Part 5 Activities

Development consent is not required for certain activities, such as for the construction of roads or electricity infrastructure. This only applies if there is a public authority carrying out the activity or a public authority approving the activity under other legislation. These activities are assessed under Part 5 of the EP&A Act.

The Minister or public authority responsible for deciding whether to proceed with an activity is called the ‘determining authority’. There may be more than one determining authority. If an AHIP is required, DECCW will be a determining authority.

Where Part 5 applies, there is a two-step assessment process. First, the determining authority must take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the activity. This is usually referred to as the review of environmental factors (REF). If the determining authority finds that the activity is likely to significantly affect the environment, an environmental impact statement EIS must be prepared and publicly exhibited.
Amendments to the EP&A Act include requirements for councils to use a standard LEP template when developing their LEPs – Standard Instrument (Local Environmental Plans) Order 2006. A compulsory clause is included in the standard LEP template (cl.15.10) for heritage conservation, specifically for the conservation of places of Aboriginal Heritage significance – i.e. development consent is required for disturbing or excavating a heritage conservation area that is a place of Aboriginal heritage significance – cl.15.10(2)(e).

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

Part 3A Major projects and infrastructure
A declared Part 3A project under s.75B of the EP&A Act does not require an Aboriginal Heritage Impact Permit (AHIP) from DECCW because Part 6 NPW Act offences related to those provisions do not apply. However, proponents are required to follow the 2005 (draft) Part 3A EP&A Act Guidelines for Aboriginal cultural heritage impact assessment and community consultation (as amended from time to time) when seeking approval under the Part 3A process. The guidelines were developed by DECCW and the NSW Department of Planning and they detail the assessment and consultation requirements that need to be followed for Aboriginal cultural heritage under the Part 3A process.

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

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

However, if Aboriginal objects are identified (e.g. through an AHIMS search, survey work or cultural knowledge) or the proponent/landholder otherwise knows about Aboriginal objects on their land that might be affected, an AHIP may still be required and the proponent/landholder should apply to DECCW where harm is likely to occur to those objects.

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

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

Integrated development
Integrated development is development that requires consent but also requires other approvals as identified in s.91(1) of the EP&A Act (e.g. AHIP under s.90 of the NPW Act). If the development is also designated, an EIS must be prepared. Otherwise a statement of environmental effects (SEE) must accompany the application.

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

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

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

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

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

Note: The requirement for an AHIP to disturb or move an Aboriginal object or disturb land for the purpose of discovering an Aboriginal object does not trigger integrated development, but may be required in the course of obtaining integrated development approval.

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

Exempt development or development that does not need consent
A proposed development is ‘exempt development’ or ‘general development not requiring consent’ if it only has a minimal impact on the local environment (e.g. small fences, barbecues and pergolas) and is classified as such in the relevant local environmental plan (LEP) or SEPP 4. Development consent is not required as long as it complies with the requirements in these environmental planning instruments.

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

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