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Subject: DA2019/1378 Portion 79 Kumarna St Duffys Forest
Attachments: due-diligence-code-of-practice-aboriginal-objects-protection-100798.pdf;

Attn: Catriona Shirley

Development Application No. DA2019/1378

Description: Construction of a dwelling house and swimming pool including the removal of vegetation and the construction of horse stables, a round yard and a riding arena

Address: Portion 79 Kumarna Street DUFFYS FOREST

Dear Catriona,

Reference is made to the proposed development at Portion 79 Kamarna St Duffys Forest.

Metropolitan Local Aboriginal Land Council (MLALC) and Allan Williams (Associate Director, Extent Heritage Pty Ltd) has indicated that there is potentially a culturally modified tree on the property. Given this, the Aboriginal Heritage Office recommends a Due Diligence assessment is undertaken for the land by a qualified archaeologist/Aboriginal heritage professional, including consideration for subsurface archaeological testing following the Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales (2010).

The Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales (2010)

is to assist individuals and organisations to exercise due diligence when carrying out activities that may harm Aboriginal objects and to determine whether they should apply for consent in the form of an Aboriginal Heritage Impact Permit (AHIP).

This code sets out the reasonable and practicable steps which individuals and organisations need to take in order to

- 1 identify whether or not Aboriginal objects are, or are likely to be, present in an area
- 2 determine whether or not their activities are likely to harm Aboriginal objects (if present)
- 3 determine whether an AHIP application is required

If Aboriginal objects are present or likely to be present **and** an activity will harm those objects, then an AHIP application will be required.

Section 86 of the NPW Act defines 'harm' to an Aboriginal object as:

Destroys, defaces, or damages the object

Moves the object from the land on which it had been situated

Causes or permits the object to be harmed.

Please find attached the Due Diligence Flow Chart and the Due Diligence Code of Practice The Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales (2010)

If you have any queries, please contact the Aboriginal Heritage Office on (02) 9976 1682.



Kind Regards,
Susan Whitby
Aboriginal Heritage Officer

Lane Cove, North Sydney, Ku-ring-gai,
Willoughby, Strathfield & the Northern Beaches Council.

29 Lawrence Street

Freshwater NSW 2096

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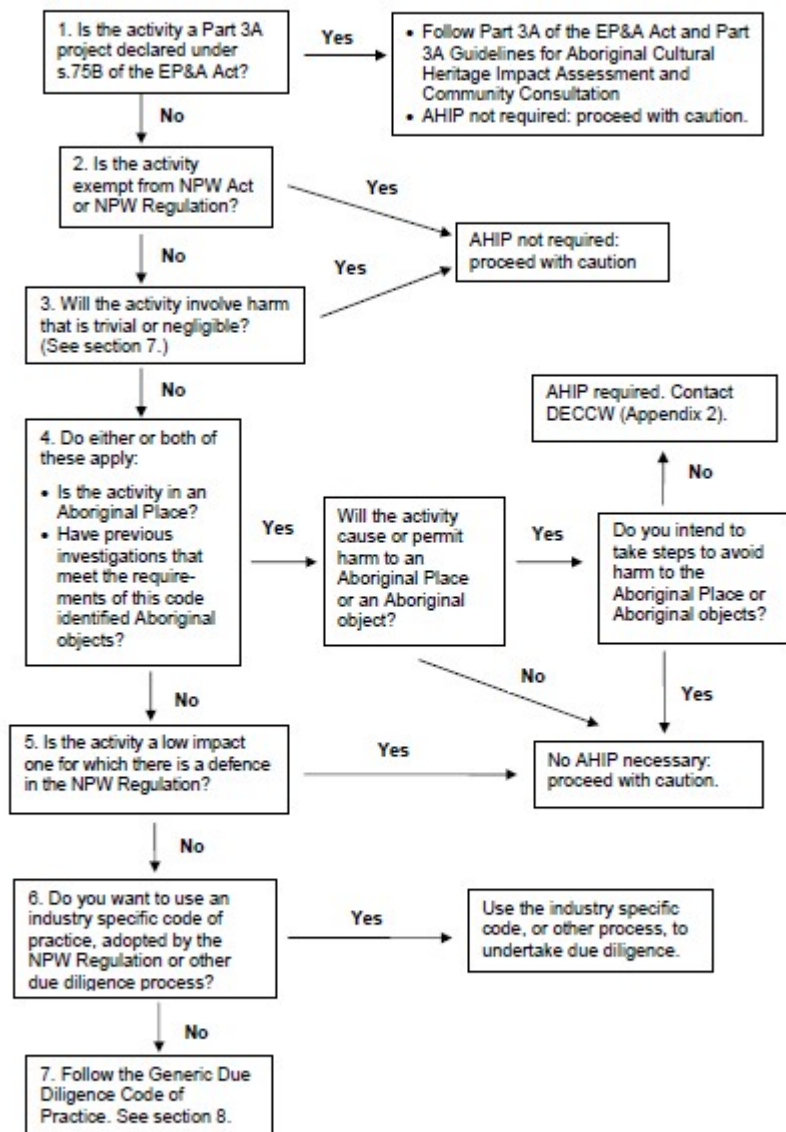
AHO@northernbeaches.nsw.gov.au

www.aboriginalheritage.org

Instagram: @aboriginalheritageoffice

I acknowledge and pay my respects to the traditional owners and ancestors of the lands in which the AHO work across.

1 Do you need to use this due diligence code?





**Environment,
Climate Change
& Water**

Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales



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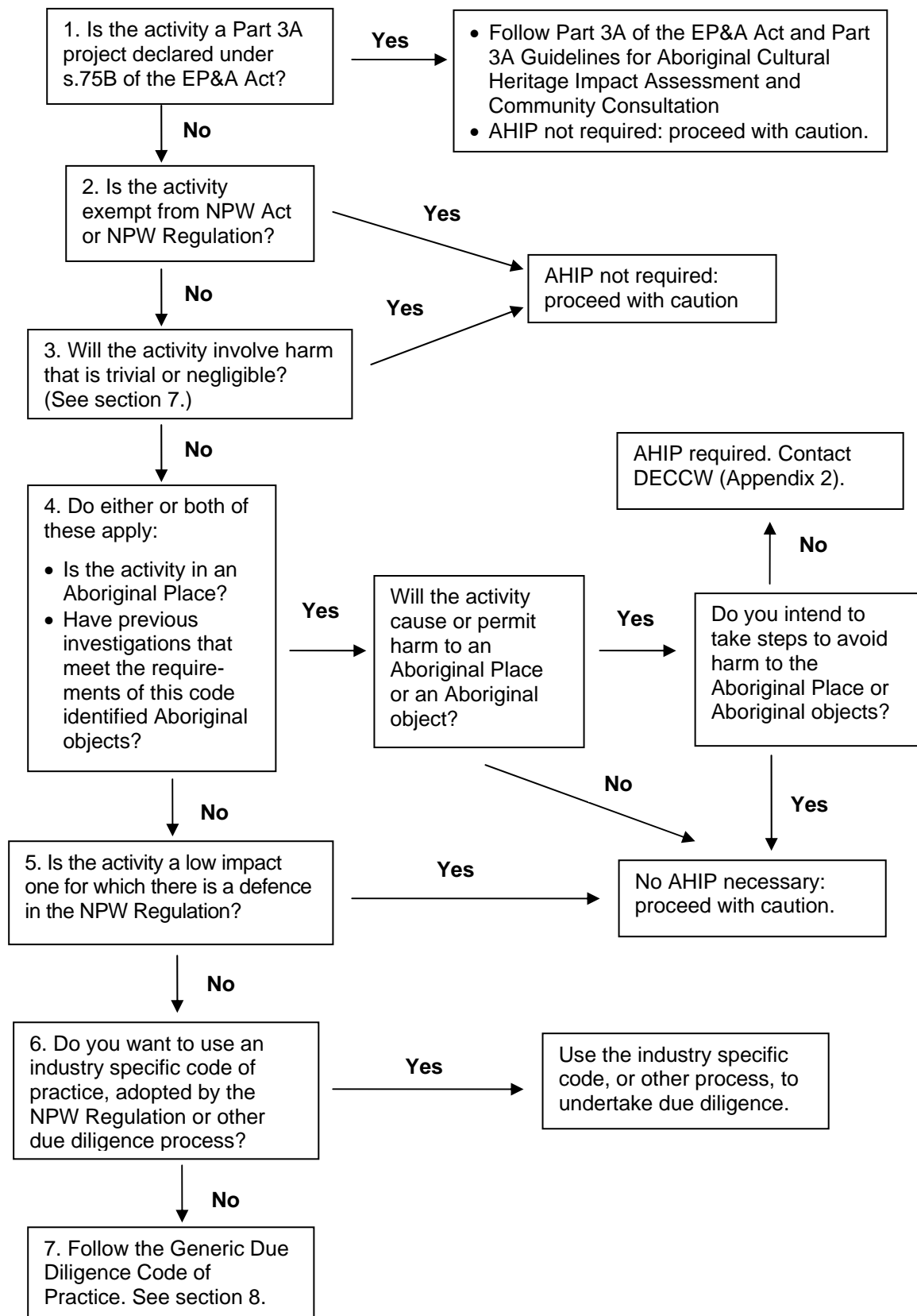
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1 Do you need to use this due diligence code?



2 Purpose of this code of practice

This code of practice is to assist individuals and organisations to exercise due diligence when carrying out activities that may harm Aboriginal objects and to determine whether they should apply for consent in the form of an Aboriginal Heritage Impact Permit (AHIP).

The *National Parks and Wildlife Act 1974* (NPW Act) provides that a person who exercises due diligence in determining that their actions will not harm Aboriginal objects has a defence against prosecution for the strict liability offence if they later unknowingly harm an object without an AHIP.

The NPW Act allows for a generic code of practice to explain what due diligence means. Carefully following this code of practice, which is adopted by the National Parks and Wildlife Regulation 2009 (NPW Regulation) made under the NPW Act, would be regarded as 'due diligence'. This code of practice can be used for all activities across all environments.

This code sets out the reasonable and practicable steps which individuals and organisations need to take in order to:

- 1 identify whether or not Aboriginal objects are, or are likely to be, present in an area
- 2 determine whether or not their activities are likely to harm Aboriginal objects (if present)
- 3 determine whether an AHIP application is required.

If Aboriginal objects are present or likely to be present **and** an activity will harm those objects, then an AHIP application will be required. Information about the permits and how to apply for them can be obtained through the Department of Environment, Climate Change and Water (DECCW) website at www.environment.nsw.gov.au/licences/index.htm.

3 Who should use this code?

Section 1 explains if you need to follow the due diligence process described in this code. This code can be used by individuals or organisations who are contemplating undertaking activities which could harm Aboriginal objects. This code will provide a process whereby a reasonable determination can be made as to whether or not Aboriginal objects will be harmed by an activity, whether further investigation is warranted and whether the activity requires an AHIP application.

If through this or any other process that meets the standards of this code, such as an environmental impact assessment, you have already taken reasonable steps to identify Aboriginal objects in an area subject to a proposed activity and it is already known that Aboriginal objects will be harmed or are likely to be harmed by an activity, then an application should be made for an AHIP.

4 How does the code link to other planning processes?

4.1 Development under Part 4 EP&A Act and activities under Part 5 EP&A Act

Consideration of the potential impacts of development on Aboriginal heritage is a key part of the environmental impact assessment process under the *Environmental Planning and Assessment Act 1979* (EP&A Act). The standards in this code can be used or adapted by proponents to inform the initial assessment of the environmental impacts of an activity on Aboriginal heritage. An environmental impact assessment which meets all of the requirements of this code will satisfy the due diligence test. Alternatively, you could adapt the requirements of this code, provided it still meets the ordinary meaning of exercising due diligence (see section 7.7).

If it is found through this initial assessment process that Aboriginal objects will or are likely to be harmed, then further investigation and impact assessment will be required to prepare information about the types of objects and the nature of the harm. This is further explained at step 5 in section 8. If you are going to harm a known Aboriginal object you will need to apply for an AHIP. In this situation, the need to obtain the AHIP is in addition to any approval under the EP&A Act (unless the project is subject to Part 3A EP&A Act).

4.2 Major projects under Part 3A EP&A Act

If your activity is a declared Part 3A project under s.75B of the EP&A Act you should refer to the 2005 (draft) *Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (as amended from time to time). These guidelines are available from the Department of Planning (see section 7).

4.3 Exempt and complying development under the EP&A Act

The due diligence process can still apply to an activity that is exempt or complying development within the meaning of the EP&A Act. However, if the exempt or complying development is a low impact activity as defined by the NPW Regulation then you may have a defence under the NPW Act and do not need to follow due diligence in carrying out the activity. Refer to section 7.

5 Do I need to consult?

Consultation with the Aboriginal community is not a formal requirement of the due diligence process. However, proponents may wish to consider undertaking consultation if it will assist in informing decision-making.

The following organisations can assist with identifying Aboriginal people who may hold cultural knowledge relevant to determining the significance of Aboriginal objects and or places:

- the relevant DECCW EPRG regional office (see Appendix 2)
- the relevant Local Aboriginal Land Council(s)¹
- the Registrar, *Aboriginal Land Rights Act 1983*, for a list of Aboriginal owners²
- the National Native Title Tribunal for a list of registered native title claimants, native title holders and registered Indigenous Land Use Agreements³

¹ www.alc.org.au

² www.oralra.nsw.gov.au

- NTSCorp Limited⁴
- the relevant local council(s)
- the relevant catchment management authorities for contact details of any established Aboriginal reference group.

If at any point an application is made for an AHIP then the consultation must be undertaken in accordance with the requirements in cl.80C of the NPW Regulation.

These requirements may also be followed where there is uncertainty about potential harm to Aboriginal objects and Aboriginal Places and you are undertaking an investigation and assessment of Aboriginal cultural heritage.

6 What are the advantages of due diligence?

In the context of protecting Aboriginal cultural heritage, due diligence involves taking *reasonable and practicable measures* to determine whether your actions will harm an Aboriginal object and, if so, what measures can be taken to avoid that harm.

There are several advantages to having a due diligence process for assessing potential harm to Aboriginal objects in that it:

- assists in avoiding unintended harm to Aboriginal objects
- provides certainty to land managers and developers about appropriate measures for them to take
- encourages a precautionary approach
- provides a defence against prosecution if the process is followed
- results in more effective conservation outcomes for Aboriginal cultural heritage.

7 Do you need to use this due diligence code?

Section 1 provides guidance on questions to ask to determine whether you need to follow this due diligence process.

7.1 Is the activity a declared project under Part 3A of the EP&A Act?

Where a project is seeking approval under Part 3A you need to identify, in the project application or concept plan application and any accompanying Preliminary Environmental Assessment, if the project will harm Aboriginal objects. If your project is a declared Part 3A project under s.75B of the EP&A Act, and you have been issued the Director General's requirements in relation to Aboriginal objects, you do not need to apply for an AHIP to harm Aboriginal objects under the NPW Act provided you follow these Director General's requirements and any conditions of approval.

You should refer to the 2005 (draft) *Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* (as amended from time to time). These guidelines are available from the Department of Planning.

The above does not apply:

³ www.nntt.gov.au

⁴ www.ntscorp.com.au

- where a project was approved under Division 4 of Part 5 (now repealed) of the EP&A Act – in this situation an AHIP will be required if the activity proposes to harm Aboriginal objects
- where a project is approved under Part 3A of the EP&A Act but subsequent applications are sent back to the consent authority (usually a local council) to determine under Part 4 of the EP&A Act (for example, some staged development or concept plan approvals) – in this situation any Aboriginal heritage matters not already covered by the Part 3A approval may still require an AHIP.

In these situations you should follow the steps in section 8 or some other due diligence process.

7.2 Is the activity an exempt activity listed in the National Parks and Wildlife Act or other legislation?

The NPW Act provides exemptions to the offences of harming Aboriginal objects and Aboriginal Places in certain circumstances. 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 carried out 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 DECCW 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 NPW Act.

7.3 Will the activity involve harm that is trivial or negligible?

Section 86 of the NPW Act sets out a number of offences about ‘harm’ to an Aboriginal object. Harm means any act or omission that:

- destroys, defaces, or damages the object
- moves the object from the land on which it had been situated
- causes or permits the object to be harmed.

Harm does not include something that is trivial or negligible. Examples of what might be a trivial or negligible act are picking up and replacing a small stone artefact, breaking a small Aboriginal object below the surface when you are gardening, crushing a small Aboriginal object when you walk on or off a track, picnicking, camping or other similar recreational activities.

7.4 Is the activity in an Aboriginal Place or are you already aware of Aboriginal objects on the land?

Aboriginal places

Aboriginal Places are declared by the Minister under s.84 of the NPW Act. The location of Aboriginal Places is made available to the public via the government gazette (available through the NSW Department of Services, Technology and

Administration). The places are also listed on the DECCW website. The due diligence defence is not available for activities which harm Aboriginal places. If you wish to undertake an activity which may harm an Aboriginal place, you must apply for an AHIP.

Known Aboriginal objects

If as a result of previous investigations that meet the requirements of this code you already know that Aboriginal objects are in the area and that harm to these objects cannot be avoided, then you need to apply for an AHIP. If the previous investigation includes a search on the Aboriginal Heritage and Information Management System (AHIMS) database (maintained by DECCW's Country, Culture and Heritage Division) which is over 12 months old you must search AHIMS again to ensure that the information is still current.

7.5 Is the activity a low impact activity for which there is a defence in the Regulation?

The NPW Regulation removes the need to follow the due diligence process if you are carrying out a specifically defined low impact activity. As a result, you are not required to follow this code or any other due diligence process if your activity is listed below. It is important to note that this defence does not apply to situations where you already know there is an Aboriginal object. This defence does not authorise harm to known Aboriginal objects.

The following low impact activities are prescribed in the NPW Regulation as a defence against the strict liability s86 (2) offence.

Clause 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,*
 - (v) *the construction of irrigation infrastructure, ground water bores or flood mitigation works,*
 - (vi) *the construction of erosion control or soil conservation works (such as contour banks), 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), 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 an act carried out in accordance with the Code of Practice for Archaeological Investigation in NSW is excluded from meaning of harm an objects 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 human activity that has changed the land's surface, being changes that remain clear and observable.*

Note: *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 anything referred to in paragraphs (a)-(g).*

If your activity is included in this list you are not required to go through the due diligence process. Proceed with caution, and if Aboriginal objects are later found when you are carrying out your activity, you must stop work, notify DECCW and apply for an AHIP if you intend to harm those known objects.

If your activity is not on this list go to 7.6.

7.6 Do you want to use an industry specific code of practice?

The NPW Act also provides that due diligence may be exercised by complying with a code of practice which is adopted under the NPW Regulation. These codes provide due diligence guidance tailored for specific types of activities or industries. Codes which have been adopted are the:

- Plantation and Reafforestation Code (being the Appendix to the Plantations and Reafforestation (Code) Regulation 2001) as in force on 15 June 2010
- Private Native Forestry Code of Practice approved by the Minister for Climate Change and the Environment and published in the Gazette on 8 February 2008⁵
- NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects published by the NSW Minerals Council Ltd and dated 13 September 2010
- Aboriginal Objects Due Diligence Code for Plantation Officers Administering the Plantations and Reafforestation (Code) Regulation 2001 published by the Department of Industry and Investment and dated 13 September 2010
- Operational Guidelines for Aboriginal Cultural Heritage Management published by Forests NSW and dated 13 September 2010.

If your activity is subject to an industry specific code that has been adopted by the NPW Regulation, you can follow that code instead of the requirements of this generic code.

Other industry associations may wish to develop codes of practice and DECCW will consider their adoption on a case by case basis.

If your activity is not subject to an industry specific code, go to section 8.

7.7 Do you wish to follow your own procedure?

You can follow your own due diligence process and manage your own risk.

Due diligence amounts to taking reasonable and practicable steps to protect Aboriginal objects. This generic code provides one process for satisfying the due diligence requirements of the NPW Act.

It is not mandatory to follow this code. An individual or corporation can take other measures, provided that such measures are objectively reasonable and practicable and meet the ordinary meaning of exercising due diligence.

⁵ www.environment.nsw.gov.au/pnf/index.htm

For example, if your proposed activity requires environmental impact assessment under the EP&A Act which includes appropriate Aboriginal cultural heritage assessment, then due diligence could be exercised through that assessment rather than through a separate assessment that specifically follows the steps in this code. A Statement of Environmental Effects (SEE), a Review of Environmental Factors (REF) or an Environmental Impact Statement (EIS) under Part 4 or Part 5 of the EP&A Act can be used to satisfy the due diligence process if it adequately addresses Aboriginal cultural heritage issues.

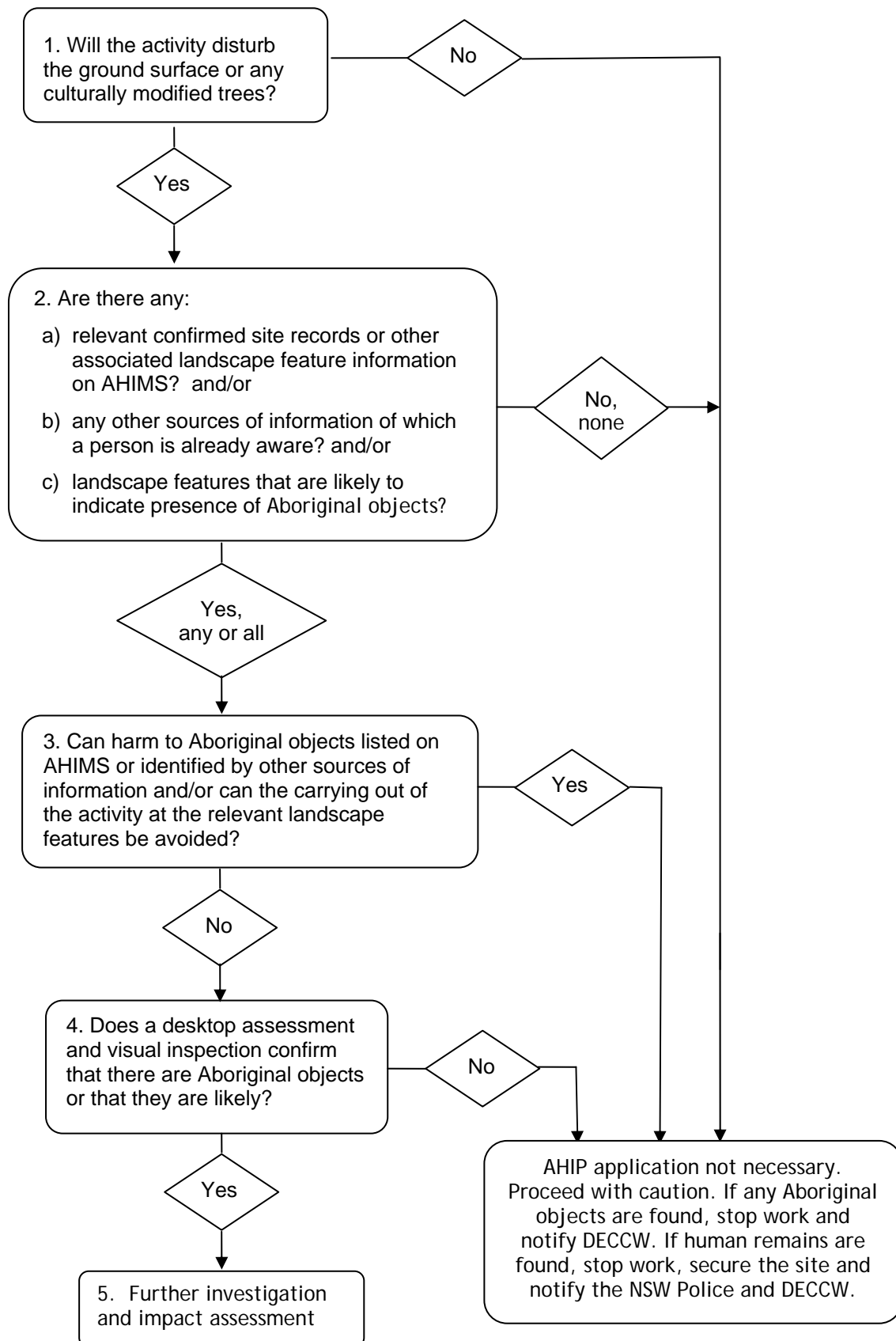
It is important that your due diligence measures are documented clearly and that these records are kept.

DECCW will not approve or certify a person's compliance with their due diligence requirements carried out under this or any other code. This is the responsibility of the company or individual doing the activity.

7.8 Follow the due diligence code of practice

If none of the above steps apply to your activity, to establish due diligence you must proceed through the generic due diligence process outlined in the flowchart in section 8 and explained further in that section.

8 The generic due diligence process



Step 1. Will the activity disturb the ground surface?

The first question to ask in the due diligence process is, Will the activity disturb the ground surface or any culturally modified trees? If an activity will disturb the ground surface there is a higher likelihood that Aboriginal objects will be harmed.

Disturbance of the ground surface is often significant when machinery is used to dig, grade, bulldoze, scrap, plough, or drill the ground surface for the purpose of, for example, building a structure or removing vegetation.

If your activity will not disturb the ground surface or any culturally modified trees then you can proceed with caution without applying for an AHIP.

If the activity will disturb the ground surface or any culturally modified trees then check the AHIMS database – step 2a.

Step 2a. Search the AHIMS database and use any other sources of information of which you are already aware

You should search the AHIMS database and check whether any Aboriginal sites have been recorded in the area where you are proposing to carry out your activity. There may also be additional landscape or other contextual information, relevant to the area of your proposed activity on AHIMS.

Information on AHIMS searches is available on DECCW's website.⁶

The initial web-based search of AHIMS is free and you will be able to print the results of your search for record keeping purposes. For the purposes of due diligence you may rely on the search results for 12 months. (See section 10 for record keeping recommendations for the due diligence process.)

If the results of the initial AHIMS search indicate that AHIMS contains information about recorded Aboriginal objects in the area of your proposed activity you must obtain copies of those records. Contact the AHIMS registrar by faxing the request form or submitting the request form over the internet. Costs may apply depending on the type of information you are asking for. There may also be restrictions in providing culturally sensitive information.

After obtaining records from AHIMS of any recorded Aboriginal objects you should confirm that these objects can be located in the area where your activity is proposed. If you think the information on AHIMS is not up to date or is inaccurate you should contact the AHIMS registrar on 02 9585 6471, 02 9585 6345 or 02 9585 6157 for further advice.

If you are aware of any other sources of information, you need to use these to identify whether or not Aboriginal objects are likely to be present in the area. Other sources of information can include previous studies, reports or surveys which you have commissioned or are otherwise aware of.

Go to step 2b.

Step 2b. Activities in areas where landscape features indicate the presence of Aboriginal objects

Regardless of whether your AHIMS search indicates known Aboriginal objects, you still need to consider whether Aboriginal objects are likely to be in the area of the proposed activity having regard to the following landscape features.

⁶ www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm

Aboriginal objects are often associated with particular landscape features as a result of Aboriginal people's use of those features in their everyday lives and for traditional cultural activities. Examples of such landscape features are rock shelters, sand dunes, waterways, waterholes and wetlands. Therefore it is essential to determine whether the site contains landscape features that indicate the likely existence of Aboriginal objects.

Consequently, if your proposed activity is:

- within 200m of waters⁷, or
- located within a sand dune system⁸, 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

and is on land that is not disturbed land (see Definitions) then you must go to step 3.

If after completing steps 2a and 2b it is reasonable to conclude that there are no known Aboriginal objects or a low probability of objects occurring in the area of the proposed activity, you can proceed with caution without applying for an AHIP.

Step 3. Can you avoid harm to the object or disturbance of the landscape feature?

This step only applies if your activity is on land that is not disturbed land or contains known Aboriginal objects.

Where as a result of step 2a you think it is likely that there are Aboriginal objects present in the area of the proposed activity, you need to decide whether you can avoid the harm to those objects.

Where as a result of step 2b you have concluded that the landscape features listed are present, you need to decide whether you can move your activity away from the area with the landscape feature(s) so as to avoid disturbing any Aboriginal objects which may be present.

Possible solutions may include reducing the area of a building footprint, changing its orientation, re-positioning built elements, re-routing infrastructure trenching or incorporating a no-development area into the site design.

If you can't avoid harm to the object or disturbance of the landscape feature(s) you must go to step 4.

If you can avoid harm to the object and disturbance of the landscape feature(s) you can proceed with caution without applying for an AHIP.

Step 4: Desktop assessment and visual inspection

This step only applies if your activity is on land that is not disturbed land or contains known Aboriginal objects.

⁷ 'Waters' means the whole or any part of: any river, stream, lake, lagoon, swamp, wetlands, natural watercourse, tidal waters (including the sea). Note: the boundary of tidal waters is defined as the high water mark.

⁸ Refers to sand ridges and sand hills formed by the wind, usually found in desert regions, near a lake or in coastal areas. In areas of western NSW, windblown dunes can occur along the eastern edges of ephemeral lakes (called lunettes dunes). They can also occur along the banks of rivers.

The assessment process is primarily a desktop exercise that involves examination and collation of the readily available information. The assessment must consider the area of the proposed activity as a whole, not just particular areas where any Aboriginal objects have been recorded on AHIMS or areas where landscape features are located.

At a minimum the information reviewed as part of the desktop assessment should include existing knowledge of Aboriginal cultural heritage gleaned from previous heritage studies or reports for the area, including any archaeological studies on AHIMS. There may be some restrictions in providing culturally sensitive information to you. Where this is the case DECCW will provide advice on how to proceed.

You must undertake a visual inspection of the area to see if Aboriginal objects can be identified or are likely to be present below the surface. This visual inspection must be done by a person with expertise in locating and identifying Aboriginal objects. This person with expertise could be an Aboriginal person or landholder with experience in locating and identifying Aboriginal objects or a consultant with appropriate qualifications or training in locating and identifying Aboriginal objects.

Where either the desktop assessment or visual inspection indicates that there are (or are likely to be) Aboriginal objects in the area of the proposed activity, more detailed investigation and impact assessment will be required. This will need to be done by a person with expertise in Aboriginal cultural heritage management. Go to step 5.

Where the desktop assessment or visual inspection does not indicate that there are (or are likely to be) Aboriginal objects, you can proceed with caution without an AHIP application.

Step 5. Further investigations and impact assessment

DECCW's website has further information about how to do a detailed investigation and impact assessment and the procedures for applying for an AHIP.

If after this detailed investigation and impact assessment you decide that harm will occur to Aboriginal objects then an AHIP application must be made.

For information that is required to support an application for an AHIP (including impact assessment and community consultation) and other relevant information see www.environment.nsw.gov.au/conservation/aboriginalculture.htm#whattodo.

All AHIP applicants must undertake consultation in accordance with clause 80C of the NPW Regulation. These requirements may also be followed where there is uncertainty about potential harm and you are undertaking a cultural heritage assessment.

If you decide an AHIP application is not necessary

If you have followed this code and at any point have reasonably decided that an AHIP application is not necessary either because Aboriginal objects are not present or, if they are present, harm to those objects can be avoided, you can proceed with caution.

If, however, while undertaking your activity you find an Aboriginal object you must stop work and notify DECCW and you may need to apply for an AHIP. Some works may not be able to resume until you have been granted an AHIP and you follow the

conditions of the AHIP. Further investigation may be required depending on the type of Aboriginal object that is found.

If human skeletal remains are found during the activity, you must stop work immediately, secure the area to prevent unauthorised access and contact NSW Police and DECCW.

The NPW Act requires that, if a person finds an Aboriginal object on land and the object is not already recorded on AHIMS, they are legally bound under s.89A of the NPW Act to notify DECCW as soon as possible of the object's location. This requirement applies to all people and to all situations, including when you are following this code.

If a person finds an Aboriginal object which is not recorded on AHIMS, they should contact DECCW as soon as practicable. Notification procedures can be found at: www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm

The due diligence process is shown diagrammatically at the beginning of this section.

9 What do I do with the results of due diligence?

Once you have gone through the due diligence process and you want to go ahead with your activity, you have several options including:

- 1 proceeding with the activity without an AHIP if you have found no evidence of Aboriginal objects using this due diligence code
- 2 amending the proposed activity to avoid harming Aboriginal objects then proceed without applying for an AHIP
- 3 applying for an AHIP, and if an AHIP is granted, following the AHIP conditions as you proceed with the activity.

The decision about which option to choose is the responsibility of the proponent using the information obtained through exercising due diligence.

10 Record keeping

Under the NPW Act, a person has a defence to any prosecution alleging harm to an Aboriginal object if they show that they exercised due diligence to identify Aboriginal objects and reasonably decided that no Aboriginal objects would be harmed.

Consequently it is strongly recommended that a person keep a record of the actions they took and the decisions they made in following the due diligence process.

11 Some background and contextual information

11.1 Aboriginal people and their cultural heritage

Aboriginal people have occupied the NSW landscape for at least 40,000 years. The evidence and important cultural meanings relating to this occupation are present throughout the landscape, as well as in documents and in the memories, stories and associations of Aboriginal people. Therefore, activities that disturb the landscape may impact on Aboriginal cultural heritage.

Aboriginal cultural heritage consists of places and items that are of significance to Aboriginal people because of their traditions, observances, customs, beliefs and history. It is evidence of the lives of Aboriginal people right up to the present. Aboriginal cultural heritage is dynamic and may comprise tangible or intangible elements. As such, it includes things made and used in earlier times, such as stone tools, art sites and ceremonial or burial grounds, as well as more recent evidence such as old mission buildings, massacre sites and cemeteries. Aboriginal cultural heritage is also represented in documents and in the memories, stories and associations of Aboriginal people.

11.2 DECCW's responsibilities for protecting Aboriginal cultural heritage

Under the NPW Act DECCW is responsible for protecting Aboriginal objects and Aboriginal Places throughout NSW. The objects of the NPW Act must be given effect whenever the Minister, the Director General or any member of staff of DECCW carries out their functions under the NPW Act. The objects of the NPW Act include:

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

The NPW Act also states that the objects of the Act are to be achieved by applying the principles of ecologically sustainable development 2A(2).

DECCW is responsible for protecting Aboriginal objects and Aboriginal Places by assessing the impacts of proposed activities on Aboriginal objects and Aboriginal Places and only allowing acceptable impacts to occur. DECCW assesses applications for AHIPs to harm Aboriginal objects and Places, and includes conditions in AHIPs to minimise damage to or disturbance of those objects and Places. DECCW is also responsible for assessing proposals for Aboriginal Places and making recommendations to the Minister to declare Aboriginal Places to protect both their tangible and intangible values.

DECCW works closely with Aboriginal communities on conservation works for Aboriginal cultural heritage, such as the protection and restoration of Aboriginal objects such as rock art, middens, burials and culturally modified trees, and is also involved in the repatriation of Aboriginal human remains.

11.3 What is an Aboriginal object?

This code applies only to Aboriginal objects as defined in the NPW Act (see Definitions). Appendix 1 provides some examples and guidance on objects. Examples of Aboriginal objects include, but are not limited to:

- human skeletal remains
- Aboriginal culturally modified trees
- middens
- rock art (paintings and engravings)
- stone artefacts
- raised earth rings
- grinding grooves
- rock shelters
- earth mounds
- hearths
- stone arrangements.

12 Offences for harming Aboriginal objects

Section 86 of the NPW Act sets out a number of offences about ‘harm’ or desecration to an Aboriginal object. Harm means any act or omission that:

- destroys, defaces or damages the object
- moves the object from the land on which it had been situated, or
- causes or permits the object to be harmed.

Harm does not include something that is trivial or negligible. Examples of what might be a trivial or negligible act are picking up and replacing a small stone artefact, breaking a small Aboriginal object below the surface when you are gardening, or crushing a small Aboriginal object when you walk on a track.

There are now two types of offences for harming an Aboriginal object:

- 1 an offence of harming or desecrating an object which a person knows is an Aboriginal object (a ‘knowing offence’)
- 2 an offence of harming an object whether or not a person knows it is an Aboriginal object (a ‘strict liability offence’).

The maximum penalty for the knowing offence is \$550,000 or \$275,000 (depending on whether there are aggravating circumstances) and 1 or 2 years' goal for an individual. For a corporation the maximum penalty for the knowing offence is \$1.1 million. The maximum penalty for the strict liability offence is \$110,000 or \$55,000 (depending whether there are aggravating circumstances) for an individual or \$220,000 for a corporation.

12.1 Defences or exemptions for harming Aboriginal objects

The NPW Act and NPW Regulation provide several defences and exemptions for both types of offence relating to harm to an Aboriginal object. Some of these defences and exemptions are explained in the diagram in section 1. The due diligence defence for the strict liability offence is explained in section 8. It is also a defence if a person holds a current AHIP and complies with the conditions of the AHIP.

In addition to the defences in the NPW Act and NPW Regulation the general defence of 'honest and reasonable mistake' would also apply to the strict liability offence.

13 Authorship and Certification of Code

The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW has been prepared by the Department of Environment, Climate Change and Water NSW.

This code complies with all the requirements of the Minimum Standards for Codes of Practice for the Protection of Aboriginal Objects in NSW gazetted on 10 September 2010.



Lisa Corbyn
Director General
DECCW
13 September 2010

Definitions

Aboriginal Heritage Impact Permit	a permit issued by the Director General of DECCW (or their delegate) allowing a person to desecrate or harm an Aboriginal Place or Aboriginal objects.
Aboriginal object (as defined in the NPW Act)	any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises NSW, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.
Aboriginal Place (as defined in the NPW Act)	a place declared under s.84 of the NPW Act that, in the opinion of the Minister, is or was of special significance to Aboriginal culture. Information about the location of Aboriginal Places in NSW can be found on the DECCW website at www.environment.nsw.gov.au/nswcultureheritage/PlacesOfSignificance.htm .
Aboriginal culturally modified tree (as defined in the NPW Regulation)	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: <ul style="list-style-type: none"> • the deliberate removal, by traditional methods, of bark or wood from the tree, or • the deliberate modification, by traditional methods, of the wood of the tree.
activity	a project, development, activity or work (this term is used in its ordinary meaning, and does not just refer to an activity as defined by Part 5 EP&A Act).
disturbed land or land already disturbed by previous activity	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. Examples include ploughing, construction of rural infrastructure (such as dams and fences), construction of roads, trails and tracks (including fire trails and tracks and walking tracks), clearing vegetation, construction of buildings and the erection of other structures, 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) and construction of earthworks.
due diligence	taking reasonable and practical steps to determine whether a person's actions will harm an Aboriginal object and, if so, what measures can be taken to avoid that harm .
harm an Aboriginal object (as defined in the NPW Act)	<ul style="list-style-type: none"> • destroy, deface, damage an object • move an object from the land on which it is situated • cause or permit an object to be harmed.
Minister	Minister administering the NPW Act

Acronyms and abbreviations

AHIMS	Aboriginal Heritage Information Management System
AHIP	Aboriginal Heritage Impact Permit
DECCW	Department of Environment, Climate Change and Water NSW
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NPW Regulation	National Parks and Wildlife Regulation 2009

Appendix 1: Examples of Aboriginal objects

Stone artefacts are a common type of Aboriginal object, and include stone tools, spear points, surface scatters, grinding stones, ground-edge axes and other implements that were used for a variety of purposes, such as in the preparation of food or to make nets, baskets and other tools. Stone artefacts often have sharp edges, or are of a stone type that is different from the natural rock in the area.

Another type of stone artefact is a ground-edge axe, which can come in different shapes, but are usually round or oval. They are sometimes rounded and narrow at one end, and slightly broader and straighter at the cutting edge.

Because stone artefacts do not rot or rust they are often the primary physical evidence of Aboriginal occupation in a particular area. They can also provide important information about past Aboriginal people's settlement patterns, lifestyle and other connections, such as trade.

The presence of stone artefacts in an area may indicate that either a place was previously used by Aboriginal people, or that the area continues to be a place of significance, which may include sensitive sites, such as men's or women's areas which may require a buffer zone to maintain. In some cases it will be appropriate to consider removing stone artefacts from where they are found (salvage), following advice from DECCW and Aboriginal groups.

Stone artefacts are often small, so they can be difficult to protect. Erosion and weathering caused by activities such as ditch digging and ploughing can disturb stone artefacts. They can also be broken when trampled by animals, or when run over by vehicles.



Stone artefacts. Mark Flanders/DECCW

Surface artefact scatters are the material remains of Aboriginal people's activities. Scatter sites usually contain stone artefacts, but other material such as charcoal, animal bone, shell and ochre may also be present. The size of scatters may vary from one square metre to larger areas, and may contain from a few to thousands of artefacts.

Stone artefacts can be found almost anywhere Aboriginal people camped or lived, particularly around occupation sites, in sand dunes, rock shelters, caves, on ridges and near watercourses. Ground-axe edges may also be found near axe-grinding grooves or quarries.

Oven or hearth sites are the remains of a domestic open fireplace. Domestic open fireplaces have been used in populated places throughout Australia to provide warmth and lighting. They are also used for cooking food and sometimes to signal from one group to another.

These hearths are roughly circular piles of burnt clay or heat fractured rock with associated charcoal fragments, burnt bone, shell and stone artefacts.



Hearth site. Stephen Meredith

Rock art includes paintings and drawings that generally occur in rock overhangs, caves and shelters. Stencils of hands, paintings or drawings of animal or people and animal tracks are common and have often been created using ochre, white pipeclay or charcoal.

Engravings commonly occur on open, flat surfaces of rock such as on sandstone outcrops, although some are found on vertical rock faces and in rock shelters. Examples of engravings include outlines of people or animals, but may also include patterns, tracks and lines.

Rock art is of high cultural significance to Aboriginal people, and many sites are still regarded as sacred or of ceremonial significance. Rock art sites are important links to the past for Aboriginal people today. They can also provide important information about the daily life and culture of Aboriginal people before European contact, and many sites are hundreds or thousands of years old.

Rock art sites can be easily damaged as they can be prone to erosion and vandalism. Touching rock art or disturbing a shelter floor in the immediate vicinity of the rock art can cause damage, as can movement on or over surfaces with rock art. Sites may also suffer from vegetation growth or removal. Effective management of rock art sites can include drainage, fencing, graffiti removal, and visitor control.



Mutawintji hand stencils. Pat Laughton/DECCW

Shell middens are commonly made up of the remains of edible shellfish, and could be the result of a single meal or many meals at the same location over many years. A midden may also contain fish and animal bones, stone tools, or charcoal. They can vary in size and depth. Middens are sometimes associated with burials.

Middens can be found on headlands, sandy beaches and dunes, around estuaries, swamps and tidal stretches of creeks and rivers, and along the banks of inland rivers, creeks and lands. Middens may also be found in the open or in rock shelters.

Middens can indicate that a place was, and may continue to be, a key meeting place of significance. Middens can also provide information about the environment that existed when Aboriginal people collected the shellfish, such as changes in species, and tools or raw materials that were used. Middens which contain burials are particularly significant.

Middens are amongst the most fragile cultural sites. They can be exposed by wind or degraded by human and animal activity. Effective management of midden sites may include stabilising the surface, such as by encouraging vegetation cover, or by restricting access to the site by erecting fencing.



Shell midden. Warren Mayers/DECCW

Axe grinding grooves are oval shaped indentations generally on flat and soft rock surfaces, such as sandstone outcrops. Aboriginal people made the grooves when shaping and sharpening stone axes by grinding them against the rock. Grooves can vary in size, shape and number. Sites with 20 to 60 grooves are not uncommon and some sites have more than 200.

Axe grinding grooves are important because they provide information about Aboriginal stone tool technology. They are often found along the edges of creeks, lakes or swamps as water was needed to keep the stone clean and cool. In areas where suitable outcrops of rock were not available, transportable pieces of stone were used for sharpening or grinding tools. Axe-grinding grooves provide important information about how stone tools were made.

As sandstone is relatively soft, it is prone to weathering, erosion and trampling by animals. Human activities such as mining, road infrastructure, damming, clearing, ploughing and construction can also destroy these sites. Management options can include stock and erosion control.



Axe grinding stones. Hilton Naden/DECCW

Aboriginal culturally modified (scarred and carved) trees are trees that show the scars caused by the removal of bark or wood for the making of, for example, canoes, vessels, boomerangs, shelters and medicines. The shape and size of the scar may indicate the purpose for which the bark or wood was removed from the tree. In some regions of NSW, trees were carved with intricate patterns and designs for ceremonial purposes, or to mark country boundaries or burials.

Carved trees associated with burial sites are usually in groups of two or more trees. Carved trees associated with ceremonial grounds may have also been used for educational purposes. Scarred and carved trees occur in various locations across NSW.

Scarred and carved trees are significant to the descendants of the Aboriginal people living today. They are becoming rarer in NSW as the trees decay, are burnt or are destroyed.

It is important to note that the defence to a prosecution contained in Clause 80B of the NPW Regulation relating to certain low impact activities does not apply in relation to any harm to an Aboriginal culturally modified tree. Ensuring that Aboriginal culturally modified trees are not harmed will likely include ensuring that effective buffer zones are used, as their significance is often part of the broader landscape.



Carrington scarred tree. Warren Mayers/DECCW

Quarry sites are sites where Aboriginal people manufactured stone tools or collected ochre for painting and decoration. Quarry sites may be found in areas of rock outcrops and can be identified by the presence of artefacts such as flaked stone. Quarry sites vary in size. They may be one or two flaked boulders or a single pit, but can also incorporate many large outcrops over large areas.

As stone was an important resource for Aboriginal people, quarries are often associated with other nearby Aboriginal sites and cultural material. In NSW a variety of stone types was quarried for particular purposes. Quarries also provide information about trade routes and other activities.

Human activities such as mining, road building, damming, clearing and construction can disturb or destroy Aboriginal quarries. Natural processes such as weathering and erosion can also cause the gradual breakdown of stone outcrops.

Aboriginal quarries can be protected by management actions such as by controlling stock and managing erosion.



Daruka axe quarry, Tamworth. Bruce Cohen/DECCW

Stone arrangements are found at places where Aboriginal people have positioned stones deliberately to form shapes or patterns, and can include large circular or linear arrangements, piles of stones, rock markers or more elaborate groupings that can depict animals or other designs. Aboriginal people also use stone arrangements for other purposes, such as for fish traps.

Stone arrangements have significant cultural heritage value because they are usually related to ceremonies, such as meetings or marriages. **Bora rings**, which are one or more raised earth rings, were used for male initiations. They are generally rare due to their vulnerability to disturbance. The stones are long lasting, but their arrangements can be damaged or destroyed. If stones are disturbed, the pattern and its significance may be lost. Ploughing, brush cutting, logging and large grazing animals can also cause disturbance.

Management options around Aboriginal stone arrangements can include stock, weed and erosion control.



Stone arrangement. M Sharp/DECCW

Burials include one of a variety of customs that Aboriginal people had for honouring the dead and laying them to rest; they were among the first people in the world to use cremation. However, Aboriginal burials may be found in a variety of landscapes throughout NSW, although most frequently they are found in middens, sand dunes, lunettes, bordering dunes and other sandy or soft sedimentary soils. Activities such as sand mining, stock grazing, ripping rabbit warrens, ploughing, trail bike riding and four-wheel car driving can devastate burial sites. Aboriginal ancestral remains are very sensitive and significant to Aboriginal people.

Landscape features and natural sacred sites are regarded as highly sacred sites to Aboriginal people. Such features include mountains, waterholes, caves, and rock formations. In addition, the flora and fauna that inhabit these landscapes also carry Aboriginal cultural significance. In some cases, an inspection of the immediate area will show no physical evidence of prior occupation or usage by Aboriginal people.

Further information about Aboriginal sites in NSW

Aboriginal scarred trees in New South Wales, a field manual (DEC and Andrew Long 2005), www.environment.nsw.gov.au/conservation/AboriginalScarredTrees.htm.

Lost but not forgotten: a guide to methods of identifying Aboriginal unmarked graves (NPWS 2003, www.environment.nsw.gov.au/nswcultureheritage/LostButNotForgotten.htm

Cultural landscapes and park management: a literature snapshot. A report for the cultural landscapes: connecting history, heritage and reserve management research project (Department of Environment and Climate Change 2008), www.environment.nsw.gov.au/resources/cultureheritage/07137cultlandresearch.pdf

Aboriginal culturally significant landscapes in the Hunter-Central Rivers Region, Hunter-Central Rivers CMA guide 2009, www.hcr.cma.nsw.gov.au/uploads/res/Publications/acsl.pdf

Site Identification, Victorian Mini Poster Series, Department of Planning and Community Development 2008, www.aboriginalaffairs.vic.gov.au/web7/aavmain.nsf/headingpagesdisplay/publications+forms+and+resourcesaav+mini-poster+series

Appendix 2: Contact details for DECCW EPRG Regional Offices

Metropolitan

Department of Environment, Climate Change and Water
Planning and Aboriginal Heritage Section
PO Box 668
Parramatta NSW 2124

Phone: (02) 9995 5000

Fax: (02) 9995 6900

North East

Department of Environment, Climate Change and Water
Planning and Aboriginal Heritage Section
Locked Bag 914
Coffs Harbour NSW 2450

Phone: (02) 6651 5946

Fax: (02) 6651 6187

North West

Department of Environment, Climate Change and Water
Environment and Conservation Programs
PO Box 2111
Dubbo NSW 2830

Phone: (02) 6883 5330

Fax: (02) 6884 9382

South

Department of Environment, Climate Change and Water
Landscape and Aboriginal Heritage Protection Section
PO Box 733
Queanbeyan NSW 2620

Phone: (02) 6229 7000

Fax: (02) 6229 7001

A map of DECCW EPRG branch boundaries is provided on the next page.

