NSW Aboriginal Land Council and NTSCORP Ltd

SUBMISSION

Draft National Parks and Wildlife Regulation 2010

Date: 18 June 2010

Introduction

This submission has been developed in response to the *Draft National Parks and Wildlife Regulation 2010* (the **Draft Regulations**) currently being considered by the NSW Government. The Draft Regulations were released for targeted consultation in February 2010, when the Minister for Climate Change and the Environment and Minister Assisting the Minister for Health (Cancer), the Hon Frank Sartor MP, introduced the *National Parks and Wildlife Amendment Bill 2010* (the Omnibus Bill). *At the time of writing this submission, the Draft Regulations were due to be finalised by July 2010.*

The submission has been developed for the NSW Department of Environment, Climate Change and Water (**DECCW**), by NTSCORP Limited (**NTSCORP**) and the NSW Aboriginal Land Council (**NSWALC**).

As outlined during the Minister's Agreement in Principle Speech for the Omnibus Bill, the aim of the amendments to the *National Parks and Wildlife Act 1974 (NSW)* and the Regulations were to: "address enforceability issues and to bring the offences and penalties relating to Aboriginal cultural heritage in line with other environment protection legislation."[1]

NSWALC and NTSCORP strongly support this aim. Both organisations worked jointly with the Minister's Office and DECCW on amendments to the Omnibus Bill designed to strengthen the heritage provisions of the Bill. These amendments were passed with bi-partisan support through the NSW Parliament in April and June 2010.

The main heritage clauses of the *Draft National Parks and Wildlife Regulation 2010* are:

> Clause 80A – Requirements for **due diligence**, including Minimum Standards for Due Diligence and the introduction of Due Diligence Codes of Practice, which will constitute a defence to the new s86(2) offence of harming Aboriginal objects under the *National Parks and Wildlife Act.*
>
> Clause 80B – List of **low impact activities** which will also constitute a defence to the new s86(2) offence of harming Aboriginal objects under the *National Parks and Wildlife Act.*
>
> Clause 80C – **Requirements for community consultation** with relevant Aboriginal parties as part of the application process for a DECCW permit authorising harm to an Aboriginal object or place (an AHIP).
>
> Clause 80E – Requirements relating to **variations of permits**.

[1] See Hansard Page: 20944, 25 February 2010, Legislative Council, as available to download from the NSW Parliament website at www.parliament.nsw.gov.au (under 'Hansard & Papers').

NSWALC and NTSCORP have committed to continue to work with the Minister and DECCW on the supporting Regulations, and the proposals for broader reform through the establishment of separate Aboriginal heritage legislation for NSW.

The Minister has also expressed his commitment to negotiate amendments to address the issues identified by NTSCORP and NSWALC with the Draft Regulations and DECCW Code of Practice.

During the Second Reading Speech for the Omnibus Bill in April 2010, Minister Sartor advised the house that:

> I have committed to continuing to work with the New South Wales Aboriginal Land Council and the Native Title Services Corporation to develop amendments to the draft regulations and the draft Department of Environment, Climate Change and Water code of practice, which will reflect and give effect to the objects of the legislation to conserve places, objects and features of significance to Aboriginal people and to strengthen the protection afforded to Aboriginal objects and places in New South Wales.[2]

Summary of recommendations

As detailed in the following sections of this submission, amendments are required to the Draft Regulations, the draft Minimum Standards and the proposed DECCW Code of Practice to ensure that:

1. The Regulations do not reduce the existing level of protection available to Aboriginal objects under the *National Parks and Wildlife Act.*

2. The Regulations support the intention and the spirit of the Omnibus Bill, and the bipartisan amendments passed in relation to the Bill. To do this, the Regulations must:

   a. give effect to the objects of the Act to conserve places, objects and features of significance to Aboriginal people and to strengthen the protection afforded to Aboriginal objects and places in New South Wales,
   b. address current enforceability issues, and
   c. bring the offences and penalties relating to Aboriginal cultural heritage in line with other environment protection legislation.

3. A **Minimum Standard** is introduced which meets the common law standard of due diligence, giving effect to the objects of the Act and respects Aboriginal People's role in protecting their cultural heritage.

   An amended version of the Minimum Standard proposed by NSWALC and NTSCORP which addresses the identified issues has been developed and is attached at **Appendix A**.

4. A robust **DECCW Code of Practice** is introduced which ensure clear guidelines, meets the common law standard of due diligence, gives effect to the objects of the Act and respects Aboriginal People's role in protecting their cultural heritage.

5. The 'low impact' activity defence to a prosecution under s86(2) is limited to genuinely low impact activities and the definition of previously disturbed land is appropriate to protect Aboriginal objects and places.

   Specific **amendments to Clause 80B** proposed by NSWALC and NTSCORP are attached at **Appendix B**.

[2] See Hansard Page: 22066, 21 April 2010, Legislative Council, as available to download from the NSW Parliament website at www.parliament.nsw.gov.au (under 'Hansard & Papers')

6. The **Community consultation** processes set out in the proposed Regulations are appropriate and clear in their intention.

   As previously outlined to the Minister in correspondence (dated 21 April 2010):

   - Changes are required to Regulation Clause 80C(1)(b) to limit the discretion of the Director General to vary the requirement to consult with Aboriginal people.
   - Amendment or deletion of Regulation Clause 80C(8) is required – to clarify that the intention is that a permit not be invalid merely because of a technical or inconsequential breach of the consultation process.

7. To ensure consultation on **variations to permits** NSWALC and NTSCORP support amendments to:

   - Regulation 80E(1) – to ensure community consultation for variations that result in significant harm must be undertaken in accordance with Regulation 80C; and
   - Regulation 80E(2) – amendments to provide that variation or transfer of permit applications may require community consultation.

Background to the new penalties for harm to Aboriginal heritage in NSW

Currently, if a person undertakes an activity without a DECCW permit, and 'knowingly' disturbs or damages an Aboriginal object or place, they can be prosecuted for an offence by DECCW under the *National Parks and Wildlife Act 1974.*

Recent amendments to the *National Parks and Wildlife Act 1974* through the Omnibus Bill passed by the NSW Parliament create a new offence for unauthorised harm to or desecration of an Aboriginal object. This offence, known as the **'strict liability' offence**, will apply whether or not a person *knew* they were disturbing or damaging an Aboriginal object.

This change is designed to encourage a higher standard of care, so that individuals and organisations are less likely to damage Aboriginal heritage.

NSWALC and NTSCORP strongly supported the introduction of a new strict liability offences and tougher penalties for unauthorised harm to Aboriginal heritage.

Also introduced with the new strict liability offence were two new defences:

1. If the person can show that he or she exercised **due diligence** to determine whether the act or omission would harm an Aboriginal object and reasonably determined that no Aboriginal object would be harmed (section 87(2)).
2. If the person can show that the act or omission was a **low impact activity** (section 87(4)).

The details of what constitutes due diligence or a low impact activity are to be defined by National Parks and Wildlife Regulations.

The introduction of these defences means that a person who decides to go ahead with an activity or development *without* a permit from DECCW, will have a defence from prosecution if they cause harm to an Aboriginal object – as long as they have followed the requirements listed in the Regulations.

The terms of the new due diligence and low impact defences are crucial because they will send a message to individuals and organisations as to what activities they can undertake without a permit from DECCW, and without fear of prosecution if an Aboriginal heritage object is damaged or destroyed.

Regulation Clause 80A - Due Diligence Defence

The recent amendments to *the National Parks and Wildlife Act* require that a Minimum Standard for Due Diligence be set by DECCW. Any Codes of Conduct developed by DECCW or other industries must meet this standard before they can be considered by the Minister and adopted into the Regulations. Once adopted into Regulation, following an industry code would act as a defence against the new strict liability offence.

DECCW released a Draft Due Diligence Code of Practice for targeted consultation in February 2010. NSWALC and NTSCORP support the principle that clear guidance is needed as to what will constitute a due diligence defence, but share the concern of other Aboriginal groups and heritage professionals (as outlined in detailed submissions to DECCW in 2009) that the proposed steps outlined in the Draft DECCW Due Diligence Code are not sufficient to ensure that harm to Aboriginal objects is likely to be avoided.

In June 2010 DECCW provided NSWALC and NTSCORP a two page Minimum Standard which generally reflects the earlier Code.

The proposed Minimum Standard developed by DECCW for adoption into the Regulations reflects the general approach of the earlier Draft Code which NSWALC and NTSCORP advised required significant amendment.

The Draft DECCW Code of Practice, Feb 2010 version, at page 5, defines due diligence as: 'reasonable and practical measures to determine whether an action or omission would harm an Aboriginal object, and if so what measures can be take to avoid that harm.' This is consistent with the commonly understood definition of due diligence.

NSWALC and NTSCORP do not agree that the current Minimum Standard sets an effective benchmark to ensure that Codes include this definition of Due Diligence or the general standard for due diligence reflected in other State and Federal legislation in Australia, particularly in other environmental protection legislation.

NSWALC and NTSCORP have developed amendments to the proposed Minimum Standard which addresses the identified issues and is attached at **Appendix A**.

The amendments proposed to the current Minimum Standard include:

a. The insertion into the Minimum Standard of a requirement that Codes of Practice must at least meet the common law standard of due diligence.

   Legal consideration of the definition of due diligence is:

   - A close examination, particularly in a legal sense, of a transaction and its related documentation
   - A minimum standard of behaviour involving a system which provides against contravention of relevant regulatory provisions and adequate supervision ensuring that the system is properly carried out
   - As a defence: the defendant took such reasonable and practicable measures to avoid committing the offence that a Court could conclude that the defendant was not negligent or otherwise at fault, that the mind was concentrated on likely risks, general precautions are unlikely to be sufficient.

b. The insertion into the Minimum Standard of a requirement that Codes of Practice be consistent with the objects of the *National Parks and Wildlife Act*, clarifying that the aim is to promote the conservation of Aboriginal heritage and the principles of Ecologically Sustainable Development (as per section 2A of the Act).

c. The insertion into the Minimum Standard of guidance as to how to contact relevant Aboriginal parties with responsibility for Aboriginal heritage protection including:

   - Local Aboriginal Land Councils,
   - Native Title holders and registered claimants,
   - NTSCORP Limited, and
   - Aboriginal Owners on the Register of Aboriginal Owners, directly or through the Registrar of the *Aboriginal Land Rights Act.*

d. A requirement that clearer advice be included in Codes of Practice to make persons aware that the Aboriginal Heritage Information Management System (AHIMS) currently records only a small number of the Aboriginal sites which exist in NSW, and that advice from the Aboriginal community is required to be certain of the presence or absence of Aboriginal sites in an area.

e. Changes to the Minimum Standard to ensure that it is clear that the 'steps' required to meet due diligence are different:

   - when determining whether an Aboriginal object is likely to exist, as opposed to
   - where a person has identified that an Aboriginal object exists, or is likely to exist, but has decided to continue without applying for an AHIP because they believe they can avoid harming the object.

f. The creation of additional obligations in relation to the second set of 'steps' – that is, where a person has identified that an Aboriginal object exists, or is likely to exist, but has decided to continue without applying for an AHIP.

   At this stage there must be recognition in a Code of Practice that there is a stronger obligation on a person to seek advice from the Aboriginal community or a heritage professional when determining if an activity will avoid the likely harm to an Aboriginal object. At a minimum in such cases there should be an obligation to notify relevant Aboriginal parties as listed above to provide the opportunity for groups to advise the person of sites not listed on AHIMS.

g. The removal of the reference to 'highly likely' at two points in the proposed Minimum Standard, as this mistakenly presents the current requirement for when a person must apply for an AHIP.

   Persons are currently required to apply for an AHIP when they are 'likely' to impact on an Aboriginal object or place. To change this to 'highly likely' would significantly reduce the current level of protection to Aboriginal heritage under the Act.

In relation to the **Draft DECCW Code of Practice**, urgent advice will be provided by NSWALC and NTSCORP once amendments to the Minimum Standards with which the Code must comply are confirmed.

Likewise, urgent advice will be provided shortly in response to the proposed **Minerals Council Code**.

As noted above and in previous submissions by NSWALC and NTSCORP to DECCW, the existing Draft Code of Practice proposed by DECCW is not supported in its current form.

Some preliminary comments on the DECCW Draft Code for consideration are:

- The Code fails to sufficiently encourage persons to seek advice from Aboriginal groups or heritage professionals.

- The Code makes a series of incorrect assumptions about the sufficiency of some steps needed to determine the likelihood of an Aboriginal object existing in an area. This includes relying on AHIMS to identify if objects exist, which includes only a small percentage of all sites in NSW, without a corresponding notification process for Aboriginal groups to provide them with the opportunity to notify DECCW or the person of unrecorded sites in the area. It also includes relying on an evaluation by a person without expertise about the likelihood of 'landscape' features to determine the likelihood of the existence of Aboriginal objects.

- The Code provides confusing advice regarding the low impact and due diligence defences. If there are activities which are common to an industry, whether these are considered unlikely to cause harm should be considered in the general context of the other due diligence steps outlined in that industry code. The list of approved low impact activities is a separate defence.

- The Code includes inappropriate descriptions of certain actions as 'trivial' such as 'crushing a rock under a foot'. Whilst it may be appropriate that activities such as walking should not attract a penalty under the *National Parks and Wildlife Act*, it is inappropriate to define destruction of an Aboriginal object as 'trivial'. This section (at page 8) requires revision.

- Given the low level of understanding about Aboriginal heritage objects amongst the general community, it is inappropriate to encourage a person to rely on a visual inspection of a site as a 'step' to due diligence without additional guidance.

Regulation 80B- low impact activities

As outlined above, proposed Regulation clause 80B included a list of 'low impact activities' which would constitute a defence against the new strict liability offence. Several of the activities are limited to those undertaken on land 'that is disturbed by previous activity'.

As previously outlined in correspondence and discussions with the Office for the Minister for the Environment and with DECCW, NSWALC and NTSCORP support amendments to Regulation 80B to ensure that the offence is limited to genuinely low impact activities and the definition of disturbed land is appropriate to protect Aboriginal objects and places.[3]

NSWALC and NTSCORP maintain their view that the proposed list of 'low impact' activities (as listed in the 7 June 2010 draft of Clause 80B provided by DECCW) includes several activities which could not reasonably be described a 'low impact' either because they commonly involve major ground disturbance to an area or are commonly understood to be the kinds of activities that would place Aboriginal objects at risk of harm. Examples of such activities are provided below.

Further, NSWALC and NTSCORP's preliminary view is that the revised definition of 'previously disturbed land' is still unacceptably broad. NSWALC is currently seeking advice on the revised definition provided by DECCW in June 2010, and will provide urgent advice to DECCW as soon as this is available.

In the interests of progressing these negotiations, an amendment to the definition has been proposed that would narrow it somewhat (see **Appendix B**), however NSWALC and NTSCORP's position on the definition is reserved until our advice is received.

NSWALC and NTSCORP strongly oppose clause 80B on the grounds that it lists a range of activities which cannot reasonably be considered low impact and would be highly likely to damage or destroy Aboriginal heritage sites.

As noted above, Clause 80B currently covers a significant number of the activities which are likely to harm Aboriginal objects.

If the clause were to be adopted without amendment, the level of protection available for Aboriginal sites in NSW would be dramatically reduced as the incentive for seeking a permit, or complying with the due diligence requirements, would be significantly undermined.

Such a change would not be consistent with the spirit of the Omnibus Bill or the amendments negotiated with the Minister to the Bill.

Recommended alternative - the Queensland model

A review of Aboriginal heritage legislation in all other Australian jurisdictions reveals that there is no equivalent low impact defence as introduced into the *National Parks and Wildlife Act 1974* (NSW) or comprehensive list of permitted 'low impact' activities in any other jurisdiction.

[3] See correspondence dated 21 April 2010 to Minister Frank Sartor from NSWALC CEO Mr Geoff Scott and correspondence dated 21 April 2010 to Minister Sartor from NTSCORP CEO Mr Warren Mundine.

The *Aboriginal Cultural Heritage Act 2003* (Qld) does refer to low impact activities however (at section 23). A list of 'low impact' activities is included in the Queensland Duty of Care Guidelines,[4] which is an equivalent to the Due Diligence Code of Practice proposed for NSW.

NSWALC and NTSCORP generally support the list of low impact activities outlined in the Queensland model as an appropriate approach.

In providing support for the Queensland model, it is noted that the Queensland model does not provide a blanket defence for the list of 'low impact' activities as would be created by the *National Parks and Wildlife Regulations*.

Instead, in the case of activities that cause no additional surface disturbance of an area, the Queensland Duty of Care Guidelines state that:

> 'it is generally unlikely that the (listed) activity will harm Aboriginal cultural heritage or could cause additional harm to Aboriginal cultural heritage to that which has already occurred, and the activity will comply with these guidelines. In these circumstances, subject to the measures set out (later sections of the Guidelines), it is reasonable and practicable for the activity to proceed without further cultural heritage assessment' (at 4.4-4.5).

Second alternative – amendments to clause 80B

DECCW has indicated that the Queensland approach is not possible and has requested that NSWALC and NTSCORP instead propose amendments to proposed clause 80B. NSWALC and NTSCORP's proposed amendments are set out at **Appendix B**.

In summary, the proposed clause 80B at Appendix B would:

- remove certain activities that necessarily involve significant land disturbance
- provide that certain classes of activities will only be low impact if they cause no additional surface disturbance or minimal disturbance to the surrounding surface or sub-surface
- amend the definition of 'previously disturbed land' so that the previous disturbance must have been significant.

As demonstrated by the examples following, many of the activities listed in clause 80B involve significant disturbance to the land. Further, the fact that the land has been previously disturbed is no reason to assume that Aboriginal objects or sites no longer exist. The limitation provided by proposed clause 80B(1)(a) and (3)(a) in Appendix B is essential to ensure that the activities covered by the defence are genuinely low impact.

Activities which should be removed from the low impact list as they cannot be considered low impact because they necessarily involve some significant land disturbance are:

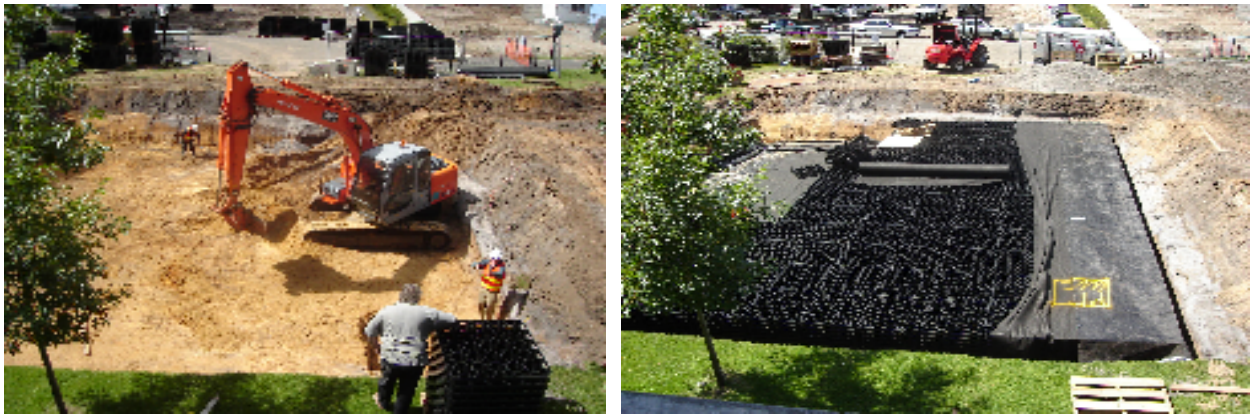
- Construction of new fences
- Construction of new water storage works (such as farm dams, water storages or water tanks)
- Construction of new irrigation systems infrastructure, ground water bores and flood mitigation works
- Construction of new erosion control and soil conservation works
- Bulk sampling
- Activities that comprise exempt development or was the subject of a complying development certificate issued under the *Environmental Planning and Assessment Act 1979*, on land previously disturbed.

[4] See Guidelines at http://www.derm.qld.gov.au/cultural_heritage/pdf/duty_of_care_guidelines.pdf

The need for clause 80B to be amended as proposed is demonstrated by the following examples of some of these activities, and the extent of disturbance that can result:

1. Construction of new water storage works

The construction of new water storage works, such as farm dams and underground water storage tanks involve the excavation of earth and the stripping of all top soil, roots and vegetation (including trees and stumps). Depending on the size of the works, the excavation can be significant. The basic machinery required for constructing a dam includes excavators and rock breaking tools. These activities involve significant land disturbance which are likely to harm an Aboriginal object if present.



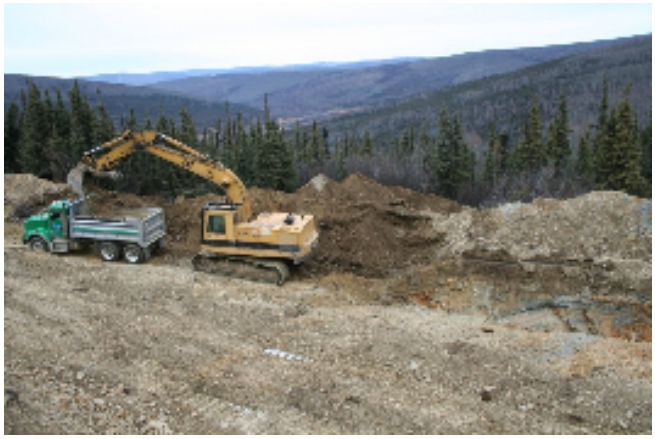
The construction of 170,000 litre underground water tanks at Monash University, NSW, as downloaded from the Monash University website at http://www.monash.edu.au

2. Downhole logging

Downhole logging involves drilling holes to undertake minerals exploration. This can involve drilling very large holes and removing large samples.

3. Bulk sampling

Bulk sampling 'is a commonly used industry term to describe the practice of extracting relatively large quantities of a resource to test the quality and marketability of that resource. Often it has been necessary to extract large quantities (in excess of 200,000 tonnes) of the resource for this purpose'.[5]



Bulk Sampling (Golden Summit project) from the Alaskan Minerals Development website, at http://www.commerce.state.ak.us/oed/minerals/mining.htm.

[5] Mark Geritz (2005) *"Bulk sampling" under a mineral development licence - Mining by another name?* at http://www.claytonutz.com/publications/newsletters/queensland_energy_and_resources_insights/20050729/bulk_sampling_under_a_mineral_development_licence-mining_by_another_name.page

Land Previously Disturbed

Advice from Senior Counsel commissioned by NSWALC on the Draft Regulations, and provided to the Minister, indicate that the terms of the defence outlined in clause 80B are so wide that it is difficult to imagine that there would be much, if any, land in NSW which would not fall within the definition of previously disturbed land.[6]

On 9 June 2010 DECCW provided to NSWALC and NTSCORP a revised version clause 80B from DECCW. The changes include:

- the insertion of 'grazing' as a low impact activity (clause 80B(1)(c)), and

- the revision of the definition of land that has been 'disturbed by previous activity' to replace 'urban areas' with:
    - 'buildings and structures and the land in the immediate vicinity of these buildings and structures' (cl 80B(4)(c)),
    - clearance of vegetation (cl 80B(4)(e)), and
    - earthworks associated with any activity listed in 80B(4) (including soil ploughing, buildings and structures, rural infrastructure, roads and pipelines).

As noted above, further advice on the revised definition has been sought, however, NSWALC and NTSCORP still have significant concerns about the breadth of the definition of 'land previously disturbed' for the following reasons.

Major sites exist in areas which have been impacted by 'previous disturbance', including major urban development. For example, there are 10,000 known sites in the Sydney basin alone. Tens of thousands of sites also exist on areas currently being farmed.

As outlined in previous submissions to DECCW, until recently, development has been allowed in NSW without respect for Aboriginal heritage. Land has been able to be disturbed, cleared and developed over most of NSW, but there survive important examples of Aboriginal objects on properties where there has been substantial clearing, grazing, fencing and other general activities which have led to 'clear and observable' impacts on the area.

The *National Parks and Wildlife Act* places an obligation on the NSW Government to protect these sites.

Although the Aboriginal sites database - the Aboriginal Heritage Information Management System (AHIMS) - currently includes over 60,000 records, DECCW has confirmed that this represents only a small fraction of the actual sites in NSW.

In any case, the current terms of proposed Regulation clause 80B (low impact defence) do not require a person to undertake an AHIMS search or a State Heritage Register search before undertaking a low impact activity.

There would be untold similar examples around NSW where a cursory examination shows no sites listed on AHIMS (often because no one has surveyed the land previously) and local history suggests there has been some degree of impact to the ground surface, therefore leading to a conclusion of little or no Aboriginal heritage potential without considering the buried (formerly exposed) land surface underneath.

But without technical assessment or local Aboriginal knowledge of what may have previously been found in similar environments, these often highly significant areas, including Aboriginal burials, are at increased risk of damage and destruction.

[6] See correspondence dated 9 April 2010 to Minister Frank Sartor from NSWALC Chair Ms Bev Manton.

The need for clause 80B to be amended as proposed is demonstrated by the following examples of how the degree of impact to the ground surface is an insufficient indicator for determining the likelihood of an Aboriginal site or object being present:

1. **BAULKHAM HILLS – Rock engraving heritage listed**

This site is adjacent to a major road at Old Northern Road, Maroota. Its close proximity to the road places the site is at risk from:

80B(1)(a)(i) maintenance of existing roads.

The site is listed on the State Heritage Register (see http://www.heritage.nsw.gov.au/07_subnav_01_2.cfm?itemid=4300425).

However, it is not a requirement for a person to check the NSW State Heritage Register before undertaking a low impact activity, and not all State Heritage listed sites are sign posted or feature objects which would commonly be recognised as Aboriginal objects.

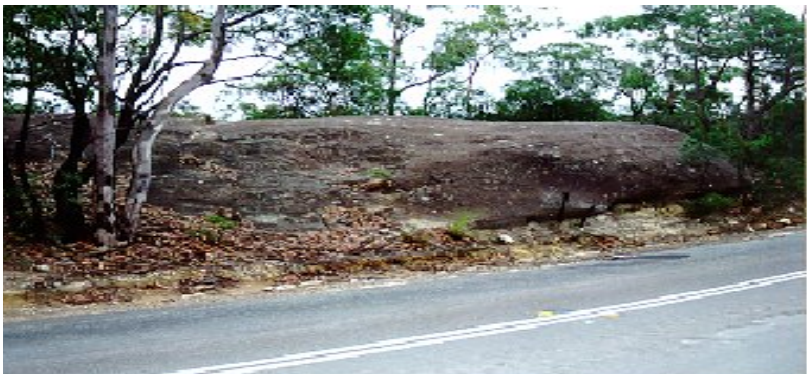


Photo of rock engraving adjacent to road, from the NSW Heritage Office website

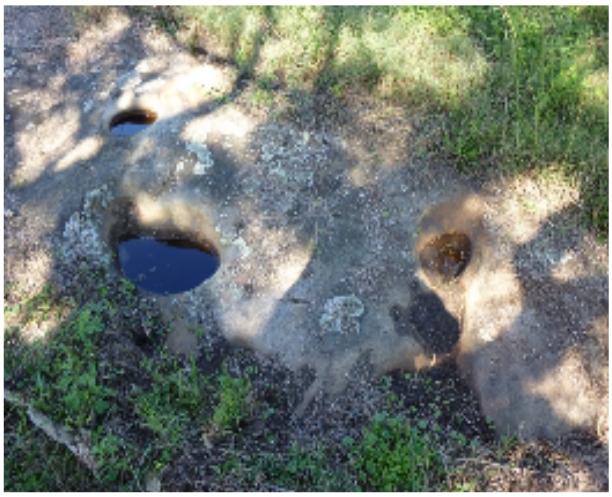
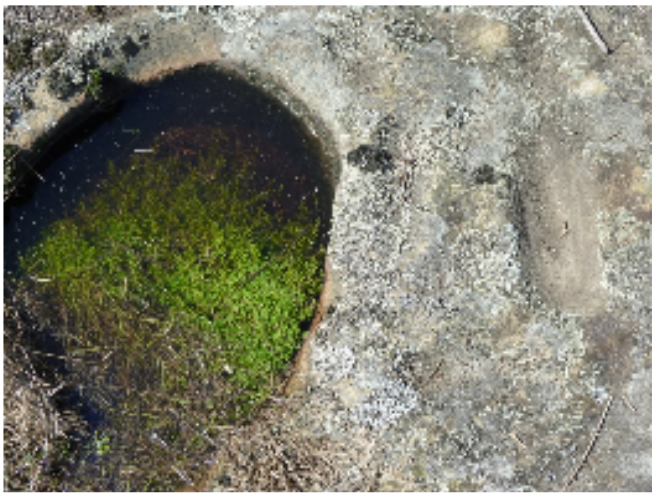
More generally, it is common for Aboriginal objects (stone artefact scatters) to be routinely located along graded vehicular tracks.

2. HAWKESBURY – Axes grooves, water holes and a scarred tree or canoe tree

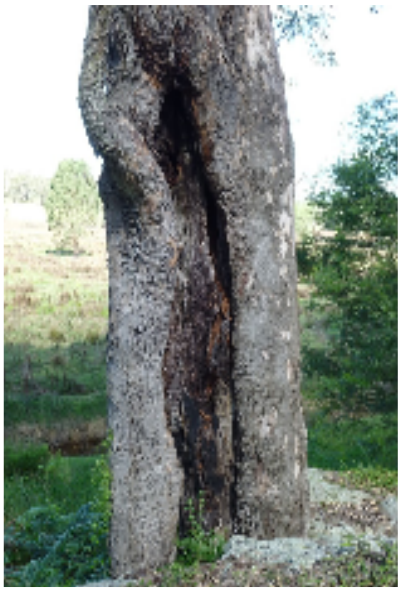
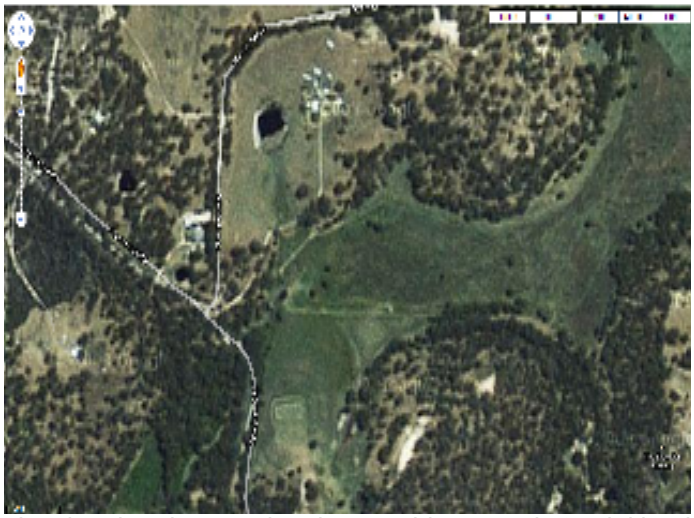
This is a rural property shortly to become surrounded by new housing in the Hawkesbury City LGA. All Aboriginal objects are within 150 metres from old and new housing. The property is currently undergoing significant construction with pools, fences and new outbuildings.

If it were assumed that, because the sites were on a rural property, near existing structures (80B(4)) these sites would be at risk from activities such as:

80B(1)(b)(iii) construction new fences
80B(1)(b)(iv) construction of water storage works, and
80B(1)(b)(v) construction of irrigation infrastructure.

Axe grinding grooves and water holes

Scarred or canoe tree *Map showing that the area has been subject to substantial land clearing*

3. EARLWOOD – Rock Art, shelter and midden

This site has survived in a residential back yard, amongst other residential properties – immediately adjacent to other buildings. It has recently been listed on the NSW State Heritage Register.

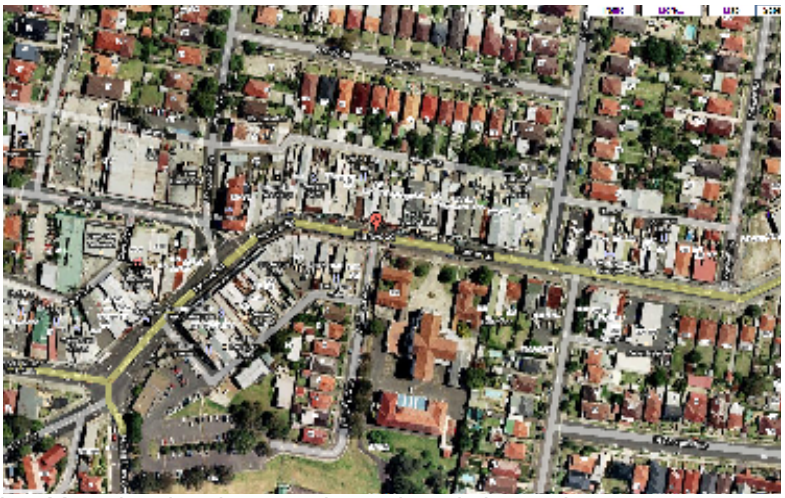
Comprising a rockshelter, midden and stencil work, the site offers a rare and unique insight into the daily life as well as the routine and ceremonial culture of the Bidigal people prior to European contact. For more information (see http://www.heritage.nsw.gov.au/07_subnav_02_2.cfm?itemid=5060975).

The site remained unrecorded in a residential backyard for many years. Recently the owner has decided to have it listed, so that it can be protected by future owners.

Given its proximity to existing infrastructure, the site would be at risk if it were assumed that it would not be impacted by activities such as:

80B(1)(a)(ii) maintenance of utilities

Rock art in residential backyard in Earlwood



Map showing the area the rock art is located

4. BURIALS

Aboriginal objects including burials can and do survive below the plough line as ploughing displaces but does not necessarily 'destroy' objects.

This has been illustrated by the recent listing on AHIMS and declaration in relation to a traditional Aboriginal burial identified and remaining on an operational pastoral property in Collarenebri. Similarly, a traditional Aboriginal burial was last year exposed in the sandy soil immediately adjacent to the intersection of two existing roads in Mungindi.

These burial sites were located both on a rural property and within close proximity to an existing road, illustrating that both sites would have potentially been at risk within the proposed drafting of Regulation Clause 80B.

This is acknowledged by DECCW in its current standard for archaeological assessment – see *Standards and Guidelines Kit* (1997) – Chapter on Impact and Mitigation – Part 1.6 'The Impact of Ploughing'.

Community consultation requirements and variation to permits

Proposed Regulation clause 80C sets out the consultation process to be followed by an applicant for a permit. Proposed subclause 80C(8) provides that 'the issue of an AHIP is not invalid merely because the applicant for the permit failed to comply with any one or more requirements set out in this clause'.

NSWALC and NTSCORP support DECCW's intention to allow flexibility where an alternative consultation process has been agreed with an Aboriginal group through an ILUA or other formal agreement, however this must be clarified in the Regulation so as not to allow a general discretion of the Director General to amend the consultation process, as this risks undermining the consultation requirements.

NSWALC and NTSCORP are concerned that this provision means that Aboriginal people would be unable to challenge the issue of a permit even where the procedures for consultation with Aboriginal persons have not been complied with, or at least that its operation, as compared with section 90K(g) is ambiguous and could cause confusion.

This could preclude an Aboriginal person from challenging the permit issued even if an applicant has failed to consult or has blatantly manipulated the consultation process, for example by holding consultations in locations where only some Aboriginal groups could attend, or selectively consulting with inappropriate Aboriginal groups who are not knowledge holders for the area.

The ability for court proceedings to be brought by any person in order to enforce breaches of legislation is an important feature of best practice environmental legislation in NSW.

It is essential that appropriate avenues of appeal for Aboriginal people are not cut off through the proposed amendments. In the past there have been only a limited number of appeals against permits by Aboriginal people in NSW, mostly regarding the consultation that was carried out by the applicant. Aboriginal groups have demonstrated they do not bring proceedings lightly but do so after careful consideration and in-depth legal advice.

Moreover, the Land and Environment Court has the ability to strike out vexatious proceedings and would apply the principles of statutory interpretation and consider parliamentary intent before invalidating a permit even where a minor breach is proven.

For further recommendations for amendments to Regulation clause 80C and E see the summary of recommendations in the earlier section of this submission.

This submission has been prepared by NSWALC and NTSCORP. For more information about this submission please refer to the contact details listed below.

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