Action 4 (as required)
16	Template letter – receipt of registration	Stage 3, Action 5
17	Template register of Aboriginal parties	Stage 3, Action 5
18	Template invitation to participate in the heritage assessment process and to attend an Aboriginal focus group meeting	Stage 3, Action 7
19	Aboriginal site officer application form	Stage 3, Action 8
20	Template focus group meeting agenda	Stage 3, Action 8
21	Detailed cultural assessment – standard brief	Stage 3, Action 8 (May be done earlier if required)
22	Checklist of supporting information required before undertaking archaeological	Stage 3, Action 11

	test excavations	
23	Template letter for unsuccessful site officer applicants	Stage 3, Action 14 Stage 4, Action 4