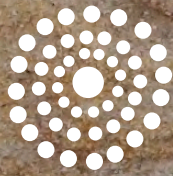
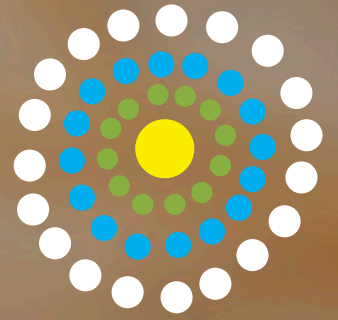


Aboriginal Cultural Heritage Management Development Assessment Toolkit FINAL ISSUE





HIGHLY COMMENDED

2013 National Trust of Australia (NSW) Heritage Awards

Research and Investigation / Analysis

Aboriginal Cultural Heritage Management
Development Assessment Toolkit

*Gondwana Consulting -
for Shellharbour Wollongong & Kiama Councils*



“Aboriginal Cultural Heritage Management Development Assessment Toolkit”

FINAL ISSUE

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for use by – Shellharbour City Council, Wollongong City Council and Kiama Municipal Council

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1. INTRODUCTION

1.1 Background

This Aboriginal Cultural Heritage Management Development Assessment Toolkit (“the Toolkit”) has been prepared for Shellharbour City Council, Wollongong City Council and Kiama Municipal Council.

Shellharbour City Council was the sponsor and lead Council for the project, which was primarily funded by a grant from the NSW Department of Family and Community Services. In-kind project support was also provided by the three participating Illawarra Councils.

1.2 Toolkit Purpose

The purpose of the Toolkit is to establish a process, and accompanying guidelines, to assist the three participating Councils in identifying and applying the most appropriate type and level of consideration of Aboriginal cultural heritage values during the assessment of development applications.

In addition to providing an “internal” development assessment pathway for the three Councils in relation to Aboriginal cultural heritage, the Toolkit’s proposed process and guidelines are also to be in a format that is compatible with the Councils’ Development Control Plans. Where incorporated as part of a Council’s Development Control Plan, the Toolkit components will offer advice and direction to proponents about the requirements for Aboriginal cultural heritage assessment that may be required to accompany a development application. The Toolkit will also enable Councils to provide better advice to proponents about the type and detail of Aboriginal cultural heritage assessments to accompany their development application. Both avenues will provide clarity, and reduce the uncertainties or “surprises”, for proponents during the development application and assessment process.

It is also intended that the Toolkit will apply to the assessment and approval of works being proposed by the Councils themselves, in relation to the consideration of Aboriginal cultural heritage values.

Significantly, implementation of the Toolkit’s assessment pathway, for both external development applications and internal Council’ works, will ensure that Aboriginal cultural heritage values are better recognised and more comprehensively addressed in the development or works assessment processes, and consequently afford the greater protection of these important sites and values.

The Toolkit is required to operate within the over-arching NSW planning laws, a Council’s Local Environmental Plan (and be compatible with the “Standard Instrument LEP”), and both State and Federal legislation regarding the protection and management of Aboriginal cultural heritage. In this context it will also help address a “gap” in the current system for managing Aboriginal culture and heritage within NSW, in terms of the lack of a connection and consistency between planning and heritage laws at the local government level.

The Toolkit is an “internal” procedure, or decision support tool, for application by the participating Councils. However it was intended that the Toolkit’s development have the broad support of, and

benefit from the inputs of, the Illawarra Aboriginal community and other stakeholders. To this end stakeholder and community information and engagement has been part of the Toolkit’s development – as described in Section 6.

1.2.1 Aboriginal Cultural Heritage and the Development Assessment Process – The Challenge

Local government has perhaps the greatest involvement with, and potential effects on, the direct physical or “on-ground” management of Aboriginal cultural heritage sites and values. This is particularly through the planning and development control functions of local councils.

Councils are required, under various planning and other legislation, to consider the impacts of proposed developments on known or possible Aboriginal cultural heritage sites, or on places of cultural or historical importance to Aboriginal people (refer to Section 5 for discussion of the applicable legislation). Under the development assessment process, proposed developments, works and activities, are assessed against applicable planning laws, regulations and other criteria or requirements. As such it is the principal avenue by which a Council’s responsibility for identifying, addressing and managing the possible impacts of a development or activity on Aboriginal cultural heritage sites/values is, or is intended to be, realised.

However when, and how, to investigate the possible impacts of a proposed development on the Aboriginal cultural heritage values of a place are not always clear or well defined – illustrated in Figure 1.

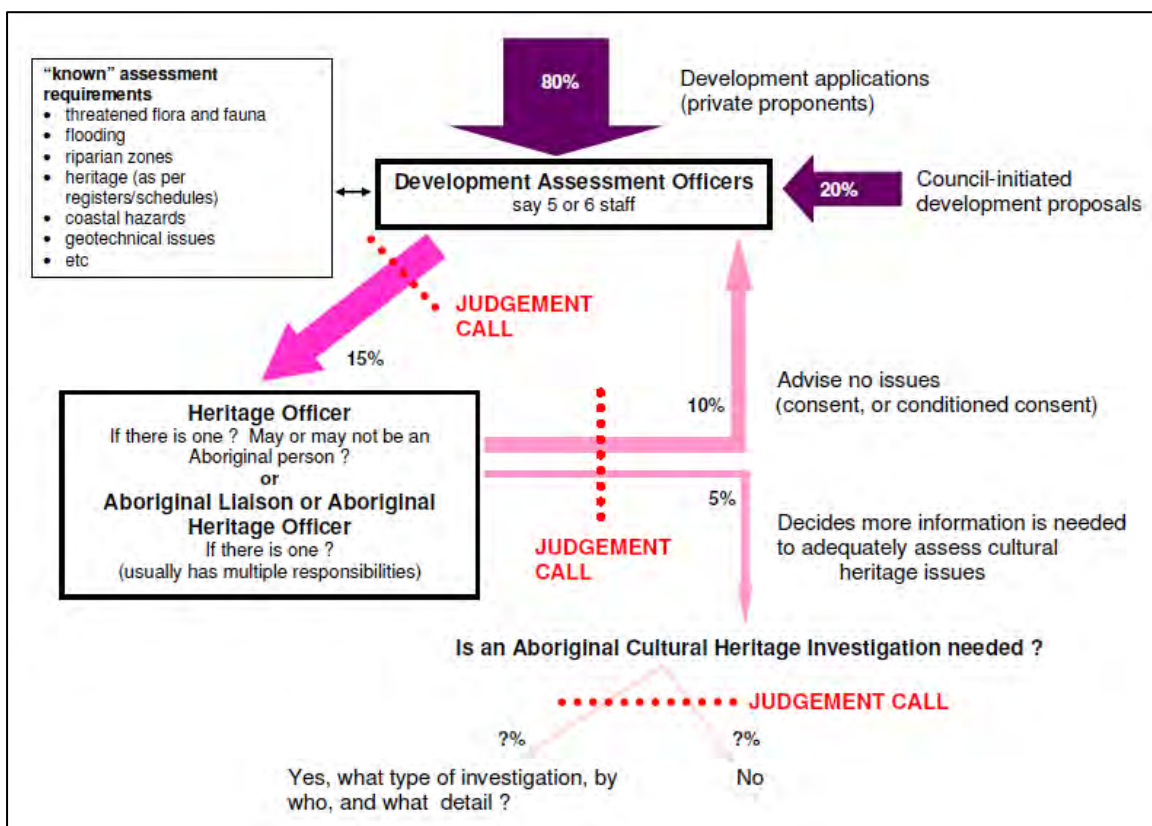


Figure 1 Aboriginal cultural heritage and the development assessment process – the challenge

1.3 Structure of this Report

This Section (Section 1) gives the background to the project and the objectives or purpose that the Toolkit is intended to meet.

Part A describes the Toolkit in terms of:

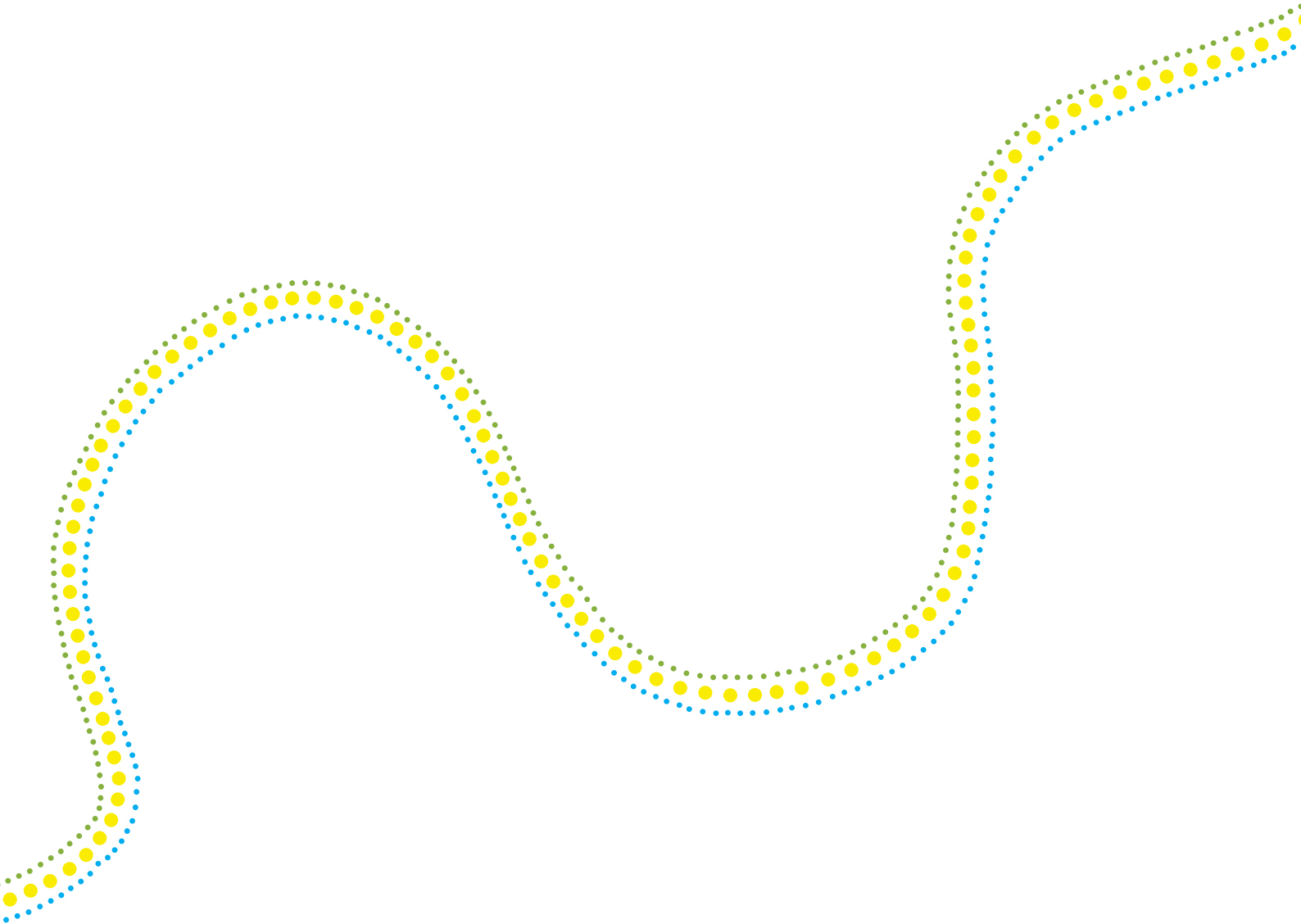
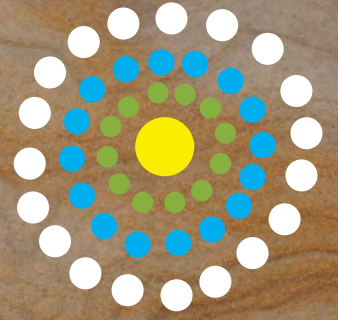
- the approach recommended for use by Councils to better address Aboriginal cultural heritage values in the development assessment process – in Section 2; and
- a style which is compatible with a Development Control Plan format – in Section 3.

Part A also provides important supporting information and background to assist Council staff in gaining a basic appreciation of the (known) Aboriginal cultural heritage of the three participating Councils and wider Illawarra region (Section 4), and the legislation relevant to the protection and management of Aboriginal cultural heritage (Section 5).

Part B describes the Toolkit's development, including stakeholder consultation efforts and the limitations or constraints encountered in the Toolkit's development – in Section 6.

PART A

The Toolkit and Supporting Information



2. THE TOOLKIT - INTERNAL COUNCIL ASSESSMENT PROCESS

2.1 The Toolkit as an Internal Council Assessment Process

This section describes the assessment process the Aboriginal Cultural Heritage Management Development Assessment Toolkit (“the Toolkit”) identifies for use within a Council when deciding if a development application (or an internal Council’s project or works proposals) warrants an Aboriginal cultural heritage assessment and, if required, the nature of this assessment.

It parallels the Toolkit’s expression in the Development Control Plan format, as set out in the following Section 3 – which is a simplified and condensed version of this approach.

However, for application by Council’s development assessment officers, heritage officers and other staff the following extended version of the Toolkit provides additional background, process, elaboration/justification and data sources. It is structured as a checklist, or a series of questions and tests, against which to assess a development proposal to determine if an Aboriginal cultural heritage assessment is required and the type of any such assessment – as shown in Figure 2.

As set out in Figure 2, application of the Toolkit requires consideration of the following factors or attributes:

- Aboriginal Places, as declared under the *National Parks and Wildlife Act 1974*
- Aboriginal cultural heritage sites as recorded on the Office of Environment and Heritage’s (OEH) Aboriginal Heritage Information Management System (AHIMS);
- additional Aboriginal cultural heritage sites, not listed on the AHIMS, as identified/documentated by local archaeological or other studies;
- mature trees (possibly 150 years or more older) that may have the potential for Aboriginal scarring;
- micro-landscape features with the potential to contain Aboriginal cultural heritage sites/features; and
- sensitive landscape settings or locations, assessed as having medium to high archaeological potential.

The Toolkit also incorporates consideration of exempt and complying developments, environmentally sensitive areas, grossly disturbed landscapes, and low impact activities as defined in the Aboriginal heritage provisions of the *National Parks and Wildlife Regulation 2009*. This is to both provide for procedural efficiencies and avoid unnecessary (including legally indefensible or “frivolous”) assessments.

The Toolkit is for guidance only, and a degree of judgment should still be employed in its application. A precautionary approach is warranted enabling a Council officer to have the discretion to require/recommend an Aboriginal cultural heritage assessment. A precautionary approach, or “erring on the side of caution” should be allowed for – even if a development proposal does not, according to

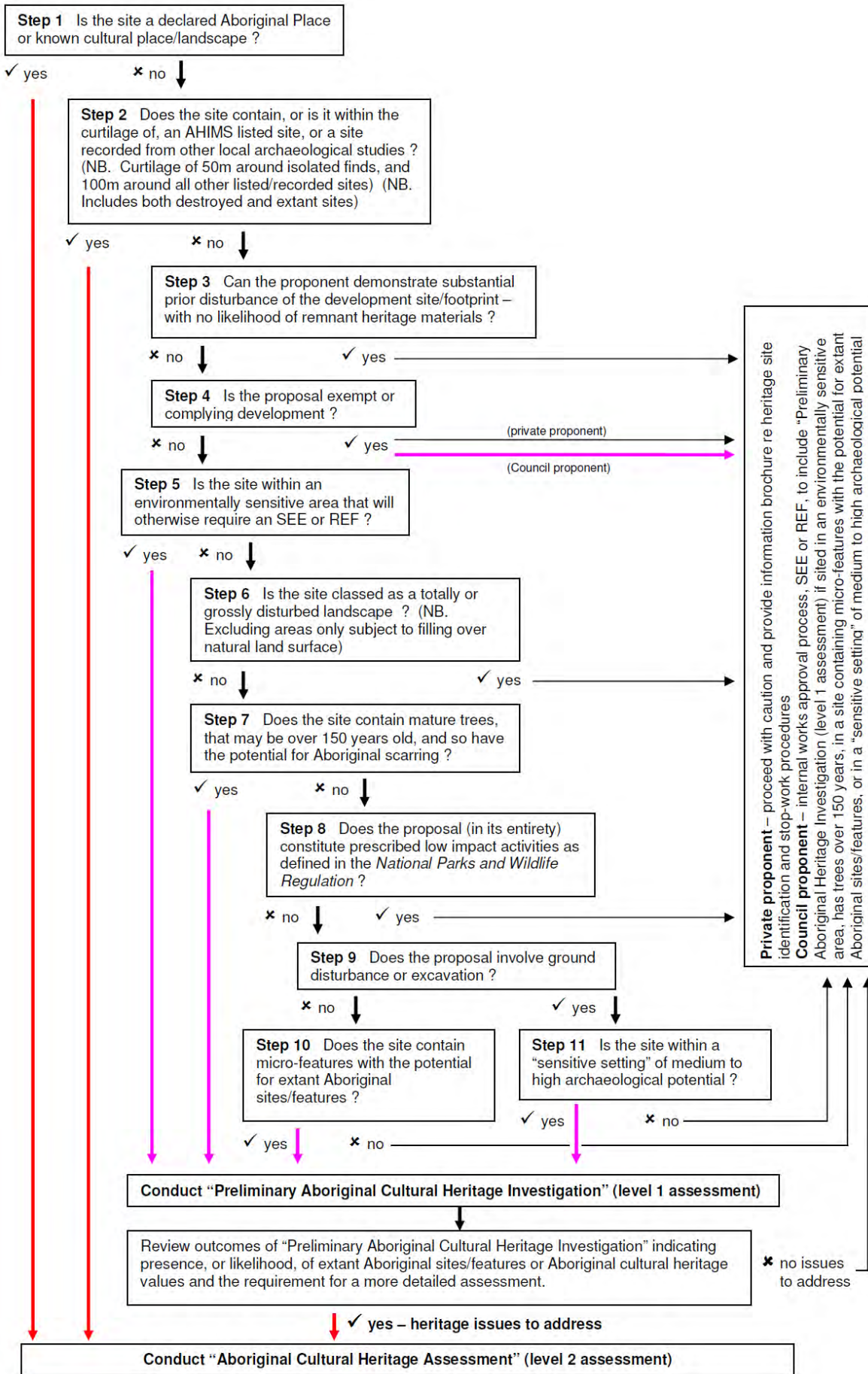


Figure 2 The Toolkit checklist/process

the steps and questions outlined in the Toolkit, expressly warrant assessment. However the grounds for doing so need to be defensible and accountable, and may include such considerations as the occurrence of undocumented but “known” heritage sites or previously expressed concern by the Aboriginal community in a locality.

2.2 Steps in Applying the Toolkit

The Toolkit sets out the following checklist, or series of questions and tests, to apply when Council staff are determining if a development proposal requires an Aboriginal cultural heritage assessment and the type of any such assessment.

Step 1. Is the site a declared Aboriginal Place or known cultural place/landscape ?

ACTION:

- **Identify if the site is part of, or in the vicinity of, a declared Aboriginal Place or a known cultural place/landscape via the following searches.**
- **Check** Council’s GIS data sets re any declared Aboriginal Place(s).
- **Apply** a curtilage of 100 metres around a declared Aboriginal Place when identifying development proposals “in the vicinity of” a declared Aboriginal Place that warrant assessment.
- **Refer to** the Office of Environment and Heritage’s on-line NSW Atlas of Aboriginal Places – at www.environment.nsw.gov.au/conservation/AboriginalPlacesNSW.htm – which includes location information, gazettal notices, maps, photographs, and an explanation of the significance of each declared Aboriginal Place in NSW.
- **Refer to** the Office of Environment and Heritage’s Aboriginal Heritage Information Management System which included details of any reports provided to the Agency in relation to places and features of significance to Aboriginal people.
- **Identify** if the site is part of a “known cultural place/landscape” – as indicated by past planning/assessment processes, or from previously expressed concerns or involvement of local Aboriginal people/groups.
- **Liaise** with local Aboriginal people or organisations – initial contact for advice, if warranted.
- ▶ **If YES – if the site is a declared Aboriginal Place, or the proposal site is in the vicinity of a declared Aboriginal Place (sufficiently close to potentially impact the values of the Place, intangible and/or tangible values), or a known and previously cited “cultural place/landscape” – go directly to a Level 2 Assessment - Conduct an “Aboriginal Cultural Heritage Assessment”.**
- ▶ **IF NO – proceed to Step 2 - Does the site contain, or is it within the curtilage of, an AHIMS listed site, or another recorded Aboriginal cultural heritage site?**

Rationale:

Declared Aboriginal Places provide recognition of, and legal protection to, Aboriginal cultural heritage on public and private lands. They are recognised locations of outstanding cultural heritage

significance – that have already been subject to a detailed documentation and significance assessment process – and are protected under the *National Parks and Wildlife Act 1974*.

This recognition can be for either tangible or intangible features and values, or both. Aboriginal Places can have spiritual, ceremonial, cultural, historic (post-contact significance), social, educational or other significance, or represent cultural landscape values. They could have been used, or continue to be used, for natural resource harvesting. They can also be places of value for contemporary Aboriginal people. Aboriginal Places may contain objects or physical items of heritage value – such as burials, middens, scarred trees, rock art, grinding grooves, fish traps or other features.

Declared Aboriginal Places are protected from “harm or desecration”, without the approval of the Office of Environment and Heritage (OEH). Harm includes destroying, defacing or damaging an Aboriginal Place – and encompasses harm both to any intangible values for which an Aboriginal Place was declared and to any Aboriginal objects within an Aboriginal Place (which are also protected under other provisions of the *National Parks and Wildlife Act 1974*).

Land use changes, developments or activities have the potential to impact both the tangible and the intangible values for which an Aboriginal Place has been declared. Therefore an “Aboriginal Cultural Heritage Assessment” (a “Level 2 Assessment”) is warranted to determine the possible implications and impacts of a proposal on these values, as well as possible impact avoidance or mitigation measures necessary or the requirement for an Aboriginal Heritage Impact Permit. Notably proposals/activities that do not involve ground-breaking or site disturbance can still have the potential to impact the intangible values of an Aboriginal Place, in terms of being inconsistent with or detracting from these values, and so may still warrant investigation.

The OEH recommends assessing the actions, developments and uses within an Aboriginal Place in terms of those that will not harm the values of the Place and that will not require an Aboriginal Heritage Impact Permit (AHIP), those that would harm the values of the place and would need an AHIP but may be acceptable in certain situations and with certain controls, and those that would have unacceptable impacts on the values of a Place.

The OEH also recommends that “if development will take place in the vicinity of an Aboriginal Place, the potential impacts of the development on an Aboriginal Place must be assessed” (OEH website - Declaration of Aboriginal Places in NSW). However no definition of “in vicinity” of an Aboriginal Place”, or other guidelines, are provided. As a minimum, the Toolkit recommends applying a curtilage of 100 metres around all declared Aboriginal Places as a “defined vicinity” within which all development applications (wholly, or largely [in impact terms], within this zone) will require an assessment of any possible impacts on the adjacent/nearby Aboriginal Place. The requirement for assessing proposals/sites in the vicinity of a Place will depend on the stated values of an Aboriginal Place and the potential for a development proposal “in the vicinity” to generate off-site impacts – physical, visual or intangible – with the potential to impact these values (such as concentrating stormwater causing potential erosion of nearby middens, land uses that would detract from the intangible values of a Place, or other case-by-case issues). The OEH *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW* specifically cites “the extent to which the development or activity will change the surrounding landscape setting” and “indirect harm” (described as impacts that “may affect sites or features located immediately beyond, or within, the area of the proposed activity”) as warranting assessment when considering a proposal’s potential effects on declared Aboriginal Places (and Aboriginal objects).

Beyond the above legislative requirements, consideration of Aboriginal Places provide a means – although limited – of including non-tangible cultural, spiritual and cultural, and landscape values in this initial version of the Toolkit while other more comprehensive, means of including these values in the assessment process are developed.

Councils may also have an understanding of those areas that are considered culturally sensitive or significant by the local Aboriginal community – despite not being formally recognised by an Aboriginal Place declaration or other heritage listing.

These other “known cultural places/landscapes” may be identified from past planning/assessment processes (such as previous Aboriginal Cultural Heritage Assessment Reports for AHIP applications regarding an Aboriginal Place) or from previously expressed concerns or involvement of local Aboriginal people/groups. This “local knowledge” will also be progressively built up as the Toolkit is applied and patterns of landscape and cultural heritage value or sensitivity accumulate. These may be as varied as sites associated with Aboriginal beliefs or ceremony, resource harvesting and camping areas (pre-contact, post-contact and continuing), former mission sites, or historic buildings that may have an Aboriginal cultural heritage association.

Some publications – such as the *Early Contact Map* (of the Illawarra) or *A History of Aboriginal People of the Illawarra 1770-1970* (2005), by the (then) Department of Environment and Conservation, can also provide some information regarding culturally significant places or landscapes.

Legislative Basis:

Aboriginal Places are declared under section 84 of the *National Parks and Wildlife Act 1974* in recognition of an area’s special significance for Aboriginal culture and people.

Section 86(4) of the *National Parks and Wildlife Act 1974* makes it an offence to harm or desecrate a declared Aboriginal Place.

However section 87A of the Act provides exemptions to the offence of harming an Aboriginal Place for actions authorised by or under the *State Emergency and Rescue Management Act 1989* that are reasonably necessary to avoid an actual or imminent threat to life or property, authorised by or under the *Rural Fires Act 1997* for emergency fire fighting activities or bushfire hazard reduction works, for works for the conservation or protection of an Aboriginal Place carried out by or under the direction of an Office of Environment and Heritage (OEH) officer, or activities undertaken in accordance with a Conservation Agreement made under the *National Parks and Wildlife Act 1975*.

Section 87B exempts Aboriginal people (and the dependants of Aboriginal people, whether Aboriginal or not) from the offence of harming an Aboriginal Place when carrying out traditional cultural activities – excluding commercial activities.

Section 90K of the Act sets out those factors that the Director-General of the OEH must consider when determining an application for an Aboriginal Heritage Impact Permit in relation to activities likely to harm or desecrate an Aboriginal Place.

The *National Parks and Wildlife Act 1974* does not include a specific requirement for Aboriginal Places to be considered in the development assessment process.

However section 79C of the *Environmental Planning and Assessment Act 1979* lists among the matters an authority should consider when determining a development application “the likely impacts of that development, including environmental impacts on ... [the] social and economic impacts in the locality” and “the public interest”. These factors have been broadly defined, and encompass Aboriginal heritage sites and values. This broad definition can provide for consideration of intangible cultural heritage elements – such as resource use areas, sites of mythological and spiritual significance, massacre sites, historic sites and so on – in the development assessment process.

Step 2. Does the site contain, or is it within the curtilage of, an AHIMS listed site, or an Aboriginal cultural heritage site recorded from other local archaeological studies ?

ACTION:

- **Determine if the site contains, or is it within the curtilage of, an AHIMS listed site, or an Aboriginal cultural heritage site recorded from other local archaeological studies ? Applying a curtilage of 100 metres around all listed/recorded sites, other than isolated finds where a 50 metre curtilage will apply. Include both destroyed and extant sites.**
- **Search the** Office of Environment and Heritage's on-line Aboriginal Heritage Information Management System (AHIMS) Web Services which allows users to search information about recorded Aboriginal objects that have been reported to the Director General Office of Environment and Heritage's – at <http://www.environment.nsw.gov.au/awssapp/login.aspx>. (AHIMS Web Services requires users to login, however there are no restrictions on access to and interrogation of the database.)
- **Refer to** previous archaeological investigations, Aboriginal cultural heritage studies or site specific reports held by Council that are known to document Aboriginal cultural heritage sites, values or sensitive areas, for information about such features that may not be entered in the AHIMS.
- **Search** the Office of Environment and Heritage's archaeological reports library (by request or on-line).
- **Liase** with local Aboriginal people or organisations – initial contact for advice, if warranted.
- ▶ **If YES – if the site contains, or is it within the curtilage of, an AHIMS listed or other recorded/known Aboriginal cultural heritage site – go directly to a Level 2 Assessment - Conduct an “Aboriginal Cultural Heritage Assessment”.**
- ▶ **IF NO – proceed to Step 3 - Can the proponent demonstrate substantial prior disturbance of the development site/footprint – with no likelihood of remnant heritage materials ?**

Rationale:

Tangible Aboriginal heritage objects – typically movable heritage items (such as stone artefacts) or larger or aggregated features (such as shell middens) or fixed objects (such as rock art or grinding grooves) – and the sites where they are located are the most commonly encountered form of Aboriginal cultural heritage. They include burials and human remains.

Tangible remains can also point to areas having cultural, social or resource values for Aboriginal communities and are useful in cultural and scientific terms – in the context of surrounding sites – in demonstrating how Aboriginal people used the landscape of an area.

Tangible Aboriginal cultural heritage objects and sites are the Aboriginal cultural heritage features or values most frequently damaged by development works and other activities. Their recognition and consideration in the development assessment process is not only a fundamental step in the Toolkit but also a legal obligation given the protection afforded these objects under the *National Parks and Wildlife Act 1974*.

Aboriginal Heritage Information Management System

The Aboriginal Heritage Information Management System (AHIMS) is considered the State's primary register of known Aboriginal heritage sites for planning and land management purposes. Its entries may be, as listed by the Office of Environment and Heritage (OEH):

- ❑ an Aboriginal object (as defined under the *National Parks and Wildlife Act 1974*);
- ❑ a group (ie. a collection, scattering, deposit, etc) of Aboriginal objects;
- ❑ an area of land containing Aboriginal objects;
- ❑ a "potential archaeological deposit" (PAD) which is an area where, based on previous investigation, Aboriginal objects are likely to be present;
- ❑ an Aboriginal site that has been partially or completely destroyed under the conditions of a past consent; or
- ❑ a declared Aboriginal Place (as defined under the *National Parks and Wildlife Act 1974*) which may, or may not, contain Aboriginal objects.

However the AHIMS is far from a complete or comprehensive listing. It is focused very much towards tangible Aboriginal sites (where there is remaining physical evidence) with a strong bias towards pre-contact sites. It strongly reflects where previous archaeological or ethno-cultural surveys have been undertaken, with many areas not investigated in detail (or at all) and so there are typically fewer records of Aboriginal sites in those areas. There is also a noted lack of intangible cultural or spiritual sites, and more contemporary locations, represented in the AHIMS listings. The *National Parks and Wildlife Act 1974* acknowledges the short-comings of the AHIMS noting, in section 90Q(3)(d)(iii), that "the AHIMS is not intended to be conclusive about whether any information or records contained within it is up-to-date, comprehensive or otherwise accurate".

The absence of a listing on the AHIMS does not necessarily mean that no Aboriginal heritage sites are known, remain or could occur in an area. There are also cultural heritage sites which are known to Aboriginal people but, for a range of reasons, may not have been identified to non-Aboriginal people and so do not show in AHIMS-sourced data. There also remain inaccuracies in the AHIMS data, and the OEH acknowledges that the data may contain "some historical errors" arising from "converting older imperial data to metric, during digital data entry, and from possible human errors".

Despite these limitations the AHIMS remain an important foundation for investigating the known Aboriginal cultural heritage objects and sites of a place.

The AHIMS Web Services offers an on-line search function and is relatively easy to use (searching the AHIMS database is also part of satisfying the OEH's due diligence requirements). The AHIMS Web Services is open to anyone, and only requires a user to register an email address and provide a self-generated password.

The AHIMS can be searched by Lot and DP number for a specific parcel of land or for a "land block" as defined by easting and northing co-ordinates of the area of interest. The search is a two stage process. A "Basic Search", undertaken on-line at no cost, will provide "an instant response" that indicates if the AHIMS records an Aboriginal site or sites within the search area. However the nature of any site, or sites, is not indicated and an "Extensive Search" is required to elaborate the location and nature of the sites(s) recorded.

An "Extensive Search" is requested using the original search area's descriptor, or by the use of GIS boundaries of the area of interest – such as the footprint of a proposed development or activity. Search results are provided as a cover letter and PDF format AHIMS report or as electronic data for a GIS based search. The AHIMS report includes further information about the Aboriginal site or sites in the search area – such as site name, features (in broad terms) and location. The OEH charges a fee for an "Extensive Search" – with a standard search being processed within 10 working days and an express search provided in 3 working days for an additional charge.

AHIMS search results are considered valid by the OEH for a period of 12 months (from a due diligence perspective).

More detailed information about a particular site can also be provided, on request and for an extra fee, from the OEH in the form of copies of the “site cards” which are the more detailed (and often illustrated) records prepared when an Aboriginal site is recorded.

Councils can also enter into an Aboriginal Heritage Information Licence Agreement (AHILA) as a formal agreement with the OEH for the conditional release of AHIMS data for an entire local government area or other large land area. AHILA information can be updated, by contacting the OEH, on a regular basis. AHILAs are subject to a number of terms and conditions, particularly regarding data confidentiality and who can access the information and for what purposes, and generally require the endorsement of the Local Aboriginal Land Council in the area concerned. However, negotiating an AHILA for the AHIMS data within their respective local government areas would provide each Council with a data base of OEH recorded Aboriginal cultural heritage objects/sites in their area and provide a sound foundation for the Toolkit’s application.

Other Recorded Aboriginal Cultural Heritage Objects/Sites

The AHIMS is not the sole source of information regarding the known or recorded Aboriginal cultural heritage objects/sites in a Council area. Such objects/sites can be documented in a variety of other studies, investigations and reports with these records, for a variety of reasons, never being entered in the AHIMS. The “local knowledge” of Aboriginal people and organisations, as well as the wider community, can also hold information about Aboriginal cultural heritage places and objects/features that may not be otherwise documented. Initial contact at this stage may also be used, in addition to seeking information from Aboriginal knowledge-holders that may not be held or as easily obtained elsewhere, to inform Aboriginal community members of a development proposal early in the assessment process.

The assessments, investigations and reports that can often include information about non-AHIMS listed objects/sites can include – Aboriginal archaeological or heritage assessments prepared for planning studies, major developments (such as collieries or land rezoning and broadacre residential developments), reviews of environmental factors, Aboriginal Heritage Plans, and reports on chance finds during development or management activities. Examples of such studies and reports containing records of Aboriginal cultural heritage objects/sites are available for all three participating Councils – such as *The Cultural Heritage of Bass Point* (1999) in the Shellharbour City Council area, the *Huntley Eco-Park, Aboriginal Archaeological Assessment* (2007) or the *Dendrobium Coal Mine – Area 3A, Aboriginal Heritage Plan* (2010) in the Wollongong City Council area, and the *Gerroa Sand Mine Extension Aboriginal Cultural Heritage Management Plan* (2009) or the *Elambra Estate, Gerringong, NSW – Archaeological Survey for Aboriginal Sites* (2000) in the Kiama Municipal Council area.

The OEH also maintains a library of archaeological reports, heritage management plans and other Aboriginal cultural heritage studies – associated with the AHIMS – that are available for searching, reference, copying or loan. An audit of the then Department of Environment and Conservation’s (now the OEH) archaeological records library in December 2004 (conducted as part of the NSW Comprehensive Coastal Assessment) identified that there were over 180 archaeological or Aboriginal heritage reports then available across the three participating Council areas (refer to Section 4 for details by Council area).

Incorporating these disparate and frequently unmapped values in the Toolkit is a challenge, especially making this information easily available to proponents before they lodge a development application. However there is an onus on Councils to include such information in the development assessment process (as there is for land owners to protect/manage these known sites) – in so far as these sites are “known” to a Council by virtue of its receipt of these reports.

Indexing these extra data sources by locality would assist Council officers to reference them as/when required, however in the longer term a consolidated map of the Aboriginal cultural heritage objects/sites information they contain would be a more desirable aim and more useful assessment tool. Such a plan could, ultimately, be made available to proponents – with the necessary data confidentiality and site security measures required – as a reference source allied to the Development Control Plan.

Curtilage Issues

The Toolkit recommends applying a curtilage of 100 metres around all AHIMS listed or other recorded sites, other than isolated finds where a 50 metre curtilage is recommended. This is:

- to allow for the possibility of minor errors in site positional data in the AHIMS;
- to recognise that the extent of a site may not be fully, or correctly, documented (such as in the case of shell middens);
- to allow for the possibility of surrounding, unrecorded, sites; and
- to enable “off-site” development impacts to be considered (eg. where development on an adjacent lot might hold potential impacts for a known site on the adjoining land parcel).

This curtilage requirement may necessitate searching the AHIMS, and other data sources, in respect of the land parcels surrounding a subject lot.

In addition to recognising and allowing for the above possible variability and errors in AHIMS sites and records, these curtilage distances have been recommended in consideration of the site buffer zones (for known sites) and site investigation zones (for unknown/potential sites) identified in response to the OEH *Due Diligence Code of Practice*.

A number of industry specific codes of practice identify minimum protective buffer zones around known Aboriginal cultural heritage sites. The *NSW Forests Due Diligence Guidelines for Aboriginal Heritage Management* (Forests NSW, 2010) specifies the following minimum protective buffer zones – 20 metres around scarred/carved trees and single burial sites (larger for a burial zone with multiple sites), and 10 metres around an artefact scatter or “relic” and an Aboriginal Place and “other sites”. The *Private Native Forestry Code of Practice for Northern NSW* (by the then Department of Environment, Climate Change and Water, 2008) specifies the following minimum buffer zones – “within 50 metres of a known burial site, within 20 metres of an Aboriginal scarred or carved tree, within 10 metres of a known Aboriginal object or place”. These are based on the “buffer zones for places, objects and items of heritage significance” as prescribed in clause 19 of the *Plantations and Reafforestation (Code) Regulation 2001* which also includes the requirement for a 20 metre wide buffer around any stone arrangement and a 10 metre wide buffer for any artefact scatter. (Note that the Toolkit does not require application of these buffer zones, but presents them to underpin part of the rationale for the site curtilages recommended.)

In the case of unknown, but potential, Aboriginal cultural heritage sites the OEH due diligence process identifies “search” zones of 200 metres from particular landscape features with the potential to harbour Aboriginal objects (such as waterways and cliff faces).

The Toolkit’s recommended 100 metre curtilage around all AHIMS listed or other recorded sites (other than isolated finds where a 50 metre curtilage is to apply) represents a balance or median distance between the distances identified in the above guidelines.

Legislative Basis:

Section 86(1) of the *National Parks and Wildlife Act 1974* makes it an offence to harm or desecrate “an object that the person knows is an Aboriginal object”. All Aboriginal objects, including sites with physical evidence and mobile heritage items, are protected under the Act regardless of their size or level of significance or land tenure (with the exception of Commonwealth Lands).

The Act defines (in section 5) an Aboriginal object 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”. The National Parks and Wildlife Service has in the past elaborated this definition, describing Aboriginal objects (also sometimes referred to as “Aboriginal sites”, “cultural material” or “relics”) as the physical evidence of the use of an area by Aboriginal people including:

- physical objects – such as stone tools, Aboriginal-built fences and stockyards, scarred trees, and the remains of fringe camps;
- material deposited on the land – such as middens; and
- the ancestral remains of Aboriginal people.

“Harm” as defined by the Act (in section 5) includes “any act or omission that destroys, defaces or damages the object” as well as, in relation to objects, moving an “object from the land on which it had been situated” (or causes or permits harm in these ways).

The Act makes it an offence to damage, deface, destroy, disturb or collect any Aboriginal object or evidence without the approval of the Director General of the OEH. However sections 86 and 87 differentiate between the type and severity of these “harm” offences and provide a number of defences to prosecution. The most serious offence, and carrying the higher penalties, is the offence of harming or desecrating an Aboriginal object which a person knows is an Aboriginal object. The second offence is a “strict liability” offence where a person harms an Aboriginal object, whether or not the person knows it is an Aboriginal object and even if the harm was unintentional. The common law defence of honest and reasonable mistake of fact applies to strict liability offences, and anyone who exercises “due diligence” in determining that their actions will not harm Aboriginal objects is afforded a defence against prosecution. The defence of due diligence can include compliance with an adopted (OEH endorsed) industry code of practice, compliance with an Aboriginal Heritage Impact Permit (AHIP), and following the OEH prescribed “code or practice” for due diligence (*Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales, 2010*).

However none of these provisions remove the requirement to address known tangible Aboriginal cultural heritage objects and sites in the development assessment process – including both sites recorded in the AHIMS or identified from other sources.

Further discussion of the legislative provisions around the protection, harm and management of known tangible Aboriginal cultural heritage objects – and the due diligence process – is included in Section 5.

Step 3. Can the proponent demonstrate substantial prior disturbance of the development site/footprint – with no likelihood of remnant heritage materials ?

ACTION:

- **Determine if the proponent has adequately demonstrated that the subject site (or development footprint) has been substantially disturbed over an equal or greater area and to an equal or greater depth and/or severity than would result from the proposed development or activity and that there is, as a consequence, no likelihood of remnant tangible heritage materials.**

- **Assess** supporting evidence to be provided by the proponent to support claim of prior substantial disturbance.
 - **Apply** the precautionary principle or a conservative approach.
 - **Note** that this “exemption” can only be applied after Steps 1 and 2 in the Toolkit – that is, after determining if the site is part of a declared Aboriginal Place or known cultural place/landscape or contains (or is proximate to) recorded/known Aboriginal cultural heritage sites or objects..
- ▶ **If YES – no Aboriginal Cultural Heritage Investigation may be warranted, but provide proponent with “proceed with caution” advice including information regarding heritage site identification, legislative protection, stop-work obligations, reporting procedures, etc.**
- ▶ **IF NO – proceed to Step 4 - Is the proposal exempt or complying development ?**

Rationale:

The land use history and previous development of a site, where these have been of an exceptionally disruptive nature, may have had the effect of removing or destroying all tangible heritage items/materials from a location. At the larger-scale, activities such as quarrying or major civil engineering works have the potential to destroy or remove an area’s tangible heritage items/materials. At the smaller-scale, site works such as underground storage tanks (such as petrol stations) or excavations (for deep foundations or below ground-swimming pools) or underground development (such as below-ground carparks) can have a similar impact.

This Step provides a proponent with the opportunity to demonstrate that a proposal does not warrant an Aboriginal cultural heritage assessment in acceptance of the absence of tangible heritage materials from the development site (and surrounds) due to their removal/destruction as a consequence of earlier land uses and/or developments. A proponent will be required to demonstrate that the subject site (or development footprint) has been substantially disturbed over an equal or greater area, and to an equal or greater depth and/or severity, than would result from the proposed development or activity and that there is, as a consequence, no likelihood of remnant tangible heritage items/materials.

A proponent will be required to provide documentary evidence to support their claim – such as prior site plans/reports, or photographs, or contemporary reports providing an assessment of the degree of site disturbance. A proponent cannot merely contend that a site has been subject to significant prior disturbance.

Councils should adopt a conservative approach when evaluating the proffered evidence for, and possible impacts of, prior land uses or developments and the potential for heritage materials to be removed or destroyed. The potential impacts of a proposal beyond the immediate development footprint – such as from stockpiles or storage areas, accesses, site offices, etc – must be considered. The possibility of fill and other materials that may contain tangible heritage items being imported to a site that might otherwise have previously been “sterilised” may also warrant consideration in some instances. Ploughing, such as by disc ploughs or rotary hoes, does not constitute significant prior site disturbance (refer to the Victorian Department of Planning and Community Development 2008 *Aboriginal Heritage Act 2006 - Practice Note: Significant Ground Disturbance*, for a detailed discussion of ploughing, deep ripping and ground disturbance due to agricultural practices).

Where there is doubt about the extent or severity of previous disturbance, or the likelihood of tangible heritage items/materials surviving at a location, a “No” response should be the default position at this Step and a proposal continue to Step 4 in the Toolkit/assessment process.

Exempting a development proposal from further Aboriginal cultural heritage assessment due to a proponent successfully demonstrating that no tangible heritage items/materials remain at a location can only be applied after Steps 1 and 2 in the Toolkit. That is, after determining if the proposed site

is part of a declared Aboriginal Place or known cultural place/landscape or contains (or is proximate to) recorded/known Aboriginal cultural heritage sites or objects. Also note that this Step is intended to enable proponents to make the case for an “exemption” from further steps in the Toolkit/assessment process (after Steps 1 and 2). Step 6 (below) allows a Council to make its own assessment in relation to totally or grossly disturbed landscapes where these might relate to a specific development proposal.

Legislative Basis:

There are no directly applicable legislative provisions in relation to this Step. However all Aboriginal objects, regardless of their location in the soil profile (including being buried, moved or impacted by post-contact activities) or landscape position, are protected under section 86(1) of the *National Parks and Wildlife Act 1974*.

Step 4. Is the proposal exempt or complying development ?

ACTION:

- **Determine if the proposal is exempt or complying development under the applicable Local Environmental Plan (LEP) or *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*.**
- **Refer to** the relevant sections of the applicable LEP regarding exempt or complying development, including the limitations on the exempt or complying development provisions (both the “Standard Instrument” LEP exempt or complying development exclusions, and any particular exclusions/requirements applied for complying developments by a Council’s LEP).
- **Refer to** the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*.
- ▶ **If YES – if the proposal is exempt or complying development and from a private proponent – advise development approval is not required and “proceed with caution” but provide information brochure regarding heritage site identification, legislative protection, stop-work obligations, reporting procedures, etc.**
- ▶ **If YES – if the proposal is exempt or complying development and Council is the proponent – proceed via the relevant internal works approval process. A Review of Environmental Factors, or works approval, is to include a “Level 1 Assessment - Preliminary Aboriginal Cultural Heritage Investigation” if the works:**
 - **are within an environmentally sensitive area (refer to Step 5); or**
 - **proposed in an area containing mature trees, that may be over 150 years old, and so have the potential for Aboriginal scarring (refer to Step 7); or**
 - **proposed within a site containing micro-features with the potential for extant Aboriginal sites/features (refer to Step 10); or**
 - **proposed in a location that is a “sensitive setting” of medium to high archaeological potential (refer to Step 11).**
- ▶ **IF NO – proceed to Step 5 - Is the site within an environmentally sensitive area that will otherwise require an SEE/REF?**

Rationale:

Local Environmental Plans (LEP) and the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* identify some small-scale developments, typically with limited or negligible environmental impacts, as either “exempt development” that does not require Council approval or “complying development” which is capable of being certified or approved under the complying development provisions of the *Environmental Planning and Assessment Act 1979*.

Private proponents may approach Council, or mistakenly lodge development applications, for developments or activities that do not require development approval under the exempt and complying development provisions of a Council’s LEP. This provides a valuable educational opportunity – to inform proponents of the potential to encounter Aboriginal sites or objects while undertaking works and advise them of the legislative protection, required responses and management/reporting obligations related to any such opportunistic finds.

Council works proposals, even where these would otherwise be exempt or complying development, warrant a closer level of scrutiny both as “exemplar projects” and more so because Council works are often undertaken on less disturbed sites – such as open space areas – with a greater potential for harbouring Aboriginal heritage sites and objects.

Legislative Basis:

The “Standard Instrument” LEP requires compulsory clauses in relation to exempt development (clause 16), complying development (clause 172) and the exclusion of exempt or complying development provisions in regard to environmentally sensitive areas (clause 18).

All three participating Councils have exempt or complying provisions within their respective (current) LEPs. Wollongong City Council and Kiama Municipal Council employ the “Standard Instrument” LEP provisions, while Shellharbour City Council’s 2000 LEP defers to the Shellharbour Development Control Plan No 11/98 for Complying Development.

A Council’s LEP may also place additional requirements or exclusions on complying development. For example, the Wollongong Local Environmental Plan 2009 specifies that complying development cannot occur on – among others – land within 100 metres of Lake Illawarra, lands mapped as Acid Sulphate Soils class 1 or 2, or any land zoned Zone RU1 Primary Production, E2 Environmental Conservation, E3 Environmental Management, W1 Natural Waterways or W2 Recreational Waterways.

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 provides exempt and complying development codes that have State-wide application.

Exempt development provisions in local LEPs are enabled by section 76 of the *Environmental Planning and Assessment Act 1979*, which allows that exempt development may be carried out without the need for development consent under Part 4 of the Act or for assessment under Part 5 of the Act. The section states that exempt development:

- must be of minimal environmental impact, and
- cannot be carried out in critical habitat of an endangered species, population or ecological community (identified under the *Threatened Species Conservation Act 1995* or the *Fisheries Management Act 1994*), and
- cannot be carried out in a Wilderness Area (identified under the *Wilderness Act 1987*).

Clause 14 of the *State Environmental Planning Policy (Infrastructure) 2007* requires that impact assessments are prepared, and provided to a local Council for consideration and response, for developments proposed by or on behalf of a public authority that will impact a local heritage item or a heritage conservation area (where these impacts are “not minor or inconsequential”).

The “Standard Instrument” LEP also includes a compulsory clause that removes the requirement for development consent where a consent authority is satisfied that a development proposal is “of a minor nature” and “would not adversely affect the significance” of an archaeological site or (listed) heritage item.

The *National Parks and Wildlife Regulation 2009* also identifies exempt development or complying development (certified as required under the *Environmental Planning and Assessment Act 1979*) as “low-impact activities” that are exempt from the due diligence process requirements and afforded a defence from prosecution for damage to an Aboriginal object (excluding Aboriginal culturally modified trees) under section 86(2) of the *National Parks and Wildlife Act 1974*. Refer to sections 4.3 and 7.5 of the Office of Environment and Heritage *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales, 2010*.

Step 5. Is the site within an environmentally sensitive area that will otherwise require an SEE or REF?

ACTION:

- **Determine if the proposal is within an environmentally sensitive area as defined by the applicable Local Environmental Plan (LEP).**
- **Refer** to the relevant sections of the applicable LEP regarding environmentally sensitive areas, including those situations where exempt and complying development provisions do not apply.
- ▶ **If YES – if the proposal is within a defined environmentally sensitive area any Statement of Environmental Effects (accompanying a private development application) or Review of Environmental Factors (for Council, or government agency/authority, proposed works) is to include a “Level 1 Assessment - Preliminary Aboriginal Cultural Heritage Investigation”.**
- ▶ **IF NO – proceed to Step 6 - Is the site unambiguously a totally or grossly disturbed landscape ?**

Rationale:

Locations identified in environmental planning instruments as being of high Aboriginal cultural significance – where these are known – can be nominated as environmentally sensitive areas. However none of the three participating Councils has, at present, a mapping layer(s) as part of their LEPs or Development Control Plans indicating such zones of significance (although the “Standard Instrument” LEP allows for the identification of areas of high Aboriginal cultural significance in relation to exempt and complying development).

Areas identified as being environmentally sensitive typically represent more “intact” or less disturbed landscapes or other locations/features. Environmentally sensitive areas typically include – wetlands and their environs (including Ramsar listed wetlands), littoral rainforest areas and their environs, coastal waters and lakes, declared aquatic reserves and marine parks and their environs, critical habitat declared under the *Threatened Species Conservation Act 1995*, areas of high biodiversity significance, national parks and other lands reserved under the *National Parks and Wildlife Act 1974*, and Crown lands reserved for environmental protection purposes (such as for the preservation of

flora, fauna or geological formations). Some participating Councils also identify other “sensitive” areas or planning constraints requiring additional consideration in development applications and assessments – including flooding coastal zone hazards, riparian corridors and watercourses, and listed heritage items or areas.

Many of these less disturbed areas also present a higher likelihood of extant Aboriginal sites and objects. As natural landscapes some of these areas may also have the potential to hold cultural landscape values or other intangible cultural heritage values. As such they warrant a closer assessment to identify any possible Aboriginal cultural heritage values – as achieved by requiring any Statement of Environmental Effects (accompanying a private development application) or Review of Environmental Factors (for Council, or government agency/authority, proposed works) to include a “Level 1 Assessment - Preliminary Aboriginal Cultural Heritage Investigation”.

Legislative Basis:

All three Councils require a Statement of Environmental Effects to be lodged as part of a development application – as part of fulfilling their obligations under Part 4 of the *Environmental Planning and Assessment Act 1979*.

The “Standard Instrument” LEP lists environmentally sensitive areas (for the purpose of limiting exempt or complying development), as any of:

- a sensitive coastal location or State coastal waters;
- land to which *State Environmental Planning Policy No 14 Coastal Wetlands* or *State Environmental Planning Policy No 26 Littoral Rainforests* applies;
- land reserved as an aquatic reserve under the *Fisheries Management Act 1994* or as a marine park under the *Marine Parks Act 1997*;
- land within a wetland of international significance declared under the Ramsar Convention on Wetlands or within a World heritage area declared under the World Heritage Convention;
- land identified in an environmental planning instrument as being of high Aboriginal cultural significance or high biodiversity significance;
- land reserved as a state conservation area under the *National Parks and Wildlife Act 1974*, or reserved or dedicated under the *Crown Lands Act 1989* for the preservation of flora, fauna, geological formations or for other environmental protection purposes; and
- land identified as being critical habitat under the *Threatened Species Conservation Act 1995* or Part 7A of the *Fisheries Management Act 1994*.

Requiring a Statement of Environmental Effects (for private development applications), or a Review of Environmental Factors (for Council, or government agency/authority, proposed works), is consistent with a Council’s development control role as a consent authority under Part 4 of the *Environmental Planning and Assessment Act 1979* and specifically section 79C regarding the matters to be considered when determining a development application.

Step 6. Is the site unambiguously a totally or grossly disturbed landscape?

ACTION:

- Determine if the proposal is within a site/location that is unambiguously a totally or grossly disturbed landscape.**

- **Refer** to local government area wide Aboriginal Heritage Studies for mapping and/or definition or description of totally or grossly disturbed landscapes.
- **Refer** to prior land use data and reliable land use or local histories where no local Aboriginal Heritage Study mapping/definitions are available – or to supplement Aboriginal Heritage Study data.
- **Apply** a conservative approach in identifying totally or grossly disturbed landscapes that have no potential to retain Aboriginal heritage materials.
- ▶ **If YES – no Aboriginal Cultural Heritage Investigation may be warranted, but provide proponent with “proceed with caution” advice including information regarding heritage site identification, legislative protection, stop-work obligations, reporting procedures, etc.**
- ▶ **IF NO – proceed to Step 7 - Does the site contain mature trees that may be over 150 years old and so have the potential for Aboriginal scarring?**

Rationale:

The *Shellharbour City Council Area Aboriginal Heritage Study 2000* defines “grossly disturbed landscapes” as “areas of gross land surface disturbance where the original land surface and soil profile has been obliterated through subsequent land use”. The Study identifies areas such as those modified by open cut quarrying or mining as “grossly disturbed landscapes”. It considers that grossly disturbed areas have “nil potential to contain archaeological sites”.

The *Wollongong City Aboriginal Heritage Planning Study 1995* similarly identified the following lands as “disturbed or largely disturbed” – “urban and suburban areas; roads, services such as power, water telephone aerodrome and sewer and [sic]; landscaped, levelled, bulldozed, excavated and land-filled etc lands; industrial precincts and mining installations”. However the Study acknowledges that “all areas of the City are considered to have archaeological potential in that they have a likelihood of containing sites.”

No comparable assessment is, as yet, available for Kiama Municipal Council.

Aboriginal heritage materials can remain in-situ below the surface disturbance level of many, if not most, types of urban land uses and other developments. There are numerous examples in the Newcastle to Wollongong coastal region of burials, middens, artefacts and other materials being unearthed during excavations and other works in urban and suburban areas.

Therefore a conservative approach is to be applied when identifying totally or grossly disturbed landscapes that have no potential to retain Aboriginal heritage materials. Only past land uses that have impacted a site to bedrock or to considerable depth (to at least below the “B Horizon”) – such as quarrying, benching, major civil engineering works, soil stripping, etc – should be considered to have resulted in totally or grossly disturbed landscapes unlikely to retain tangible Aboriginal heritage materials. However such heavily impacted and modified sites can still hold intangible cultural heritage values (refer to Step 1).

Areas that have been subject to filling (due either to human activity, such as by reclamation or landfill, or natural processes such as sand blows), but without significant disturbance to the natural ground surface beneath, should not be classed as totally or grossly disturbed landscapes. Such areas have the potential for tangible Aboriginal heritage materials to exist, “sealed”, beneath these upper fill layers and can also still hold spiritual significance or have intangible cultural heritage values.

Legislative Basis:

All Aboriginal objects, regardless of their location in the soil profile (including being buried, moved or impacted by post-contact activities) or landscape position, are protected under section 86(1) of the *National Parks and Wildlife Act 1974*.

Clause 80B(4) of the *National Parks and Wildlife Regulation 2009* provides a broad definition of disturbed land, as – “land is disturbed if it has been the subject of a human activity that has changed the land’s surface, being changes that remain clear and observable”. This definition is applied in relation to certain specific low impact activities (that present a lesser risk of inadvertent impact on unknown Aboriginal sites/objects) which are afforded a defence against prosecution for damage to an Aboriginal object under section 86(2) of the *National Parks and Wildlife Act 1974* (refer to Step 8). However this definition of disturbed land, and the associated legislative provisions and relevant parts of the Office of Environment and Heritage due diligence process, does not operate more widely than the specified low impact activities (and does not provide a defence where a proponent is aware of known or recorded Aboriginal cultural heritage sites). The Toolkit applies a far more rigorous definition of “totally or grossly disturbed landscapes” than that set out in the *National Parks and Wildlife Regulation 2009* – and the latter should not be applied in relation to this Step.

Step 7. Does the site contain mature trees that may be over 150 years old and so have the potential for Aboriginal scarring ?

ACTION:

- **Determine if the proposal is within a site/location that contains mature trees that may be over 150 years old and so have the potential for Aboriginal scarring ?**
- **Require proponent confirmation**, with supporting evidence (such as photographic evidence, records of past land clearing, prior land use data and land use/local histories, or as part of an arborist report if required for other purposes) to demonstrate the presence or absence of mature trees (possibly over 150 years old).
- **Remote sensing** (recent low-level aerial photography or “Google Earth” imagery) by Council officers to assess the presence or absence of mature trees (possibly over 150 years old).
- **Site inspection** by Council officers to assess the presence or absence of mature trees (possibly over 150 years old).
- **Apply** a conservative approach in identifying mature trees (possibly over 150 years old), and include both living and dead trees (including stumps, stags and fallen logs).
- ▶ **If YES – if mature trees, that may be over 150 years old and so have the potential for Aboriginal scarring, go directly to a “Level 1 Assessment - Preliminary Aboriginal Cultural Heritage Investigation”.**
- ▶ **IF NO – proceed to Step 8 - Does the proposal (in its entirety) constitute prescribed low impact activities as defined in the *National Parks and Wildlife Regulation 2009* ?**

Rationale:

The deliberate removal of bark or wood from a tree by Aboriginal people provided the raw materials for a wide variety of uses – such as the construction of shelters, watercraft, containers and other artefacts. Trees were also marked or “wounded” by deliberate marking (such as tree carving, often

associated with burial or ceremonial sites), the removal of wood for artefact manufacture, “hollowing” of trees during food collection, or making foot and hand holds for climbing.

However the use of bark or wood declined markedly after European settlement (although many Aboriginal people carry on traditions and techniques relating to the removal and use of these materials). Subsequent land clearing, bushfires and the natural death and decay of host trees have meant that across much of the landscape of the Illawarra (similar to most of the NSW coast) Aboriginal scarred trees are now increasingly rare. In areas subject to early settlement, such as the less rugged landscapes of the Illawarra, only trees around 150 years of age or older are likely to have the potential for Aboriginal scarring (according to the *Wollongong City Aboriginal Heritage Planning Study*, 1995). However evidence of scarring is not limited to living trees and may be found on standing dead trees, stumps or stags, and fallen trees and logs.

Early European settlers adopted bark stripping and other techniques and it can be difficult to distinguish scarred trees resulting from “traditional” Aboriginal activities from those made by early settler or subsequent damage (such as insects, lightning strike, “dropping” branches, or a wide range of other natural and incidental wounds). The confirmation of Aboriginal scarred trees requires a degree of specialist expertise, however the identification of potential scar trees and mature/senescent trees that may be capable of hosting Aboriginal scarring is less challenging. The publication *Aboriginal Scarred Trees in New South Wales - A Field Manual*, by the (then) Department of Environment and Conservation provides a useful guide to scar trees and their identification.

In addition to their cultural heritage significance, Aboriginal scarred trees are of importance due to their scarcity value. The significance of Aboriginal scarred trees is also often enhanced as part of their broader landscape context, and the Office of Environment and Heritage (OEH) recommends ensuring that effective buffer zones are retained to recognise and protect this significance.

The potential for scarred trees, or suitable candidate “host” trees, remaining on the site of a proposed development warrants particular attention during the development assessment process.

A range of other regulations, permits and approvals also relate to land/vegetation clearing, and there is the potential to include Aboriginal cultural heritage considerations in these other assessment and approval processes.

Legislative Basis:

Section 86(1) of the *National Parks and Wildlife Act 1974* makes it an offence to harm or desecrate “an object that the person knows is an Aboriginal object”. All Aboriginal objects, including sites with physical evidence, are protected under the Act regardless of their size or level of significance or land tenure (with the exception of Commonwealth Lands).

The Act defines (in section 5) an Aboriginal object 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”. The National Parks and Wildlife Service has in the past elaborated this definition, describing Aboriginal objects (also sometimes referred to as “Aboriginal sites”, “cultural material” or “relics”) as the physical evidence of the use of an area by Aboriginal people. Scarred trees are specifically identified in this elaborating definition.

Scarred trees are also specifically addressed in clause 80B of the *National Parks and Wildlife Regulation 2009* – which excludes “harm to an Aboriginal culturally modified tree” from the regulation’s defence to prosecution for damage to an Aboriginal site/object as a result of certain low impact activities.

Step 8. Does the proposal (in its entirety) constitute prescribed low impact activities as defined in the *National Parks and Wildlife Regulation 2009*?

ACTION:

- **Determine if the proposal (in its entirety) constitutes prescribed low impact activities, as defined in the *National Parks and Wildlife Regulation 2009* ?**
- **Assess** the activities, works or actions that can reasonably be anticipated to be associated with the proposed development or activity against those identified as low impact activities (considered likely to have a negligible impact on any unknown Aboriginal sites/objects, and not requiring application of the due diligence process) in the *National Parks and Wildlife Regulation 2009*.
- **Note** that these legislated low impact activity provisions/exclusions do not apply to known Aboriginal sites/object (refer to Steps 2 and 7) (or for Aboriginal sites/object discovered while undertaking these low-impact activities) and do not authorise harm to known Aboriginal sites/objects.
- **Apply** the precautionary principle or a conservative approach.
- ▶ **If YES – no Aboriginal Cultural Heritage Investigation may be warranted, but provide proponent with “proceed with caution” advice including information regarding heritage site identification, legislative protection, stop-work obligations, reporting procedures, etc.**
- ▶ **IF NO – proceed to Step 9 - Does the proposal involve ground disturbance or excavation ?**

Rationale:

The *National Parks and Wildlife Regulation 2009*, and related due diligence process recommended by the Office of Environment and Heritage (OEH), recognises certain “low impact” activities that may present a lesser risk of inadvertent damage to unknown Aboriginal cultural heritage sites/objects, or are concerned more with the maintenance of existing facilities/infrastructure in modified settings, or both. These low impact activities – specified in clause 80B of the Regulation – relate mainly to the maintenance of existing accesses and utilities, farming and land management activities and the maintenance of associated infrastructure, grazing, exempt or complying (where certified) developments, mining exploration work, geological or geophysical or seismic surveys, the removal of isolated or dead/dying vegetation, groundwater surveys, and certain environmental rehabilitation works. Many of these are only considered low impact, and afford a defence against prosecution for damage to an Aboriginal object under section 86(2) of the *National Parks and Wildlife Act 1974*, when taking place on “land that has been disturbed” for which the Regulation adopts a reasonably broad definition (with this definition only applying in the case of the Regulation’s specified low impact activities).

It must also be noted that the exemptions of clause 80B of the *National Parks and Wildlife Regulation 2009* do not apply to known Aboriginal cultural heritage sites/objects – with Aboriginal scarred trees specifically excluded from these exemptions under sub-clauses (2) and (3).

The *National Parks and Wildlife Act 1974* also specifies activities that are exempted from the Aboriginal object/site protection, and prosecution for harm, provisions of the Act.

Not all of these low-impact or exempt activities would require development consent to allow them to be carried out. However many do.

The provisions of clause 80B of the *National Parks and Wildlife Regulation 2009*, and sections 87A and 87B of the *National Parks and Wildlife Act 1974*, would suggest that the consideration of the possible impacts of these activities on Aboriginal cultural heritage sites/objects (for locations where there are no known sites/objects) is not sufficiently high risk or significant to warrant consideration via the OEH's recommended due diligence process. It does not necessarily follow that issues around Aboriginal cultural heritage values need not be addressed in the development assessment process. However a Council would need sound, and justifiable or defensible grounds, for requiring the investigation of Aboriginal cultural heritage values in those instances where the National Parks and Wildlife legislation implies that the risks to, or possible impacts on, Aboriginal cultural heritage sites/objects are not significant.

Development proposals which include works or activities not considered low-impact or exempt, that is they are not entirely prescribed low impact activities, should remain in the development assessment process and proceed to subsequent steps in the Toolkit decision process.

Legislative Basis:

Clause 80B of the *National Parks and Wildlife Regulation 2009*, and related due diligence process set out by the OEH, recognises certain low impact activities that present a lesser risk of inadvertent damage to unknown Aboriginal sites/objects. Many of the specified activities are only considered low impact, and afford a defence against prosecution for damage to an Aboriginal object under section 86(2) of the *National Parks and Wildlife Act 1974*, when taking place on "land that has been disturbed".

For the purposes of clause 80B, the Regulation applies a broad definition of disturbed land – prescribing that "land is disturbed if it has been the subject of a human activity that has changed the land's surface, being changes that remain clear and observable". Examples given in the regulation of activities that may have disturbed land include:

- ❑ soil ploughing;
- ❑ the construction of rural infrastructure (such as dams and fences);
- ❑ the construction of roads, trails and tracks (including fire trails and tracks and walking tracks);
- ❑ vegetation clearing;
- ❑ the construction of buildings and the erection of other structures;
- ❑ the construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines, stormwater drainage and other similar infrastructure);
- ❑ substantial grazing activities, involving the construction of rural infrastructure; and
- ❑ earthworks associated with any of the above activities.

The low impact activities as set out in clause 80B of the Regulation, for which that clause removes the obligation for a proponent to go through the due diligence process and sanctions them to "proceed with caution" (under the terms of the *National Parks and Wildlife Act 1974* and *National Parks and Wildlife Regulation 2009*), include the following:

- ❑ maintenance of existing roads, fire trails/tracks, other trails/tracks, maintenance of existing utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines) on land that has been disturbed;
- ❑ farming and land management works – specifically cropping and leaving paddocks fallow, constructing farm dams or water tanks or other water storage works, constructing fences, constructing irrigation infrastructure or ground water bores, constructing flood mitigation works, and constructing erosion control or soil conservation works (such as contour banks) – on land that has been disturbed;
- ❑ farming and land management work that involve the maintenance of existing infrastructure – specifically grain/fibre or fertiliser storage areas, dams or water tanks or other water storage works, infrastructure or ground water bores, flood mitigation works, fences, and erosion control or soil conservation works (such as contour banks) (the clause does not specify that these

activities are only low-impact when on disturbed lands, however their presence would define the lands on which they occur as disturbed under the terms of the clause);

- ❑ the grazing of animals – generally (not specifically on land that has been disturbed);
- ❑ activities defined as exempt development, or the subject of a complying development certificate issued under the *Environmental Planning and Assessment Act 1979* (complying development) – on land that has been disturbed;
- ❑ mining exploration work – specifically costeaning, bulk sampling or drilling – on land that has been disturbed;
- ❑ survey and mapping work – specifically geological mapping, surface geophysical surveys (including gravity surveys, radiometric surveys, magnetic surveys and electrical surveys but excluding seismic surveys), sub-surface geophysical surveys involving downhole logging, and sampling and coring using hand-held equipment (excluding when part of archaeological investigations) – generally (not specifically on land that has been disturbed);
- ❑ the removal of isolated, dead or dying vegetation – generally (not specifically on land that has been disturbed), but only if there is minimal disturbance to the surrounding ground surface;
- ❑ seismic surveying or the construction and maintenance of groundwater monitoring bores – on land that has been disturbed; and
- ❑ environmental rehabilitation work – including temporary silt fencing, tree planting, bush regeneration and weed removal, but not including erosion control or soil conservation works (such as contour banks) – generally (not specifically on land that has been disturbed).

These low impact activities, and associated negation of the due diligence requirement and provision of a defence from prosecution for damage to an Aboriginal object under section 86(2) of the *National Parks and Wildlife Act 1974*, do not apply to Aboriginal culturally modified trees which are protected regardless of clause 80B (refer to Step 7).

Certain other activities are also exempted from the Aboriginal object/site protection, and prosecution for harm, provisions of the *National Parks and Wildlife Act 1974*. Section 87A exempts:

- ❑ conservation or protection works relating to an Aboriginal object (or place) undertaken by a National Parks and Wildlife Service officer or a person under the direction of such an NPWS officer;
- ❑ any emergency fire fighting activities or bush fire hazard reduction works (as defined in and authorised or required to be carried out under the *Rural Fires Act 1997*);
- ❑ anything authorised by or under the *State Emergency and Rescue Management Act 1989* in relation to an emergency (as defined in that Act) that was reasonably necessary in order to avoid an actual or imminent threat to life or property; and
- ❑ anything specifically required or permitted under the terms of a conservation agreement entered into under *National Parks and Wildlife Act 1974*.

Section 87A of the *National Parks and Wildlife Act 1974* exempts Aboriginal people and their dependants (whether Aboriginal or not) from penalties related to harming or defacing Aboriginal objects/places if undertaking traditional cultural activities (except commercial activities).

Step 9. Does the proposal involve ground disturbance or excavation?

ACTION:

- ❑ **Determine if the proposal will involve ground disturbance or excavation ?**
- ❑ **Review** the development application and proposed works or activities to determine if they will entail ground disturbance or excavation.

- **Apply** a conservative approach in identifying the likelihood of ground disturbance. The depth and extent of ground disturbance is not considered a significant determinant, with any ground disturbance (other than point penetration) sufficient to trigger a “yes” response to this Step.
- ▶ **If NO – if the development proposal will not entail ground disturbance or excavation proceed to Step 10 - Does the site contain micro-features with the potential for extant Aboriginal sites/features?**
- ▶ **IF YES – proceed to Step 11 - Is the site within a “sensitive setting” of medium to high archaeological potential?**

Note: The Toolkit’s assessment process “splits’ after Step 9. Those development proposals that WILL NOT entail ground disturbance or excavation proceed to Step 10, while those that WILL involve ground disturbance or excavation proceed to Step 11.

Rationale:

This Step is to differentiate those development proposals that involve above-ground works only (including activity applications) with no anticipated ground disturbance or excavation, from those that will entail ground-breaking of any depth and extent. This is considered warranted to better target subsequent steps in the Toolkit’s application, and to provide efficiencies in the development assessment process.

No thresholds have been identified in regard to the depth and extent of ground disturbance as the chief aim of this Step is to separate above-ground only works in the subsequent Toolkit steps. The depth and extent of ground disturbance is also not considered a significant factor on which to differentiate the type and intensity of Aboriginal cultural heritage investigation a development proposal warrants – given that the potential impacts of a 200 millimetre deep ground surface disturbance may be the same as, or greater than, the impacts of a 2 metre excavation depending on a range of other site attributes.

For the purposes of this Step land clearance, vegetation removal, bush regeneration works (other than non-invasive methods such as seed broadcasting and mulching or brush matting), and fencing are considered to entail ground disturbance.

For the purposes of this Step minor point penetrations of the ground surface – such as tent pegs as part of a marquee and temporary flags or signs (on stakes or posts not requiring footings) associated with a major community event which requires development consent – are not considered to entail ground disturbance or excavation. This approach is supported by the information prepared by the (then) Department of Environment Climate Change and Water explaining the due diligence changes to the National Parks and Wildlife legislation which described “trivial or negligible” events, noting that these are not considered “harm”. Events cited include “picking up and replacing a small stone artefact, breaking a small Aboriginal object below the surface when you are gardening, crushing a small Aboriginal object when you walk on or off a track, picnicking, camping or other similar recreational activities.”

Legislative Basis:

There are no directly applicable legislative provisions in relation to this Step.

However it is consistent with the first step in applying the Office of Environment and Heritage’s (OEH) generic due diligence code of practice – as set out in the *Due Diligence Code of Practice for the*

Protection of Aboriginal Objects in New South Wales (2010). This initial step requires a proponent to determine if “the activity will disturb the ground surface ?” (or any culturally modified trees ?) on the basis that where this occurs “there is a higher likelihood that Aboriginal objects will be harmed”.

This Step is also consistent with the OEH *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW* (2010) which also requires an assessment, among other matters, of both the “material evidence of Aboriginal land use” and the “nature and range of occupation evidence” at a subject site as well an assessment of “any potential harm to Aboriginal objects and/or declared Aboriginal places”.

Step 10. Does the site contain micro-features with the potential for extant Aboriginal sites/features ?

ACTION:

- **Determine if the site contains micro-features with the potential for extant Aboriginal sites/features ?**
- **Require proponent confirmation**, with supporting evidence (such as photographic evidence, survey plans, low-level aerial photography, etc), to demonstrate the presence or absence of any of the listed range of possible micro-features considered to have the potential for extant Aboriginal cultural heritage sites/features.
- **Remote sensing** (recent low-level aerial photography or “Google Earth” imagery) by Council officers to assess the presence or absence of any listed micro-features.
- **Site inspection, if required**, by Council officers to assess the presence or absence of any listed micro-features.
- ▶ **If YES – if micro-features considered to have the potential for extant Aboriginal sites/features are present go directly to a “Level 1 Assessment - Preliminary Aboriginal Cultural Heritage Investigation”.**
- ▶ **IF NO – no Aboriginal Cultural Heritage Investigation may be warranted, but provide proponent with “proceed with caution” advice including information regarding heritage site identification, legislative protection, stop-work obligations, reporting procedures, etc.**

Rationale:

Micro-features are those small scale landscape features (both specific features such as rock shelters, and locations such as creek margins) that are considered to possibly contain or support Aboriginal cultural heritage sites/objects. They are all surface features or landscape components. As such these features, and any sites/objects they hold, could be vulnerable – both directly and indirectly – to proposed developments, works or activities that would take place primarily above the ground surface (such as major cultural celebrations or festivals, large scale sporting events, open air theatres and concerts, cycling races, temporary structures, land subdivision, or changes in use of a site). They are also vulnerable to more disruptive developments or works (as addressed in Step 11).

Micro-features of interest in the development assessment process include:

- the riparian corridor 200 metres wide on each side of permanent or ephemeral creeks or watercourses (including waterways subsequently modified by post-settlement activity);
- sandstone outcrops adjacent to waterways/watercourses;

- ❑ exposed sandstone platforms or relatively level sandstone outcrops (including platforms and outcrops that may have been buried or covered due to post-contact land uses);
- ❑ rock overhangs/shelters over 1 metre high (especially with relatively level and/or dry floors);
- ❑ areas of undisturbed native vegetation in excess of 100 square metres or covering 10% or more of a site (whichever is the greater for the site in question);
- ❑ spurs, ridgelines, ridge tops and high points or knolls; and
- ❑ cliffs – including areas above or below clifflines.

These micro-features are highly visible or readily examined landscape features, and the particular Aboriginal cultural heritage sites/objects which they typically contain are similarly more visible or readily observed ground-surface or above-ground heritage sites/objects. These include more frequently encountered objects such as grinding grooves, engraved art, stencil art, pigment art and surface artefact scatters and “open” campsites as well as uncommon or rare features such as sheltered occupation sites, scarred or carved trees, oven or hearth sites (surface exposures), quarry sites (stone or ochre), stone arrangements, ceremonial sites or burials (where these have a surface expression, such as mounds), fish traps, and constructed/enlarged water holes.

Micro-features are identifiable by a layperson, even if some of the Aboriginal cultural heritage sites/objects they support can be more cryptic. Note: The participating Councils could prepare supporting information to provide proponents with descriptions/details of the micro-features or landscapes and possible Aboriginal cultural heritage sites/objects that may be encountered to assist proponents at this Step (examples of similar materials prepared by other councils are provided in Appendix A).

The above list of micro-features has been drawn from previous Aboriginal cultural heritage studies in the Illawarra and the characteristics and occurrence, including landscape positions and patterning, of the Aboriginal cultural heritage sites/objects that these investigations revealed. This has been supplemented with information from the Office of Environment and Heritage (OEH) regarding those landscape features that are typically associated with particular sites/objects, as well as other observed links between types of Aboriginal cultural heritage sites/objects and certain landscape features elsewhere in the Illawarra and Sydney region.

Legislative Basis:

Part 6 of the *National Parks and Wildlife Act 1974* provides “blanket protection” to Aboriginal objects and tangible sites. These objects/features are legally protected regardless of whether they have been recorded or not, regardless of their size, and regardless of their significance to Aboriginal people.

As set out in Appendix 1 to the OEH’s *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales* (2010) many Aboriginal objects are present or exposed on or above the ground surface (such as surface artefact scatters, oven/hearth sites, middens [where exposed], axe grinding grooves, rock engravings, stone arrangements, and quarries) or as part of small-scale surface/landscape features (in the case of rock art [stencil and pigment art] and scarred/modified trees). Both the *Due Diligence Code of Practice* and the OEH *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW* (2010) require an assessment, among other matters, of both the “material evidence of Aboriginal land use” and the “nature and range of occupation evidence” at a subject site. These guidelines require desktop and predictive assessments, as well as visual inspections or site surveys.

This Step is consistent with the “standard LEP template”, which includes the compulsory provision (Clause 5.10) requiring that a Council (as consent authority) before granting consent for a development or activity in an “Aboriginal place of heritage significance” must “consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and

assessment". An "Aboriginal place of heritage significance" is defined as "the site of one or more Aboriginal objects or a place that has the physical remains of pre-European occupation by, or is of contemporary significance to, the Aboriginal people. It may (but need not) include items and remnants of the occupation of the land by Aboriginal people".

Step 11. Is the site within a "sensitive setting" of medium to high archaeological potential?

ACTION:

- **Determine if the site is within a "sensitive" landscape setting or position assessed as being of medium to high archaeological potential (as defined by applicable Aboriginal cultural heritage studies or the Office of Environment and Heritage Aboriginal Sites Decision Support Tool)?**
 - **Identify**, by comparison with available predictive models and landscape sensitivity mapping, if the site is located in a landscape setting/position considered to be of medium or high archaeological potential, or landscape sensitivity, for the potential location of Aboriginal cultural heritage sites/features. The source data for determining archaeological potential or landscape sensitivity will vary across the three participating Councils.
 - **Require proponent confirmation**, with supporting evidence (such as photographic evidence, survey plans, low-level aerial photography, etc), to demonstrate the presence or absence of any of the possible micro-features considered to have the potential for extant Aboriginal cultural heritage sites/features (as listed at Step 10).
 - **Remote sensing** (recent low-level aerial photography or "Google Earth" imagery) by Council officers to assess the correct application of predictive models and landscape sensitivity mapping, and the presence or absence of any listed micro-features.
 - **Site inspection, if required**, by Council officers to assess the correct application of predictive models and landscape sensitivity mapping, and the presence or absence of any listed micro-features.
- ▶ **If YES – if the site is within a landscape setting/position of medium to high archaeological potential go directly to a "Level 1 Assessment - Preliminary Aboriginal Cultural Heritage Investigation".**
- ▶ **IF NO – no Aboriginal Cultural Heritage Investigation may be warranted, but provide proponent with "proceed with caution" advice including information regarding heritage site identification, legislative protection, stop-work obligations, reporting procedures, etc.**

Rationale:

Aboriginal cultural heritage sites/features occur across the entire landscape, both before European colonisation and today. However some parts of the landscape have a greater potential to have contained, and to retain, specific types or arrays of sites/features.

Aboriginal peoples' traditional use of the different areas or features of the landscape led to a patterning in the distribution of certain site types in response to landscape features – such as proximity to water (waterways, waterholes, wetlands, etc), vegetation, terrain (sand dunes, rock shelters, elevated terraces, etc), soils, and others. As a consequence certain Aboriginal sites/objects were, and are, often associated with particular landscape features. This "landscape sensitivity"

approach (sometimes also called “predictive modelling”) has been increasingly employed to identify and manage Aboriginal cultural heritage sites – both known sites and, especially, as yet unrecorded sites. This approach evaluates an area in terms of the likelihood of Aboriginal cultural heritage sites/features originally occurring there (based on the landscape type or setting), and then the likelihood of such sites surviving or being relatively undisturbed into the present. It allows areas with differing potential for the location and survival of sites to be determined – and planning, assessment or management responses developed accordingly.

This “landscape sensitivity” approach is especially useful in determining the likelihood of subsurface sites/objects persisting in a landscape – such as middens, archaeological deposits, or burials – even where there may be no surface expression of these sites/objects or little evidence of their potential existence.

Above-ground Aboriginal cultural heritage sites/objects were addressed in Step 10, for those development applications that only entail proposed above-ground works. However the development applications under consideration in this Step 11 are those that will entail ground disturbance or excavation, which will also potentially impact above-ground sites/objects. As such, where a development application is assessed at this Step the possible impacts on all potential Aboriginal cultural heritage sites/objects, both below and above ground, should be examined.

The availability and level of detail in “landscape sensitivity” data varies markedly across the three participating Councils. Accordingly the base data against which to determine the archaeological potential or landscape sensitivity of a proposed development site will vary for each Council.

Office of Environment and Heritage Aboriginal Sites Decision Support Tool

The Office of Environment and Heritage (OEH) has recently developed the Aboriginal Sites Decision Support Tool (ASDST) which is available for use on the Agency’s website. The ASDST has been developed to support the assessment of Aboriginal cultural heritage site issues across NSW at the landscape and regional scales. It offers predictive maps of selected Aboriginal cultural heritage site types based on the application of predictive modelling. These are derived from, and extend, the Aboriginal Heritage Information Management System (AHIMS) data by illustrating the potential distribution of site features recorded in that database.

The site types included in the ASDST, which are relevant to the Illawarra, include – stone artefacts, rock art, burials, grinding grooves, hearths, coastal shell middens, stone quarries and scarred trees. The mapping layer generated by the ASDST most applicable for the Toolkit’s purposes is the “current model”, which takes into account estimated historical impacts on Aboriginal features to predict the likely survival of each of the above feature types in the present-day landscape. This is based on the pre 1750 models of the distribution of these sites adjusted to reflect a realistic likelihood of site features occurring in the present-day landscape.

As described on the OEH’s website ASDST page, “the ‘current model’ maps do this by utilising tenure, native vegetation extent, land-use mapping and mining history (such as sand mining) to place parameters upon the likely survival rates of different features under different types of land-use and land condition. Parameters estimating impacts were derived through consultation and a series of expert workshops. Tenure and tenure history was used to provide an idea for how long parts of the landscape have been managed for conservation (eg as a National Park); native vegetation extent was used to identify those areas of the landscape that have been subjected to clearing; land-use mapping indicates how land is currently used (ie. cropping, grazing, roads or urban); and mining reveals which parts of the landscape where site likelihood has been irretrievably degraded (eg even though it might now be in a National Park and covered in native vegetation).”

The “current model” maps grade the likelihood of a feature occurring at a specific location in the present-day landscape – based on 1 hectare cells (as discussed below) – from “high likelihood” to

“low likelihood”, shown using gradational tones (from black = high, to white = low/nil). NB: No precise definition of these varying levels of likelihood is provided with the model.

ASDST maps are user-generated on the OEH website via an interactive mapping tool. The maps are designed to be used at scales of 1:100,000, and intended to chiefly be applied for regional planning purposes. However their application at finer scales is possible, with data resolution to the 1 hectare level (each cell or pixel in the ASDST map products represents 1 hectare on the ground, and is “attributed with a value indicating the relative value [depicted in shades of black/grey] of what the layer is describing at that place” – as shown in Figure 3. The datasets used to generate the ASDST maps are themselves derived at the 1:100,000 scale or coarser, and any inaccuracies in these data layers are carried through to the final predictive products.

Despite these limitations, in the absence of more detailed local government area specific predictive modelling the ASDST provides useful if somewhat generalised “landscape sensitivity” to assist in the Toolkit’s application.

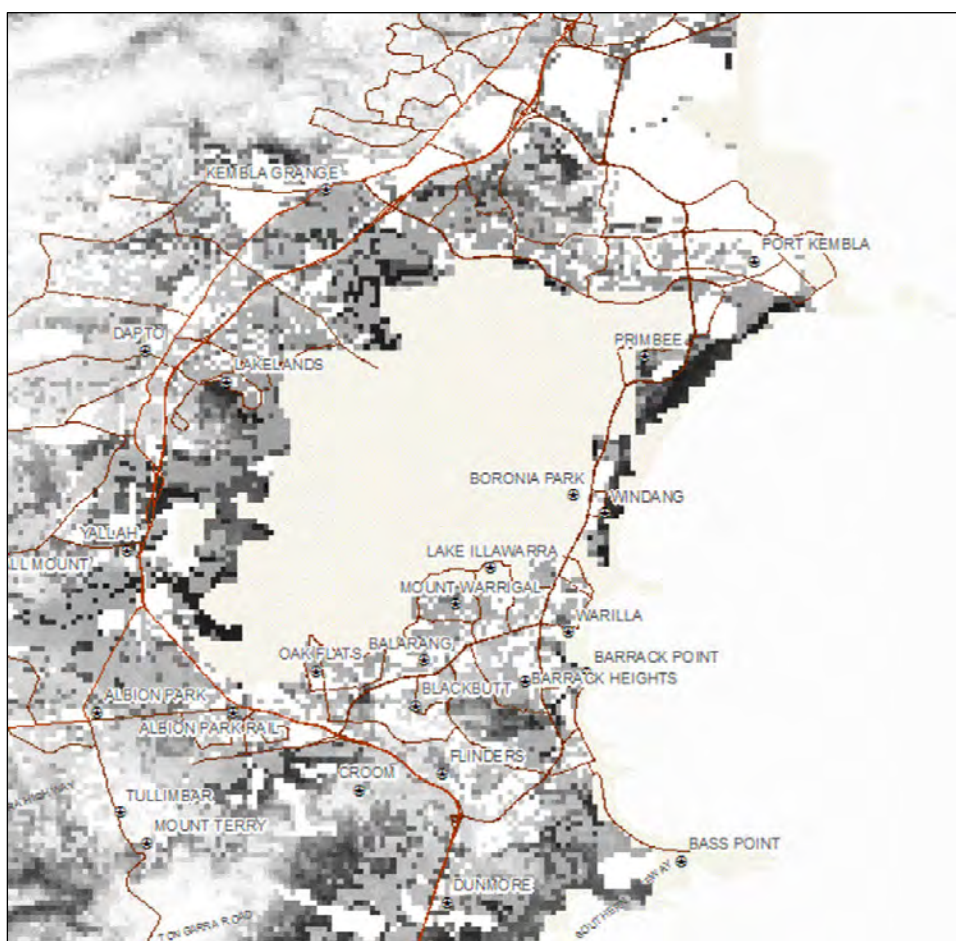


Figure 3 An example of predictive modelling generated by the ASDST, for the present-day modelled likelihood of coastal middens

(source: OEH website)

Shellharbour City Council

Shellharbour City Council has the most comprehensive, and recent, landscape sensitivity mapping at the local government area level. The *Shellharbour City Council Area Aboriginal Heritage Study* (2000) identified, and mapped, nine individual “landscape zones of archaeological sensitivity” across the entire Council area (refer to Chapter 8, Map 4 and Table 6 of the Study). The potential for each zone to contain each of the following seven Aboriginal cultural heritage sites/features was rated and described (in text and table format) – open artefact scatters, middens, rock shelter sites, grinding grooves, burials, scarred trees, and other site types. General “areas of archaeological sensitivity”

within each landscape zone, within particular landscape features or positions (or landscape sub-units) where applicable, were also described. The potential for each landscape zone to contain Aboriginal cultural heritage sites/features was rated as nil, low, moderate (medium) or high – however an exact definition of each of these terms/ratings was not provided.

Based on the nine “landscape zones of archaeological sensitivity”, as mapped in the 2000 Aboriginal Heritage Study, eight of the nine zones have moderate or high potential for at least one of the seven Aboriginal cultural heritage sites/features assessed (the only exception being the “grossly disturbed landsurface” zone). In this coarse format the predictive model is not sufficiently refined or detailed to differentiate those locations where development applications require an Aboriginal cultural heritage investigation – as simply applying the landscape sensitivity model as mapped in the 2000 Aboriginal Heritage Study would select all areas (except the “grossly disturbed landsurface” zone) for investigation.

However the 2000 Aboriginal Heritage Study also describes “areas of archaeological sensitivity” within each of the eight landscape zones of archaeological sensitivity that are of interest. These landscape sub-units provide a more workable set of landscape settings to apply in selecting those locations where further Aboriginal cultural heritage investigations are warranted. These areas of archaeological sensitivity are:

- ❑ littoral zone (coastal and estuarine) 200 metres from bank or shore – including in urban and developed areas – and especially sites near creek or estuary mouths and undisturbed locally elevated generally level landforms (especially when close to a freshwater source, adjacent to rock platforms, or on a relatively deep sedimentary deposit);
- ❑ low-gradient sedimentary contexts – including in urban and developed areas;
- ❑ locally elevated generally level landforms such as terrace edges, spurline crests, remnant dunes, and the banks of drainage lines and wetland basins – in valley floor alluvium and estuarine infill deposits;
- ❑ generally level spurline crests, low rises, benches and ridges as well as locally elevated and/or generally level ground adjacent to drainage lines or freshwater – on slopes and spurs surrounding valley floors or coastal plain slopes;
- ❑ level ground on ridge and spurline crests and benches, especially locally elevated landforms adjacent to freshwater – on valley slopes of the Illawarra Escarpment;
- ❑ relatively level ground, especially close to a water source and in saddles – on elevated ground and watershed crests above the escarpment; and
- ❑ bedrock platforms of even or fine grained sandstone within or near a watercourse – on sandstone drainage lines.

Unfortunately these landscape sub-units or settings, with moderate to high archaeological sensitivity, are not individually mapped in the 2000 Aboriginal Heritage Study. This limits their application within the Toolkit, including as a reference for private proponents when preparing the development applications – until adequately mapped. A fallback dataset to these landscape sub-units or settings, for possible use in the interim, is discussed below.

Wollongong City Council

An Aboriginal heritage study was completed for the Wollongong City Council area in 1995 – the *Wollongong City Aboriginal Heritage Planning Study*. This also included a brief discussion of the archaeological sensitivity of the local government area’s main landforms. The study identified the “immediate coast” as an area of high archaeological sensitivity, and the “alluvial plains and foothills” were also considered sensitive.

However these assessments are too broad to be usefully applied by the Toolkit.

There is a reasonable degree of similarity between many landforms of the Wollongong and Shellharbour City Council areas. Based on this it may be realistic to apply the “landscape zones of archaeological sensitivity”, and the smaller and more useful “areas of archaeological sensitivity” with

these (once adequately mapped), as identified in the *Shellharbour City Council Area Aboriginal Heritage Study* (2000) to the Wollongong City Council area.

A fallback dataset for the Wollongong City Council area is discussed below.

Kiama Municipal Council

There are no predictive models or landscape sensitivity mapping available specific to the Kiama Municipal Council area. A fallback dataset for this area is also discussed below

Fallback Data Sets

Two options are possible fallbacks to provide the necessary predictive modelling or landscape sensitivity mapping for use in the Toolkit in the short term (or medium term for the Kiama Municipal Council area).

Option one is to “default” to the OEH’s generalised set of “landscape features that indicate the likely existence of Aboriginal objects”. These apply across all three Council areas, and include land that is “not disturbed” and is:

- ❑ within 200 metres of waters (meaning any river, stream, lake, lagoon, swamp, wetlands, natural watercourse, or tidal waters including the sea); or
- ❑ located within a sand dune system (including marine/coastal, estuarine, fluvial/riverine or aeolian dunes); or
- ❑ located on a ridge top, ridge line or headland; or
- ❑ located within 200 metres below or above a cliff face; or
- ❑ within 20 metres of or in a cave, rock shelter, or a cave mouth.

Option two is to cautiously apply the OEH Aboriginal Sites Decision Support Tool to identify if the proposed development site in question – based on the ASDST’s 1 hectare grid – is modelled to have a high likelihood for one of more of the site types that the ASDST addresses.

Applying both fallback methods would also be a workable interim solution for this Step in the Toolkit.

Legislative Basis:

Part 6 of the *National Parks and Wildlife Act 1974* provides “blanket protection” to Aboriginal objects and tangible sites. These objects/features are legally protected regardless of whether they have been recorded or not, regardless of their size, and regardless of their significance to Aboriginal people.

Both the OEH *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales* (2010) and *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW* (2010) require an assessment, among other matters, of both the “material evidence of Aboriginal land use” and the “nature and range of occupation evidence” at a subject site. Both require predictive assessments of the likelihood of various sites/objects occurring in a subject area – based on “landscape features [which] indicate the presence of Aboriginal objects” (step 2b in the generic due diligence process) or “a predictive model of Aboriginal site distribution” – as well as visual inspections or site surveys.

As for Step 10, this Step is also consistent with the “standard LEP template” which requires that a Council (as consent authority) before granting consent for a development or activity in an “Aboriginal place of heritage significance” must “consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and assessment”. An “Aboriginal place of heritage significance” is defined as “the site of one or more Aboriginal objects or a place that has the physical

remains of pre-European occupation by, or is of contemporary significance to, the Aboriginal people. It may (but need not) include items and remnants of the occupation of the land by Aboriginal people”.

2.3 Levels of Aboriginal Cultural Heritage Assessment

As indicated in Figure 2, the Toolkit includes two levels of Aboriginal cultural heritage assessment:

- a “Preliminary Aboriginal Cultural Heritage Investigation”, or a Level 1 Assessment; and
- an “Aboriginal Cultural Heritage Assessment”, or a Level 2 Assessment.

A Level 1 Assessment is undertaken where there is the potential for Aboriginal cultural heritage features or values to occur on the site of a proposed development with the risk that these features or values may be impacted. A Preliminary Aboriginal Cultural Heritage Investigation (a Level 1 Assessment) may be an outcome of Steps 4, 5, 7, 10 or 11 of the Toolkit.

A Level 2 Assessment is undertaken for those sites where there are known Aboriginal cultural heritage features or values – specifically where there is a declared Aboriginal Place or known cultural place/landscape, or sites having or proximate to recorded/known Aboriginal cultural heritage site or object. An Aboriginal Cultural Heritage Assessment (a Level 2 Assessment) may be an outcome of Step 1 or Step 2 of the Toolkit, or in response to the findings of a level 1 Preliminary Aboriginal Cultural Heritage Investigation.

2.3.1 Aboriginal Community Involvement in the Assessment Process

The involvement of local Aboriginal people or organisations is required for both a level 1 and level 2 Aboriginal cultural heritage assessment.

Such consultation and involvement may be relatively simple or straightforward for a Level 1 Assessment, but will necessarily be more rigorous for a Level 2 Assessment and comply with the OEH’s *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010* – as discussed further below.

Ensuring Aboriginal involvement in the assessment process is the proponent’s responsibility. It may be done directly with people or organisations within the Illawarra Aboriginal community, or through an Aboriginal heritage consultant or specialist who will engage with local Aboriginal people or organisations on the proponent’s behalf.

To ensure that Aboriginal cultural heritage information is accorded the same status as other data in the planning and development assessment process and is “defensible” (such as that provided by geotechnical or biodiversity consultants), it is highly desirable that any Aboriginal people or organisations specifically engaged to participate in an Aboriginal cultural heritage assessment hold suitable professional indemnity insurance. To ensure equality of opportunity for all Aboriginal knowledge-holders to contribute to the identification and protection of Aboriginal cultural heritage, individuals who do not hold such insurance may be able to provide their services via an Aboriginal job network or other umbrella agency and benefit from their insurance cover.

It is not considered appropriate that Councils engage Aboriginal people to provide cultural heritage services or advice to private proponents.

2.3.2 Preliminary Aboriginal Cultural Heritage Investigation (Level 1 Assessment)

A Preliminary Aboriginal Cultural Heritage Investigation, a Level 1 Assessment, is to include the following as a minimum.

- A search of the Office of Environment and Heritage's Aboriginal Heritage Information Management System (AHIMS) and obtaining the site cards (detailed records) for any listed sites.
- Consultation with local Aboriginal people or organisations as to any known or potential Aboriginal cultural heritage sites/values of the proposed development area and an appropriate level of assessment (with an advisory/confirmation letter). Advice as to the intensity scale and extent of investigations considered warranted, including the need for any on-site inspections in company with Aboriginal representatives, could be sought during these discussions – as a guide to the appropriate level of detail and intensity for the assessment.
- A desktop assessment, including a review of:
 - any relevant Aboriginal Heritage Study;
 - existing knowledge of area's Aboriginal cultural heritage sites/values from previous heritage studies or reports for the area and other published works (including any archaeological studies listed on AHIMS); and
 - the landforms, geomorphology and land use history of the site.
- A visual inspection or on-ground reconnaissance level (walk-over) survey of the area to detect any readily identifiable Aboriginal cultural heritage sites/objects, determine the likelihood of sub-surface materials, and assess the degree/extent of previous significant site disturbance. If suggested during the initial consultation regarding the site, this walk-over inspection should preferably be carried out with the involvement of local Aboriginal people or organisations (with a post-inspection advisory/confirmation letter).
- A brief report outlining the assessment activities undertaken and key findings, the outcomes of any site inspections, any Aboriginal cultural heritage sites/objects located and the potential for sub-surface or un-located values, and recommendations as to the requirement for a more detailed level 2 "Aboriginal Cultural Heritage Assessment".

2.3.3 Aboriginal Cultural Heritage Assessment (Level 2 Assessment)

An Aboriginal Cultural Heritage Assessment, a Level 2 Assessment, is a more detailed and comprehensive assessment to uncover or discover (or confirm, in the case of previously known or recorded sites/objects) evidence of Aboriginal cultural heritage. The format and level of detail of these more comprehensive assessments will vary, with the size and characteristics of both the site and the proposed development or activity.

However a Level 2 Assessment must be undertaken in accordance with the OEH's *Aboriginal Cultural Heritage Consultation Requirements for Proponents* (2010). The OEH specifically recommends that these requirements also be used where a proponent is required to undertake a cultural heritage assessment to determine the potential impact or harm that a proposed development or activity may have on a site's Aboriginal cultural heritage values. They clearly set out the requirements for consultation with "Aboriginal parties" when undertaking a cultural heritage assessment to determine the potential impacts that a proposal might hold for Aboriginal cultural heritage sites/values.

A Level 2 Assessment may potentially include the disturbance or excavation of parts of a site for heritage/archaeological investigations.

It can also lead to the identification of measures for integrating a site's Aboriginal cultural heritage values into a proposed development – to avoid or mitigate/ameliorate impacts on Aboriginal cultural heritage values. Such outcomes may avoid the legislative obligation for a developer to prepare (and a Council to require, as part of the development application package) an Aboriginal Heritage Impact Permit (AHIP) under section 90 of the *National Parks and Wildlife Act 1974*. (A Level 2 Assessment need not always result in, or warrant, an AHIP application – with this depending on the circumstances of each development proposal and the heritage values of a proposed site.) The final Aboriginal Cultural Heritage Assessment report must also be part of the supporting documentation for the subject development application.

However where impacts or harm to Aboriginal cultural heritage values cannot be avoided, the Aboriginal Cultural Heritage Assessment and the consultation with Aboriginal people or groups central to its preparation, will help inform the OEH's decision making in regard to an AHIP application. In these cases the application is subject to the integrated development provisions of section 91 of the *Environmental Planning and Assessment Act 1979*, and a Council cannot (in most circumstances) approve a development application without the OEH's concurrence via approval of the necessary AHIP. Alternatively a proponent may seek an AHIP directly from the OEH separate to the development application process and lodge this, if approved, as part of the supporting documentation for their development application.

OEH granting of an AHIP does not obligate a Council to approve the associated development application, with a Council still able to reject or specify approval conditions for a development application on the basis of Aboriginal cultural heritage values (or other heritage matters).

2.4 Other Exemptions and Exclusions

Some circumstances may provide a development application with an exemption or exclusion to full consideration under the Toolkit's assessment pathway. These are in addition to Step 3 in the Toolkit process where a proponent has the opportunity to demonstrate that prior land uses or developments have removed or destroyed all tangible heritage items/materials from a location (so removing the need for assessment beyond Step 2).

Such exemptions or exclusions that may be applied, on a case by case basis, include:

- where a detailed Aboriginal cultural heritage assessment or archaeological investigation – of an acceptable standard and including the required level of Aboriginal community consultation – has been undertaken over the entire proposed site of a development application within the last 10 years (such as at the rezoning stage of a major subdivision);
- declared Part 3A projects (under the *Environmental Planning and Assessment Act 1979*, now repealed), where the Director-General's requirements address the AHIP provisions of the *National Parks and Wildlife Act 1974* and other Aboriginal cultural heritage management considerations (excluding instances of staged approval or concept plan endorsement only, where Part 4 determinations under the *Environmental Planning and Assessment Act 1979* have been handed back to local councils).

3. DEVELOPMENT CONTROL PLAN INTEGRATION

3.1 Aims of Integrating the Toolkit into a Development Control Plan

The aims of integrating the Aboriginal Cultural Heritage Management Development Assessment Toolkit (“the Toolkit”) into a Council’s Development Control Plan (DCP) are:

- to support and elaborate the Aboriginal cultural heritage protection measures in a Council’s Local Environmental Plan;
- to increase applicants’ (and the wider community’s) awareness of Aboriginal cultural heritage matters, and the need to address these in the planning and development assessment process in a similar way to which other values and planning constraints are addressed;
- to identify those circumstances – in terms of the types of development or activities and landscape position, location or site attributes – where Aboriginal cultural heritage matters will require consideration when preparing and lodging a development application;
- to provide applicants with the necessary information, or direct them to where this information is readily available, to allow them to determine if their proposal will require the investigation of Aboriginal cultural heritage matters;
- to provide applicants with guidance as to the type of Aboriginal cultural heritage information or investigations that may be required in support of their development application, and the level of detail or minimum content required.

To achieve these aims it is important that the Toolkit’s inclusion in a DCP predominantly refers to information that is publicly accessible and can be reasonably understood by the layperson. References to material that is not easily accessed by the public, or to “restricted” information, would not allow for effective self-assessment of Aboriginal cultural heritage assessment requirements by an applicant. However in some instances it may be appropriate to fall-back to the qualification of “refer to Council” for further information or advice.

Although the subsequent investigation of the Aboriginal cultural heritage aspects of a site and development proposal may require a level of expertise, it is desirable that the decisions as to whether such investigations will be required can be taken, as far as practicable, by the proponents themselves. In those instances where a proponent is not capable of doing this, the Toolkit section of a DCP should provide Council staff with the sound and transparent framework with which to guide a proponent through these requirements and provide other advice in relation to Aboriginal cultural heritage matters in a pre-lodgement meeting or as “counter advice”.

This necessity to draw on publicly accessible, and readily interpreted, information only when specifying Aboriginal cultural heritage assessment requirements is a constraint in tailoring the Toolkit to a DCP compatible format. However as improved datasets become available (such as for refined landscape sensitivity mapping across each of the three Councils) the sophistication and usefulness of the Toolkit’s format and application within the participating Council DCPs will improve.

3.2 The Toolkit Simplified for Development Control Plan Inclusion

A simplified format of the Toolkit's key components and requirements for incorporation in a Development Control Plan (DCP) would include the following sections marked with the following symbol (►). These are shown conceptually in Figure 4.

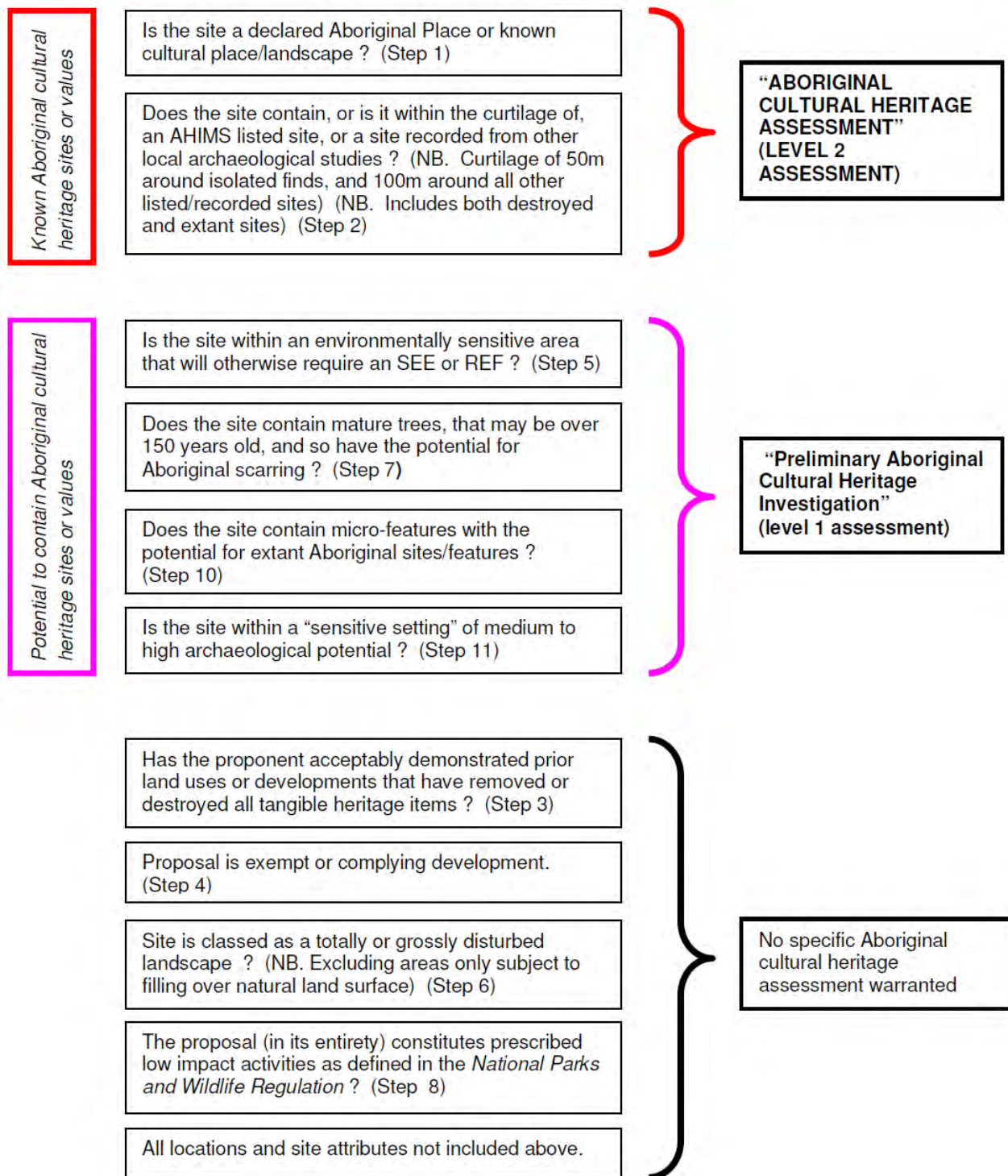


Figure 4 Toolkit process reconfigured into a Development Control Plan compatible format

It is recommended that any Aboriginal cultural heritage or Toolkit section within a DCP commences with a preamble explaining “what is Aboriginal cultural heritage” and the breadth of cultural heritage features and values known (and likely to occur) across the Illawarra. Several Office of Environment and Heritage (OEH) publications provide useful general descriptions or introductions to Aboriginal cultural heritage – such as that given in *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010* (as included in Appendix B).

The DCP introduction should also set out the aims and objectives of the DCP’s Aboriginal cultural heritage provisions.

The aim of a DCP’s Aboriginal cultural heritage provisions might be:

- ▶ To ensure that Aboriginal cultural heritage values, both objects and tangible sites or features as well as intangible spiritual and cultural values, are fully and effectively addressed in the development assessment process and afforded appropriate protection or management consistent with legislative requirements.

Possible objectives of a DCP’s Aboriginal cultural heritage provisions are recommended as follows.

- ▶ The objectives of these Aboriginal cultural heritage provisions are:
 - to provide detailed controls and guidelines intended to assist in the identification, protection and conservation of Aboriginal cultural heritage sites and values in the [insert Council area] for the benefit of its citizens, the community generally and for future generations;
 - to increase proponent’s awareness of Aboriginal cultural heritage matters and promote the increased identification and recognition of Aboriginal cultural heritage sites and values in the planning and development process;
 - to assist in the implementation of the Council’s LEP and [insert any Council specific Aboriginal cultural heritage studies];
 - to provide potential proponents and the wider community with clear and accessible information on Council’s requirements, and other legislative requirements, for the conservation of Aboriginal cultural heritage sites and values;
 - to promote and encourage appropriate and sympathetic site design and development solutions for areas having known, or potential, Aboriginal cultural heritage sites and values; and
 - to increase community awareness and appreciation of the Aboriginal cultural heritage sites and values of the [insert Council area].

Specific provisions for the Aboriginal cultural heritage (or Toolkit section) within a DCP include the following possible clauses.

- ▶ Council will require a Preliminary Aboriginal Cultural Heritage Investigation to be undertaken for a development proposal if the answer to any of the following questions is YES. The findings and outcomes of a Preliminary Aboriginal Cultural Heritage Investigation will help determine if a more detailed Aboriginal Cultural Heritage Assessment is required.
 - Is the proposal located within an environmentally sensitive area, as defined by the [insert Council LEP] ?
Answering this question:
Refer to the relevant sections of the [insert Council LEP], and accompanying plans, identifying environmentally sensitive areas – including those situations where exempt and complying development provisions do not apply.
 - Does the proposed development site contain mature trees, that may be over 150 years old and so have the potential for Aboriginal scarring (including living trees, standing dead trees, stumps or stags, fallen trees and logs)?

Answering this question:

Conduct an on-site inspection of the proposed development site to identify any mature trees (possibly over 150 years old), applying a conservative approach in identifying mature trees and including both living and dead trees (including stumps, stags and fallen logs).

Provide supporting evidence (such as photographic evidence, records of past land clearing, prior land use data and land use/local histories, or a specialist/arborist report if warranted) to demonstrate the presence, or absence, of mature trees (possibly over 150 years old).

- Does the proposed development site contain any of the following small scale landscape features that may potentially hold Aboriginal cultural heritage sites/objects:
 - the riparian corridor 200 metres wide on each side of permanent or ephemeral creeks or watercourses (including waterways subsequently modified by post-settlement activity) ?
 - sandstone outcrops adjacent to waterways/watercourses ?
 - exposed sandstone platforms or relatively level sandstone outcrops (including platforms and outcrops that may have been buried or covered due to post-contact land uses) ?
 - rock overhangs/shelters over 1 metre high (especially with relatively level and/or dry floors) ?
 - areas of undisturbed native vegetation in excess of 100 square metres or covering 10% or more of a site (whichever is the greater for the site in question) ?
 - spurs, ridgelines, ridge tops and high points or knolls ? or
 - cliffs, including areas above or below clifflines ?

Answering this question:

Contact Council, if required, for more detailed information and examples of the listed small scale landscape features having the potential to contain Aboriginal cultural heritage sites/objects.

Conduct an on-site inspection of the proposed development site to identify the presence of any small scale landscape features that may potentially hold Aboriginal cultural heritage sites/objects.

Provide supporting evidence (such as photographic evidence, survey plans, low-level aerial photography, etc) to demonstrate the presence or absence of any of the listed small scale landscape features.

- Is the proposal located within a “sensitive landscape setting” or location assessed as being of medium to high archaeological potential ?

Answering this question:

Refer to Council for further information regarding these “sensitive” landscape settings or locations of medium to high archaeological potential – including plans of the location and extent of these areas, or alternative information to use in answering this question.

- ▶ Council will require an Aboriginal Cultural Heritage Assessment to be undertaken for a development proposal if the answer to any of the following questions is YES.

- Is the proposed development site part of, or is it within 100 metres of, an Aboriginal Place as declared under the *National Parks and Wildlife Act 1974* or within a location of recognised Aboriginal cultural/spiritual significance ?

Answering this question:

Refer to the Office of Environment and Heritage’s (OEH) on-line NSW Atlas of Aboriginal Places – at www.environment.nsw.gov.au/conservation/AboriginalPlacesNSW.htm – which includes location information, gazettal notices, maps, photographs, and an explanation of the significance of each declared Aboriginal Place in NSW. The Atlas can be searched by locality.

Refer to Council for further information regarding declared Aboriginal Places and any other locations recognised as being of Aboriginal cultural/spiritual significance in the [insert Council area]

- Does the proposed development site contain a known Aboriginal site or object, as recorded by the Office of Environment and Heritage in the Aboriginal Heritage Information Management System (AHIMS) or known to Council?
- Is the proposed development site within 100 metres of a known Aboriginal site or object (other than “isolated finds”, where a 50 metre proximity threshold will apply for the purposes of this question), as recorded by the Office of Environment and Heritage in the Aboriginal Heritage Information Management System (AHIMS) or known to Council ?

Answering these questions:

Search the Office of Environment and Heritage’s on-line Aboriginal Heritage Information Management System (AHIMS) – at <http://www.environment.nsw.gov.au/awssapp/login.aspx>. The AHIMS Web Services allows on-line users to search information about recorded Aboriginal objects/sites by Lot and DP Number, or using eastings and northings or latitude and longitude, as well as using map-based interrogation. Buffer zones can be requested around a search area – at 50 metres, 200 metres or 1 kilometre. A “basic search”, at no cost, will return a report advising if any recorded Aboriginal objects/sites (and declared Aboriginal Places) within the search area, and an “extensive search” is required to detail any recorded Aboriginal objects/sites.

Refer to Council for information regarding other known Aboriginal site or object in the [insert Council area] that may not be listed on the AHIMS data base (but are still protected under the *National Parks and Wildlife Act 1974*).

- ▶ An Aboriginal cultural heritage investigation or assessment is not required for proposed development sites that are completely within any areas mapped by Council as totally or grossly disturbed landscapes (and do not contain a declared Aboriginal Place or known Aboriginal site or object as described above).

Refer to Council [and insert any Council specific Aboriginal cultural heritage studies] for information and mapping regarding those areas considered to be totally or grossly disturbed landscapes.

Refer to prior land use data and reliable land use or local histories to identify disruptive land uses, but apply a conservative approach in identifying totally or grossly disturbed landscapes that have no potential to retain Aboriginal heritage materials.

- ▶ An Aboriginal cultural heritage investigation or assessment is not required for proposed development sites (that do not contain a declared Aboriginal Place or known Aboriginal site or object as described above) where it can be demonstrated that a site has been substantially disturbed over an equal or greater area, and to an equal or greater depth and/or severity, than would result from the proposed development or activity.

Proponents must provide supporting evidence to trigger this “substantial disturbance” – such as prior site plans/reports, photographs, or contemporary reports providing an assessment of the degree of site disturbance.

- ▶ An Aboriginal cultural heritage investigation or assessment is not required for proposed development sites where a detailed Aboriginal cultural heritage assessment or archaeological investigation – of an acceptable standard and including the required level of Aboriginal community consultation – has been undertaken over the entire proposed development site within the last 10 years.

- ▶ A Preliminary Aboriginal Cultural Heritage Investigation must be undertaken by a suitably qualified or experienced person, with expertise in Aboriginal cultural heritage, and will include as a minimum:

- a search of the Aboriginal Heritage Information Management System database and other information held by the Office of Environment and Heritage;
- the involvement of, and consultation with, local Aboriginal people or organisations;

- background research relevant to the site, its Aboriginal cultural heritage context, landscape setting, and land use history; and
 - an on-ground site inspection.
- ▶ An Aboriginal Cultural Heritage Assessment must be undertaken by a suitably qualified or experienced person, with expertise in Aboriginal cultural heritage, and will be consistent – in terms of consultation with the Aboriginal community, process and content – with the Office of Environment and Heritage publications *Aboriginal Cultural Heritage Consultation Requirements for Proponents* (2010) and the *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW* (2010), and other applicable guidelines as published by this Agency. Adequate consultation with the Illawarra Aboriginal community will be a critical element in the preparation of an Aboriginal Cultural Heritage Assessment.

In addition to the above specific prescriptions, the Aboriginal cultural heritage section of a DCP should include more general information including references to:

- the provisions in the relevant Council Local Environmental Plan regarding places of Aboriginal heritage significance, when development consent is and is not required, consideration of the effects of a proposed development on Aboriginal heritage significance or objects, and local Aboriginal community notification requirements;
- the *National Parks and Wildlife Act 1974* as the principal legislation dealing with Aboriginal cultural heritage sites and objects, the protection this legislation afford to Aboriginal objects and places, and Aboriginal Heritage Impact Permit requirements;
- the *Environmental Planning and Assessment Act 1979* provisions relating to Aboriginal cultural heritage, and particularly the requirements regarding integrated development; and
- the legal obligations regarding the discovery/disturbance of unrecorded sites during development work or activities and the associated stop work, site protection and reporting responsibilities.

Several councils have prepared information sheets or brochures to assist proponents, especially residential and smaller or less experienced applicants, navigate the development application requirements and processes regarding Aboriginal cultural heritage (as shown in Appendix C).

3.2.1 Development Control Plan Data Availability/Accessibility

As noted in Section 3.1 it is important the Aboriginal cultural heritage assessment requirements set out in the Development Control Plan refer to publicly available, accessible and understandable information. This is necessary to enable proponents to self-assess the Aboriginal cultural heritage investigation or assessment requirements specific to their site and proposal.

Table 1 sets out the steps in the Toolkit, as required to interpret and apply the above Development Control Plan components, and the corresponding data sources available to proponents.

Table 1 Development Control Plan data availability/accessibility

Toolkit Step or Development Control Plan Item	Information Available to Proponent
Step 1- declared Aboriginal Place and known cultural place/landscape	<ul style="list-style-type: none"> • OEH on-line NSW Atlas of Aboriginal Places • Council advice re other/local known cultural places/landscapes

Toolkit Step or Development Control Plan Item	Information Available to Proponent
Step 2 - AHIMS listed sites, and other known Aboriginal cultural heritage sites	<ul style="list-style-type: none"> • OEH on-line Aboriginal AHIMS Web Services • OEH archaeological reports library • Council index of previous archaeological investigations, Aboriginal cultural heritage studies or site specific reports
Step 3 - proponent demonstration of substantial prior disturbance	<ul style="list-style-type: none"> • prior land use data and reliable land use or local histories • specialist assessment/report • Council Aboriginal Heritage Studies (where available) and Council mapping (where available)
Step 4 - exempt or complying development	<ul style="list-style-type: none"> • Council LEP
Step 5 - environmentally sensitive areas	<ul style="list-style-type: none"> • Council LEP and accompanying maps
Step 6 - totally or grossly disturbed landscapes	<ul style="list-style-type: none"> • Council Aboriginal Heritage Studies (where available) and Council mapping (where available) • prior land use data and reliable land use or local histories
Step 7 - mature trees that may be over 150 years old	<ul style="list-style-type: none"> • proponent's site knowledge and on-ground inspection
Step 8 - low impact activities prescribed by OEH	<ul style="list-style-type: none"> • listed in the <i>National Parks and Wildlife Regulation 2009</i> and due diligence guidelines
Step 9 - ground disturbance or excavation	<ul style="list-style-type: none"> • proponent's knowledge of their proposed development or activity
Step 10 - micro-features with the potential for extant Aboriginal sites/features	<ul style="list-style-type: none"> • description, list and examples to be provided by Council
Step 11 - "sensitive" landscape setting or location of medium to high archaeological potential	<ul style="list-style-type: none"> • information to be provided by Council – based on "fallback" OEH generalised set of landscape features that indicate the likely existence of Aboriginal objects (until landscape sub-unit mapping available, for Shellharbour and possibly Wollongong by extrapolation) • OEH on-line Aboriginal Sites Decision Support Tool

4. ABORIGINAL CULTURAL HERITAGE INFORMATION FOR THE ILLAWARRA

A comprehensive audit of the Aboriginal cultural heritage values of the three participating Council areas was not part of the brief for the Aboriginal Cultural Heritage Management Development Assessment Toolkit's ("the Toolkit") development. However it was necessary to gain an understanding of both:

- the nature of the area's Aboriginal cultural heritage objects, sites, place and values – to ensure the Toolkit addressed, and was somewhat tailored to, the characteristics of the Aboriginal cultural heritage "assets" that are most likely to be encountered in the development assessment process; and
- the coverage and comprehensiveness, and inadequacies, of the currently available information regarding the area's Aboriginal cultural heritage objects, sites, place and values – to ensure that the Toolkit was formulated, and could be practically applied and reasonably effective, within the limits of current and readily available cultural heritage information.

This section does not provide a detailed description of the known Aboriginal cultural heritage objects, sites, place and values of the three participating Council areas. This information can be found in the area-specific Aboriginal heritage studies and other reports referred to below.

4.1 Shellharbour City Council

4.1.1 Shellharbour City Council Area Aboriginal Heritage Study

Navin Officer Heritage Consultants undertook the *Shellharbour City Council Area Aboriginal Heritage Study*, for Shellharbour City Council, during 1999 and 2000. The Study's aims were to:

- create a mechanism for determining the likelihood of an area containing a site of Aboriginal heritage significance;
- enable a systematic approach to be taken in the assessment of heritage significance of sites with potential to contain items of Aboriginal heritage significance;
- understand those places identified as being significant to the Aboriginal community for other reasons, but where there may be no physical archaeological evidence.
- involve the local Aboriginal community in all phases of the study;
- allow for Aboriginal heritage to be integrated, as a Stage 2, into the wider Shellharbour City Council Heritage Study; and
- facilitate a more comprehensive inventory of Shellharbour's heritage.

The Study comprised "Aboriginal consultation/participation, a literature and heritage register review, a review of landuse relative to Aboriginal site location/survival, development of a predictive site location model, sensitivity mapping, development of criteria for the assessment of site significance, and preparation of conservation and planning policies for land with potential to contain unrecorded sites." Field survey effort for the Study was limited to two days only, with the bulk of the project being the review of existing site records/data and past Aboriginal heritage studies across parts of the

Council area and in comparable settings. The Study cited 24 previous archaeological/Aboriginal investigations undertaken (as at 1999) within the Shellharbour City Council area. Most of these had been undertaken in the eastern urban areas as well as along infrastructure corridors.

The Study identified the following suite of site types as present within the Shellharbour City Council area (these sites, and their typical landscape positioning, are detailed in an extract from the Study in Appendix D of this Toolkit):

- artefact occurrences;
- isolated finds;
- artefact scatters with some shell;
- coastal middens;
- estuarine middens;
- burials;
- scarred trees;
- ceremonial grounds and stone arrangements;
- rock shelter sites;
- grinding groove sites;
- potential archaeological deposit (PAD);
- traditional story place or other ceremonial place; and
- “contact’ sites.

Based on a review of oral histories, oral reports and written ethno-historic sources Navin Officer Heritage Consultants also identified 23 locations of “Aboriginal historical and cultural significance” most of which are locations or places only with no remaining tangible evidence (refer to Navin Officer Heritage Consultants, 2000(b), pages 20 and 22-6). These date from both the pre-contact and post-contact periods.

The Study included the following site location predictions (reproduced from Navin Officer Heritage Consultants, 2000(b), pages 51-2), which predict the pattern of occurrence of sites of Aboriginal heritage significance (mostly tangible objects/sites) across the landscape. These predictions have been based on the local and regional Aboriginal sites databases, Aboriginal settlement and land use models, information from comparable studies elsewhere on the South Coast, and field observations and verification.

- Sites are likely to occur at varying densities in all broad topographic zones. However a range of micro-topographic variables can effectively predict topographies which are archaeologically sensitive. These include: relatively level ground without significant surface rock, proximity to a freshwater source, and locally elevated and well drained ground.
- Sites tend to be situated at or close to ecotones – the areas at which different environmental zones meet.
- Artefact occurrences, detectable as isolated finds or surface scatters of artefacts and/or subsurface archaeological deposits, are likely to be the most common site type within the Shellharbour City Council Area.
- Artefact scatters, (also termed open camp sites), are most likely to occur on level, well drained ground, either adjacent to sources of freshwater and wetlands, or along the crests of spurs and ridgelines.
- Ridge and spurlines which afford effective through-access across, and relative to, the surrounding landscape will tend to contain more and larger sites.

- ❑ The crests of low relief spurs which extend into and across valley floor flats are likely to be a focus for occupation due to their well drained and elevated context in close proximity to a range of exploitable environments.
- ❑ Estuarine midden sites are normally located close to the estuarine environment, on elevated ground.
- ❑ Coastal middens are frequently located on or near rocky headlands or rock platforms, adjacent to a creek mouth or hind-dune water sources. Smaller and lower density middens comprising sandy-shore shell species are frequently exposed in hind dune swales.
- ❑ Sites containing both midden shell and lithic material are likely to occur on elevated ground adjacent to wetlands or valley floor drainage corridors. The following topographies fall into this category: low gradient basal colluvial slopes, terminal spurline crests, alluvial terraces, and valley floor sand bodies.
- ❑ Burial sites are generally found in landforms characterised by a relatively deep profile of soft sediments such as aeolian sand and alluvium. Burials characteristically occur in the deposits of occupation sites such as middens.
- ❑ Scarred trees may occur in all topographies where old growth trees survive, either as isolated trees or as part of remnant or continuous forest.
- ❑ Rock shelters are likely to contain evidence of Aboriginal occupation if they are relatively dry, have a level floor with a significant proportion consisting of sediment rather than rock, are at least 1 m high, and are close to a water source or major ridgeline. Shelters with larger internal spaces which comply with these criteria are more likely to have occupation evidence, than smaller shelters. In topographies where rock overhangs are rare, even small sheltered spaces may have been occupied. Occupation evidence may be in the form of occupation deposit, pigment art on the wall and ceiling, grinding grooves, and rarely engraved art.
- ❑ Engraving sites in open contexts (not in a rock shelter) are very rare in the southern Illawarra region. Sites of this type may occur on relatively level sandstone platforms, situated either on crests or on streambed rock exposures. Rock types which weather to form a smooth and even surface are favoured for engravings.
- ❑ Grinding grooves may occur singly or, more commonly in groups and are typically situated close to or within a local water source, such as a streamline or pothole. Grinding grooves typically occur on fine grained, relatively level sandstone platforms in the upper catchments of streamlines. However, in topographies where sandstone is scarce, any suitable surface exposure may be utilised, regardless of its proximity to water.
- ❑ Isolated finds can occur anywhere in the landscape and may represent the random loss or deliberate discard of artefacts, or the remains of dispersed artefact scatters.

Of particular relevance for the Toolkit Navin Officer Heritage Consultants combined these site location predictions with the findings of previous archaeological results, land use history (and particularly the impacts of past land use practices on the archaeological record) and landscape/environmental descriptions to divide the Shellharbour City Council Area into a series of landscape zones of differing “archaeological sensitivity”. This is defined as the potential for encountering extant Aboriginal archaeological sites in a particular landscape zone or setting (noting that this is focused on tangible heritage sites only, and other places of Aboriginal cultural heritage significance with no physical remains or evidence in any landscape setting).

Navin Officer Heritage Consultants identified nine such landscape zones of differing “archaeological sensitivity” across the entire Shellharbour City Council area, as shown in Figure 5 and described in

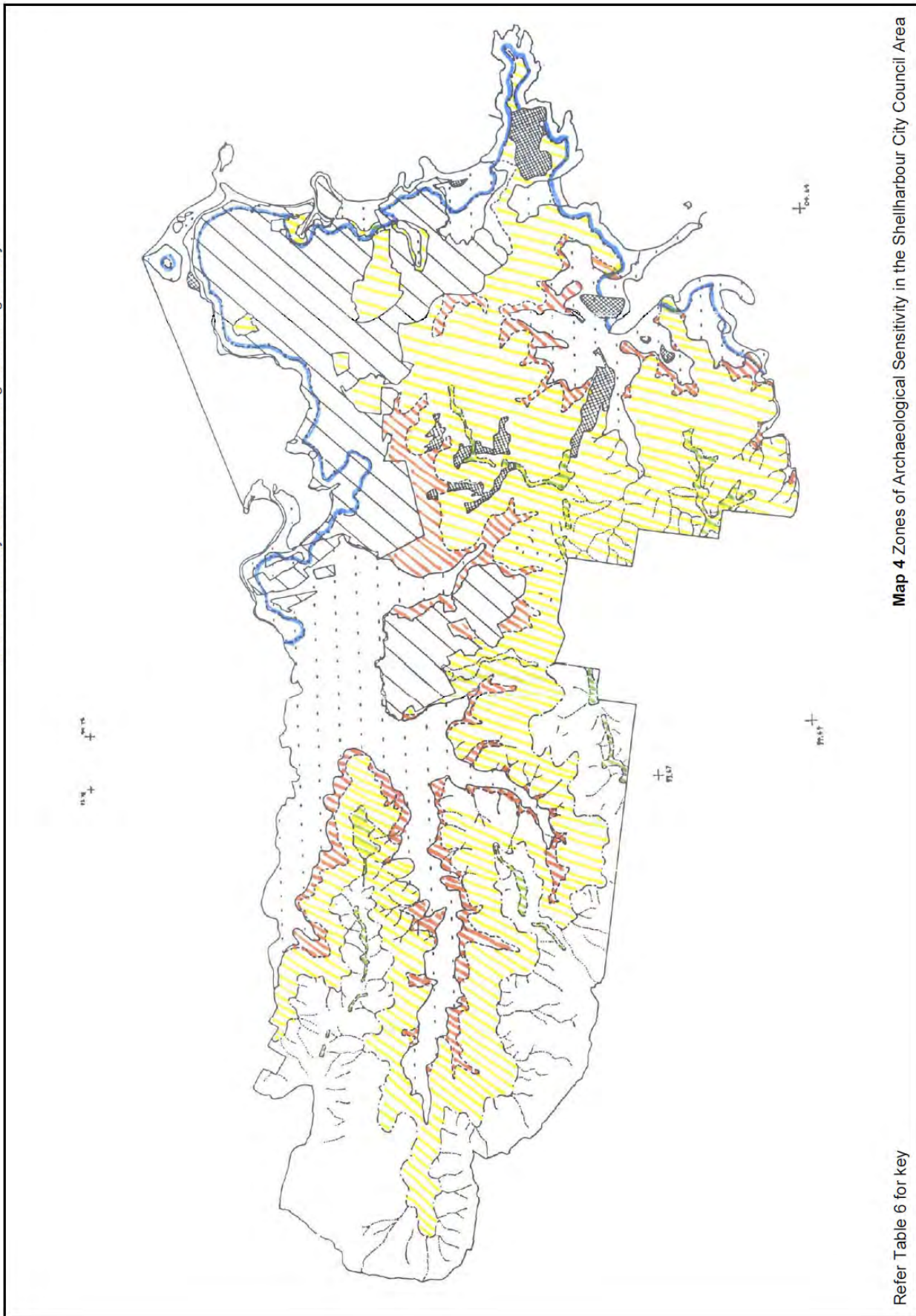


Figure 5 Zones of archaeological sensitivity in the Shellharbour City Council area
(Source: Navin Officer Heritage Consultants, 2000(b), page 59)

Map Key	Zone Description	Areas of archaeological sensitivity	open artefact scatters	middens	rock shelter sites	grinding grooves	burials	scarred trees	other site types
	Grossly disturbed landscape	none	nil	nil	nil	nil	nil	nil	nil
	Urban landscape	remnant undisturbed subsurface deposits within littoral zone	low	generally low but low to moderate on low gradient sedimentary contexts within littoral zone	nil	nil	generally low but low to moderate on low gradient sedimentary contexts, especially within littoral zone	generally nil, but low to moderate where and if remnant old growth trees survive	nil
	Littoral zone (coastal and estuarine) 200m from bank/shore	relatively undisturbed locally elevated generally level landforms, especially when close to a freshwater source, adjacent to rock platforms, or on a relatively deep sedimentary deposit	moderate, often in association with midden deposits	moderate to high	generally low, but low to moderate along unsurveyed coastal scarps.	low	moderate, especially in or near middens, near creek or estuary mouths, and on landforms with relatively deep sedimentary deposit	low	low
	Valley floor alluvium and estuarine infill deposits	locally elevated generally level landforms such as terrace edges, spurline crests, remnant dunes, the banks of drainage lines and wetland basins	moderate, many sites may be entirely subsurface	generally low, but moderate to high within littoral zone	nil	nil	low to moderate	low to moderate where and if remnant old growth trees survive	low
	Basal valley slopes and associated low spurlines	generally level spurline crests and low rises, locally elevated and/or generally level ground adjacent to drainage lines	moderate	low	nil	low, except for creeks with identified potential (see grinding groove zone)	generally low, but low to moderate in valley floor contexts	low to moderate where and if remnant old growth trees survive	low

Table 2 Summary of zones of archaeological sensitivity in the Shellharbour City Council area
(Source: Navin Officer Heritage Consultants, 2000, pages 60-1)





Map Key	Zone Description	Areas of archaeological sensitivity	open artefact scatters	middens	rock shelter sites	grinding grooves	burials	scarred trees	other site types
	Coastal plain slopes and low to mid valley slopes fringing the coastal plain	generally level ground on ridge and spurline crests and benches, especially locally elevated landforms adjacent to freshwater	generally low, but moderate on sensitive landforms	nil	low, but sites may rarely occur on latite scarps or on isolated sandstone tors where this zone borders the Illawarra escarpment zone	low, accept for creeks with identified potential (see grinding groove zone)	low	low to moderate where remnant old growth trees survive	low
	Illawarra escarpment mid to upper valley slopes	generally level ground on ridge and spurline crests and benches, especially locally elevated landforms adjacent to freshwater, all rockshelters >1m high with relatively dry and level sediment floors relatively level sandstone platforms	generally low, but moderate on sensitive landforms	nil, but minimal quantities of shell may occur in shelter deposits	moderate to high in areas of sandstone escarpment or tors	moderate on bedrock exposures of sandstone in drainage lines and rock platforms	generally low, but low to moderate in rock shelters	moderate where remnant old growth trees survive	Engraved rock art may occur in rock shelters or open rock platforms, pigment art may occur in shelters with deposit
	Relatively level ground on elevated and major watershed crests	relatively level ground, especially close to a water source and in saddles	moderate	nil	low	moderate on bedrock exposures of sandstone in drainage lines and rock platforms	low	low to moderate where remnant old growth trees survive	low for stone arrangements on relatively undisturbed landsurfaces
	Sandstone drainage lines	bedrock platforms of even and fine grained sandstone within or near a water source	low	nil	moderate in Illawarra escarpment zone	generally moderate, moderate to high in Illawarra escarpment zone	nil	low to moderate where remnant old growth trees survive	low to moderate for engraved rock art on open rock platforms

Table 2. Additional details of each zone, and the likelihood of certain site types remaining within each are given in an extract from the Study in Appendix E.

4.1.2 Other Shellharbour City Council Area Studies

To supplement the above Navin Officer Heritage Consultants Study, a selection of other location-specific investigations of Aboriginal cultural heritage values across the Shellharbour City Council area were reviewed – mostly associated with the assessment individual development proposals. The additional studies/reports reviewed included:

- *The Cultural Heritage of Bass Point* (1999);
- *Shellharbour Urban Fringe Lands Cultural Heritage Assessment* (2004);
- *Aboriginal Archaeological Assessment and Statement of Heritage Impact - Macquarie Shores Cycleway, Koon Bay Foreshore, Albion Park Rail, NSW* (2005);
- *Tallawarra Lands Aboriginal Cultural Heritage Assessment* (2008); and
- *Shellharbour Memorial Garden Albion Park – Aboriginal and Historical Heritage Assessment and Impact Assessment* (2008).

However none of this sample of reports identified additional site types, or suggested alternative or additional areas of archaeological sensitivity, to those already presented in the *Shellharbour City Council Area Aboriginal Heritage Study*.

An audit of the then Department of Environment and Conservation's (now the Office of Environment and Heritage) Aboriginal Heritage Information Management System (AHIMS) in December 2004 – conducted as part of the NSW Comprehensive Coastal Assessment – identified a total of 57 sites across 6 site types and 128 individual site features, as shown in Table 3. The 57 site records were (in 2004) very much concentrated along the coastal fringe and in the area's south-east – as shown on Figure 6. Additional sites would have been entered on the AHIMS since this time.

The same audit in 2004 identified that only three archaeological (Aboriginal heritage) reports relating to the Shellharbour City Council area were, as at that time, lodged with the then Department of Environment and Conservation archaeological records library.

Table 3 AHIMS listed sites features in the Shellharbour City Council area, across a total of 57 listed sites (as at December 2004)

(Source: Department of Environment and Conservation, 2005)

Site Feature	No.	Site Feature	No.
Aboriginal Resource & Gathering	0	Aboriginal Ceremony & Dreaming	0
Rock Art	0	Artefact (stone, bone, shell, glass)	54
Burial	2	Ceremonial Ring (stone or earth)	1
Conflict	0	Earth Mound	35
Fish Trap	0	Grinding Groove	0
Habitation Structure	0	Hearth	0
Non-Human Bone & Organic Material	0	Ochre Quarry	0
Potential Archaeological Deposit	0	Shell	35
Stone Arrangement	0	Stone Quarry	0
Modified Tree (Carved or Scarred)	1	Water Hole	0
Total Number of Features			128

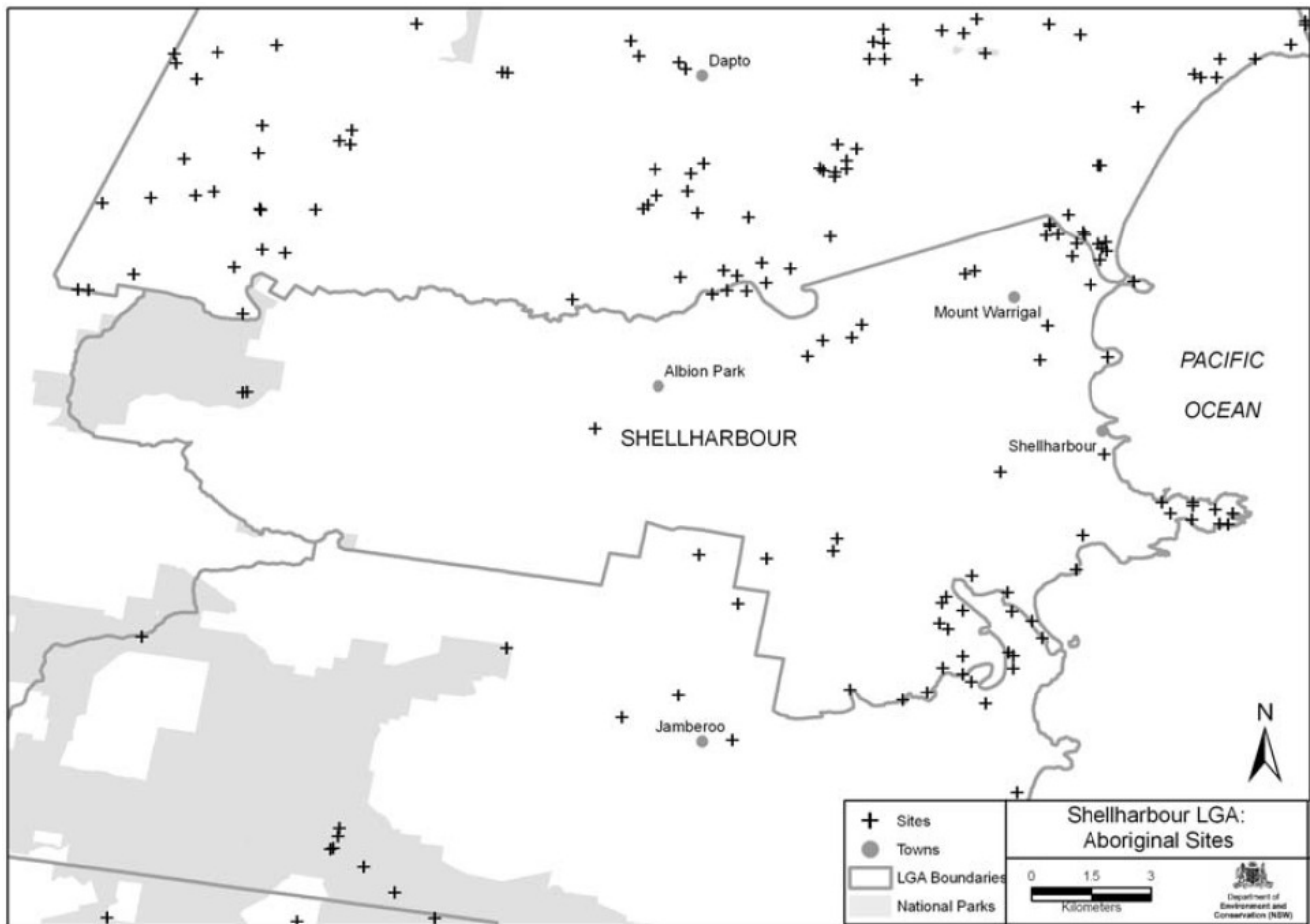


Figure 6 Location of AHIMS listed sites in the Shellharbour City Council area (as at December 2004)

(Source: Department of Environment and Conservation, 2005)

4.2 Wollongong City Council

4.2.1 Wollongong City Aboriginal Heritage Planning Study

The *Wollongong City Aboriginal Heritage Planning Study* was prepared by Mary Dallas Consulting Archaeologists for Wollongong City Council in 1995. The study’s aim was to provide Council with an appraisal of the area’s Aboriginal archaeological resources for use in “the assessment of future development proposals and future land management planning”. The Study’s three core components were:

- an Aboriginal sites database, at a useable scale (based on the then available data);
- Aboriginal sites predictive model and planning (although only “limited field reconnaissance”, mainly for familiarisation purposes, was undertaken); and
- a strategy for the future planning and management of Aboriginal sites and sensitive areas (based on the site prediction model).

The Study cited 69 previous archaeological/Aboriginal investigations undertaken (as at 1995) within the Wollongong City Council area. Most of these had been undertaken for impact assessment purposes and were “concentrated in the lands north or east of the Illawarra escarpment in urban, rural and industrial lands”.

The Study cited a total of 1,538 sites as, at that time (1995), listed in “the NPWS Register of Aboriginal Sites”. It noted that site records were strongly skewed (almost 90% of recorded site) to the sandstone landscapes of the Woronora Plateau – as shown in Figure 7 – and that “the archaeology of the alluvial plains and the foothills is less well known” (particularly foothill-lowland sub-tropical rainforest settings). However the archaeology of “the immediate coast, foredunes and dune ridges was considered relatively well known”.

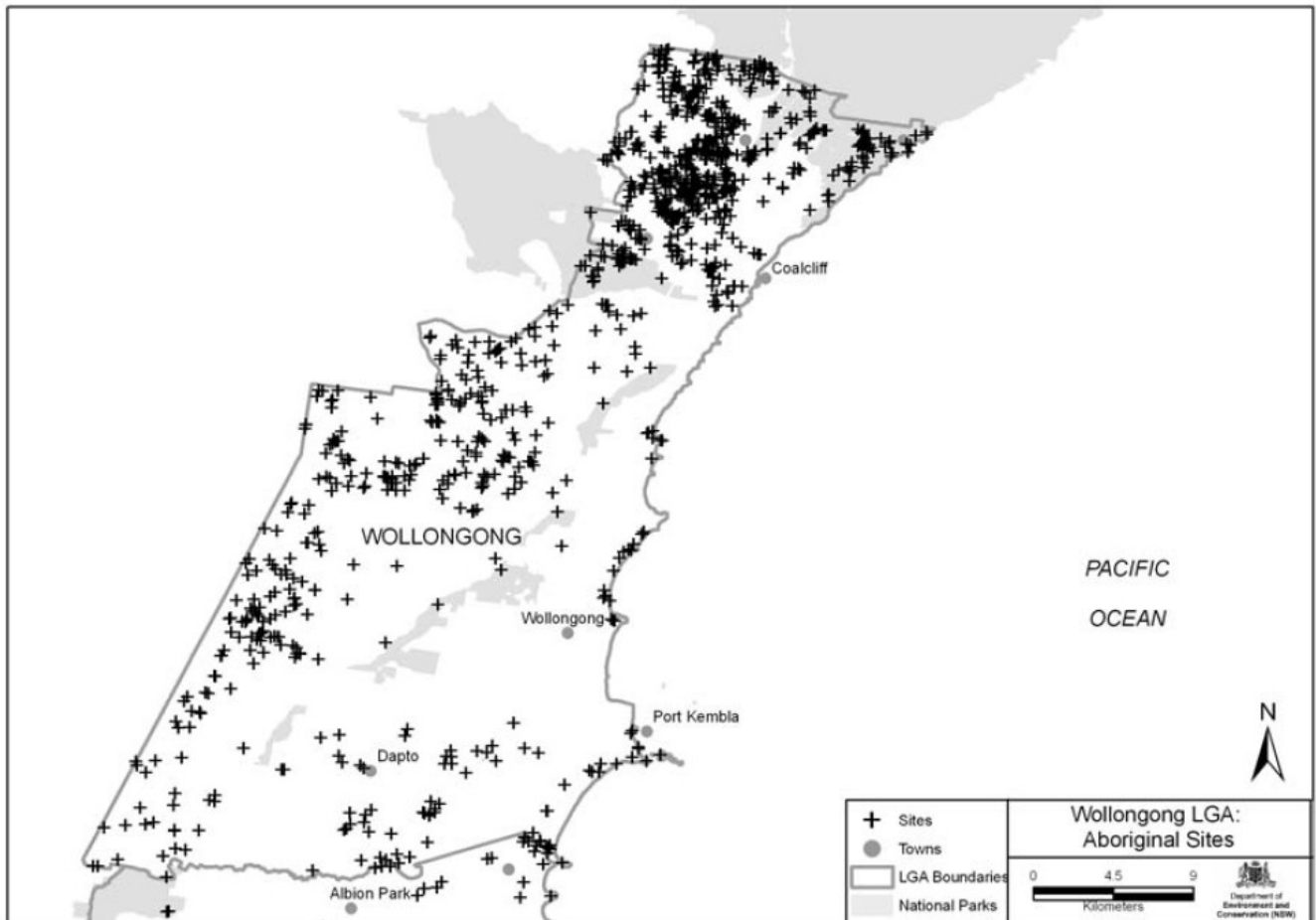


Figure 7 Location of AHIMS listed sites in the Wollongong City Council area (as at December 2004)

(Source: Department of Environment and Conservation, 2005)

The Study identified the following suite of site types as present within the Wollongong City Council area:

- “open camp sites” and “open sites” (artefact occurrences);
- isolated finds;
- middens;
- burials;
- scarred trees;
- shelters with art;
- shelters with middens;
- shelters with occupation deposits or potential archaeological deposits (PADs);
- rock engravings (and abraded grooves);
- axe grinding grooves;
- occupation sites/deposits;

- potential archaeological deposits (PADs);
- water hole/well;
- quarry; and
- stone arrangements.

Based on oral histories and discussions with older Aboriginal people, the Study identified Hill 60 and Coomaditchy [sic] Lagoon as culturally significant places with strong historical associations for Aboriginal people (noting that there were also other likely sites that could be identified by an oral history programme).

The Study included the following site location predictions for the pattern of occurrence of sites of Aboriginal heritage significance (mostly tangible objects/sites) across the landscapes of the Wollongong City Council area (summarised from Dallas and Sullivan, 1995, pages 34-9).

- ❑ Middens. Usually located on elevated dry ground close to an aquatic environment – along the immediate coast in and on coastal dunes (such as the Windang Peninsula) on, or sheltered below, rocky headlands as well as around river estuaries, coastal lagoons (Lake Illawarra foreshore) and near river or lake mouths. Coastal middens can be hidden or buried by aeolian sands.
- ❑ Open camp sites. Likely to occur on dry relatively flat landforms along or adjacent to creeks. More frequently used sites, with accumulated deposits, are more likely to occur on elevated ground such as around Lake Illawarra, or along its feeder creeks, on terraces and benches. Most likely to be subsurface features, and concentrated in the alluvial plains and foothills.
- ❑ Shelter sites with occupation deposit. Likely to occur in sandstone landforms where weathering has resulted in suitable overhangs or recesses, most often in Hawkesbury Sandstone, usually with sufficient headroom and depth to afford protection from the elements (although shelters as small as 1 metre x 1 metre x 1 metre have been recorded as containing occupation evidence). Often located immediately below ridge tops or adjacent to creeks, frequently with north to north-westerly aspects.
- ❑ Engraving, painting or drawing sites. The distribution of these sites relates to the occurrence of suitable rock outcrops and surfaces common in the Hawkesbury Sandstone formations. Engravings can occur in groups with numerous depictions, or as single depictions on sandstone platforms or small rock exposures.
- ❑ Axe grinding grooves. Found where suitable sandstone is exposed in or adjacent to creeks, often associated with rockpools in creeks or on rock platforms.
- ❑ Rock engravings. Can be located on any suitable fine-grained sandstone, often located on high vantage points along ridgelines at the headwaters of creeks.
- ❑ Stone arrangements. Expected to occur in areas close to stone outcrops or on prominent rock outcrops, but are relatively rare sites and difficult to detect.
- ❑ Scarred or carved trees. Require a tree (or remains) at least 150 years old, but can be located in any environmental setting.
- ❑ Burial sites. Generally located in elevated, soft, dry sediments such as sand or alluvial silts. Also located on coastal dunes, around Lake Illawarra in foreshore sediments, or in deposits within rock shelters.
- ❑ Mythological sites. Identification is usually dependent on information from Aboriginal people, may not exhibit any material or artefactual evidence.

- Contact sites or historical sites. Identification is usually dependent on information from Aboriginal people, oral histories or historical records – material evidence may be present.

The Study also presented the likely occurrence of the above sites within the differing land systems (coast, alluvial plain, foothills, escarpment and plateau), and their constituent landforms, of the Wollongong City Council area – as included in an extract from the Study in Appendix F.

The Study did not include detailed landscape sensitivity data – which it described as “Aboriginal site potential ... measured in terms of how likely an area is to contain sites, and the likelihood of those sites remaining relatively undisturbed.” It did conclude that “all areas of the City are considered to have archaeological potential in that they have a likelihood of containing sites.” However the following areas were considered to be “disturbed or largely disturbed” (and so had a lesser potential for extant tangible Aboriginal cultural heritage sites) – “urban and suburban; roads, services such as power, water, telephone, aerodrome, sewer; landscaped, levelled, bulldozed, excavated and land-filled etc lands; industrial precincts; mining installations.” Land uses with a higher potential for retaining heritage sites were identified as:

- undeveloped or vacant lands throughout the Council area;
- recreational precincts, open space and parks;
- foreshores and beaches;
- caravan parks and golf courses; and
- grazing lands.

4.2.2 Other Wollongong City Council Area Studies

To supplement the above *Wollongong City Aboriginal Heritage Planning Study*, a selection of location-specific investigations of Aboriginal cultural heritage values across the Wollongong City Council area were reviewed – most investigations were associated with the assessment of individual development proposals. The additional studies/reports reviewed included:

- *West Dapto Archaeological Potential* (1984);
- *Study Assessment of Aboriginal Archaeological Resource: Sandon Point, Wollongong NSW* (1992);
- *Archaeological Salvage Excavation at McCauleys Beach, Thirroul, NSW - Preliminary Report* (1998);
- *Huntley Eco-Park, Aboriginal Archaeological Assessment, New South Wales* (2007); and
- *Dendrobium Coal Mine – Area 3A, Aboriginal Heritage Plan* (2010).

However none of this sample of reports identified additional site types, or suggested alternative or additional areas of archaeological sensitivity, to those already presented in the *Wollongong City Aboriginal Heritage Planning Study*.

An audit of the then Department of Environment and Conservation’s (now the Office of Environment and Heritage) Aboriginal Heritage Information Management System (AHIMS) in December 2004 – conducted as part of the NSW Comprehensive Coastal Assessment – identified a total of 1,067 sites listed in the AHIMS across 13 site types and 1,443 individual site features, as shown in Table 4. Additional sites would have been entered on the AHIMS since this time.

The same audit in 2004 identified that there were 138 archaeological (Aboriginal heritage) reports relating to the Wollongong City Council area available, as at that time, in the archaeological records library of the then Department of Environment and Conservation.

Table 4 AHIMS listed sites features in the Wollongong City Council area, across a total of 1,067 listed sites (as at December 2004)

(Source: Department of Environment and Conservation, 2005)

Site Feature	No.	Site Feature	No.
Aboriginal Resource & Gathering	0	Aboriginal Ceremony & Dreaming	1
Rock Art	516	Artefact (stone, bone, shell, glass)	384
Burial	10	Ceremonial Ring (stone or earth)	0
Conflict	0	Earth Mound	74
Fish Trap	0	Grinding Groove	323
Habitation Structure	0	Hearth	2
Non-Human Bone & Organic Material	0	Ochre Quarry	0
Potential Archaeological Deposit	41	Shell	74
Stone Arrangement	5	Stone Quarry	1
Modified Tree (Carved or Scarred)	6	Water Hole	8
Total Number of Features			1443

4.3 Kiama Municipal Council

No detailed Aboriginal cultural heritage or planning study has, as yet, been prepared for the Kiama Municipal Council area.

An audit of the then Department of Environment and Conservation's (now the Office of Environment and Heritage) archaeological records library in December 2004 – conducted as part of the NSW Comprehensive Coastal Assessment – identified that there were 40 archaeological (Aboriginal heritage) reports relating to the Kiama Municipal Council area available. These reports were mostly associated with the assessment of individual development proposals or other site specific investigations. Additional location-specific Aboriginal cultural heritage investigations have been completed across the local government area in the subsequent years, such as the:

- *Gerroa Sand Mine Extension Archaeological Subsurface Testing Programme* (2006);
- *Gerringong to Bomaderry Princes Highway Upgrade Preliminary Indigenous and Non-Indigenous Assessment* (2007);
- *Kiama to Jerrara 33kV Feeder – Cultural Heritage Assessment* (2007);
- *Gerroa Sand Mine Extension Aboriginal Cultural Heritage Management Plan* (2009).

In the absence of an overall Aboriginal cultural heritage study these individual reports, amalgamated into a single database with accompanying plan(s) and combined with the Office of Environment and Heritage Aboriginal Heritage Information Management System (AHIMS) information (as below), could serve as a suitable – albeit stop-gap – database to support application of the Toolkit in the Kiama area.

The 2004 NSW Comprehensive Coastal Assessment also audited the then Department of Environment and Conservation's AHIMS data base. This identified a total of 56 sites then listed within the Kiama Municipal Council area, across 10 site types and 92 individual site features – as shown in Table 5. As shown on Figure 8 many of these records are along the coastal strip.

Additional sites would have been entered on the AHIMS since the snapshot was prepared in 2004.

Table 5 AHIMS listed sites features in the Kiama Municipal Council area, across a total of 56 listed sites (as at December 2004)

(Source: Department of Environment and Conservation, 2005)

Site Feature	No.	Site Feature	No.
Aboriginal Resource & Gathering	0	Aboriginal Ceremony & Dreaming	1
Rock Art	6	Artefact (stone, bone, shell, glass)	40
Burial	1	Ceremonial Ring (stone or earth)	0
Conflict	0	Earth Mound	18
Fish Trap	0	Grinding Groove	4
Habitation Structure	0	Hearth	0
Non-Human Bone & Organic Material	0	Ochre Quarry	0
Potential Archaeological Deposit	1	Shell	18
Stone Arrangement	2	Stone Quarry	0
Modified Tree (Carved or Scarred)	1	Water Hole	0
Total Number of Features			92

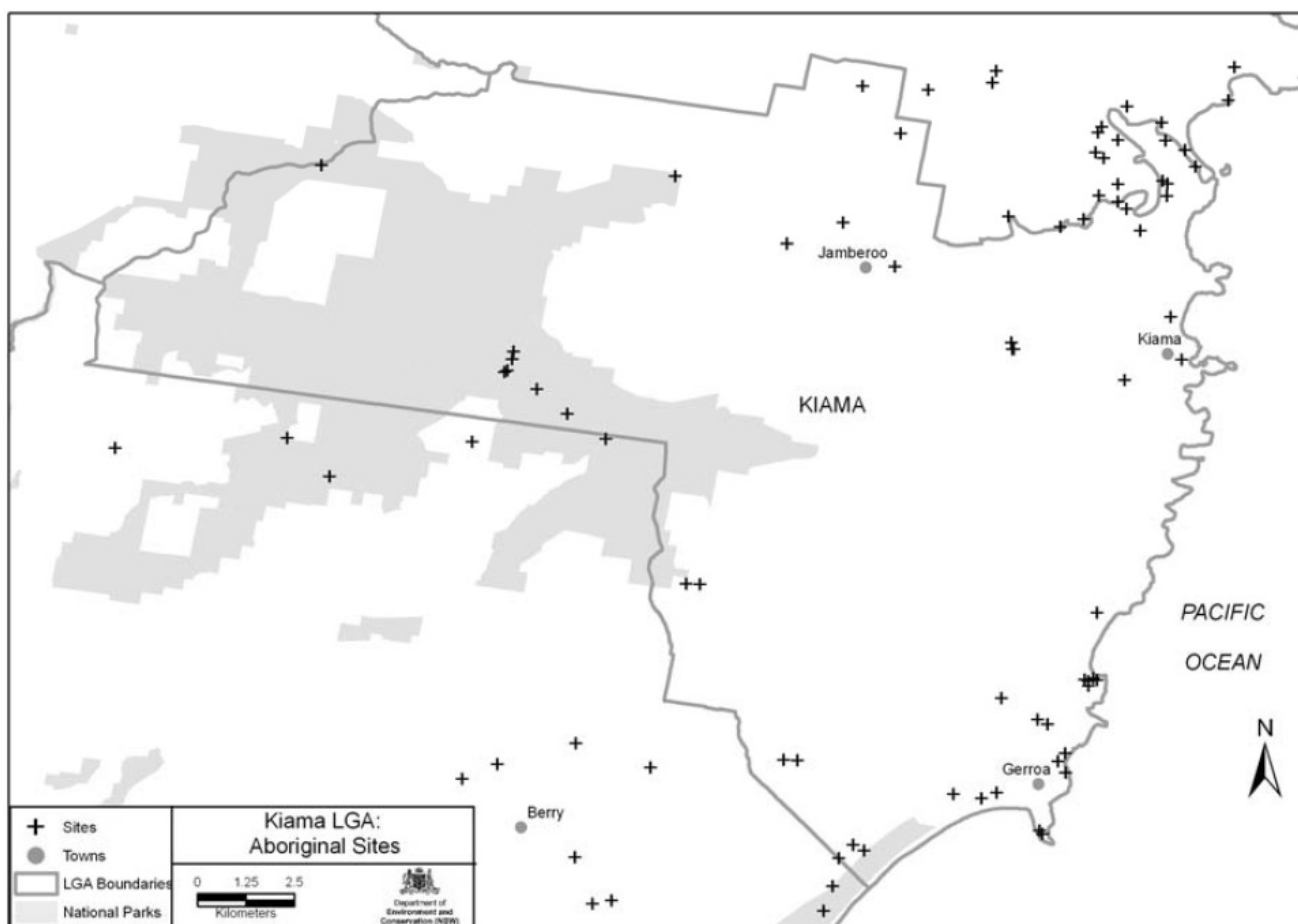


Figure 8 Location of AHIMS listed sites in the Kiama Municipal Council area (as at December 2004)

(Source: Department of Environment and Conservation, 2005)

4.4 Regional Scale Aboriginal Cultural Heritage Studies

Two regional scale studies or reports also provide useful information regarding Aboriginal cultural heritage sites and values across the three participating Council areas, and could be used as data layers/sources in the Toolkit's application.

4.4.1 A History of Aboriginal People of the Illawarra 1770 to 1970

A History of Aboriginal People of the Illawarra 1770 to 1970 was prepared by the Department of Environment and Conservation in 2005. It provides a brief history of the Aboriginal people of the Illawarra from pre-contact to the recent past, and was prepared in conjunction with Wollongong City Council and the Illawarra Local Aboriginal Land Council. It covers the Wollongong and Shellharbour City Council areas only.

Appendix 1 to the report identifies the following 14 significant Aboriginal places with historical and continuing cultural associations or "attachments" (as listed in more detail in Appendix G):

- Five Islands;
- Red Point – Hill 60 – Djillawarra;
- Windang Island;
- Gooseberry Island;
- Hooka Island;
- Mount Kiera;
- Mount Kembla;
- Coomaditchy;
- Fig Tree Site;
- Sandon Point;
- Shores and swamps of, and watercourse conjunctions with, Lake Illawarra;
- Bulli Pass; and
- Golf links,

The Study also lists 38 traditional stories of the Dharawal Aboriginal People, linking these to localities within the Illawarra and beyond.

4.4.2 Aboriginal Cultural Heritage Landscape Mapping of Coastal NSW

The NSW Comprehensive Coastal Assessment process was initiated by the NSW Government in 2001 to assess the environmental (natural and cultural), social and economic values of the State's coastline. The "Aboriginal Cultural Heritage Landscape Mapping" project, which was part of this wider initiative, was intended "to provide information to assist state and local government to ensure that Aboriginal community and cultural values are respected, understood and equitably considered in the future planning and management of the coastal areas of NSW".

The project produced a series of broad-area Aboriginal cultural landscape maps for sections of the coast. These were developed in consultation with local Aboriginal communities, and agreed to by the respective Aboriginal communities, and were intended as "a culturally appropriate tool to improve coastal planning and management".

Each cultural landscape map shows up to ten "Cultural Landscape Units" determined on the basis of Aboriginal country types. The primary factor in determining the country type mapped in the Cultural

Landscape Unit layer was whether there were Aboriginal words in the coastal Aboriginal languages which described the general nature of Country – in terms of terrain, landform, resource availability, or another form of description. The ten cultural landscape units applied were:

- coastal dunes and sand plains (vegetated);
- coastal alluvial plain (saline);
- areas disturbed by post settlement human activity;
- swamps/waterlogged areas;
- floodplains/terraces (alluvial soils);
- rocky outcrops;
- lower slopes (deep soils)
- undulating low hillslopes; and
- steep slopes

Overlaying the cultural landscape units are broadly defined areas that were identified by contemporary Aboriginal communities as having specific values “relevant to them today”. These values were grouped into the following five generic categories:

- spiritual/ceremonial – including places and areas of creation and law stories, ceremonial activity areas, gender specific areas, burials, etc;
- physical evidence – including the range of Aboriginal Heritage Information Management System listed sites and other sites/areas known to the participating Aboriginal communities;
- environmental knowledge and resources – including places and areas known for their cultural resources (foods, medicines, implements, etc), and environmental knowledge areas (increase sites, weather knowledge, etc);
- historical – including post-contact places and areas of importance (such as conflict areas, massacre areas, missions, etc); and
- social/economic – including traditional travel and trade routes, contemporary social gathering areas, and others.

The resulting maps show “two general cultural value layers”, but do not contain any detailed information as to the actual nature of values mapped. The maps were intended to be applied at the regional scale – to inform Department of Planning regional strategies or broad strategic planning undertaken by local councils, Catchment Management Authorities and other land management agencies. However the information presented is still of some value for the Toolkit, particularly as they present cultural and less tangible values which are – at present – largely absent from other data layers.

The Illawarra-Shoalhaven Regional Cultural Landscape Map (Map No. 4) – as shown at Figure 9 – covers all three participating councils.

It identifies extensive parts of the Wollongong City Council area, and large sections of the Shellharbour City Council and Kiama Municipal Council areas (particularly along and behind the coastline), as culturally significant especially in terms of social/economic and spiritual/ceremonial values.

The identification of those areas not considered to hold cultural significance for contemporary Aboriginal people is also a valuable data layer for the Toolkit’s application.

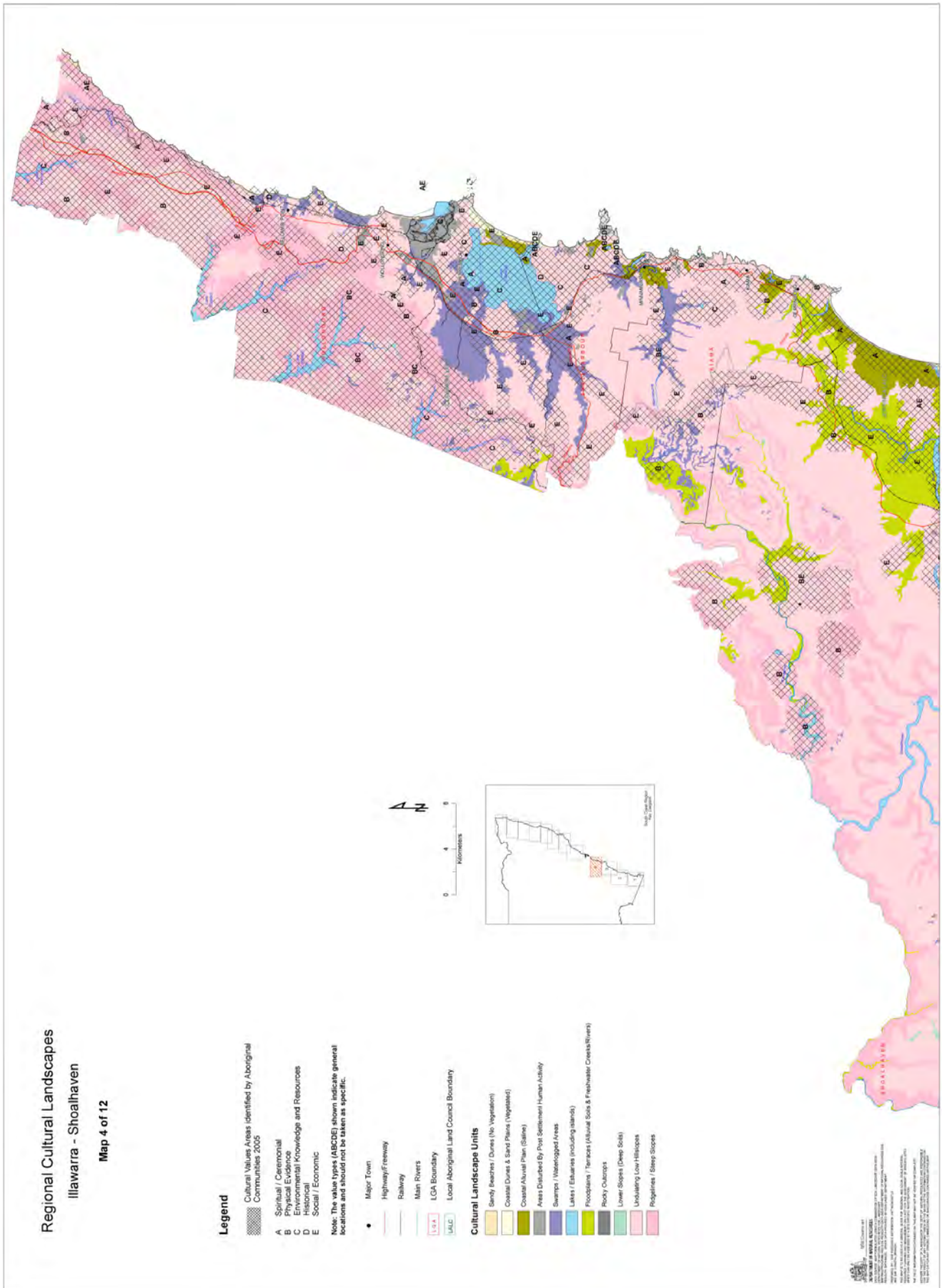


Figure 9 Illawarra-Shoalhaven regional cultural landscape map
(source: Andrews, Daylight and Hunt, Department of Natural Resources, 2006)

5. ABORIGINAL CULTURAL HERITAGE LEGISLATION

This section presents a summary of the principal current State and Commonwealth legislation relating to the protection of Aboriginal cultural heritage sites, objects and values and development assessment and approval process in New South Wales. The summary should be considered an overview only and is not to be regarded as a comprehensive review of all legislative provisions (or as formal legal advice).

5.1 Legislative Context

The *National Parks and Wildlife Act 1974 (NPW Act)* and associated regulations, administered by the Office of Environment and Heritage (OEH), provides the main mechanism for the protection and management of Aboriginal objects and Aboriginal places throughout New South Wales. The *Environmental Planning and Assessment Act 1979 (EPA Act)* and associated regulations, establishes the framework for planning and development assessment and approvals processes in the State.

The two Acts operate, although largely separately, to protect Aboriginal objects and places within the planning and development assessment process. Significantly, in terms of the Toolkit's operation, the *National Parks and Wildlife Act 1974* does not include a specific requirement for Aboriginal Places to be considered in the development assessment process.

The protections, requirements, obligations and processes set out in these two Acts, and the other legislation discussed below, have implications for local and state government agencies, private landholders and developers, and the Aboriginal community and their representative organisations when applying the planning and development assessment process.

In New South Wales, as in most other Australian states, this process is primarily one of identifying any Aboriginal objects and/or sites extant within a proposed development area, and then assessing the likelihood of "harm" to these features as a result of the proposed development or activity. Proponents are required to consider possible measures for avoiding harm to Aboriginal objects and/or sites. However when avoiding harm is not feasible, development impacts on Aboriginal cultural heritage values are regulated by a permit process. Under this approach decisions are made by the government authority administering the legislation (in this case the Director-General of the OEH) regarding which Aboriginal objects/sites should be protected from development impact or, more usually, the permitted damage to or disturbance of other Aboriginal objects/sites. This approval to damage or disturb specific Aboriginal objects/sites is provided to a proponent in the form of an Aboriginal Heritage Impact Permit. Many Aboriginal people and organisations are concerned that this approach is too focused on the "approved destruction" of Aboriginal objects/sites and does not sufficiently provide for the protection of Aboriginal cultural heritage values.

The Toolkit, and its component steps, has been shaped to be consistent with these legislative provisions. However as the issuing of Aboriginal Heritage Impact Permits is the role of the OEH, the Toolkit is more focused on the earlier steps in the above Aboriginal cultural heritage value identification and development assessment/approval process.

Local and state government can assist with identifying known objects and places from databases such as the Aboriginal Heritage Information Management System, and other records, however, these databases and records will only detail known objects or places and further investigation may be required to identify as yet unrecorded object/s. Local Aboriginal Land Councils are also a source of information regarding recorded and unrecorded objects and places and may assist in identifying appropriate individuals to be consulted as part of the due diligence process. Local Aboriginal Land Council may also assist custodians throughout a consultation process or register an interest in being consulted about a development or other activity. Consultation requirements are set out in the *Aboriginal Cultural Heritage Consultation Requirements for Proponents* (2010) document.

A number of other publications can also provide guidance in meeting legal obligations and responsibilities in protecting Aboriginal cultural heritage including:

- *Due Diligence Code of Practice for Protection of Aboriginal Objects in NSW* (2010);
- *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW* (2010); and
- *Applying for an Aboriginal Heritage Impact Permit: Guide for Applicants* (2010).

Other state and commonwealth legislation that may influence Aboriginal heritage protection and management, to varying degrees, include the following:

- *Heritage Act 1977*;
- *Local Government Act 1993*;
- *Aboriginal Land Rights Act 1983*;
- *Native Title (New South Wales) Act 1994*;
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Commonwealth);
- *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth);
- *Protection of Movable Cultural Heritage Act 1986* (Commonwealth); and
- *Native Title Act 1993* (Commonwealth).

5.2 State Legislation

5.2.1 National Parks and Wildlife Act 1974

The *National Parks and Wildlife Act 1974* (*NPW Act*) is the principal legislation governing the protection and management of Aboriginal heritage in NSW. This legislation is administered by the Office of Environment and Heritage (OEH) (often via the NSW National Parks and Wildlife Service [NPWS]). Some Aboriginal people are disturbed by the same legislation and government agency that is primarily concerned with biodiversity conservation also being employed to protect Aboriginal heritage, expressing the concern that this places their culture on the same “level” as plants and animals.

Part 6 of the *NPW Act* provides the principal mechanisms for the protection and management of Aboriginal objects and Aboriginal places throughout New South Wales.

The Act defines (in section 5) an Aboriginal object 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”. The National Parks and Wildlife Service has in the past elaborated this definition, describing Aboriginal objects (also sometimes referred to as “Aboriginal sites”, “cultural material” or “relics”) as the physical evidence of the use of an area by Aboriginal people including:

- physical objects – such as stone tools, Aboriginal-built fences and stockyards, scarred trees, and the remains of fringe camps;
- material deposited on the land – such as middens; and

- the ancestral remains of Aboriginal people.

Under the *NPW Act* the responsibility for obtaining and complying with the required permits, and demonstrating appropriate due diligence, rests with individuals and organisations undertaking planning and development activities. As a minimum requirement, and to avoid unnecessary harm and potential prosecution, individuals and organisations will need to determine if their activity is exempt as well as whether or not Aboriginal objects are likely to be present, and whether or not an activity will harm those objects, before deciding if more detailed assessments and approval processes are required.

5.2.1.1 Protection of Aboriginal Objects/Sites and Declared Aboriginal Places

Part 6 of the *National Parks and Wildlife Act 1974 (NPW Act)* establishes the regulatory system for the protection of Aboriginal objects and declared Aboriginal places by making it illegal to harm (damage, deface, destroy, disturb or collect) any Aboriginal object or evidence or desecrate a declared Aboriginal Place without an exemption (such as an Aboriginal Heritage Impact Permit) or a defence.

The Act provides “blanket protection” to Aboriginal objects and tangible sites. That is, all Aboriginal objects, including sites with physical evidence and mobile heritage items, are protected under the *NPW Act* regardless of their size or level of significance or land tenure (with the exception of Commonwealth Lands). The Act protects Aboriginal objects and tangible sites regardless of whether or not they have been “found” and formally registered, or whether or not they are of particular significance to Aboriginal people. Unlike Aboriginal objects, culturally significant places and areas (such as “natural sacred sites”) and larger landscape-scale features (such as story or dreaming trails) or “cultural landscapes” are only protected if they have been declared or reserved in accordance with the Act. Languages, stories and cultural practices are not explicitly protected by the Act.

Section 86 of the *NPW Act* establishes a number of offences related to harming Aboriginal objects and Aboriginal Places. Establishing these “offences of harm” is the Act’s principal tool for the protection of Aboriginal objects/sites and declared Aboriginal Places. The Act defines harm of an object or place as any act or omission that:

- destroys, defaces or damages the object or place; or
- moves an object from the land on which it had been situated; or
- is specified by the regulations; or
- causes or permits the object or place to be harmed in a manner referred to above.

“Harm” does not include any act or omission that desecrates the object or place or is trivial or negligible, as discussed further below, or is excluded by definition in the *National Parks and Wildlife Regulation 2009 (NPW Regulation)*.

“Harm” can either be deliberate (such as vandalism to a rock art site or felling a known Aboriginal marked tree) or unintentional (e.g. mining sand from a dune that contains unrecorded burials). Accordingly the *NPW Act* differentiates between the type and severity of “harm” and provides a number of exemptions and defences to prosecution.

There are two types of offences for harming Aboriginal objects/sites. The most serious offence, under section 86(1) is the offence of harming or desecrating an Aboriginal object or tangible site which a person knows is an Aboriginal object/site. This offence carries higher penalties including imprisonment. Other offences are “strict liability” offences under section 86(2) where a person may harm an Aboriginal object or tangible site, even if the person is unaware that it is an Aboriginal object/site and the harm was unintentional (in this case intent does not need to be proven).

Section 86(4) of the *NPW Act* provides that a person must not harm or desecrate an Aboriginal Place (as declared under Section 84 of the Act). This is also a “strict liability” offence not requiring intent to be proven.

The Act describes certain defences against prosecution for the above offences of harming Aboriginal objects or tangible sites, or a declared Aboriginal Place. Section 87 of the Act sets out applicable defences as:

- where harm is caused in compliance with an Aboriginal Heritage Impact Permit (AHIP) (where the conditions of such a permit have not been contravened);
- exercising “due diligence” to determine that the actions or omissions in question would not harm Aboriginal objects/sites or a declared Aboriginal Place (including complying with a “due diligence process” or adherence to a prescribed “code of practice” as set out in the *NPW Regulation*) (the due diligence process is discussed further below); and
- when undertaking certain low impact acts, or omissions, as set out in the *NPW Regulation* (also discussed further below).

The common law defence of an “honest and reasonable mistake of fact” also applies (under Section 86(5) of the Act) as a defence against prosecution for harming Aboriginal objects or tangible sites, or a declared Aboriginal Place for strict liability offences.

In addition, the *NPW Act* (section 87A and 87B) exempts certain actions and persons from the offence of harming Aboriginal objects or tangible sites or a declared Aboriginal Place, including those actions:

- authorised by or under the *State Emergency and Rescue Management Act 1989* and the *Rural Fires Act 1997* (for fire emergencies of bushfire hazard reduction works);
- in accordance with a Conservation Agreement made under the *NPW Act*;
- required for the conservation or protection of an Aboriginal object or Aboriginal place and carried out by an Office of Environment and Heritage (OEH) officer or a person under the direction of an OEH officer; or
- that occurred while an Aboriginal person, or their dependents, was undertaking traditional cultural activity (of a non-commercial nature).

Clause 3A of the *NPW Regulation* excludes actions undertaken as part of an authorised archaeological survey and in accordance with *Code of Practice for Archaeological Investigation in New South Wales* from the definition of causing “harm” to Aboriginal objects or tangible sites. Activities such as archaeological test excavations – such as to investigate the possible presence of Aboriginal objects across a development site – may be undertaken without an AHIP as long as they are compliant with this *Code of Practice*. Archaeological investigations/activities outside the *Code of Practice* cannot be undertaken without an AHIP.

5.2.1.2 OEH Due Diligence Code of Practice, and Other Due Diligence Processes

The Office of Environment and Heritage (OEH) has developed a due diligence code of practice (*Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales, 2010*) “to assist individuals and organisations to exercise due diligence when carrying out activities that may harm Aboriginal objects and to determine whether they should apply for consent in the form of an Aboriginal Heritage Impact Permit (AHIP)” for any probable adverse impacts on Aboriginal objects.

Applying the “due diligence code of practice” to determine that proposed developments or actions will not harm Aboriginal objects/sites provides proponents with a defence against prosecution for strict liability offences (*National Parks and Wildlife Act 1974* section 86(2) offences) if they later unknowingly harm an object without an AHIP. This defence is enabled by the *National Parks and Wildlife Regulation 2009* specifically citing, in clause 80A(a), that compliance with the *Due Diligence Code of Practice* constitutes due diligence in determining whether an act or omission would harm an Aboriginal object or site (for the purposes of being a defence from prosecution under sections 87(2)

and 87(3) of the *NPW Act*). The *NPW Act* and associated *NPW Regulation* also allows for the adoption of industry or activity specific codes of practice, in addition to the OEH generic *Due Diligence Code of Practice*. However no such specific codes, or other “prescribed documents”, as identified in clause 80A of the *NPW Regulation* at present relate directly to the land use planning and development assessment process.

The *Due Diligence Code of Practice* sets out the reasonable and practicable steps which proponents “who are contemplating undertaking activities which could harm Aboriginal objects” should to take in order to:

- identify whether or not Aboriginal objects/sites are, or are likely to be, present in an area;
- determine whether or not their proposed developments or activities are likely to harm Aboriginal objects/sites (if present); and
- determine whether an AHIP application is required.

The *Due Diligence Code of Practice* provides a process, endorsed by the OEH and providing a defence against strict liability offences (section 86(2) offences) under the *NPW Act*, through which “a reasonable determination can be made as to whether or not Aboriginal objects will be harmed by an activity, whether further investigation is warranted and whether the activity requires an AHIP application.” The generic due diligence process set out in the 2010 *Code of Practice* is shown in Figure 10 and elaborated in Appendix H.

The *Due Diligence Code of Practice* does not generally apply where a proponent is aware of known Aboriginal object/site that may be impacted by a proposed development or activity. In this instance the AHIP process is triggered and the due diligence process largely superseded (and the offence of harming or desecrating a known Aboriginal object or tangible site under section 86(1) of the *NPW Act* also applies).

Access to the Aboriginal Heritage Information Management System, maintained in accordance with section 90Q of the *NPW Act*, which records information about known Aboriginal cultural heritage sites and objects has been revised to support application of the *Due Diligence Code of Practice*. Section 90Q(3)(d) specifies that among the purposes of the AHIMS is to allow access to the AHIMS “(ii) by or on behalf of persons exercising due diligence to determine whether an act or omission would harm an Aboriginal object for the purposes of section 87 (2), and (iii) by public and local authorities in the exercise of their land management, planning and other similar functions”. However section 90Q(3)(d) also recognises that “the AHIMS is not intended to be conclusive about whether any information or records contained within it is up-to-date, comprehensive or otherwise accurate”.

5.2.1.3 Specified Low Impact Activities Unlikely to Harm Aboriginal Objects/Sites

Section 87(4) of the *National Parks and Wildlife Act 1974 (NPW Act)* provides a defence against strict liability offences (section 86(2) offences) under the Act for ten categories of low impact activities that are considered unlikely to harm Aboriginal objects or tangible sites. These section 87(4) low impact activities are specified in clause 80B of the *National Parks and Wildlife Regulation 2009 (NPW Regulation)*.

Many of these specified low impact activities only afford a defence against prosecution for strict liability offences when taking place on “land that has been disturbed”. For the purposes of clause 80B the *NPW Regulation* applies a broad definition of disturbed land – prescribing, in clause 80B(4), that “land is disturbed if it has been the subject of a human activity that has changed the land’s surface, being changes that remain clear and observable”. Examples given in the *NPW Regulation* of activities that may have disturbed land include:

- soil ploughing;
- the construction of rural infrastructure (such as dams and fences);
- the construction of roads, trails and tracks (including fire trails and tracks and walking tracks);
- vegetation clearing;

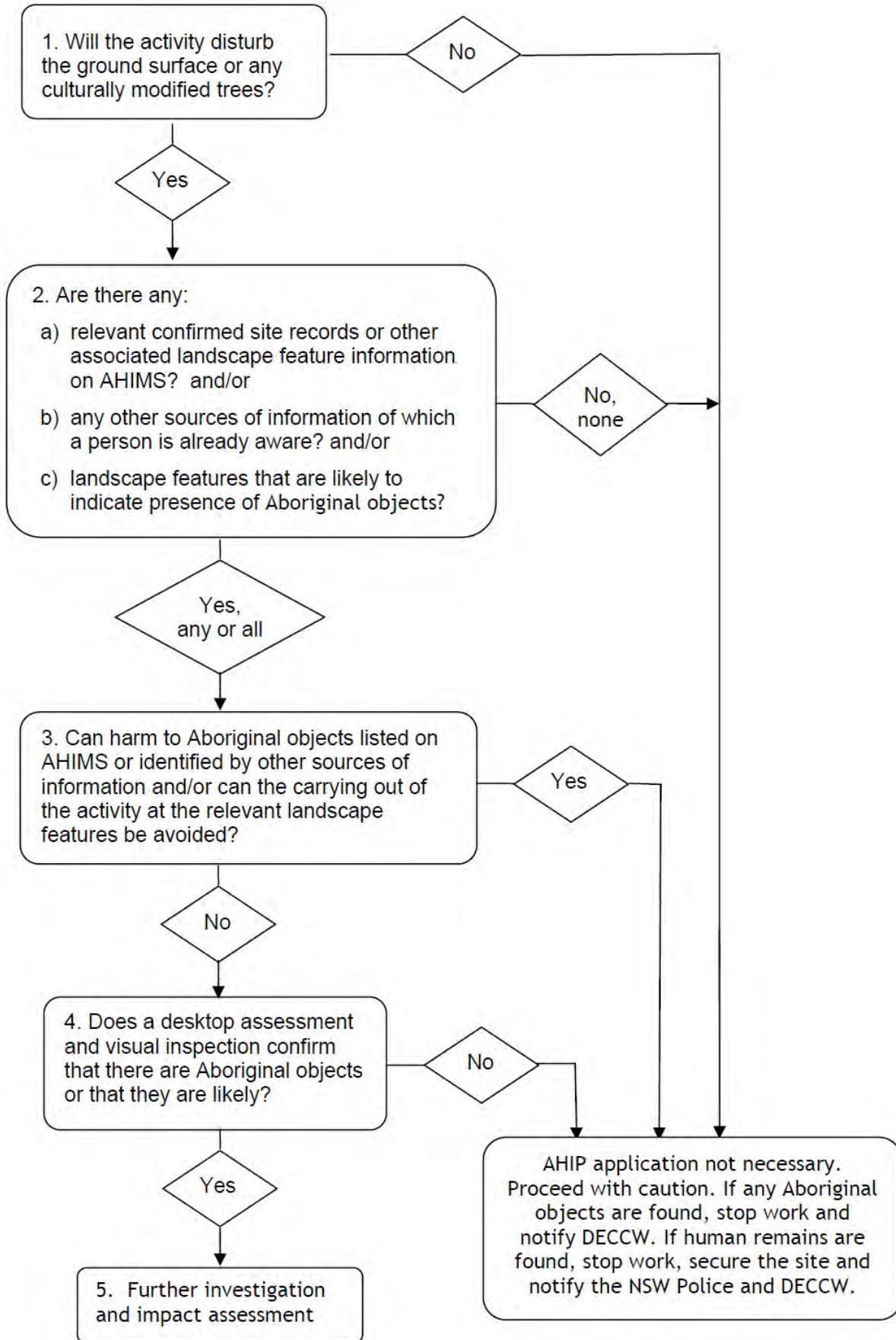


Figure 10 The Office of Environment and Heritage generic due diligence process
 (source: Department of Environment, Climate Change and Water 2010(c), page 10)

- the construction of buildings and the erection of other structures;
- the construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines, stormwater drainage and other similar infrastructure);
- substantial grazing activities, involving the construction of rural infrastructure; and
- earthworks associated with any of the above activities.

The ten categories of low impact activities set out in clause 80B of the *NPW Regulation*, for which that clause removes the obligation for a proponent to go through the due diligence process and provides a defence against strict liability offences of harming an Aboriginal object, include the following:

- maintenance of existing roads, fire trails/tracks, other trails/tracks, maintenance of existing utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines) on land that has been disturbed – clause 80B(1)(a);
- farming and land management works on land that has been disturbed – specifically cropping and leaving paddocks fallow, constructing farm dams or water tanks or other water storage works, constructing fences, constructing irrigation infrastructure or ground water bores, constructing flood mitigation works, and constructing erosion control or soil conservation works (such as contour banks) – clause 80B(1)(b);
- farming and land management works that involve the maintenance of existing infrastructure – specifically grain/fibre or fertiliser storage areas, dams or water tanks or other water storage works, infrastructure or ground water bores, flood mitigation works, fences, and erosion control or soil conservation works (such as contour banks) (the clause does not specify that these activities are only low-impact when on disturbed lands, however their presence would define the lands on which they occur as disturbed under the terms of the clause) – clause 80B(1)(c);
- the grazing of animals (generally, not specifically on land that has been disturbed) – clause 80B(1)(d);
- activities defined as exempt development, or the subject of a complying development certificate issued under the *Environmental Planning and Assessment Act 1979* (complying development) on land that has been disturbed – clause 80B(1)(e);
- mining exploration work on land that has been disturbed – specifically costeaning, bulk sampling or drilling – clause 80B(1)(f);
- survey and mapping work – specifically geological mapping, surface geophysical surveys (including gravity surveys, radiometric surveys, magnetic surveys and electrical surveys but excluding seismic surveys), sub-surface geophysical surveys involving downhole logging, and sampling and coring using hand-held equipment (excluding when part of archaeological investigations) (generally, not specifically on land that has been disturbed) – clause 80B(1)(g);
- the removal of isolated, dead or dying vegetation (generally, not specifically on land that has been disturbed), but only if there is minimal disturbance to the surrounding ground surface – clause 80B(1)(h);
- seismic surveying or the construction and maintenance of groundwater monitoring bores on land that has been disturbed – clause 80B(1)(i); and
- environmental rehabilitation work – including temporary silt fencing, tree planting, bush regeneration and weed removal, but not including erosion control or soil conservation works (such as contour banks) (generally, not specifically on land that has been disturbed) – clause 80B(1)(j).

These low impact activities exemptions do not apply to Aboriginal culturally modified trees which are protected regardless of clause 80B of the *NPW Regulation* – as explicitly clarified in clauses 80B(2) and 80B(3).

These low impact activities provisions do not apply in the case of known Aboriginal objects/sites, where the offence of harming or desecrating a known Aboriginal object or tangible site under section 86(1) of the *NPW Act* is still valid – requiring known tangible Aboriginal cultural heritage objects and sites to still be addressed in the development assessment process.

5.2.1.4 Trivial or Negligible Impact Actions

The definition of “harm” to an Aboriginal object or Aboriginal Place in section 5 of the *National Parks and Wildlife Act 1974 (NPW Act)* “does not include any act or omission that ... is trivial or negligible”. Actions that are considered to have trivial or negligible impact are not identified in the *NPW Act*, or in the *National Parks and Wildlife Regulation 2009 (NPW Regulation)*.

However the Office of Environment and Heritage’s 2011 guide to Aboriginal Heritage Impact Permits gives examples of “trivial or negligible” events as “picking up and replacing a small stone artefact, breaking a small Aboriginal object below the surface when you are gardening, crushing a small Aboriginal object when you walk on or off a track, picnicking, camping or other similar recreational activities.”

5.2.1.5 Reporting Obligations for “Discovered” or “Known” Aboriginal Objects

Section 89A of the *National Parks and Wildlife Act 1974 (NPW Act)* requires that any person who locates an Aboriginal object/site must notify the Office of Environment and Heritage (OEH) “within a reasonable time”. Not to do so is considered an offence under the Act, “unless the person believes on reasonable grounds that the Director-General is aware of the location of that Aboriginal object”.

Aboriginal objects/sites that are “discovered” during the course of undertaking a development or activity are afforded the full protection available under the *NPW Act* and accompanying regulations – even if not reported to the OEH. This applies even in the case of low impact activities and the preamble to clause 80B in the *National Parks and Wildlife Regulation 2009 (NPW Regulation)* states – “If a person discovers an Aboriginal object in the course of undertaking any of the activities listed below, the person should not harm the object – as the person may be committing an offence under section 86(1) of the Act (the offence of knowingly harming an Aboriginal object) – and should obtain an Aboriginal heritage impact permit, if needed.” Any activity that threatens an Aboriginal object/site, or an Aboriginal Place, should be stopped so that harm can be avoided and a further assessment completed prior to an activity continuing. Only the responsible Minister can issue an official stop work order (as discussed below) however, if work continues after an object/site is found and harm results then an individual or organisation may be liable for prosecution against the most serious harm offence under section 86(1) of the *NPW Act*. An Aboriginal Heritage Impact Permit (AHIP) may also be required before an activity can continue.

5.2.1.6 Aboriginal Heritage Impact Permits

An Aboriginal Heritage Impact Permit (AHIP) is the statutory instrument issued under section 90 of the *National Parks and Wildlife Act 1974 (NPW Act)* that the Office of Environment and Heritage (OEH) uses to approve and manage harm or possible harm to Aboriginal objects/sites and declared Aboriginal Places.

As such they are a key mechanism in the Aboriginal culture and heritage management system prescribed in the *NPW Act* – which is focused on managing harm to, and enforcing offences for harming, Aboriginal objects/sites and declared Aboriginal Places. However there is also the view that, by their nature and focus on approving “harm”, that AHIPs allow for the incremental destruction of Aboriginal cultural heritage with inadequate emphasis placed on requiring serious endeavours to avoid harm to Aboriginal objects/sites or on the protective management of the known Aboriginal values of a place.

In the planning, development assessment and development/works process AHIPs are typically issued where harm to a known Aboriginal object/site within a development area cannot be avoided. As such they represent an end point in the Toolkit’s application, where the development assessment and Aboriginal cultural heritage investigation stage moves into the integrated development approval process (refer to Section 5.2.2.2 below).

An AHIP issued by the Director-General of OEH allows Aboriginal objects/sites to be “harmed” (mostly including destruction, disturbance, relocation or moving and salvage/collection or removal) without giving rise to an offence under section 87 of the *NPW Act*, as long as the harm is in accordance with the terms and conditions of the AHIP and other conditions are not contravened. AHIPS may be issued subject to conditions or unconditionally (section 90(2) of the *NPW Act*). Conditions can include requirements for the preparation and implementation of Aboriginal Cultural Heritage Management Plans. Failure to comply with the conditions attached to an AHIP is an offence under section 90J of the *NPW ACT*.

Under section 90(3) of the Act the Director-General of OEH can issue AHIPs in a variety of forms – an AHIP “may be issued in relation to a specified Aboriginal object, Aboriginal place, land, activity or person or specified types or classes of Aboriginal objects, Aboriginal places, land, activities or persons.” AHIPs can be issued in relation to specified parcels of land as well as covering multistage developments.

The NPW Act refers to the *National Parks and Wildlife Regulation 2009 (NPW Regulation)* to prescribe requirements around the preparation and content of AHIP applications (sections 90A and 90N). Clause 80C of the *NPW Regulation* sets out an explicit and detailed Aboriginal community consultation process that a “proposed applicant must carry out” before applying for an AHIP. This includes:

- the “notification of Aboriginal persons” – clauses 80C(2) and 80C(3);
- the form and contents of this notice – clause 80C(4);
- registering and informing “interested Aboriginal parties” – clause 80C(5);
- consulting with interested Aboriginal parties regarding the proposed methodology to be used in preparing the cultural heritage assessment report to be submitted with the application – clauses 80C(6) and 80C(7); and
- consulting with Aboriginal parties regarding the draft cultural heritage assessment report – clause 80C(8).

Clause 80D(1) of the *NPW Regulation* requires an AHIP application to be accompanied by a cultural heritage assessment report. The matters to be addressed by the cultural heritage assessment report are detailed in clauses 80D(2) and 80D(3) as:

- the significance of the Aboriginal objects or Aboriginal places that are the subject of the application – clause 80D(2)(a);
- the actual or likely harm to those Aboriginal objects or Aboriginal places from the proposed activity that is the subject of the application – clause 80D(2)(b);
- any practical measures that may be taken to protect and conserve those Aboriginal objects or Aboriginal places – clause 80D(2)(c);
- any practical measures that may be taken to avoid or mitigate any actual or likely harm to those Aboriginal objects or Aboriginal places – clause 80D(2)(d); and
- if any submission has been received from a registered Aboriginal party under clause 80C (including any submission on the proposed methodology to be used in the preparation of the report and any submission on the draft report), a copy of the submission, and the applicant’s response to each such submission – clause 80D(3).

Section 90K(1) of the *NPW Act* sets out the following matters that the Director General of the OEH must consider (to the exclusion of any other considerations, as required by section 90K(2) of the Act) when determining an AHIP application:

- the objects of the *NPW Act*;
- actual or likely harm to the Aboriginal objects (or Aboriginal Place) that are the subject of the permit;
- practical measures that may be taken to protect and conserve the subject area’s Aboriginal objects (or Aboriginal Place) that are the subject of the permit;
- practical measures that may be taken to avoid or mitigate any actual or likely harm to the subject area’s Aboriginal objects (or Aboriginal Place);

- the significance of the subject area's Aboriginal objects (or Aboriginal Place);
- the results of any consultation by the applicant with Aboriginal people regarding the subject area's Aboriginal objects (or Aboriginal Place), including any submissions made by Aboriginal people as part of a consultation required by the *NPW Regulations*, and whether any such consultation substantially complied with any requirements for consultation set out in the *NPW Regulations*;
- the social and economic consequences of the decision;
- any documents accompanying the application, and any public submission received by the Director-General made under the *Environmental Planning and Assessment Act 1979* in connection with the proposed development or activity; and
- any other matter prescribed by the *NPW Regulations*.

Applicants have several rights of appeal in relation to the Director-General's determinations around an AHIP application (under section 90L of the *NPW Act*). However Aboriginal people and third parties have no express rights to appeal the issuing or conditioning of an AHIP, although in limited circumstances cases may be brought in the Land and Environment Court against a decision by the Director-General's to issue an AHIP.

The holder of an AHIP can apply to the Director-General of the OEH to vary the permit or any conditions a permit may contain (sections 90D of the *NPW Act*). Where such a variation would result in a "significant increase in harm to the Aboriginal objects or Aboriginal places concerned" the Director-General has the discretionary power to require further consultation with the Aboriginal community (under clause 80E of the *NPW Regulations*). The Director General can also make minor, correcting, amendments to an AHIP (sections 90D(3) of the Act), however third parties cannot apply for variations to an AHIP once issued.

Once granted an AHIP can be transferred to another person or entity. This requires the written consent of the AHIP holder and approval of the Director-General of the OEH (sections 90B and 90E of the Act).

The Director-General may suspend or revoke an AHIP subject to a process set out in sections 90G and 90I of the *NPW Act*.

5.2.1.7 Stop Work Orders and Emergency Site Protection

Under section 91AA of the *National Parks and Wildlife Act 1974 (NPW Act)* the Director-General of the Office of Environment and Heritage (OEH) can issue a stop work order if an action that is being, or is about to be, carried out is likely to significantly affect an Aboriginal object/site or declared Aboriginal Place. Any individual or organisation can request the Director-General to issue such an order under the *NPW Act*, but only the Director-General of the OEH has the authority to issue a stop work order due to Aboriginal cultural heritage protection issues (within the State legislative framework).

The Director-General may order that an action stop or not go ahead within the vicinity of the Aboriginal object/site or declared Aboriginal Place. A stop work order lasts 40 days and can be extended "for such further period or periods of 40 days as the Director-General thinks fit" (under section 91DD of the Act).

The *NPW Act* sets out some circumstances in which a stop work order cannot be issued – such as actions authorised/licenced under the *NPW Act* or *Threatened Species Conservation Act 1995*, authorised under the *State Emergency and Rescue Management Act 1989* to reasonably avoid a threat to life or property, emergency fire fighting activities consistent with the *Rural Fires Act 1997*, or in relation to a development or activity approved under the *Environmental Planning and Assessment Act 1979*.

Under section 91CC of the *NPW Act* stop work orders can be appealed, in writing, to the Minister administering the *NPW Act*.

5.2.1.8 Interim Protection Orders

Under section 91A of the *National Parks and Wildlife Act 1974 (NPW Act)* the Director-General of the Office of Environment and Heritage (OEH) can make an interim protection order for a specified area of land which “has, in the Director-General’s opinion, natural, scientific or cultural significance”. Any individual or organisation can request the Director-General to make an interim protection order under the *NPW Act*, but the Director-General of the OEH has the final decision and authority to do so.

An interim protection order can operate for up to 2 years (or as is specified in the order), or until revoked prior (section 91D of the Act).

An owner or occupier of lands subject to an interim protection order has a right of appeal to the Land and Environment Court against the imposition of the order or any of its terms (section 91H of the Act).

5.2.1.9 Remediation Directions Relating to Harm to Aboriginal Objects and Places

Under section 91L of the *National Parks and Wildlife Act 1974 (NPW Act)* the Director-General of the Office of Environment and Heritage (OEH) can provide written direction to a person who has committed an offence under the Act harming an Aboriginal object/site or declared Aboriginal Place requiring them to carry out specific remediation works (in a specified manner and within a set time). Remediation works can include actions to control, abate or mitigate the harm as well as measures to protect, conserve, maintain, remediate or restore the harmed Aboriginal object/site. These remediation directions can be made whether or not a person has been proceeded against or convicted for the harm offence in question.

5.2.2 Environmental Planning and Assessment Act 1979

The *Environmental Planning and Assessment Act 1979 (EPA Act)* is the principal legislation governing environmental land use planning and development assessment and control in New South Wales. The *EPA Act* establishes processes for preparing and applying planning instruments and the assessment of environmental impact.

The *EPA Act* works to protect Aboriginal cultural heritage by requiring local councils to prepare environmental planning instruments – including Local Environmental Plans (LEPs) and Development Control Plans (DCPs) – that include specific provisions for protection, management and assessment of Aboriginal cultural heritage values (primarily known Aboriginal sites and values) in the planning and development assessment/control process.

5.2.2.1 Environmental Planning Instruments and the “Standard LEP Template”

Part 3 of the *Environmental Planning and Assessment Act 1979 (EPA Act)* establishes two types of environmental planning instruments, both of which bind the government and private developers alike:

- State environmental planning policies (SEPPs); and
- local environmental plans (LEPs).

SEPPs are focused on issues of State level significance, however there are at present no SEPPs relating specifically to the protection of Aboriginal cultural heritage.

LEPs are prepared by local councils and approved by the Minister for Planning. These planning instruments generally cover permissible uses and potential constraints on land use, and divide a

Council area into “land use zones” (such as residential, industrial, recreation, environment protection, etc) to guide land use and planning decision making. LEPs can limit the range of activities which may be carried out within a specific area without requiring permission. It should be noted that while an LEP may allow certain activities to go ahead without consent, the development or activity must be in accordance with relevant legislation such as the *National Parks and Wildlife Act 1974*. LEPs may also require specific levels of assessment including the requirement for more detailed Aboriginal heritage investigations where necessary to ensure that the values of a site or object are protected in accordance with relevant legislation.

Under the State Government’s Standard Instrument (Local Environmental Plans) Order 2006 (and subsequent amendments or clarifications) local councils are required to use a “standard LEP template” when developing LEPs for their local government areas or part thereof. This template includes a compulsory clause, clause 5.10, regarding heritage conservation.

Clause 5.10 of the “standard LEP template” includes a compulsory provision which requires that a consent authority “must, before granting consent under this clause to the carrying out of development in an Aboriginal place of heritage significance: (a) consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and assessment (which may involve consideration of a heritage impact statement), and (b) notify the local Aboriginal communities, in writing or in such other manner as may be appropriate, about the application and take into consideration any response received within 28 days after the notice is sent.”

Other inclusions in this compulsory clause relevant to the protection and management of Aboriginal heritage features and values include the following:

- the objectives of the clause include “to conserve Aboriginal objects and Aboriginal places of heritage significance”;
- development consent is required for “demolishing or moving ... an Aboriginal object”;
- development consent is required for “disturbing or excavating an Aboriginal place of heritage significance” or erecting a building on land or subdividing land “on which an Aboriginal object is located or that is within an Aboriginal place of heritage significance”;
- development consent is not required if the applicant has notified the consent authority of the proposed development and the consent authority is satisfied that the proposed development is of a minor nature or is for maintenance purposes and would not adversely affect the significance of the Aboriginal object, Aboriginal place of heritage significance;
- development consent is not required where the development is exempt development;
- before granting consent to any development on land on which a heritage item is situated the consent authority can require the preparation of a heritage impact statement and/or a heritage conservation management plan; and
- a consent authority may grant consent to development for “any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent”.

The “standard LEP template” requires heritage items (if any) to be listed and described in a schedule accompanying an LEP – “Schedule 5 Environmental Heritage”. Heritage items as identified in Schedule 5 must also be shown on the LEP’s accompanying “Heritage Map”. However the location and nature of “Aboriginal objects” and “Aboriginal places of heritage significance” may (but need not) be described in Schedule 5. This may be done if agreement is reached with the Aboriginal community to list Aboriginal objects or Aboriginal places of heritage significance in Schedule 5 Environmental Heritage, with these features – if listed – included in a separate part of the schedule. “Aboriginal objects” and “Aboriginal places of heritage significance” may also be shown on a separate sheet of the Heritage Map series marked “Aboriginal Heritage Map”.

Where the Aboriginal community does not agree to listing or showing cultural heritage sites/areas as part of an LEP, more detailed and site-specific measures for the protection of Aboriginal cultural heritage sites/values (beyond the general provisions of the “standard LEP template”) can be realised via a local Council’s Development Control Plan (DCP). It is at this DCP level where the Toolkit’s application has been targeted – as described in Section 3.

DCPs are prepared and approved by local councils to help achieve the objectives of the LEP by providing specific, comprehensive requirements for certain types of development or locations (such as for heritage precincts). They may prevent or place restrictions and constraints on development within and around sites with known, or potential, Aboriginal cultural heritage values.

Local councils are responsible for land use and development decision making in their specific local government areas, in accordance with the *EPA Act*, other than in matters related to State Significant Infrastructure (SSI) and State Significant Development (SSD) or for developments proposed by government agencies and authorities. State level decision making authorities have responsibility for assessing SSI, SSD and government agency planning and development proposals. Both State and Local Government decision making processes are required to comply with all relevant legislation and approved environmental planning instruments. It should be noted that under the *EPA Act* some provisions of LEPs and DCPs do not apply to SSI and SSD.

5.2.2.2 Development Assessment (Part 4)

Part 4 of the *Environmental Planning and Assessment Act 1979 (EPA Act)* provides the framework for development assessment and approval processes by local government (consent) authorities (or the Minister for Planning).

Section 79C lists the matters that a decision making authority should take into consideration when determining a development application. These include:

- “the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality” (section 79C(1)(b)); and
- “the public interest” (79C(1)(e)).

The *EPA Act* employs a broad definition of the environment to include “all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings” and encompasses Aboriginal heritage sites and values. This broad definition may also apply to less tangible cultural heritage elements such as resource use areas, sites of mythological and spiritual significance, and massacre sites.

Integrated Development

Part 4 (section 91) of the *EPA Act* addresses the approval processes for “integrated development” – development and activities that require both consent from local authorities as well as permits or licences under other legislation, whereby the approvals of State government agencies are linked to the development consent process. This includes developments and activities that require an Aboriginal Heritage Impact Permit (AHIP) under section 90 of the *National Parks and Wildlife Act 1974 (NPW Act)*. Under the *EPA Act* and alongside the local government authorities the Office of Environment and Heritage (OEH) becomes an approval body for the determination of activities and development proposals that are likely to harm Aboriginal objects or places. In this role the OEH must provide “general terms of approval” to the consent authority (local Council) and any development consent issued must be consistent with these terms/conditions.

A local government authority cannot approve a development or activity that requires an AHIP if the OEH decides that it will not issue an AHIP. An AHIP may not need to be issued before a development can be approved by the local authority however it must be in place before the activity or object subject to the AHIP is “harmed”. If the OEH agrees to issue an AHIP and the development is

approved the proponent has three years in which to obtain the AHIP as long as approval for the development or activity has not lapsed or been revoked when an AHIP application is made. The individual or organisation proposing a development or activity is responsible for carrying out the required due diligence under *NPW Act* and for providing adequate information to enable the OEHL to decide whether or not a permit should and/or will be issued and what if any conditions may apply to an AHIP.

Under Section 91(2) (a) of the *EPA Act* the integrated development approval process does not apply when an Aboriginal object is discovered during an approved development process or activity. In these circumstances, however, the discovery of the Aboriginal object must be reported under the *NPW Act* and an AHIP may be required before a development or activity can continue.

Exempt and Complying Development

Proposed developments or activities that are identified as having only minimal impact on the local environment – and are classed as such in a Council’s Local Environmental Plan (LEP), or listed in State Environmental Planning Policy No. 4 - Development Without Consent and Miscellaneous Exempt and Complying Development (SEPP 4) – are considered “exempt development” or “general development not requiring consent”. Development consent is not required as long as a proposed development or activity is compliant with the above requirements.

However, if Aboriginal objects/sites are known to occur on a development site for which the proposed works are classed as “exempt development”, and there is the potential for these to be impacted, then an AHIP may still be required and the proponent should lodge an AHIP application separately with the OEHL.

Similarly, proposed developments or activities that are classed as “complying development” under a local LEP or via SEPP 4 can still require a separate AHIP in those cases where known Aboriginal objects/sites occur, and are likely to be impacted, within a development site.

5.2.2.3 Part 5 Approvals

Development consent is not required for certain activities, such as for the construction of roads or electricity infrastructure where there is a public authority carrying out the activity or such works are approved by a public authority under other legislation. These activities are assessed under Part 5 of the *Environmental Planning and Assessment Act 1979 (EPA Act)*.

Part 5 of the Act provides the framework for environmental assessment and approval processes for developments proposed by government agencies or where decision making responsibility lies at the State level. This includes the assessment and approval of State Significant Infrastructure (SSI) and State Significant Development (SSD). This part of the *EPA Act* also gives the Minister for Planning the power to decide which State authorities will have responsibility for assessing different types of developments or activities.

Under Section 111 of the *EPA Act* the determining authority is required to consider the environmental impacts of a planned development or activity – to “examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity”. This stage is typically achieved via the preparation of a Review of Environmental Factors. Section 112 of the Act requires an authority to subsequently determine whether the level of impact is sufficient to require the preparation of an Environmental Impact Statement (with associated public exhibition requirements).

The definition of the “environment” in New South Wales, in section 4 of the *EPA Act*, includes “all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.” Department of Planning guidelines for the interpretation of section 111 and 112 of

the *EPA Act* requires that Aboriginal cultural heritage is addressed as part of the environmental impact identification and assessment process.

5.2.3 Heritage Act 1977

The *Heritage Act 1977* is intended to protect the State's natural and cultural heritage. In practice the Act has focused on items and places of non-indigenous heritage (features such as historic buildings and gardens, historic places and objects, historical archaeological sites, and historic shipwrecks). It does not specifically refer to Aboriginal heritage items (in fact, remnants of "Aboriginal settlement" and occupation are specifically excluded from the definition of "relics" as employed by the Act – in section 4).

However Aboriginal objects, sites or places may be subject to this Act's provisions if listed on the State Heritage Register or subject to an interim heritage order (under Part 4 of the Act). Items listed on the State Heritage Register, or subject to an Interim Heritage Order, are afforded protection from a range of damaging or disruptive activities (under section 57) – except with the prior approval of the Heritage Branch. Approval for certain works or development may therefore be required from the Heritage Branch, in addition to an Aboriginal Heritage Impact Permit under the *National Parks and Wildlife Act 1974 (NPW Act)*, as part of the integrated development assessment/approval process.

This Act can provide protection for Aboriginal heritage when:

- a tangible Aboriginal cultural site is known, recorded or under further investigation – supplementing the provisions of the *NPW Act*;
- an Aboriginal cultural site is of mythological, spiritual or historic significance but with no tangible/relic material (and hence where the *NPW Act* cannot be invoked); and
- a site is under threat of destruction or significant damage – using the Act's Emergency or Interim Heritage Order provisions.

The *Heritage Act 1977* also includes references to the "cultural" value and "archaeological" value of items or places, both of which may include Aboriginal heritage values, in the assessment of both state and local heritage significance (section 4A(1)).

5.2.4 Local Government Act 1993

The *Local Government Act 1993* includes specific references to items of Aboriginal cultural significance in the provisions relating to the planning and management of community lands (section 36D). This includes setting out the core management objectives for areas of community land identified as an area of cultural significance (section 36H), as well as the ability to keep any sensitive Aboriginal sites/values information confidential in the planning process (section 36DA). The Act also enables local councils to prepare local approvals policies setting out specific matters for consideration in relation to applications to demolish, build or undertake works.

5.2.5 Aboriginal Land Rights Act 1983

The *Aboriginal Land Rights Act 1983* is administered by Aboriginal Affairs New South Wales and, among other objectives, establishes the NSW Aboriginal Land Council and the 119 Local Aboriginal Land Councils across the State.

Section 52(4) of the Act describes the functions of Local Aboriginal Land Councils in relation to "Aboriginal culture and heritage" as:

- to take action to protect the culture and heritage of Aboriginal persons in the Council's area, subject to any other law.
- to promote awareness in the community of the culture and heritage of Aboriginal persons in the Council's area.

The Act does not provide Local Aboriginal Land Councils with direct authority for the protection or management of Aboriginal cultural heritage objects, sites or places nor does it release a Land Council from compliance with the provisions of the *National Parks and Wildlife Act 1974* or other legislation.

The *Aboriginal Land Rights Act 1983* also establishes the Aboriginal Land Rights Act Registrar – whose functions include maintaining the Register of Aboriginal Land Claims and the Register of Aboriginal Owners. Registration as an Aboriginal owner does not confer land title rights but acknowledges the person's cultural association with a specific area the land. The Act also allows Aboriginal people and groups to negotiate access to private land, enabling a connection to Country to be maintained.

A concern in using Local Aboriginal Land Councils in consultation on cultural heritage and development assessment issues has been the lack of formal representation on Land Councils for Aboriginal people with local tribal and cultural affiliations. Land Council office bearers are typically elected from contemporary Aboriginal people (also being Council members) living in a Council area. They do not necessarily have traditional links to the Council area. Similarly, Land Council boundaries do not always relate to tribal or traditional boundaries. For such reasons, and especially following the recognition of native title rights, additional Aboriginal organisations have emerged seeking to represent traditional cultural interests and the particular rights of local tribal groups.

5.2.6 Native Title (New South Wales) Act 1994

The *Native Title (New South Wales) Act 1994* was passed to ensure that the laws of New South Wales are consistent with the Commonwealth laws in relation to native title, particularly regarding future dealings affecting native title. The Act establishes state-based mechanisms for deciding claims to native title as well as validating past acts that would otherwise be invalidated by the existence of Native Title and confirms certain state rights.

The Act allows for claims for legal recognition of native title rights, which can take the form of access and use rights to an area of land or to full native title ownership. However in New South Wales many native title rights have been extinguished due to settlement patterns and historic land tenure arrangements. To the extent that native title rights are recognised, this law also protects Aboriginal culture and heritage.

The Act also provides for Indigenous Land Use Agreements (ILUAs), agreements between Aboriginal groups and the Government relating to the use and management of land and waters. ILUAs can be made between one or more native title groups and the Government, even where no legal determination about native title rights has been made. ILUAs can enable Aboriginal groups to negotiate involvement in broad-scale natural resource management initiatives as well as specific local actions. They may also address the management of Aboriginal cultural heritage objects, sites or places and provide for involvement in the planning and development assessment process.

5.3 Commonwealth Legislation

5.3.1 *Aboriginal and Torres Strait Islander (Heritage Protection) Act 1984*

The *Aboriginal and Torres Strait Islander (Heritage Protection) Act 1984* is the principal piece of Commonwealth legislation protecting Aboriginal heritage. The Act addresses the issue of Aboriginal cultural property in the wider sense, compared with the various State legislation that primarily protect the physical evidence of past Aboriginal occupation or other tangible heritage items. The Act has no cut-off date, and applies equally to contemporary Aboriginal cultural property as well as historic and pre-contact sites and objects. This cultural property can include any place, object and stories that are “of particular significance to Aboriginals in accordance with Aboriginal tradition” – as such it can provide particular protection for “sacred sites”.

An area (such as a “significant Aboriginal area”) or object cannot be protected by this Act unless it has been declared under the Act. An Aboriginal or Torres Strait Islander person can request the Federal Environment Minister to make a declaration protecting an Aboriginal area or object (including Aboriginal remains) from injury or desecration. This process requires assessment, State consultation, reporting and exhibition prior to a formal declaration of protection. However the Act also provides for emergency declaration of up to 60 days duration for “areas and objects that are at immediate risk of injury or are at risk of being used in a manner that is inconsistent with Aboriginal tradition”. The Act provides for heavy penalties for the contravention of a protective declaration.

In many cases Aboriginal archaeological sites registered under State legislation will also be eligible as Aboriginal places subject to the provision of this Federal legislation. The responsible Federal Minister may make a declaration under the Act in cases where State or Territory laws do not provide adequate protection for heritage places (and in many senses the Act is seen as a “last resort” to protect Aboriginal heritage when State legislation has proved ineffective). Where there is a conflict the Federal legislation takes precedence over the State laws.

The Act also encourages negotiated outcomes for site protection through mediation between Aboriginal people, land users and developers.

5.3.2 *Environment Protection and Biodiversity Conservation Act 1999*

The *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* introduced a new assessment and approvals system for actions that significantly affect matters of national environmental significance or the environment of Commonwealth land or that are carried out by the Commonwealth Government. Aboriginal and Torres Strait Islander heritage sites can be protected under this Act as part of World Heritage, National Heritage or Commonwealth Heritage if the site concerned meets the criteria for the relevant listing. Approval from the relevant Federal Minister is required for “controlled actions” which will have a significant impact on items and places included on the National Heritage or Commonwealth Heritage listings.

Under a bilateral agreement between the New South Wales and Australian Governments, the NSW *Environmental Planning and Assessment Act 1979* may be used to assess environmental impacts on matters of national environmental significance. This means that local government authorities can assess development proposals even when a matter of national environmental significance is involved. Under the bilateral agreement, the responsible State Minister is required to sign off on any development assessment or approval made by a local government authority.

5.3.3 Native Title Act 1993

The *Native Title Act 1993* is intended to recognise and protect native title rights, that is, the rights and interests in land and waters that Aboriginal and Torres Strait Islander people hold under their traditional laws and customs.

However this Act does not provide for the special protection or management of Aboriginal cultural sites, nor does it enable native title claims on an area of land simply because of the presence of Aboriginal cultural sites/values. The Act does, however, provide registered native title holders with the right to negotiate regarding “permissible future acts” including certain developments that could infringe upon native title rights related to cultural heritage places and objects. The right to negotiate is not a right to veto and can generally only be exercised on land where native title has not been extinguished.

The Register of Native Title Claims may also be useful for identifying appropriate individuals and organisations to consult during due diligence processes if Local Aboriginal Land Councils are unable to assist.

5.3.4 Protection of Movable Cultural Heritage Act 1986

The *Protection of Movable Cultural Heritage Act 1986* makes it unlawful to export a “protected object” without a permit/certificate from the Federal Environment Minister. Objects of “Australian Aboriginal and Torres Strait Islander Heritage (including sacred and secret objects, and human remains)” are one of nine categories of protected objects.