



APPENDIX 1

RECORDS OF ABORIGINAL PARTICIPATION



Record of Aboriginal Representative Participation*

Name(s) of Aboriginal Representative: Trina Ridgeway Vienna Maslin & Lance Bungie*

Name of Aboriginal Organisation: Purfleet-Taree Local Aboriginal Land Council

Archaeologist(s): name & address Kelvin Officer
Navin Officer Heritage Consultants
102 Jervois St. Deakin ACT 2600 ph 02 62829415

Project Name: Moorland to Herons Creek Pacific Highway Upgrade
EIS Archaeological Survey

Client: name & address Ove Arup & Partners
(please send your invoice to this address) Attention: Helen Weston ph 03 9347 6888
PO Box 448, Kew VIC 3101

- Type of participation:
- Guided inspection of study area and sites
 - Accompanied/participated in archaeological survey
 - Separate inspection or survey
 - Accompanied/participated in excavation program

Period of participation:

Date(s)	Start	Finish
1 August 2002	8:00 am	5:00 pm
2 August 2002	8:20 am	4:30 pm
3 August 2002	8:00 am	3:45 pm
4 August 2002	9:00 am	12:30 pm

Issues raised:

* Lance Bungie not present on 4 August

Signed (archaeologist):

Kelvin Officer

Signed (Aboriginal representative(s)):

Vienna Maslin

* please note this form is not an invoice. For payment, please send an invoice from your organisation to the client name and address provided above.



Record of Aboriginal Representative Participation*

Name(s) of Aboriginal Representative: Trevor Roberts & Pat Donovan

Name of Aboriginal Organisation: Bunyah Local Aboriginal Land Council

Archaeologist(s): name & address Kelvin Officer
Navin Officer Heritage Consultants
102 Jervis St. Deakin ACT 2600 ph. 0262829415

Project Name: Moorland to Herons Creek Pacific Highway Upgrade
EIS Archaeological Survey

Client: name & address Ove Arup & Partners
(please send your invoice to this address) Attention: Helen Weston ph. 0393476888
PO Box 448, Kew, Vic 3101

- Type of participation:
- Guided inspection of study area and sites
 - Accompanied/participated in archaeological survey
 - Separate inspection or survey
 - Accompanied/participated in excavation program

Period of participation:

Date(s)	Start	Finish
3 August 2002	8:00 am	3:45 pm
4 August 2002	9:00 am	12:30 pm

Issues raised:

Signed (archaeologist): Kelvin Officer

Signed (Aboriginal representative(s)): Pat Donovan

* please note this form is not an invoice. For payment, please send an invoice from your organisation to the client name and address provided above.



APPENDIX 2

STATUTORY INFORMATION¹

¹ The following information is provided as a guide only and is accurate to the best knowledge of Navin Officer Heritage Consultants. Readers are advised that this information is subject to confirmation from qualified legal opinion.



A2.1 New South Wales Legislation

A2.1.1 Indigenous heritage

National Parks and Wildlife Act 1974

The following summary is based on:

- the provisions of the current National Parks and Wildlife Act 1974 (as amended). It should be noted that amendments to this Act were passed by both houses of the NSW State Government in 2001 (no.130, assented 19/12/2001). Some of these amendments are yet to be proclaimed.
- Department of Environment and Conservation policy as presented in the 1997 Standards and Guidelines Kit for Aboriginal Cultural Heritage provided by the NSW NPWS, and as communicated orally to the consultants on a periodic basis. The 1997 Standards and Guidelines Kit is currently under review and subject to change in the near future.

The guideline documents presented in the 1997 Standards and Guidelines Kit were stated to be working drafts and subject to an 18 months performance review. The Standards Manual was defined not to be a draft and subject to periodic supplements.

Overview

The National Parks and Wildlife Act 1974 (as amended) provides the primary basis for the legal protection and management of Aboriginal sites within NSW. The implementation of the Aboriginal heritage provisions of the Act is the responsibility of the Department of Environment and Conservation (DEC).

The rationale behind the Act is the prevention of unnecessary or unwarranted destruction of relics, and the active protection and conservation of relics that are of high cultural significance.

With the exception of some artefacts in collections, or those specifically made for sale, the Act generally defines all Aboriginal artefacts to be 'Aboriginal Objects' and to be the property of the Crown. An Aboriginal object has a broad definition and is inclusive of most archaeological evidence. The Act then provides various controls for the protection, management and disturbance of Aboriginal Objects.

An Aboriginal object is defined as:

'any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.' [Section 5(1)].

In practice, archaeologists use a methodology that groups 'Aboriginal Objects' into various site classifications according to the nature, occurrence and exposure of archaeological material evidence. The archaeological definition of a site may vary according to survey objectives, however a site is not recognised or defined as a legal entity in the Act. It should be noted that even single and isolated artefacts are protected as Aboriginal Objects under the Act.

Generally it is an offence to do any of the following without a Permit from the Director-General of the Department of Environment and Conservation under Section 87: disturb or excavate any land for the purpose of discovering an Aboriginal Object; disturbing or moving an Aboriginal Object; take possession of or removing an Aboriginal Object from certain lands; and erecting a building or structure to store Aboriginal Objects on certain land (Section 86). The maximum penalty is \$11,000 for individuals and \$22,000 for corporations. Section 175B outlines circumstances where corporation directors may be taken to have contravened these provisions, based on the acts or omissions of that Corporation.



Consents regarding the use or destruction of Aboriginal Objects are managed through a system of Permits and Consents under the provisions of Sections 87 and 90 of the Act. The processing and assessment of Permit and Consent applications is dependent upon adequate archaeological review and assessment, together with an appropriate level of Aboriginal community liaison and involvement (refer Standards for Archaeological Practice in Aboriginal Heritage Management in 1997 NPWS Standards and Guidelines Kit).

The Minister may declare any place which, in his or her opinion, is or was of special Aboriginal significance with respect to Aboriginal culture, to be an Aboriginal place (Section 84). The Director-General has responsibility for the preservation and protection of the Aboriginal place (Section 85). An area declared to be an Aboriginal place may remain in private ownership, or be acquired by the Crown by agreement or by a compulsory process (Section 145).

The Director General may make an interim protection order and order that an action cease where that action is, or is likely to, significantly affect an Aboriginal object of Aboriginal place. Such an order is current for 40 days (Section 91AA, Schedule 3[10]). Such an order does not apply to certain actions, such as where they are in accordance with development consents or emergency procedures.

General Management Constraints and Requirements

The Act, together with the policies of the Department of Environment and Conservation provide the following constraints and requirements on land owners and managers:

- It is an offence to knowingly disturb an Aboriginal Object (or site) without an appropriate permit or consent (Sections 87 and 90);
- Prior to instigating any action which may conceivably disturb an Aboriginal Object (this generally means land surface disturbance or felling of mature trees), archaeological survey and assessment is required (refer Standards for Archaeological Practice in Aboriginal Heritage Management in 1997 NPWS Standards and Guidelines Kit).
- When the archaeological resource of an area is known or can be reliably predicted, appropriate landuse practices should be adopted which will minimise the necessity for the destruction of sites/Aboriginal Objects, and prevent destruction to sites/Aboriginal Objects which warrant conservation (refer Standards for Archaeological Practice in Aboriginal Heritage Management in 1997 NPWS Standards and Guidelines Kit).
- Documented and appropriate consultation with relevant Aboriginal Community representatives is required by the Department of Environment and Conservation as part of the prerequisite information necessary for endorsement of consultant recommendations or the provision of Consents and Permits by the NPWS (refer Standards for Archaeological Practice in Aboriginal Heritage Management in 1997 NPWS Standards and Guidelines Kit).

The National Parks and Wildlife Amendment Bill 2001

Although this Act was passed by both houses of the NSW Parliament in 2001, a number of its provisions with regard to Aboriginal cultural heritage have yet to be gazetted and are not yet law. These include the following provisions:

- The requirement for a section 90 'Consent to Destroy' from the Director General will be replaced by a 'heritage impact permit' (Schedule 3[1], 3[3-8]).
- The offence under section 90 of the Principal Act of 'knowingly' destroying, defacing or damaging Aboriginal objects and Aboriginal Places without Consent will be changed so that the element of knowledge will be removed (Schedule 3 [2]). The amended section 90, subsection 1 will read:



'A person must not destroy, deface, damage or desecrate, or cause or permit the destruction, defacement, damage or desecration of, an Aboriginal object or Aboriginal place.'

- Section 90 subsection 1 will not apply when an Aboriginal object or Aboriginal place is dealt with in accordance with a heritage impact permit issued by the Director-General (Schedule 3[3], Section 90(1B) in amended Act).
- It will be a defence to a prosecution for an offence against subsection 1 if the defendant shows that:
 - (a) 'he or she took reasonable precautions and exercised due diligence to determine whether the action constituting the alleged offence would, or would be likely to, impact on the Aboriginal object of Aboriginal place concerned, and
 - (b) the person reasonably believed that the action would not destroy, deface, damage or desecrate the Aboriginal object or Aboriginal place.' (Schedule 3[3], Section 90(1C) in amended Act)
- A court will be able to direct a person to mitigate damage to or restore an Aboriginal object or an Aboriginal place in appropriate circumstances when finding the person guilty of an offence referred to in section 90 of the Principal Act (Schedule 3[9]).
- Schedule 4[8] of the Bill provides for the Director-General to withhold in the public interest specified documents in the possession of the NPWS which relate to the location of Aboriginal objects, or the cultural values of an Aboriginal place or Aboriginal object.

Statutory constraints arising from artefacts which constitute background scatter

Background scatter is a term used generally by archaeologists to refer to artefacts that cannot be usefully related to a place or focus of past activity. There is no single concept for background 'scatter' or discard, and therefore no agreed definition. The recognition of background material within a particular study area is dependent on an appreciation of local contextual and taphonomic factors. Artefacts within a 'background' scatter can be found in most landscape types and may vary considerably in density.

Standard archaeological methodologies cannot effectively predict the location of individual background scatter artefacts. Surface survey may detect background material either as individual artefacts ('isolated finds'), or even as small, low-density 'sites'. Subsurface testing may sample, and through analysis, characterise background material. However, beyond the scope of archaeological sampling, the potential to encounter background artefacts within the context of development related ground disturbance will always remain.

Most previous cultural resource management archaeological methodologies have acknowledged that there is little scientific justification for the conduct of archaeological salvage or ground disturbance monitoring to effect the recovery of background artefacts. The intrinsic scientific value of any recovered artefacts does not, in general, outweigh the expense of conducting the monitoring. However, low density distributions of artefacts are a current subject of interest by some heritage practitioners and DEC policy regarding this issue may change in the future. The monitoring of construction related ground works by Aboriginal groups is now increasingly practiced. The recovery of background scatter artefacts is often a probable outcome of such monitoring exercises.

Given the nature of statutory and DEC policy requirements in NSW, the detection of background artefacts during monitoring can be problematic. Unless the Aboriginal object is covered by a current Consent or Permit (or Heritage Impact Permit (HIP)), from DEC, all further impact to the find, and the ground in its immediate vicinity, must cease until one is gained. It may take up to eight weeks for this to occur. In the past, however, DEC has not as a general rule granted Consents to cover artefacts within background scatters. This is because DEC only provide Consents where the significance and



location of the Aboriginal Objects to be impacted can be reliably defined. By their very nature, this cannot be done for artefacts that constitute a background scatter.

The present policies of DEC do not provide an effective or proactive means of dealing with the statutory constraints posed by the detection of background scatter artefacts during development works. It should therefore be noted, that in the event that an Aboriginal artefact ('Aboriginal object') is detected during monitoring of ground disturbance within a development study area, and that area is not covered by a Consent to Destroy (or Heritage Impact Permit), there may be considerable delays to development works while an application for a Consent to Destroy is processed.

A2.1.2 Non-Indigenous Heritage

The NSW Heritage Act (1977)

Overview

The purpose of the NSW Heritage Act 1977 is to ensure that the heritage of New South Wales is adequately identified and conserved. In practice the NSW Heritage Act has focussed on items and places of non-indigenous heritage to avoid overlap with the NPWS Act, 1974 which has primary responsibilities for nature conservation and the protection of Aboriginal relics and places in NSW.

The *Heritage Amendment Act 1998* came into effect in April 1999. This Act instigated changes to the NSW heritage system, which were the result of a substantial review begun in 1992. A central feature of the amendments was the clarification and strengthening of shared responsibility for heritage management between local government authorities, responsible for items of local significance, and the NSW Heritage Council. The Council retained its consent powers for alterations to heritage items of state significance.

The Heritage Act is concerned with all aspects of conservation ranging from the most basic protection against damage and demolition, to restoration and enhancement. It recognises two levels of heritage significance, State significance and Local significance across a broad range of values. Some key provisions of the Act are:

- the establishment and functions of the Heritage Council (Part 2),
- interim heritage orders (Part 3), the State Heritage Register (Part 3A),
- Heritage Agreements (Part 3B),
- environmental planning instruments (Part 5),
- the protection of archaeological deposits and relics (Part 6), and
- the establishment of Heritage and Conservation Registers for state government owned and managed items (Part 7).

Generally this Act provides protection to items that have been identified, assessed and listed on various registers including State government section 170 registers, local government LEPs and the State Heritage Register. The Interim Heritage Order provisions allow the minister or his delegates (local government may have delegated authority) to provide emergency protection to threatened places which have not been previously identified. The only 'blanket' protection provisions in the Act relate to the protection of archaeological deposits and relics greater than 50 years old.

Protection of Archaeological Relics and Deposits

Section 139 of the Act specifically provides protection for any item classed as a relic. A relic is defined as "...any deposit object or material evidence -

- (a) which relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement; and



(b) which is 50 or more years old."

(Heritage Act 1977, Part 1, Section 4)

Section 139 of the Act disallows disturbance of a relic unless in accordance with an 'excavation permit' from the Heritage Council. Some forms of disturbance to relics may be exempt from requiring a section 139 permit (refer below).

Section 146 of the Act requires that the discovery of a previously unknown relic be reported to the Heritage Council within a reasonable time of its discovery.

Permits and Approval Requirements

The Act includes two key approval requirements;

- A permit must be obtained for works which have the potential to interfere with a heritage item or place which is either listed on the State Heritage Register or the subject of an interim heritage order (Section 57); and
- A permit must be obtained to disturb or excavate land where it is known (or there is reasonable cause to suspect) that such action will or is likely to uncover or affect a relic (Section 139).

Exemptions from Permit Requirements

Certain activities are exempted from the Section 57 and 139 permit approval requirements. Exemptions from Section 57 requirements may be granted by the Minister, and the NSW Heritage Council may provide exemptions from Section 139 requirements.

A schedule of section 57 exemptions has been formulated which includes activities such as certain types of maintenance and repair, minor excavations, changes of use, some temporary structures and 'anything which in the opinion of the Director is of a minor nature and will not adversely affect the heritage significance of the item'. In many cases notification of such proposed activities must be made by the applicant to the Director, and written notification from the Director received regarding his satisfaction that the exemption criteria have been met.

A series of exemptions have also been established for Section 139 Permit approval requirements. This includes demolition and maintenance of bridges not listed on the State Heritage Register, some forms of excavation and maintenance of underground services, conservation and repair of monuments and grave markers, and the exposing of survey marks in the course of survey operations.

On the 5th March of 2003, the following section 139 exemptions were notified:

Excavation or disturbance of the following land does not require an excavation permit under Section 139, provided that the Director is satisfied that the criteria in (a), (b) or (c) have been met and the person to undertake the excavation or disturbance has received a notice advising that the Director is satisfied:

- (a) where an archaeological assessment has been prepared in accordance with Guidelines published by the Heritage Council of NSW which indicates that there is little likelihood of there being any relics in the land or that any relics in the land are unlikely to have State or local heritage significance;
- (b) where the excavation or disturbance of land will have a minor impact on the archaeological resource;
- (c) where the excavation or disturbance of land involves only the removal of fill which has been deposited on the land.



A person proposing to excavate or disturb land according to the above criteria must write to the Director and describe the proposed excavation or disturbance and set out why it satisfies the criteria. The Director shall notify the applicant if he or she is satisfied that one or more of the criteria have been met.

The Heritage Council of NSW

The role of the Heritage Council is to provide the Minister with advice on a broad range of matters relating to the conservation of the heritage of NSW. It also has a role in promoting heritage conservation through research, seminars and publications. The membership of the Heritage Council is designed to reflect a broad range of interests and areas of expertise.

Interim Heritage Orders

Under the provisions of Part 3 of the Act, the Minister can make an interim heritage order (IHO). A recommendation with respect to an order can come from the Heritage Council, either based on a request for the Minister, or the Council's own considerations. The Minister can also authorise Local Councils to make IHOs within their area. An interim conservation order may remain in force for up to 12 months, until such time as it is revoked or the item is listed on the State Heritage Register. A heritage order may control activities such as demolition of structures, damage to relics, places or land, development and alteration of buildings, works or relics.

The State Heritage Register

Changes to the Heritage Act in the 1998 amendments established the State Heritage Register which includes all places previously protected by permanent conservation orders (PCOs) and items identified as being of state significance in heritage and conservation registers prepared by State Government instrumentalities. Sites or places which are found to have a state level of heritage significance should be formally identified to the Heritage Council and considered for inclusion on the State Heritage Register.

Heritage Agreements

Under Section 39 of the Act, the Minister can enter into an Agreement with the owner of a heritage item listed on the State Heritage Register to ensure its conservation. Such an Agreement can cover a range of responsibilities including financial or specialist assistance and can be attached to the title of the land.

Environmental Planning Instruments

Part 5 of the Act gives the Heritage Council the authority to request that an environmental planning instrument be prepared covering certain lands. It also directs that the Heritage Council shall be consulted by others when preparing a draft planning instrument affecting land to which an interim heritage order applies or which includes an item listed on the State Heritage Register. In addition it gives the Heritage Council the authority to produce guidelines for the preparation of such planning instruments.

Heritage and Conservation Registers

Section 170 of the Act requires all state government instrumentalities to establish and maintain a Heritage and Conservation Register that lists items of environmental heritage. The register is to include items which are, or could potentially be, the subject of a conservation instrument, and which are owned, occupied or otherwise under the control of that instrumentality.

The National Trust (NSW)

While the National Trust Register does not provide any statutory obligations for protection of a site as such, the acknowledgment of a place being listed on the Register as a significant site lends weight to its heritage value. Also, the fact that the actual data for sites may be minimal, does not diminish the



significance of a place. In fact, many sites were listed with only basic data added, especially in the early developmental stages of the Register.

The Trust, over the last few years have been upgrading the information for places listed, with criteria for assessment for listing based on the Australian Heritage Commission Criteria of assessment for entry to the Register of the National Estate.

Environment Planning & Assessment Act (1979)

The EP&A Act and its regulations, schedules and associated guidelines require that environmental impacts are considered in land use planning and decision making. Environmental impacts include cultural heritage assessment.

There are three main areas of protection under the Act:

- Planning instruments allow particular uses for land and specify constraints. Part III governs the preparation of planning instruments. Both Aboriginal and Historic (Non-Indigenous) cultural heritage values should be assessed when determining land use.
- Section 90 lists impacts that must be considered before development approval is granted. Part IV relates to the development assessment process for local government authorities. Impact to both Aboriginal and Historic (Non-Indigenous) cultural heritage values are included.
- State Government agencies which act as the determining authority on the environmental impacts of proposed activities must consider a variety of community and cultural factors in their decisions, including Aboriginal and Historic (Non-Indigenous) cultural heritage values. Part V relates to activities that do not require consent but still require an environmental evaluation, such as proposals by government authorities.

Under the *Environment Planning & Assessment Act (1979)* the Minister of Urban Affairs and Planning may make various planning instruments such as regional environmental plans (section 51) and local environment plans (section 70). The Minister may direct a public authority such as a Local Council, to exercise certain actions within a specified time, including the preparation of draft Local Environmental Plans and appropriate provisions to achieve the principles and aims of the Act (section 117).

These planning instruments may identify places and features of cultural heritage significance and define various statutory requirements regarding the potential development, modification and conservation of these items. In general, places of identified significance, or places requiring further assessment, are listed in various heritage schedules that may form part of a Local Environmental Plan (LEP) or a Regional Environmental Plan (REP). Listed heritage items are then protected from certain defined activities, normally including demolition, renovation, excavation, subdivision, and other forms or damage, unless consent has been gained from an identified consent authority. The consent authority under a LEP is normally the local Shire or City Council.

In addition to the development of these environmental planning instruments, the Director of the Department of Infrastructure, Planning and Natural Resources (DIPNR) or a Council may prepare a Development Control Plan (DCP), where it is considered that more detailed provisions or guidelines are required over any part of land covered by an REP, LEP or their Drafts (sections 51A and 72).

In determining a development application (DA), a consent authority, such as a local Council, must take into consideration any of the following that are relevant to the subject application (section 79C(1) Potential Matters for Consideration):

- the provisions of any environmental planning instrument, or draft environmental planning instrument (which has been placed on public exhibition); any development control plan; and the regulations;



- the likely impacts of that development on the natural and built environments, and the social and economic impacts on the locality;
- the suitability of the site for the development;
- any submissions made in accordance with the Act or the regulations; and
- the public interest.

Best Practice Guidelines have been issued by DIPNR on the use of section 79C(1) and include an assessment of how the proposed development will affect the heritage significance of the property, or adjacent properties, in terms of the historic, scientific, cultural, spiritual and archaeological of Aboriginal, non-Aboriginal and natural heritage.

If a development consent is required from council under the provisions of a LEP and a permit or license is also required from a State Government Agency an integrated development must be submitted to the consent authority. A development is an 'integrated development' if it requires an approval under section 90 of the *NSW National Parks & Wildlife Act, 1974* or if the Director General of NPWS is of the opinion that consultation with an Aboriginal group or organisation should be consulted prior to a determination being made. Any development approval issued for an integrated development of this kind must be consistent with the general terms of approval or requirements provided by the relevant State Government Agency.

The *Environmental Planning & Assessment Act, 1979*, as amended, provides for the listing of heritage items and conservation areas and for the protection of these items or areas through environmental planning instruments (like LEPs and REPs) at the local government and State planning levels. These statutory planning instruments usually contain provisions for the conservation of these items and areas as well as an assessment process to reduce the impacts of new development on the heritage significance of a place, building or conservation area.

NSW Aboriginal Land Rights Act 1983

This Act recognises that land in NSW was traditionally owned and lived on by the Aborigines and that land is particularly important to Aborigines for spiritual, social, cultural and economic reasons.

The Act was designed to give control over land, where possible, to local Aboriginal communities. The principal objectives of the Act are to:

- constitute Land Councils as Aboriginal land holding and managing bodies corporate;
- facilitate the acquisition of land by transfer (of existing Aboriginal reserves), and open market purchase;
- define a process for the processing of land claims against certain forms of Crown land;
- define which crown lands were open to claim,
- and provide for Land Council funding (7.5% of the previous years land tax, to end after 15 years ie.1998).

The Act defines claimable land as Crown Land which is not lawfully used or occupied and which is not needed nor likely to be needed for "an essential public purpose" (Section 36). The Lands Department includes the following as lands which need to be retained for future public purposes: lands needed or likely to be needed for conservation reserves, dams, forestry, flood mitigation, urban commercial and industrial development, public recreation, and public access.

Once granted, Section 42 exempts Aboriginal land from compulsory acquisition except by a special Act of Parliament.



The Act provides for a three tiered structure of Aboriginal Land Councils at the Local, Regional and State level. The aim of the Council system is to provide Local Council representation across the whole of NSW. Land Council membership is open to any Aboriginal person over 18 who lives within the defined boundaries of a Council area, or has since moved elsewhere. In the latter case membership is subject to a vote by Council members. Council executive positions are elected from and by the membership. Representatives from each of the Local Land Councils form the Regional Councils (or Branch Officers), and representatives from each of the Regional Councils form the State or NSW Aboriginal Land Council.

The Land Council system of representation was originally to be complemented by an Aboriginal Heritage and Culture Commission with responsibility for the protection and management of Aboriginal sites. This never eventuated however and these legal responsibilities remain with the NSW National Parks and Wildlife Service.

In the absence of any purposefully constituted system of representation for Aboriginal cultural heritage management, the Land Councils have, until recently, acted as the most accessible and representative bodies for providing community comment on cultural site management and development assessment investigations.

A criticism of the use of the Land Council system in consultation on cultural heritage issues has been the lack of formal representation for people with local tribal and cultural affiliations. Land Council office bearers are elected from contemporary resident Land Council members and need not have traditional ties to the Council area. Similarly, Land Council boundaries do not necessarily relate to tribal or traditional boundaries. For these reasons, and particularly following the recognition of native title rights, additional Aboriginal organisations have developed which specifically seek to represent traditional cultural interests and rights according to various tribal group criteria.

A2.2 Commonwealth Legislation

Environment and Heritage Legislation Amendment Act (No 1) 2003

Australian Heritage Council Act 2003

Australian Heritage Council (Consequential and Transitional Provisions) Act 2003

These three Acts replace the previous Commonwealth heritage regime instigated by the *Australian Heritage Commission Act 1975*. The Acts establish the following provisions:

The National Heritage List

The National Heritage List is a schedule of places which the Minister for the Environment and Heritage considers to have 'National Heritage Value' based on prescribed 'National Heritage Criteria'. The List may include places outside of Australia if agreed to by the Country concerned. There is a public nomination process and provision for public consultation on nominations. Expert advice regarding nominations is provided to the Minister by the Australian Heritage Council.

A nominated place considered to be at risk can be placed on an emergency list while its heritage value is assessed.

The listing of a place is defined as a 'matter of national environmental significance' under the Environment Protection & Biodiversity Conservation Act 1999. As a consequence, the Minister must grant approval prior to the conduct of any proposed actions which will, or are likely to have, a significant impact on the National Heritage values of a listed place.

The Minister is to ensure that there is approved management plans for most listed places owned or controlled by the Commonwealth or a Commonwealth agency, and that Commonwealths actions are in accord with such plans.

The Commonwealth or its agencies cannot sell or lease a listed place unless the protection of its National Heritage values is specified in a covenant, or such an action is found to be unnecessary, unreasonable or impractical. All Commonwealth agencies which own or control places which have or



may have National Heritage values, must take all reasonable steps to assist the Minister and Australian Heritage Council to identify and assess those values.

The Commonwealth Heritage List

The Commonwealth Heritage List is a schedule of places owned or controlled by the Commonwealth, which the Minister for the Environment and Heritage considers to have 'Commonwealth Heritage Value'. The list may include places outside of Australia. The processes of nomination and assessment are similar to those for the National Heritage List. Like the National Heritage List, there is a provision for emergency listing.

The Act places a range of obligations on the Commonwealth Agencies with regard to places included on the Commonwealth Heritage List. These include:

- Development of a heritage strategy applicable to all listed places controlled by the agency;
- Preparation of a management plan for each listed place;
- Conduct of a program to identify Commonwealth Heritage values on lands controlled by the agency and maintaining a register of such values;
- Ensuring that no action is taken which has, will have, or is likely to have an adverse impact on the National Heritage values of a National Heritage Place, or the Commonwealth Heritage values of a Commonwealth Heritage Place, unless there is no feasible or prudent alternative and all reasonable measures to mitigate impact have been taken;
- Including a covenant in any sale or lease contract for land which includes a Commonwealth Heritage place which stipulates the protection of the Commonwealth Heritage values of that place, unless such an action is found by the agency to be unnecessary, unreasonable or impractical.

The Australian Heritage Council

The Australian Heritage Council provides expert advice to the Minister on heritage issues and nominations for the listing of places on the National Heritage List and the Commonwealth Heritage List. The Council replaces the former Australian Heritage Commission.

The Register of the National Estate

The register of the National Estate was established under the now repealed *Australian Heritage Commission Act 1975*. The National Estate was defined under this Act as 'those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community'. Under the new Commonwealth Acts, the Register will be retained, but not added to, by the Australian Heritage Council as a publicly accessible database for public education and the promotion of heritage conservation. Nominations will be assessed by the Australian Heritage Council. The Minister must consider the information in the Register when making decisions under the *Environment Protection & Biodiversity Conservation Act 1999*. A transitional provision allows for the Minister to determine which of the places on the Register and within Commonwealth areas should be transferred to the Commonwealth Heritage List.

Environment Protection & Biodiversity Conservation Act 1999

This Act repeals the following pieces of Commonwealth legislation: the *Environment Protection (Impact of Proposals) Act 1974*, the *Endangered Species Protection Act 1992*, the *National Parks and Wildlife Conservation Act 1975*, the *World Heritage Properties Conservation Act 1983*, and the *Whale Protection Act 1980*. The scope and coverage of the Act is wide and far-reaching. The objectives of the Act include: the protection of the environment, especially those aspects of national



significance; to promote the conservation of biodiversity and ecologically sustainable development, and to recognise the role of indigenous people and their knowledge in realising these aims.

The Act makes it a criminal offence to undertake actions having a significant impact on any matter of national environmental significance (NES) without the approval of the Environment Minister. Actions which have, may have or are likely to have a relevant impact on a matter of NES may be taken only:

- in accordance with an assessment bilateral agreement (which may accredit a State approval process) or a declaration (which may accredit another Commonwealth approval process); and
- with the approval of the Environment Minister under Part 9 of the Act. An action that requires this Commonwealth approval is called a 'controlled action'

Matters of national environmental significance (NES) are defined as:

- a place listed on the National Heritage List
- World heritage values within declared World Heritage Properties (section 12(1));
- Ramsar wetlands of international importance (section 16(1));
- nationally threatened species and communities (section 18);
- migratory species protected under international agreements (section 20);
- nuclear actions;
- the Commonwealth marine environment (generally outside 3 nautical miles from the coast) (section 23(1&2)); and
- any additional matters specified by regulation (following consultation with the States) (section 25).

In addition, the Act makes it a criminal offence to take on Commonwealth land an action that has, will have, or is likely to have a significant impact on the environment (section 26(1)). A similar prohibition (without approval) operates in respect of actions taken outside of Commonwealth land, if it has, or is likely to have a significant impact on the environment on Commonwealth land (section 26(2)). Section 28, in general, requires that the Commonwealth (or its agencies) must gain approval (unless otherwise excluded from this provision), prior to conducting actions which has, will, or is likely to have a significant impact on the environment inside or outside the Australian jurisdiction.

The Act adopts a broad definition of the environment that is inclusive of cultural heritage values. In particular, the 'environment' is defined to include the social, economic and cultural aspects of ecosystems, natural and physical resources, and the qualities and characteristics of locations, places and areas (section 528).

The Act allows for several means by which a controlled action can be assessed, including an accredited assessment process, a public environment report, an environmental impact statement, and a public inquiry (Part 8).

Section 68 imposes an obligation on a proponent proposing to take an action that it considers to be a controlled action, to refer it to the Environment Minister for approval.

World heritage values are defined to be inclusive of natural and cultural heritage (section 12(3)), and a declared World Heritage Property is one included on the World Heritage List, or is declared to be such by the Minister (sections 13 and 14). The Act defines various procedures, objectives and Commonwealth obligations relating to the nomination and management of World Heritage Properties (Part 15, division 1).



Aboriginal and Torres Strait Islander Heritage Protection Act, 1984

The *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* provides for the protection of areas and objects that are of significance to Aboriginal people in accordance with Aboriginal tradition. The Act allows Aborigines to apply to the Minister to seek protection for significant Aboriginal areas and objects. The Minister has broad powers to make such a declaration should the Minister be satisfied that the area or object is a significant Aboriginal area or object and is under immediate threat of injury or desecration. A duly processed declaration by the Minister can have effect for any specified time period. An 'emergency declaration' can remain in force for up to thirty days.

It is an offence under the Act to contravene a provision of a declaration. Provisions are made for penalties of up to \$50,000.00 for a corporation found guilty of contravening the Act and up to \$10,000.00 and imprisonment for a maximum of five years for a person found guilty of contravening the Act.

Under the Act, 'Aboriginal tradition' means:

'the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships' (Section 3).

A 'significant Aboriginal area' refers to:

an area of land or water in Australia being of 'particular significance to Aboriginals in accordance with Aboriginal tradition' (Section 3).

A 'significant Aboriginal object' refers to:

an object (including Aboriginal remains) of 'particular significance to Aboriginals in accordance with Aboriginal tradition' (Section 3).

For the purposes of the Act, an area or object is taken to be injured or desecrated if:

- a) in the case of an area it is used or treated in a manner inconsistent with Aboriginal tradition; the use or significance of the area in accordance with Aboriginal tradition is adversely affected by reason of anything done in or near the area; or passage through or over, or entry upon the area by any person occurs in a manner inconsistent with Aboriginal tradition;
- b) in the case of an object it is used or treated in a manner inconsistent with Aboriginal tradition (Section 3).

Native Title Act, 1993

'Native title' is the name given by the High Court to Indigenous property rights recognised by the court in the *Mabo* judgment (3 June 1992). The *Mabo* judgment overthrew the legal fiction of *terra nullius* – that the land of Australia had belonged to no one when the British arrived in 1788.

The judgment found that a native title to land existed in 1788 and may continue to exist provided it has not been extinguished by subsequent acts of government and provided Indigenous groups continue to observe their traditional laws and customs.

The main purpose of the Act is to recognise and protect Native Title, which can be defined as the 'rights and interests in land and waters that Aboriginal and Torres Strait Islander people have under laws and customs and that are recognised by the common law' (Section 223). The traditions of Aboriginal and Torres Strait Islander peoples can change with time and sometimes people stop following a tradition. Therefore, the Act states that native title rights can change or even finish.



The Act contains a process for determining whether native title exists, what rights and interests native title holders have, and whether people who have title have 'exclusive possession' (Sections 13, 61 and 225).

The Act states that native title is only extinguished in a few cases where it is necessary to make past acts legal. The Act provides for the validation of various categories of past government acts and grants of rights to use or own land or waters (prior to 1/1/94), which might have been invalid because the land or waters was native title land or waters at the time (Sections 14 and 19). As a consequence, native title does not exist over grants of freehold land, private freehold, all exclusive possession leases (residential, commercial, agricultural and some pastoral leases, defined in Sections 246 to 249), roads, and the construction of a public work (defined in Section 253). Other forms of leasehold interest, licences and permits do not extinguish native title, or may only extinguish native title rights where these cannot co-exist with the granted rights and interests (as in the case of some leasehold rights). The determination of where and when native title rights have been extinguished by past acts is complex and remains subject to court interpretation.

The Act establishes the National Native Title Tribunal which has various responsibilities regarding the hearing and processing of native title claims. The Tribunal maintains a public Register of Native Title Claims and Claimants (Part 7) and a Register of Native Title Determinations (Part 8). The Register of Native Title Claims provides a useful means of identifying individuals and organisations that claim traditional cultural links and associations. It should not however be considered in any way to provide a definitive or comprehensive compilation of such potential claimants.

The Act empowers the states and territories to legislate their own native title regimes. This includes the setting up of alternative state/territory-based claims mediation bodies, replacing the Commonwealth's National Native Title Tribunal.

Some future acts of governments can affect native title. The 'non-extinguishment principle' will apply to most future acts (section 238). This means that those acts will not extinguish native title. If there is a conflict between the rights and interests under native title and those granted by a government, the act or grant will win. But once the interests are finished native title can again have full effect. The non-extinguishment principle will not apply when people choose to give up their native title (section 21) or a government compulsorily acquires native title land (section 23(3)b)) and pays compensation. In those cases native title is extinguished or lost forever.

In order to demonstrate native title rights to a piece of land, claimants must be able to prove that:

- they owned the land under Aboriginal or Torres Strait Islander customs and laws;
- they have not lost their traditional links with the land; and
- Governments have not used the land or given it to anyone else in a way which 'extinguishes' native title.

Following the 1998 amendments to the Native Title Act, every native title application is a proceeding in the Federal Court.

An administrative test is applied to all Native Title claims to determine if a claim can be considered to be registered. A registered claim entitles the claimants to certain procedural rights, including the right to negotiate, pending the making of a determination of native title. Despite this, if an application fails the registration test, the applicant may still pursue the application for determination of native title. The conditions of the registration test are set out in sections 190B and 190C of the amended Native Title Act 1993. An application must comply with each of the conditions specified.

Under the Act, registered native title holders and registered native title claimants have a right to negotiate before certain 'permissible future acts' happen (Subdivision B of Division 3 of Part 2). These acts may involve mining or other development activities, and compulsory acquisition of native title for the alienation of crown lands. The right to negotiate is not a 'veto' or right to reject.



Where the right to negotiate applies to a future act, a state or territory government cannot validly do the future act unless it has complied with the right to negotiate provisions of the Native Title Act. Unless the grant can be fast-tracked (Section 32), this means that:

- the government party must give the native title party an opportunity to make submissions to it about the future act; and
- the negotiation parties must negotiate in good faith with a view to reaching agreement on the doing of the act with or without conditions.

If these obligations are not met, an activity carried out by a government party may be invalid and the authority may be exposed to claims for damages and compensation. Where negotiation fails to provide agreement between the parties, the Act provides various means for an arbitrated decision to be made (Sections 27, 35 and 39). The Tribunal may be requested to assist the parties by mediation. If the parties are unable to reach agreement then any one of them may make a future act determination application to the Tribunal. This is an application for the Tribunal to make a determination whether the future act can be done and if so whether any conditions should be imposed. These determinations can be overridden in certain circumstances by State, Territory or Commonwealth Ministers (Section 42).

The Act allows 'non-claimants' with an interest in land to ask for a determination about native title. If no one opposes a non-claimant application, future acts over the lands or waters are valid (Sections 61, 67 and 24).

The Act also allows for and defines procedures for the acquisition of native title lands for public purposes.

Commonwealth Historic Shipwrecks Act (1976)

This Act applies to all historic shipwreck sites, associated artefacts, flotsam and jetsam in open water and below low water mark, within Australian territorial waters.

Section 4A (1) (b) of the Act states that a wreck must be at least 75 years old for it to qualify as an historic shipwreck. This commonwealth Act is the main form of protection of maritime relics and sites within NSW. A permit from the NSW Director of Planning is required before any disturbance to a NSW historic shipwreck can occur.



APPENDIX 3

ABORIGINAL SITE TYPES



Most Common Site Types

Open Artefact Scatters or 'Open Camp Sites': This type of site consists of a scatter of two or more discarded stone tools and debitage. They vary in size, density and diversity and represent a spectrum of past activities from interim day camps, to long stay base camps. Stone artefacts are normally found on ground surfaces that exhibit some form of exposure (or erosion) and allows the observation of the material within the upper soil profile. There may also be a significant subsurface component to a site, often identified initially as a potential archaeological deposit. Most surface recordings of artefact scatters tend to significantly under represent the actual content and size of a site. Open artefact scatters are likely to be the most common site type recorded in the region and are found in all landscape contexts.

Isolated Finds: An isolated find is a single stone artefact, not located within a rock shelter, and which occurs without any associated evidence of Aboriginal occupation within an (arbitrary) radius of 60 m. Isolated finds may be indicative of:

- random loss or deliberate discard of a single artefact
- the remnant of a now dispersed and disturbed artefact scatter
- an otherwise obscured or sub-surface artefact scatter

Except in the case of the latter, isolated finds are considered to be constituent components of the *background scatter* present within any particular landform.

Shell Middens: These sites normally contain a dominant proportion of shell material together with other types of occupation debris including flaked stone, the remains of campfires (charcoal), and the bones of terrestrial animals and scale fish. Midden deposits may include shellfish from fresh, estuarine or marine resources, or include varying combinations of each. The proportion of different environmental zones represented is often correlated with the distance to that resource. Middens are usually located on the elevated, well-drained margins of fluvial, lacustrine and littoral environments. These include coastal embayments and headlands (especially near freshwater sources), estuaries, wetlands, and major silt-dominated drainage channels.

Scarred Trees: This type of site comprises a scar or scars, situated on a tree, or its remains, which displays diagnostic characteristics of the removal of bark (and sometimes wood) in the past by Aborigines. Bark was removed from trees for a wide range of reasons. Due to the multiplicity of uses and the continuous process of occlusion (or healing) following removal, it is difficult to accurately determine the intended purpose for any particular example of bark removal. Many natural causes of scarring can present characteristics similar to scars made by people. Similarly scar created by nineteenth century white settlers can be hard to distinguish from Aboriginal examples. Scarred trees may occur anywhere old-growth trees survive.

Less Common or Regionally Rare Site Types

Quarries or stone procurement sites: These sites are normally found where there are outcrops or accumulations of stone or other materials such as ochre, suitable for processing into stone tools or other commodities. Procurement sites can include cobble and pebble beds associated with rivers, and streams, surface bedrock exposures, pebbles derived from conglomerate outcrops, and cliff areas along the coast. Typically procurement sites involve the extraction and processing of siliceous rock types for the manufacture of artefacts.

Stone Arrangements: These sites are defined as any arrangement of placed rocks that can be reasonably assigned to Aboriginal activity. Typically these include rock cairns and alignments of single or grouped stones. This site type is often located on high ridges and spurs but are difficult to predict and often limited in distribution.

Ceremonial Grounds: 'Bora' grounds or earth circles functioned as a prepared stage for initiation and other ceremonial activities which held a key role in the teaching and maintenance of the complex religious and social framework within Aboriginal society. Bora grounds consist mostly of one or more circular rings defined by mounded earth, sand and/or rocks. In some cases ceremonial grounds were located at significant or strategic locations within the landscape:



Burials: This site type is generally found in soft sediments such as aeolian sand or alluvial silts, but may also occur in middens, mound sites, rockshelters and hollow trees. In valley floor contexts, burials often occur in locally elevated topographies rather than poorly drained sedimentary basins. Burials are also known to have occurred on rocky hilltops. Burials are generally only visible where there has been disturbance of sub-surface sediments or where some erosional process has exposed them. This type of site can be accidentally uncovered during construction activity or due to erosion. Along the coast, burials usually took place in areas of sand where it was relatively easy to prepare the grave.

'Contact' Sites relate to sites that contain evidence of Aboriginal occupation during the period of early European occupation in a local area. The term 'contact' is a general description that refers to the typically poorly documented period when traditional Aboriginal society made initial contact with Europeans. Evidence of this period of 'contact' could potentially be Aboriginal flaked glass, art motifs depicting European people or objects, burials with historic grave goods or markers, and debris from 'fringe camps' where Aborigines who were employed by, or who traded with, the White community may have lived or camped.

Traditional story place or a 'natural mythological' place are categories used for any locality which manifests, or is associated with, a traditional Aboriginal story or ceremony. Most sites consist of natural landscape features which relate to stories about the dreaming or resident spirits and cosmological figures. These places are also sometimes known as 'natural mythological' sites. However, places that relate to historical events including ceremonies, battles and massacres may fall into this category and do not necessarily correspond to significant landscape features. Many of these sites will have no archaeological manifestation and their identification is dependent on oral or written evidence of Aboriginal lore.



Figure 2a The Moorland to Herons Creek study area (Lorne 1:25,000 topographic 3rd Ed LIC 2000 and Cooperook 1:100,000 topographic 2nd Ed CMA 1987).

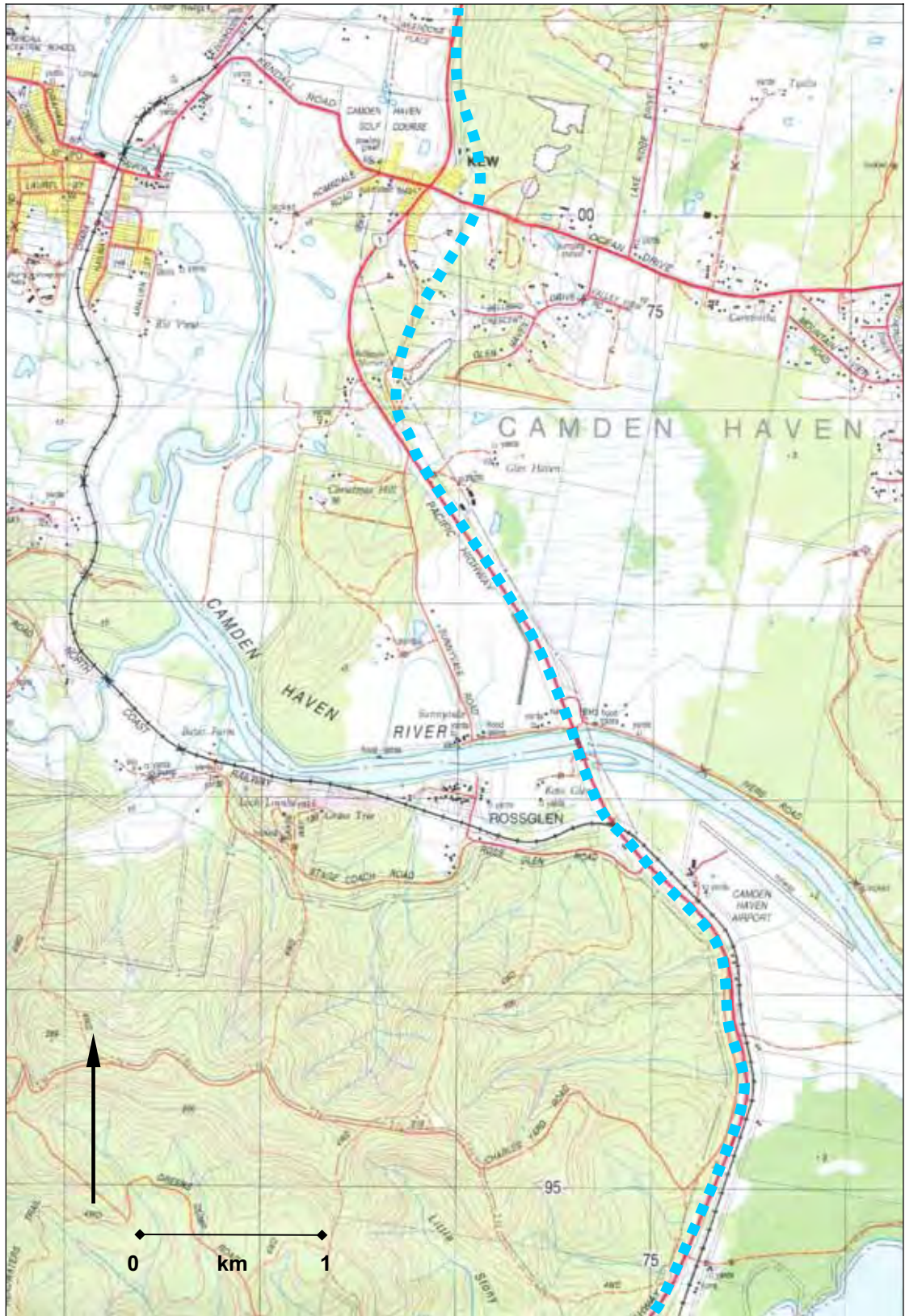


Figure 2b The Moorland to Herons Creek study area (Lorne 1:25,000 topographic 3rd Ed LIC 2000).

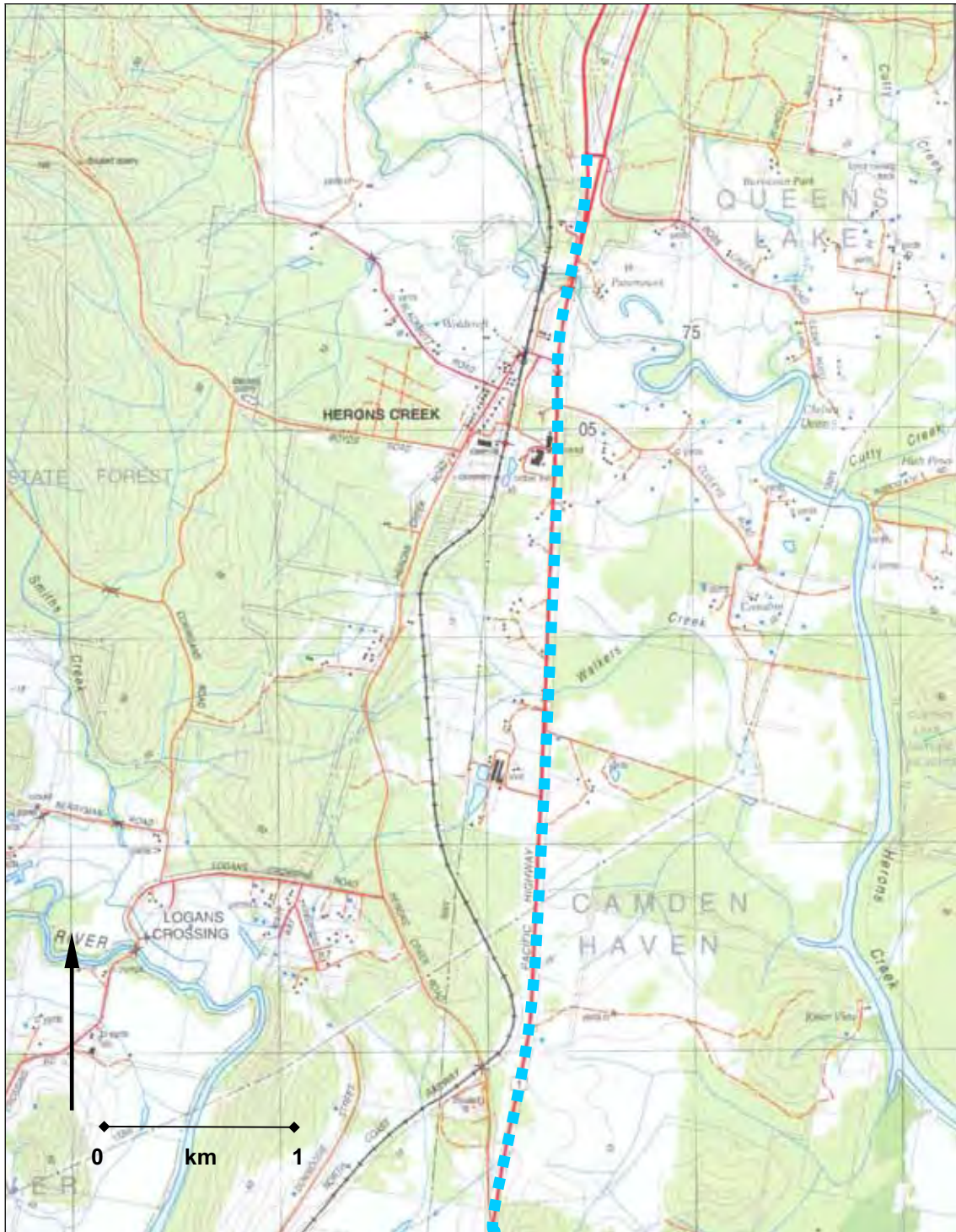


Figure 2c The Moorland to Herons Creek study area
(Byabarra 1:100,000 topographic map 3rd Ed LIC 2000).



Figure 10.2 Location of historic sites and features within, and close to, the Moorland to Herons Creek study area (Lorne 1:25,000 topographic 3rd Ed LIC 2000).

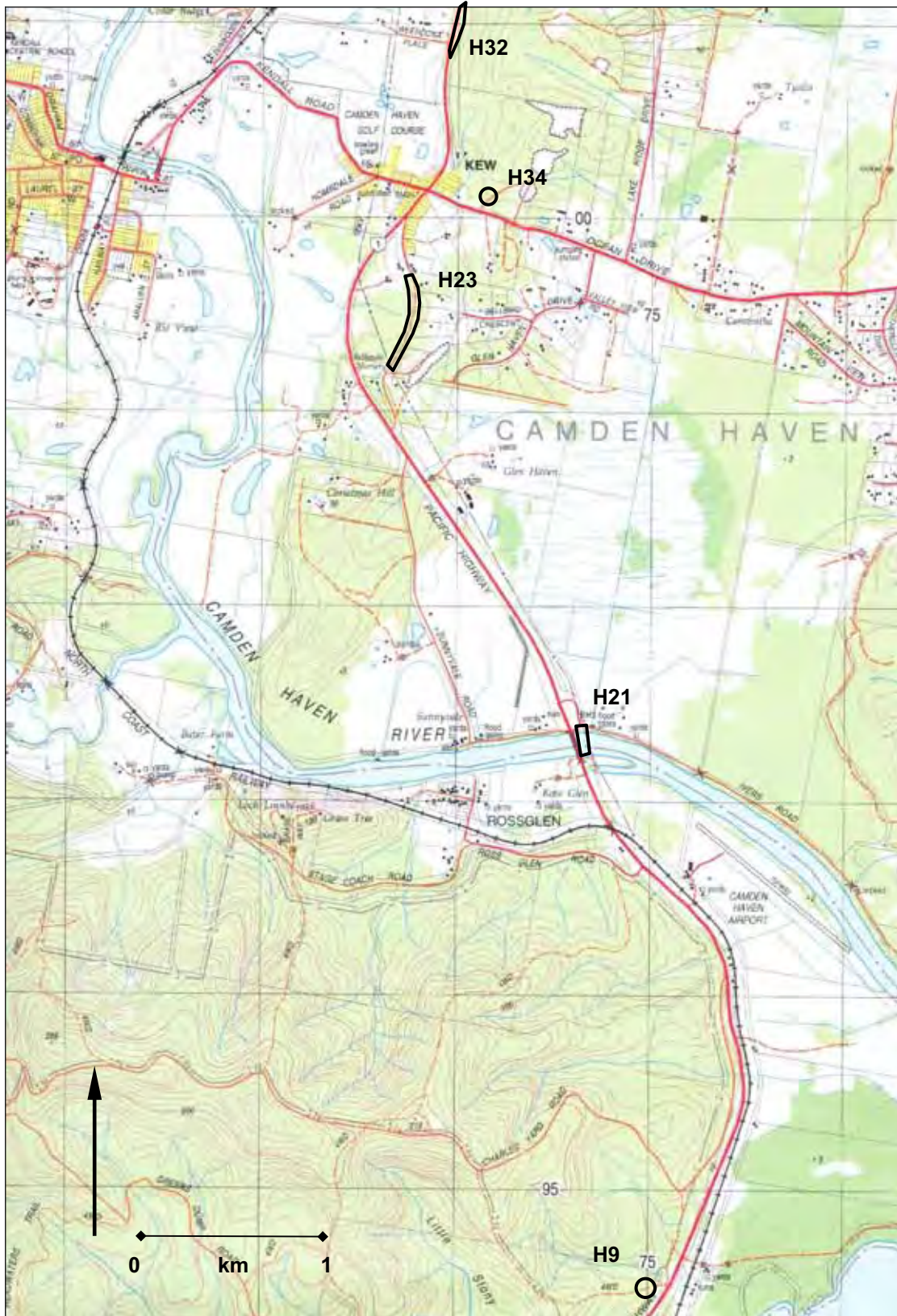


Figure 10.3 Location of historic sites and features within, and close to, the Moorland to Herons Creek study area (Lorne 1:25,000 topographic 3rd Ed LIC 2000)..



Figure 10.4 Location of historic sites and features within, and close to, the Moorland to Herons Creek study area (Bybarra 1:100,000 topographic map 3rd Ed LIC 2000).



APPENDIX 1

RECORDS OF ABORIGINAL PARTICIPATION



Record of Aboriginal Representative Participation*

Name(s) of Aboriginal Representative: Trina ^{Ridgeway} Vienna Maslin & Lance Bungie*

Name of Aboriginal Organisation: Purfleet-Taree Local Aboriginal Land Council

Archaeologist(s): name & address Kelvin Officer
Navin Officer Heritage Consultants
102 Jervois St. Deakin ACT 2600 ph 02 62829415

Project Name: Moorland to Herons Creek Pacific Highway Upgrade
EIS Archaeological Survey

Client: name & address Ore Arup & Partners
(please send your invoice to this address) Attention: Helen Weston ph 03 9347 6888
PO Box 448, Kew VIC 3101

- Type of participation:
- Guided inspection of study area and sites
 - Accompanied/participated in archaeological survey
 - Separate inspection or survey
 - Accompanied/participated in excavation program

Period of participation:

Date(s)	Start	Finish
1 August 2002	8:00 am	5:00 pm
2 August 2002	8:20 am	4:30 pm
3 August 2002	8:00 am	3:45 pm
4 August 2002	9:00 am	12:30 pm

Issues raised:

* Lance Bungie not present on 4 August

Signed (archaeologist):

Kelvin Officer

Signed (Aboriginal representative(s)):

Vienna Maslin

* please note this form is not an invoice. For payment, please send an invoice from your organisation to the client name and address provided above.



Record of Aboriginal Representative Participation*

Name(s) of Aboriginal Representative: Trevor Roberts & Pat Donovan

Name of Aboriginal Organisation: Bunyah Local Aboriginal Land Council

Archaeologist(s): name & address Kelvin Officer
Navin Officer Heritage Consultants
102 Jervis St. Deakin ACT 2600 ph. 0262829415

Project Name: Moorland to Herons Creek Pacific Highway Upgrade
EIS Archaeological Survey

Client: name & address Ove Arup & Partners
(please send your invoice to this address) Attention: Helen Weston ph. 0393476888
PO Box 448, Kew, Vic 3101

- Type of participation:
- Guided inspection of study area and sites
 - Accompanied/participated in archaeological survey
 - Separate inspection or survey
 - Accompanied/participated in excavation program

Period of participation:

Date(s)	Start	Finish
3 August 2002	8:00 am	3:45 pm
4 August 2002	9:00 am	12:30 pm

Issues raised:

Signed (archaeologist): Kelvin Officer

Signed (Aboriginal representative(s)): P. Donovan

* please note this form is not an invoice. For payment, please send an invoice from your organisation to the client name and address provided above.



APPENDIX 2

STATUTORY INFORMATION¹

¹ The following information is provided as a guide only and is accurate to the best knowledge of Navin Officer Heritage Consultants. Readers are advised that this information is subject to confirmation from qualified legal opinion.



A2.1 New South Wales Legislation

A2.1.1 Indigenous heritage

National Parks and Wildlife Act 1974

The following summary is based on:

- the provisions of the current National Parks and Wildlife Act 1974 (as amended). It should be noted that amendments to this Act were passed by both houses of the NSW State Government in 2001 (no.130, assented 19/12/2001). Some of these amendments are yet to be proclaimed.
- Department of Environment and Conservation policy as presented in the 1997 Standards and Guidelines Kit for Aboriginal Cultural Heritage provided by the NSW NPWS, and as communicated orally to the consultants on a periodic basis. The 1997 Standards and Guidelines Kit is currently under review and subject to change in the near future.

The guideline documents presented in the 1997 Standards and Guidelines Kit were stated to be working drafts and subject to an 18 months performance review. The Standards Manual was defined not to be a draft and subject to periodic supplements.

Overview

The National Parks and Wildlife Act 1974 (as amended) provides the primary basis for the legal protection and management of Aboriginal sites within NSW. The implementation of the Aboriginal heritage provisions of the Act is the responsibility of the Department of Environment and Conservation (DEC).

The rationale behind the Act is the prevention of unnecessary or unwarranted destruction of relics, and the active protection and conservation of relics that are of high cultural significance.

With the exception of some artefacts in collections, or those specifically made for sale, the Act generally defines all Aboriginal artefacts to be 'Aboriginal Objects' and to be the property of the Crown. An Aboriginal object has a broad definition and is inclusive of most archaeological evidence. The Act then provides various controls for the protection, management and disturbance of Aboriginal Objects.

An Aboriginal object is defined as:

'any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.' [Section 5(1)].

In practice, archaeologists use a methodology that groups 'Aboriginal Objects' into various site classifications according to the nature, occurrence and exposure of archaeological material evidence. The archaeological definition of a site may vary according to survey objectives, however a site is not recognised or defined as a legal entity in the Act. It should be noted that even single and isolated artefacts are protected as Aboriginal Objects under the Act.

Generally it is an offence to do any of the following without a Permit from the Director-General of the Department of Environment and Conservation under Section 87: disturb or excavate any land for the purpose of discovering an Aboriginal Object; disturbing or moving an Aboriginal Object; take possession of or removing an Aboriginal Object from certain lands; and erecting a building or structure to store Aboriginal Objects on certain land (Section 86). The maximum penalty is \$11,000 for individuals and \$22,000 for corporations. Section 175B outlines circumstances where corporation directors may be taken to have contravened these provisions, based on the acts or omissions of that Corporation.



Consents regarding the use or destruction of Aboriginal Objects are managed through a system of Permits and Consents under the provisions of Sections 87 and 90 of the Act. The processing and assessment of Permit and Consent applications is dependent upon adequate archaeological review and assessment, together with an appropriate level of Aboriginal community liaison and involvement (refer Standards for Archaeological Practice in Aboriginal Heritage Management in 1997 NPWS Standards and Guidelines Kit).

The Minister may declare any place which, in his or her opinion, is or was of special Aboriginal significance with respect to Aboriginal culture, to be an Aboriginal place (Section 84). The Director-General has responsibility for the preservation and protection of the Aboriginal place (Section 85). An area declared to be an Aboriginal place may remain in private ownership, or be acquired by the Crown by agreement or by a compulsory process (Section 145).

The Director General may make an interim protection order and order that an action cease where that action is, or is likely to, significantly affect an Aboriginal object of Aboriginal place. Such an order is current for 40 days (Section 91AA, Schedule 3[10]). Such an order does not apply to certain actions, such as where they are in accordance with development consents or emergency procedures.

General Management Constraints and Requirements

The Act, together with the policies of the Department of Environment and Conservation provide the following constraints and requirements on land owners and managers:

- It is an offence to knowingly disturb an Aboriginal Object (or site) without an appropriate permit or consent (Sections 87 and 90);
- Prior to instigating any action which may conceivably disturb an Aboriginal Object (this generally means land surface disturbance or felling of mature trees), archaeological survey and assessment is required (refer Standards for Archaeological Practice in Aboriginal Heritage Management in 1997 NPWS Standards and Guidelines Kit).
- When the archaeological resource of an area is known or can be reliably predicted, appropriate landuse practices should be adopted which will minimise the necessity for the destruction of sites/Aboriginal Objects, and prevent destruction to sites/Aboriginal Objects which warrant conservation (refer Standards for Archaeological Practice in Aboriginal Heritage Management in 1997 NPWS Standards and Guidelines Kit).
- Documented and appropriate consultation with relevant Aboriginal Community representatives is required by the Department of Environment and Conservation as part of the prerequisite information necessary for endorsement of consultant recommendations or the provision of Consents and Permits by the NPWS (refer Standards for Archaeological Practice in Aboriginal Heritage Management in 1997 NPWS Standards and Guidelines Kit).

The National Parks and Wildlife Amendment Bill 2001

Although this Act was passed by both houses of the NSW Parliament in 2001, a number of its provisions with regard to Aboriginal cultural heritage have yet to be gazetted and are not yet law. These include the following provisions:

- The requirement for a section 90 'Consent to Destroy' from the Director General will be replaced by a 'heritage impact permit' (Schedule 3[1], 3[3-8]).
- The offence under section 90 of the Principal Act of 'knowingly' destroying, defacing or damaging Aboriginal objects and Aboriginal Places without Consent will be changed so that the element of knowledge will be removed (Schedule 3 [2]). The amended section 90, subsection 1 will read:



'A person must not destroy, deface, damage or desecrate, or cause or permit the destruction, defacement, damage or desecration of, an Aboriginal object or Aboriginal place.'

- Section 90 subsection 1 will not apply when an Aboriginal object or Aboriginal place is dealt with in accordance with a heritage impact permit issued by the Director-General (Schedule 3[3], Section 90(1B) in amended Act).
- It will be a defence to a prosecution for an offence against subsection 1 if the defendant shows that:
 - (a) 'he or she took reasonable precautions and exercised due diligence to determine whether the action constituting the alleged offence would, or would be likely to, impact on the Aboriginal object of Aboriginal place concerned, and
 - (b) the person reasonably believed that the action would not destroy, deface, damage or desecrate the Aboriginal object or Aboriginal place.' (Schedule 3[3], Section 90(1C) in amended Act)
- A court will be able to direct a person to mitigate damage to or restore an Aboriginal object or an Aboriginal place in appropriate circumstances when finding the person guilty of an offence referred to in section 90 of the Principal Act (Schedule 3[9]).
- Schedule 4[8] of the Bill provides for the Director-General to withhold in the public interest specified documents in the possession of the NPWS which relate to the location of Aboriginal objects, or the cultural values of an Aboriginal place or Aboriginal object.

Statutory constraints arising from artefacts which constitute background scatter

Background scatter is a term used generally by archaeologists to refer to artefacts that cannot be usefully related to a place or focus of past activity. There is no single concept for background 'scatter' or discard, and therefore no agreed definition. The recognition of background material within a particular study area is dependent on an appreciation of local contextual and taphonomic factors. Artefacts within a 'background' scatter can be found in most landscape types and may vary considerably in density.

Standard archaeological methodologies cannot effectively predict the location of individual background scatter artefacts. Surface survey may detect background material either as individual artefacts ('isolated finds'), or even as small, low-density 'sites'. Subsurface testing may sample, and through analysis, characterise background material. However, beyond the scope of archaeological sampling, the potential to encounter background artefacts within the context of development related ground disturbance will always remain.

Most previous cultural resource management archaeological methodologies have acknowledged that there is little scientific justification for the conduct of archaeological salvage or ground disturbance monitoring to effect the recovery of background artefacts. The intrinsic scientific value of any recovered artefacts does not, in general, outweigh the expense of conducting the monitoring. However, low density distributions of artefacts are a current subject of interest by some heritage practitioners and DEC policy regarding this issue may change in the future. The monitoring of construction related ground works by Aboriginal groups is now increasingly practiced. The recovery of background scatter artefacts is often a probable outcome of such monitoring exercises.

Given the nature of statutory and DEC policy requirements in NSW, the detection of background artefacts during monitoring can be problematic. Unless the Aboriginal object is covered by a current Consent or Permit (or Heritage Impact Permit (HIP)), from DEC, all further impact to the find, and the ground in its immediate vicinity, must cease until one is gained. It may take up to eight weeks for this to occur. In the past, however, DEC has not as a general rule granted Consents to cover artefacts within background scatters. This is because DEC only provide Consents where the significance and



location of the Aboriginal Objects to be impacted can be reliably defined. By their very nature, this cannot be done for artefacts that constitute a background scatter.

The present policies of DEC do not provide an effective or proactive means of dealing with the statutory constraints posed by the detection of background scatter artefacts during development works. It should therefore be noted, that in the event that an Aboriginal artefact ('Aboriginal object') is detected during monitoring of ground disturbance within a development study area, and that area is not covered by a Consent to Destroy (or Heritage Impact Permit), there may be considerable delays to development works while an application for a Consent to Destroy is processed.

A2.1.2 Non-Indigenous Heritage

The NSW Heritage Act (1977)

Overview

The purpose of the NSW Heritage Act 1977 is to ensure that the heritage of New South Wales is adequately identified and conserved. In practice the NSW Heritage Act has focussed on items and places of non-indigenous heritage to avoid overlap with the NPWS Act, 1974 which has primary responsibilities for nature conservation and the protection of Aboriginal relics and places in NSW.

The *Heritage Amendment Act 1998* came into effect in April 1999. This Act instigated changes to the NSW heritage system, which were the result of a substantial review begun in 1992. A central feature of the amendments was the clarification and strengthening of shared responsibility for heritage management between local government authorities, responsible for items of local significance, and the NSW Heritage Council. The Council retained its consent powers for alterations to heritage items of state significance.

The Heritage Act is concerned with all aspects of conservation ranging from the most basic protection against damage and demolition, to restoration and enhancement. It recognises two levels of heritage significance, State significance and Local significance across a broad range of values. Some key provisions of the Act are:

- the establishment and functions of the Heritage Council (Part 2),
- interim heritage orders (Part 3), the State Heritage Register (Part 3A),
- Heritage Agreements (Part 3B),
- environmental planning instruments (Part 5),
- the protection of archaeological deposits and relics (Part 6), and
- the establishment of Heritage and Conservation Registers for state government owned and managed items (Part 7).

Generally this Act provides protection to items that have been identified, assessed and listed on various registers including State government section 170 registers, local government LEPs and the State Heritage Register. The Interim Heritage Order provisions allow the minister or his delegates (local government may have delegated authority) to provide emergency protection to threatened places which have not been previously identified. The only 'blanket' protection provisions in the Act relate to the protection of archaeological deposits and relics greater than 50 years old.

Protection of Archaeological Relics and Deposits

Section 139 of the Act specifically provides protection for any item classed as a relic. A relic is defined as "...any deposit object or material evidence -

- (a) which relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement; and



(b) which is 50 or more years old."

(Heritage Act 1977, Part 1, Section 4)

Section 139 of the Act disallows disturbance of a relic unless in accordance with an 'excavation permit' from the Heritage Council. Some forms of disturbance to relics may be exempt from requiring a section 139 permit (refer below).

Section 146 of the Act requires that the discovery of a previously unknown relic be reported to the Heritage Council within a reasonable time of its discovery.

Permits and Approval Requirements

The Act includes two key approval requirements;

- A permit must be obtained for works which have the potential to interfere with a heritage item or place which is either listed on the State Heritage Register or the subject of an interim heritage order (Section 57); and
- A permit must be obtained to disturb or excavate land where it is known (or there is reasonable cause to suspect) that such action will or is likely to uncover or affect a relic (Section 139).

Exemptions from Permit Requirements

Certain activities are exempted from the Section 57 and 139 permit approval requirements. Exemptions from Section 57 requirements may be granted by the Minister, and the NSW Heritage Council may provide exemptions from Section 139 requirements.

A schedule of section 57 exemptions has been formulated which includes activities such as certain types of maintenance and repair, minor excavations, changes of use, some temporary structures and 'anything which in the opinion of the Director is of a minor nature and will not adversely affect the heritage significance of the item'. In many cases notification of such proposed activities must be made by the applicant to the Director, and written notification from the Director received regarding his satisfaction that the exemption criteria have been met.

A series of exemptions have also been established for Section 139 Permit approval requirements. This includes demolition and maintenance of bridges not listed on the State Heritage Register, some forms of excavation and maintenance of underground services, conservation and repair of monuments and grave markers, and the exposing of survey marks in the course of survey operations.

On the 5th March of 2003, the following section 139 exemptions were notified:

Excavation or disturbance of the following land does not require an excavation permit under Section 139, provided that the Director is satisfied that the criteria in (a), (b) or (c) have been met and the person to undertake the excavation or disturbance has received a notice advising that the Director is satisfied:

- (a) where an archaeological assessment has been prepared in accordance with Guidelines published by the Heritage Council of NSW which indicates that there is little likelihood of there being any relics in the land or that any relics in the land are unlikely to have State or local heritage significance;
- (b) where the excavation or disturbance of land will have a minor impact on the archaeological resource;
- (c) where the excavation or disturbance of land involves only the removal of fill which has been deposited on the land.



A person proposing to excavate or disturb land according to the above criteria must write to the Director and describe the proposed excavation or disturbance and set out why it satisfies the criteria. The Director shall notify the applicant if he or she is satisfied that one or more of the criteria have been met.

The Heritage Council of NSW

The role of the Heritage Council is to provide the Minister with advice on a broad range of matters relating to the conservation of the heritage of NSW. It also has a role in promoting heritage conservation through research, seminars and publications. The membership of the Heritage Council is designed to reflect a broad range of interests and areas of expertise.

Interim Heritage Orders

Under the provisions of Part 3 of the Act, the Minister can make an interim heritage order (IHO). A recommendation with respect to an order can come from the Heritage Council, either based on a request for the Minister, or the Council's own considerations. The Minister can also authorise Local Councils to make IHOs within their area. An interim conservation order may remain in force for up to 12 months, until such time as it is revoked or the item is listed on the State Heritage Register. A heritage order may control activities such as demolition of structures, damage to relics, places or land, development and alteration of buildings, works or relics.

The State Heritage Register

Changes to the Heritage Act in the 1998 amendments established the State Heritage Register which includes all places previously protected by permanent conservation orders (PCOs) and items identified as being of state significance in heritage and conservation registers prepared by State Government instrumentalities. Sites or places which are found to have a state level of heritage significance should be formally identified to the Heritage Council and considered for inclusion on the State Heritage Register.

Heritage Agreements

Under Section 39 of the Act, the Minister can enter into an Agreement with the owner of a heritage item listed on the State Heritage Register to ensure its conservation. Such an Agreement can cover a range of responsibilities including financial or specialist assistance and can be attached to the title of the land.

Environmental Planning Instruments

Part 5 of the Act gives the Heritage Council the authority to request that an environmental planning instrument be prepared covering certain lands. It also directs that the Heritage Council shall be consulted by others when preparing a draft planning instrument affecting land to which an interim heritage order applies or which includes an item listed on the State Heritage Register. In addition it gives the Heritage Council the authority to produce guidelines for the preparation of such planning instruments.

Heritage and Conservation Registers

Section 170 of the Act requires all state government instrumentalities to establish and maintain a Heritage and Conservation Register that lists items of environmental heritage. The register is to include items which are, or could potentially be, the subject of a conservation instrument, and which are owned, occupied or otherwise under the control of that instrumentality.

The National Trust (NSW)

While the National Trust Register does not provide any statutory obligations for protection of a site as such, the acknowledgment of a place being listed on the Register as a significant site lends weight to its heritage value. Also, the fact that the actual data for sites may be minimal, does not diminish the



significance of a place. In fact, many sites were listed with only basic data added, especially in the early developmental stages of the Register.

The Trust, over the last few years have been upgrading the information for places listed, with criteria for assessment for listing based on the Australian Heritage Commission Criteria of assessment for entry to the Register of the National Estate.

Environment Planning & Assessment Act (1979)

The EP&A Act and its regulations, schedules and associated guidelines require that environmental impacts are considered in land use planning and decision making. Environmental impacts include cultural heritage assessment.

There are three main areas of protection under the Act:

- Planning instruments allow particular uses for land and specify constraints. Part III governs the preparation of planning instruments. Both Aboriginal and Historic (Non-Indigenous) cultural heritage values should be assessed when determining land use.
- Section 90 lists impacts that must be considered before development approval is granted. Part IV relates to the development assessment process for local government authorities. Impact to both Aboriginal and Historic (Non-Indigenous) cultural heritage values are included.
- State Government agencies which act as the determining authority on the environmental impacts of proposed activities must consider a variety of community and cultural factors in their decisions, including Aboriginal and Historic (Non-Indigenous) cultural heritage values. Part V relates to activities that do not require consent but still require an environmental evaluation, such as proposals by government authorities.

Under the *Environment Planning & Assessment Act (1979)* the Minister of Urban Affairs and Planning may make various planning instruments such as regional environmental plans (section 51) and local environment plans (section 70). The Minister may direct a public authority such as a Local Council, to exercise certain actions within a specified time, including the preparation of draft Local Environmental Plans and appropriate provisions to achieve the principles and aims of the Act (section 117).

These planning instruments may identify places and features of cultural heritage significance and define various statutory requirements regarding the potential development, modification and conservation of these items. In general, places of identified significance, or places requiring further assessment, are listed in various heritage schedules that may form part of a Local Environmental Plan (LEP) or a Regional Environmental Plan (REP). Listed heritage items are then protected from certain defined activities, normally including demolition, renovation, excavation, subdivision, and other forms or damage, unless consent has been gained from an identified consent authority. The consent authority under a LEP is normally the local Shire or City Council.

In addition to the development of these environmental planning instruments, the Director of the Department of Infrastructure, Planning and Natural Resources (DIPNR) or a Council may prepare a Development Control Plan (DCP), where it is considered that more detailed provisions or guidelines are required over any part of land covered by an REP, LEP or their Drafts (sections 51A and 72).

In determining a development application (DA), a consent authority, such as a local Council, must take into consideration any of the following that are relevant to the subject application (section 79C(1) Potential Matters for Consideration):

- the provisions of any environmental planning instrument, or draft environmental planning instrument (which has been placed on public exhibition); any development control plan; and the regulations;



- the likely impacts of that development on the natural and built environments, and the social and economic impacts on the locality;
- the suitability of the site for the development;
- any submissions made in accordance with the Act or the regulations; and
- the public interest.

Best Practice Guidelines have been issued by DIPNR on the use of section 79C(1) and include an assessment of how the proposed development will affect the heritage significance of the property, or adjacent properties, in terms of the historic, scientific, cultural, spiritual and archaeological of Aboriginal, non-Aboriginal and natural heritage.

If a development consent is required from council under the provisions of a LEP and a permit or license is also required from a State Government Agency an integrated development must be submitted to the consent authority. A development is an 'integrated development' if it requires an approval under section 90 of the *NSW National Parks & Wildlife Act, 1974* or if the Director General of NPWS is of the opinion that consultation with an Aboriginal group or organisation should be consulted prior to a determination being made. Any development approval issued for an integrated development of this kind must be consistent with the general terms of approval or requirements provided by the relevant State Government Agency.

The *Environmental Planning & Assessment Act, 1979*, as amended, provides for the listing of heritage items and conservation areas and for the protection of these items or areas through environmental planning instruments (like LEPs and REPs) at the local government and State planning levels. These statutory planning instruments usually contain provisions for the conservation of these items and areas as well as an assessment process to reduce the impacts of new development on the heritage significance of a place, building or conservation area.

NSW Aboriginal Land Rights Act 1983

This Act recognises that land in NSW was traditionally owned and lived on by the Aborigines and that land is particularly important to Aborigines for spiritual, social, cultural and economic reasons.

The Act was designed to give control over land, where possible, to local Aboriginal communities. The principal objectives of the Act are to:

- constitute Land Councils as Aboriginal land holding and managing bodies corporate;
- facilitate the acquisition of land by transfer (of existing Aboriginal reserves), and open market purchase;
- define a process for the processing of land claims against certain forms of Crown land;
- define which crown lands were open to claim,
- and provide for Land Council funding (7.5% of the previous years land tax, to end after 15 years ie.1998).

The Act defines claimable land as Crown Land which is not lawfully used or occupied and which is not needed nor likely to be needed for "an essential public purpose" (Section 36). The Lands Department includes the following as lands which need to be retained for future public purposes: lands needed or likely to be needed for conservation reserves, dams, forestry, flood mitigation, urban commercial and industrial development, public recreation, and public access.

Once granted, Section 42 exempts Aboriginal land from compulsory acquisition except by a special Act of Parliament.



The Act provides for a three tiered structure of Aboriginal Land Councils at the Local, Regional and State level. The aim of the Council system is to provide Local Council representation across the whole of NSW. Land Council membership is open to any Aboriginal person over 18 who lives within the defined boundaries of a Council area, or has since moved elsewhere. In the latter case membership is subject to a vote by Council members. Council executive positions are elected from and by the membership. Representatives from each of the Local Land Councils form the Regional Councils (or Branch Officers), and representatives from each of the Regional Councils form the State or NSW Aboriginal Land Council.

The Land Council system of representation was originally to be complemented by an Aboriginal Heritage and Culture Commission with responsibility for the protection and management of Aboriginal sites. This never eventuated however and these legal responsibilities remain with the NSW National Parks and Wildlife Service.

In the absence of any purposefully constituted system of representation for Aboriginal cultural heritage management, the Land Councils have, until recently, acted as the most accessible and representative bodies for providing community comment on cultural site management and development assessment investigations.

A criticism of the use of the Land Council system in consultation on cultural heritage issues has been the lack of formal representation for people with local tribal and cultural affiliations. Land Council office bearers are elected from contemporary resident Land Council members and need not have traditional ties to the Council area. Similarly, Land Council boundaries do not necessarily relate to tribal or traditional boundaries. For these reasons, and particularly following the recognition of native title rights, additional Aboriginal organisations have developed which specifically seek to represent traditional cultural interests and rights according to various tribal group criteria.

A2.2 Commonwealth Legislation

Environment and Heritage Legislation Amendment Act (No 1) 2003

Australian Heritage Council Act 2003

Australian Heritage Council (Consequential and Transitional Provisions) Act 2003

These three Acts replace the previous Commonwealth heritage regime instigated by the *Australian Heritage Commission Act 1975*. The Acts establish the following provisions:

The National Heritage List

The National Heritage List is a schedule of places which the Minister for the Environment and Heritage considers to have 'National Heritage Value' based on prescribed 'National Heritage Criteria'. The List may include places outside of Australia if agreed to by the Country concerned. There is a public nomination process and provision for public consultation on nominations. Expert advice regarding nominations is provided to the Minister by the Australian Heritage Council.

A nominated place considered to be at risk can be placed on an emergency list while its heritage value is assessed.

The listing of a place is defined as a 'matter of national environmental significance' under the Environment Protection & Biodiversity Conservation Act 1999. As a consequence, the Minister must grant approval prior to the conduct of any proposed actions which will, or are likely to have, a significant impact on the National Heritage values of a listed place.

The Minister is to ensure that there is approved management plans for most listed places owned or controlled by the Commonwealth or a Commonwealth agency, and that Commonwealths actions are in accord with such plans.

The Commonwealth or its agencies cannot sell or lease a listed place unless the protection of its National Heritage values is specified in a covenant, or such an action is found to be unnecessary, unreasonable or impractical. All Commonwealth agencies which own or control places which have or



may have National Heritage values, must take all reasonable steps to assist the Minister and Australian Heritage Council to identify and assess those values.

The Commonwealth Heritage List

The Commonwealth Heritage List is a schedule of places owned or controlled by the Commonwealth, which the Minister for the Environment and Heritage considers to have 'Commonwealth Heritage Value'. The list may include places outside of Australia. The processes of nomination and assessment are similar to those for the National Heritage List. Like the National Heritage List, there is a provision for emergency listing.

The Act places a range of obligations on the Commonwealth Agencies with regard to places included on the Commonwealth Heritage List. These include:

- Development of a heritage strategy applicable to all listed places controlled by the agency;
- Preparation of a management plan for each listed place;
- Conduct of a program to identify Commonwealth Heritage values on lands controlled by the agency and maintaining a register of such values;
- Ensuring that no action is taken which has, will have, or is likely to have an adverse impact on the National Heritage values of a National Heritage Place, or the Commonwealth Heritage values of a Commonwealth Heritage Place, unless there is no feasible or prudent alternative and all reasonable measures to mitigate impact have been taken;
- Including a covenant in any sale or lease contract for land which includes a Commonwealth Heritage place which stipulates the protection of the Commonwealth Heritage values of that place, unless such an action is found by the agency to be unnecessary, unreasonable or impractical.

The Australian Heritage Council

The Australian Heritage Council provides expert advice to the Minister on heritage issues and nominations for the listing of places on the National Heritage List and the Commonwealth Heritage List. The Council replaces the former Australian Heritage Commission.

The Register of the National Estate

The register of the National Estate was established under the now repealed *Australian Heritage Commission Act 1975*. The National Estate was defined under this Act as 'those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community'. Under the new Commonwealth Acts, the Register will be retained, but not added to, by the Australian Heritage Council as a publicly accessible database for public education and the promotion of heritage conservation. Nominations will be assessed by the Australian Heritage Council. The Minister must consider the information in the Register when making decisions under the *Environment Protection & Biodiversity Conservation Act 1999*. A transitional provision allows for the Minister to determine which of the places on the Register and within Commonwealth areas should be transferred to the Commonwealth Heritage List.

Environment Protection & Biodiversity Conservation Act 1999

This Act repeals the following pieces of Commonwealth legislation: the *Environment Protection (Impact of Proposals) Act 1974*, the *Endangered Species Protection Act 1992*, the *National Parks and Wildlife Conservation Act 1975*, the *World Heritage Properties Conservation Act 1983*, and the *Whale Protection Act 1980*. The scope and coverage of the Act is wide and far-reaching. The objectives of the Act include: the protection of the environment, especially those aspects of national



significance; to promote the conservation of biodiversity and ecologically sustainable development, and to recognise the role of indigenous people and their knowledge in realising these aims.

The Act makes it a criminal offence to undertake actions having a significant impact on any matter of national environmental significance (NES) without the approval of the Environment Minister. Actions which have, may have or are likely to have a relevant impact on a matter of NES may be taken only:

- in accordance with an assessment bilateral agreement (which may accredit a State approval process) or a declaration (which may accredit another Commonwealth approval process); and
- with the approval of the Environment Minister under Part 9 of the Act. An action that requires this Commonwealth approval is called a 'controlled action'

Matters of national environmental significance (NES) are defined as:

- a place listed on the National Heritage List
- World heritage values within declared World Heritage Properties (section 12(1));
- Ramsar wetlands of international importance (section 16(1));
- nationally threatened species and communities (section 18);
- migratory species protected under international agreements (section 20);
- nuclear actions;
- the Commonwealth marine environment (generally outside 3 nautical miles from the coast) (section 23(1&2)); and
- any additional matters specified by regulation (following consultation with the States) (section 25).

In addition, the Act makes it a criminal offence to take on Commonwealth land an action that has, will have, or is likely to have a significant impact on the environment (section 26(1)). A similar prohibition (without approval) operates in respect of actions taken outside of Commonwealth land, if it has, or is likely to have a significant impact on the environment on Commonwealth land (section 26(2)). Section 28, in general, requires that the Commonwealth (or its agencies) must gain approval (unless otherwise excluded from this provision), prior to conducting actions which has, will, or is likely to have a significant impact on the environment inside or outside the Australian jurisdiction.

The Act adopts a broad definition of the environment that is inclusive of cultural heritage values. In particular, the 'environment' is defined to include the social, economic and cultural aspects of ecosystems, natural and physical resources, and the qualities and characteristics of locations, places and areas (section 528).

The Act allows for several means by which a controlled action can be assessed, including an accredited assessment process, a public environment report, an environmental impact statement, and a public inquiry (Part 8).

Section 68 imposes an obligation on a proponent proposing to take an action that it considers to be a controlled action, to refer it to the Environment Minister for approval.

World heritage values are defined to be inclusive of natural and cultural heritage (section 12(3)), and a declared World Heritage Property is one included on the World Heritage List, or is declared to be such by the Minister (sections 13 and 14). The Act defines various procedures, objectives and Commonwealth obligations relating to the nomination and management of World Heritage Properties (Part 15, division 1).



Aboriginal and Torres Strait Islander Heritage Protection Act, 1984

The *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* provides for the protection of areas and objects that are of significance to Aboriginal people in accordance with Aboriginal tradition. The Act allows Aborigines to apply to the Minister to seek protection for significant Aboriginal areas and objects. The Minister has broad powers to make such a declaration should the Minister be satisfied that the area or object is a significant Aboriginal area or object and is under immediate threat of injury or desecration. A duly processed declaration by the Minister can have effect for any specified time period. An 'emergency declaration' can remain in force for up to thirty days.

It is an offence under the Act to contravene a provision of a declaration. Provisions are made for penalties of up to \$50,000.00 for a corporation found guilty of contravening the Act and up to \$10,000.00 and imprisonment for a maximum of five years for a person found guilty of contravening the Act.

Under the Act, 'Aboriginal tradition' means:

'the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships' (Section 3).

A 'significant Aboriginal area' refers to:

an area of land or water in Australia being of 'particular significance to Aboriginals in accordance with Aboriginal tradition' (Section 3).

A 'significant Aboriginal object' refers to:

an object (including Aboriginal remains) of 'particular significance to Aboriginals in accordance with Aboriginal tradition' (Section 3).

For the purposes of the Act, an area or object is taken to be injured or desecrated if:

- a) in the case of an area it is used or treated in a manner inconsistent with Aboriginal tradition; the use or significance of the area in accordance with Aboriginal tradition is adversely affected by reason of anything done in or near the area; or passage through or over, or entry upon the area by any person occurs in a manner inconsistent with Aboriginal tradition;
- b) in the case of an object it is used or treated in a manner inconsistent with Aboriginal tradition (Section 3).

Native Title Act, 1993

'Native title' is the name given by the High Court to Indigenous property rights recognised by the court in the *Mabo* judgment (3 June 1992). The *Mabo* judgment overthrew the legal fiction of *terra nullius* – that the land of Australia had belonged to no one when the British arrived in 1788.

The judgment found that a native title to land existed in 1788 and may continue to exist provided it has not been extinguished by subsequent acts of government and provided Indigenous groups continue to observe their traditional laws and customs.

The main purpose of the Act is to recognise and protect Native Title, which can be defined as the 'rights and interests in land and waters that Aboriginal and Torres Strait Islander people have under laws and customs and that are recognised by the common law' (Section 223). The traditions of Aboriginal and Torres Strait Islander peoples can change with time and sometimes people stop following a tradition. Therefore, the Act states that native title rights can change or even finish.



The Act contains a process for determining whether native title exists, what rights and interests native title holders have, and whether people who have title have 'exclusive possession' (Sections 13, 61 and 225).

The Act states that native title is only extinguished in a few cases where it is necessary to make past acts legal. The Act provides for the validation of various categories of past government acts and grants of rights to use or own land or waters (prior to 1/1/94), which might have been invalid because the land or waters was native title land or waters at the time (Sections 14 and 19). As a consequence, native title does not exist over grants of freehold land, private freehold, all exclusive possession leases (residential, commercial, agricultural and some pastoral leases, defined in Sections 246 to 249), roads, and the construction of a public work (defined in Section 253). Other forms of leasehold interest, licences and permits do not extinguish native title, or may only extinguish native title rights where these cannot co-exist with the granted rights and interests (as in the case of some leasehold rights). The determination of where and when native title rights have been extinguished by past acts is complex and remains subject to court interpretation.

The Act establishes the National Native Title Tribunal which has various responsibilities regarding the hearing and processing of native title claims. The Tribunal maintains a public Register of Native Title Claims and Claimants (Part 7) and a Register of Native Title Determinations (Part 8). The Register of Native Title Claims provides a useful means of identifying individuals and organisations that claim traditional cultural links and associations. It should not however be considered in any way to provide a definitive or comprehensive compilation of such potential claimants.

The Act empowers the states and territories to legislate their own native title regimes. This includes the setting up of alternative state/territory-based claims mediation bodies, replacing the Commonwealth's National Native Title Tribunal.

Some future acts of governments can affect native title. The 'non-extinguishment principle' will apply to most future acts (section 238). This means that those acts will not extinguish native title. If there is a conflict between the rights and interests under native title and those granted by a government, the act or grant will win. But once the interests are finished native title can again have full effect. The non-extinguishment principle will not apply when people choose to give up their native title (section 21) or a government compulsorily acquires native title land (section 23(3)b)) and pays compensation. In those cases native title is extinguished or lost forever.

In order to demonstrate native title rights to a piece of land, claimants must be able to prove that:

- they owned the land under Aboriginal or Torres Strait Islander customs and laws;
- they have not lost their traditional links with the land; and
- Governments have not used the land or given it to anyone else in a way which 'extinguishes' native title.

Following the 1998 amendments to the Native Title Act, every native title application is a proceeding in the Federal Court.

An administrative test is applied to all Native Title claims to determine if a claim can be considered to be registered. A registered claim entitles the claimants to certain procedural rights, including the right to negotiate, pending the making of a determination of native title. Despite this, if an application fails the registration test, the applicant may still pursue the application for determination of native title. The conditions of the registration test are set out in sections 190B and 190C of the amended Native Title Act 1993. An application must comply with each of the conditions specified.

Under the Act, registered native title holders and registered native title claimants have a right to negotiate before certain 'permissible future acts' happen (Subdivision B of Division 3 of Part 2). These acts may involve mining or other development activities, and compulsory acquisition of native title for the alienation of crown lands. The right to negotiate is not a 'veto' or right to reject.



Where the right to negotiate applies to a future act, a state or territory government cannot validly do the future act unless it has complied with the right to negotiate provisions of the Native Title Act. Unless the grant can be fast-tracked (Section 32), this means that:

- the government party must give the native title party an opportunity to make submissions to it about the future act; and
- the negotiation parties must negotiate in good faith with a view to reaching agreement on the doing of the act with or without conditions.

If these obligations are not met, an activity carried out by a government party may be invalid and the authority may be exposed to claims for damages and compensation. Where negotiation fails to provide agreement between the parties, the Act provides various means for an arbitrated decision to be made (Sections 27, 35 and 39). The Tribunal may be requested to assist the parties by mediation. If the parties are unable to reach agreement then any one of them may make a future act determination application to the Tribunal. This is an application for the Tribunal to make a determination whether the future act can be done and if so whether any conditions should be imposed. These determinations can be overridden in certain circumstances by State, Territory or Commonwealth Ministers (Section 42).

The Act allows 'non-claimants' with an interest in land to ask for a determination about native title. If no one opposes a non-claimant application, future acts over the lands or waters are valid (Sections 61, 67 and 24).

The Act also allows for and defines procedures for the acquisition of native title lands for public purposes.

Commonwealth Historic Shipwrecks Act (1976)

This Act applies to all historic shipwreck sites, associated artefacts, flotsam and jetsam in open water and below low water mark, within Australian territorial waters.

Section 4A (1) (b) of the Act states that a wreck must be at least 75 years old for it to qualify as an historic shipwreck. This commonwealth Act is the main form of protection of maritime relics and sites within NSW. A permit from the NSW Director of Planning is required before any disturbance to a NSW historic shipwreck can occur.



APPENDIX 3

ABORIGINAL SITE TYPES



Most Common Site Types

Open Artefact Scatters or 'Open Camp Sites': This type of site consists of a scatter of two or more discarded stone tools and debitage. They vary in size, density and diversity and represent a spectrum of past activities from interim day camps, to long stay base camps. Stone artefacts are normally found on ground surfaces that exhibit some form of exposure (or erosion) and allows the observation of the material within the upper soil profile. There may also be a significant subsurface component to a site, often identified initially as a potential archaeological deposit. Most surface recordings of artefact scatters tend to significantly under represent the actual content and size of a site. Open artefact scatters are likely to be the most common site type recorded in the region and are found in all landscape contexts.

Isolated Finds: An isolated find is a single stone artefact, not located within a rock shelter, and which occurs without any associated evidence of Aboriginal occupation within an (arbitrary) radius of 60 m. Isolated finds may be indicative of:

- random loss or deliberate discard of a single artefact
- the remnant of a now dispersed and disturbed artefact scatter
- an otherwise obscured or sub-surface artefact scatter

Except in the case of the latter, isolated finds are considered to be constituent components of the *background scatter* present within any particular landform.

Shell Middens: These sites normally contain a dominant proportion of shell material together with other types of occupation debris including flaked stone, the remains of campfires (charcoal), and the bones of terrestrial animals and scale fish. Midden deposits may include shellfish from fresh, estuarine or marine resources, or include varying combinations of each. The proportion of different environmental zones represented is often correlated with the distance to that resource. Middens are usually located on the elevated, well-drained margins of fluvial, lacustrine and littoral environments. These include coastal embayments and headlands (especially near freshwater sources), estuaries, wetlands, and major silt-dominated drainage channels.

Scarred Trees: This type of site comprises a scar or scars, situated on a tree, or its remains, which displays diagnostic characteristics of the removal of bark (and sometimes wood) in the past by Aborigines. Bark was removed from trees for a wide range of reasons. Due to the multiplicity of uses and the continuous process of occlusion (or healing) following removal, it is difficult to accurately determine the intended purpose for any particular example of bark removal. Many natural causes of scarring can present characteristics similar to scars made by people. Similarly scar created by nineteenth century white settlers can be hard to distinguish from Aboriginal examples. Scarred trees may occur anywhere old-growth trees survive.

Less Common or Regionally Rare Site Types

Quarries or stone procurement sites: These sites are normally found where there are outcrops or accumulations of stone or other materials such as ochre, suitable for processing into stone tools or other commodities. Procurement sites can include cobble and pebble beds associated with rivers, and streams, surface bedrock exposures, pebbles derived from conglomerate outcrops, and cliff areas along the coast. Typically procurement sites involve the extraction and processing of siliceous rock types for the manufacture of artefacts.

Stone Arrangements: These sites are defined as any arrangement of placed rocks that can be reasonably assigned to Aboriginal activity. Typically these include rock cairns and alignments of single or grouped stones. This site type is often located on high ridges and spurs but are difficult to predict and often limited in distribution.

Ceremonial Grounds: 'Bora' grounds or earth circles functioned as a prepared stage for initiation and other ceremonial activities which held a key role in the teaching and maintenance of the complex religious and social framework within Aboriginal society. Bora grounds consist mostly of one or more circular rings defined by mounded earth, sand and/or rocks. In some cases ceremonial grounds were located at significant or strategic locations within the landscape:



Burials: This site type is generally found in soft sediments such as aeolian sand or alluvial silts, but may also occur in middens, mound sites, rockshelters and hollow trees. In valley floor contexts, burials often occur in locally elevated topographies rather than poorly drained sedimentary basins. Burials are also known to have occurred on rocky hilltops. Burials are generally only visible where there has been disturbance of sub-surface sediments or where some erosional process has exposed them. This type of site can be accidentally uncovered during construction activity or due to erosion. Along the coast, burials usually took place in areas of sand where it was relatively easy to prepare the grave.

'Contact' Sites relate to sites that contain evidence of Aboriginal occupation during the period of early European occupation in a local area. The term 'contact' is a general description that refers to the typically poorly documented period when traditional Aboriginal society made initial contact with Europeans. Evidence of this period of 'contact' could potentially be Aboriginal flaked glass, art motifs depicting European people or objects, burials with historic grave goods or markers, and debris from 'fringe camps' where Aborigines who were employed by, or who traded with, the White community may have lived or camped.

Traditional story place or a 'natural mythological' place are categories used for any locality which manifests, or is associated with, a traditional Aboriginal story or ceremony. Most sites consist of natural landscape features which relate to stories about the dreaming or resident spirits and cosmological figures. These places are also sometimes known as 'natural mythological' sites. However, places that relate to historical events including ceremonies, battles and massacres may fall into this category and do not necessarily correspond to significant landscape features. Many of these sites will have no archaeological manifestation and their identification is dependent on oral or written evidence of Aboriginal lore.



APPENDIX 4

CRITERIA FOR IDENTIFYING ABORIGINAL SCARRED TREES



The identification of a scar on a tree as Aboriginal in origin is dependent on a set of inter-related interpretive criteria. The credibility of alternative causal explanations such as natural traumas and other types of human scarring must be tested for each scar.

A range of diagnostic criteria have been developed to assist in the identification of Aboriginal scarred trees. The following numbered criteria are based on archaeological work conducted by Simmons (1977) and Beesley (1989). It should be noted that these criteria have never been quantitatively tested or quantified using non-relative criteria such as absolute dating or an analysis of pre-occluded scar morphologies. This is because radiocarbon dating or dendrochronology is mostly inconclusive, and the removal of regrowth exposes trees to further damage.

1. **The scar does not normally run to ground level:** (scars resulting from fire, fungal attack or lightning nearly always reach ground level). However, ground termination does not necessarily discount an Aboriginal origin (some ethno-historic examples of canoe scars reach the ground);
 - 1(a). **If a scar extends to the ground, the sides of the original scar must be relatively parallel:** (natural scars tend to be triangular in shape);
2. **The scar is either approximately parallel sided or concave, and symmetrical:** (few natural scars are likely to have these properties except fire scars which may be symmetrical but are wider at the base than their apex. Surveyors marks are typically triangular, and often adzed);
3. **The scar should be reasonably regular in outline and regrowth:** scars of natural origin tend to have irregular outlines and may have uneven regrowth;
4. **The ends of the scar should be 'shaped', either squared off, or pointed** (often as a result of regrowth): (a 'keyhole' profile with a 'tail' is suggestive of branch loss);
5. **A scar which contains adze or axe marks** on the original scar surface is likely to be the result of human scarring. Their morphology and distribution may lend support to an interpretation of an Aboriginal origin: (marks produced after the scarring event may need to be discounted);
6. **The tree must date to the time of Aboriginal bark exploitation within its region:** (within the NSW central/north coast a scar age of at least 100-140 years is prerequisite)
7. **The tree must be endemic to the region:** (and thus exclude historic plantings).

Field based identification of Aboriginal scars, is based on surface evidence only and will not necessarily provide a definitive classification. In many cases the possibility of a natural origin cannot be ruled out, despite the presence of several diagnostic criteria or the balance of interpretation leaning toward an Aboriginal origin. For this reason interpretations of an Aboriginal origin are qualified by the recorder's degree of certainty. The following categories were used:

Definite Aboriginal scar - This is a scar that conforms to all of the criteria and/or has in addition a feature or characteristic that provides definitive identification, such as diagnostic axe or adze marks, or an historical identification. All conceivable natural causes of the scar can be reliably discounted.

Aboriginal scar - This is a scar where an Aboriginal origin is considered the most likely. The scar conforms to all of the criteria and a natural origin is considered unlikely and improbable.

Probable Aboriginal scar - This is a scar that conforms to all of the criteria and where an Aboriginal origin is considered to be the most likely. Despite this, a natural origin cannot be ruled out.

Possible Aboriginal scar - This is a scar which conforms to all or most of the criteria and where an Aboriginal origin cannot be reliably considered as more likely than alternative natural causes. The characteristics of this scar will also be consistent with a natural cause.



APPENDIX 5

PLATES

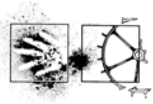


Plate 1: Possible Aboriginal scarred tree A7, looking S.



Plate 2: Possible Aboriginal scarred tree A8, looking SW.



Plate 3: Possible Aboriginal scarred tree A16, looking N.



Plate 4: Location of PAD1 (middle foreground) – looking northwest.



Plate 5: Location of PAD2 (are to right of bridge spans) – looking southwest towards South Brother Mountain.



Plate 6: PAD3 (in area surrounding billboard) – looking northwest.



Plate 7: The section of PAD4 to the west of the existing highway (the foreground area to the left of the drainage line) – looking southwest.



Plate 8: General view of PAD5 – the elevated terrace and associated basal slopes in middle distance – looking southwest from existing road embankment



Plate 9: Site H33 - section of former Pacific Highway alignment dating to the 1980s - looking north.



Plate 10: Site H30 - wooden rail bridge near Stewarts River – looking northeast.



Plate 11: Site H21 - pylon remains of former concrete Pacific Highway bridge – looking south from N bank of Camden Haven River.



Plate 12: Site H23 - section of a former Pacific Highway alignment dating to the 1940s, looking south.



Plate 13: Site H34 – a surface scatter of nineteenth century glass and ceramic fragments located in the foreground of the picture, looking northeast.



Plate 14: Site H34 - surface scatter of nineteenth century glass and ceramic fragments – close-up of deposit.



Plate 15: The northern end of site H32, a remnant section of former Pacific Highway alignment, looking south.



Plate 16: H35 – a tree stump with springboard notches, looking south (Charlie Dearling pictured).