



NEW SOUTH WALES  
MINERALS COUNCIL LTD  
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# **NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects**



### **Authorship and Certification of Code of Practice**

The *NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects* has been prepared by the NSW Minerals Council. This Code of Practice complies with all the requirements of the *Minimum Standards for Codes of Practice for the Protection of Aboriginal Objects in NSW* gazetted on 10 September 2010.



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# DEFINITIONS

<b>Aboriginal Heritage Impact Permit (AHIP)</b>	A permit issued by the Director-General of DECCW (or their delegate) authorising a person to harm or desecrate Aboriginal objects or places.
<b>Aboriginal object (as defined in <i>National Parks and Wildlife Act 1974</i>)</b>	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.
<b>Aboriginal place (as defined in <i>National Parks and Wildlife Act 1974</i>)</b>	<p>A place declared under Section 84 of the NPW Act that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture.</p> <p>Note: Information about the location of Aboriginal places in NSW can be found on the DECCW website at: <a href="http://www.environment.nsw.gov.au/nswcultureheritage/PlacesOfSignificance.htm">http://www.environment.nsw.gov.au/nswcultureheritage/PlacesOfSignificance.htm</a></p>
<b>Aboriginal culturally modified tree (as defined in <i>National Parks and Wildlife Regulation 2009</i>)</b>	<p>A tree that, before or concurrent with (or both) the occupation of the area in which the tree is located by persons of non-Aboriginal extraction, has been scarred, carved or modified by an Aboriginal person by:</p> <p>(a) the deliberate removal, by traditional methods, of bark or wood from the tree, or</p> <p>(b) the deliberate modification, by traditional methods, of the wood of the tree.</p>
<b>Activity</b>	A project, development, activity or work program (ie. this term is used in its ordinary way and does not just refer to an activity as defined by the <i>Environmental Planning and Assessment Act 1979</i> ).
<b>Disturbed land or land already disturbed by previous activity (as defined in <i>National Parks and Wildlife Regulation 2009</i>)</b>	<p>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.</p> <p>Examples include: soil ploughing, construction of rural infrastructure (such as dams and fences), construction of roads, trails and tracks (including fire trails and tracks and walking tracks), clearing vegetation, construction of buildings and the erection of other structures, construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines, stormwater drainage and other similar infrastructure) and construction of earthworks (such as previous drill sites or trenches).</p>
<b>Code of practice</b>	A code of practice, prescribed by <i>National Parks and Wildlife Regulation 2009</i> , to be followed by members of a particular occupation or organisation and when followed legally satisfy due diligence requirements.
<b>Due diligence</b>	Taking reasonable and practicable steps to determine whether a person's actions will harm an Aboriginal object and if so what measures can be taken to avoid that harm.

- Harm an Aboriginal object**  
(as defined in *National Parks and Wildlife Act 1974*)
- Destroy, deface or damage an object
  - Move an object from the land on which it is situated
  - Cause or permit an object to be harmed.

**Trivial or negligible acts**      Actions which have minimal impact on the environment.  
 Examples of what may be ‘trivial or negligible acts’ given in the DECCW Code are “picking up and replacing a small stone artefact, breaking a small Aboriginal object when you are gardening or crushing a small Aboriginal object when you walk on a track, picnicking, camping or other similar recreational activities”.

## ACRONYMS AND ABBREVIATIONS

AHIMS	Aboriginal Heritage Information Management System (maintained by DECCW)
AHIP	Aboriginal Heritage Impact Permit
CHMP	Cultural Heritage Management Plan
Code of Practice	<i>NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects</i>
DECCW Code	<i>Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW</i>
EA	Environmental Assessment
EIS	Environmental Impact Statement
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i> (NSW)
DECCW	NSW Department of Environment, Climate Change and Water
DoP	NSW Department of Planning
EL	Exploration Licence
I&I NSW	Industry and Investment NSW (previously Department of Primary Industries)
IDAS	Integrated Development Assessment System
Mining SEPP	State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007
ML	Mining Lease
NPW Act	<i>National Parks and Wildlife Act 1974</i> (NSW) including the 2010 amendments
NPW Regulation	<i>National Parks and Wildlife Regulation 2009</i> (NSW)
NPWS	NSW National Parks and Wildlife Service (part of DECCW)
NSW	New South Wales
NSWMC	New South Wales Minerals Council
REF	Review of Environmental Factors

## SECTION 1 - INTRODUCTION

The mining industry is a key stakeholder in the protection and preservation of Aboriginal heritage. The NSW Minerals Council (NSWMC) is strongly committed to ensuring that Aboriginal heritage is protected while the industry maintains its ability to operate effectively. The environmental and social performance of the mining industry lays the foundations for the industry's reputation for environmental sustainability and as a responsible community citizen. The management of our heritage is becoming increasingly important in the eyes of the community, who provide the minerals industry's social licence to operate.

NSWMC provides a united voice for mineral explorers, producers and operators, as well as extractive material producers and associated service providers operating in New South Wales (NSW). This *NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects* (Code of Practice) has been developed to assist the mining industry exercise due diligence when carrying out activities that may harm Aboriginal objects and to determine whether proponents should apply for consent in the form of an Aboriginal Heritage Impact Permit (AHIP).

Under the *National Parks and Wildlife Act 1974* (NPW Act), including the 2010 amendments, it is an offence to harm an Aboriginal object:

- Which the person knows is an Aboriginal object (a 'knowing offence')
- Whether or not a person knows it is an Aboriginal object (a 'strict liability offence').

At 1 October 2010, the maximum penalty for a knowing offence is \$550,000 for an individual or \$1.1 million for a corporation and a 2 year gaol term. The maximum penalty for a strict liability offence is \$110,000 for an individual or \$220,000 for a corporation. Further information on offences and defences is detailed in Appendix 1.

A person or organisation who exercises due diligence in determining that their actions would not harm Aboriginal objects has a defence against prosecution for the strict liability offence if they later unknowingly harm an object without an AHIP. The due diligence defence is not available for activities which harm Aboriginal places.

**This Code of Practice sets out a procedure which, when followed, will satisfy the due diligence requirement. If a person or company can demonstrate that they exercised due diligence and determined that it was unlikely that Aboriginal objects would be harmed, then they have a defence to prosecution under the strict liability offence under Section 86(2) of the NPW Act.**

This Code of Practice sets out the reasonable and practicable steps which the minerals industry can take to:

- Identify whether or not Aboriginal objects are present or likely to be present in an area
- Consider whether or not their activities are likely to harm Aboriginal objects (if present) and
- Determine whether an AHIP is required.

This Code of Practice has been developed by NSWMC and is largely based on the generic *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* (DECCW Code), produced by the Department of Environment, Climate Change and Water (DECCW). Examples specific to the minerals industry have been included to simplify and clarify the process for the NSW minerals industry. This Code of Practice has been produced in consultation with NSWMC members, Industry and Investment NSW (I&I NSW), DECCW and the NSW Department of Planning (DoP). Any enquiries regarding the practical application of the NPW legislation should be addressed to DECCW.

This Code of Practice is for guidance only, and does not provide legal advice.

## SECTION 2 - WHAT IS DUE DILIGENCE?

Due diligence is a legal concept describing a standard of care. Exercising due diligence means considering the *likely risks* of a proposed course of action. It is not enough to perform activities carefully. Due diligence requires consideration of obligations under the NPW Act, and the consideration and adoption of a course of action that is directed towards preventing a breach of the Act.

In the context of protecting Aboriginal cultural heritage, due diligence involves taking reasonable and practicable measures to determine whether actions will harm an Aboriginal object and if so, what measures can be taken to avoid that harm. Following this Code of Practice does not provide certainty about the existence of Aboriginal objects.

If a person already knows or believes that an activity they propose to carry out will harm Aboriginal objects, then they do not need to go through this due diligence process. In most cases they must apply to DECCW for an AHIP, which has its own assessment process. Information related to applications for permits can be obtained through the DECCW website. If an AHIP is granted and activities are undertaken in accordance with the conditions of an AHIP, there is a valid defence to prosecution under the NPW Act.

Following successful due diligence, an activity may be undertaken though always with caution. Work should be stopped and DECCW notified if any Aboriginal objects are found. The due diligence defence does not authorise continuing harm.

### 2.1 ADVANTAGES OF DUE DILIGENCE

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

- Assists in avoiding unintended harm to Aboriginal objects
- Provides certainty to proponents about appropriate measures to take
- Encourages a precautionary approach
- Provides a defence against prosecution if the process is followed
- Results in more effective conservation outcomes for Aboriginal cultural heritage.

### 2.2 HOW TO SATISFY DUE DILIGENCE REQUIREMENTS

This Code of Practice provides one process for satisfying the due diligence requirements under the NPW Act. It should be used where:

- A person is not sure whether Aboriginal objects are likely to be present on land or
- Aboriginal objects are likely to be present, but a person is not sure that an activity they want to carry out will harm those objects.

The NPW Act provides that due diligence will be satisfied if a person has complied with this Code of Practice, which is adopted under the *National Parks and Wildlife Regulation 2009* (NPW Regulation). It is not mandatory to follow this Code of Practice. An individual or company can take other measures, provided that such measures are objectively reasonable and practicable. For example, if the proposed activity requires an environmental impact assessment under the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the assessment includes appropriate Aboriginal cultural heritage assessment, then due diligence would be met through that process.

Examples of other processes that can be used to exercise due diligence include other industry codes or the DECCW Code. The use of Regional Aboriginal Cultural Heritage Assessments, which indicate the presence or absence of Aboriginal objects, may form part of due diligence.



## 2.3 CONSULTATION

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

The requirement for consultation is triggered when the proponent knows an AHIP is required or is considering any sub-surface testing to inform an AHIP application. In these cases, consultation must be undertaken in accordance with the NPW Regulation. The DECCW *Aboriginal Cultural Heritage Community Consultation Requirements for Proponents* provides more information on the consultation process. These requirements may also be followed where there is uncertainty about potential harm to Aboriginal objects and Aboriginal Places and when undertaking an investigation and assessment of Aboriginal cultural heritage.

Although not a requirement of due diligence, to increase the likelihood that Aboriginal objects are identified, proponents are encouraged to contact known Aboriginal groups with responsibility for cultural heritage in the area. Notice to Aboriginal groups may provide important information that has not been recorded on AHIMS, or has been recorded incorrectly.

Notice in the form of an email inviting the opportunity to provide information about sites in a particular area is sufficient - noting that the invitation is to provide additional information about unregistered sites to the proponent, and does not constitute consultation.

Relevant Aboriginal groups with responsibility for cultural heritage protection in any given area are:

- Local Aboriginal Land Councils<sup>1</sup>
- Native Title holders, registered claimants<sup>2</sup> and Aboriginal Traditional Owners through NTSCORP Limited<sup>3</sup> and the National Native Title Tribunal
- Aboriginal Owners on the Register of Aboriginal Owners, directly or through the Registrar of the *Aboriginal Land Rights Act*.<sup>4</sup>

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

- DECCW Environment Protection and Regulation Group regional office
- Local councils
- Catchment Management Authorities (for contact details of any established Aboriginal reference group).

## 2.4 CERTIFYING COMPLIANCE WITH THE DUE DILIGENCE PROCESS

DECCW will not approve or certify compliance with due diligence requirements carried out under this or any other Code of Practice. This is an individual's responsibility.

## 2.5 RECORD KEEPING

Under the NPW Act, a person has a defence to prosecution against harming an Aboriginal object if they can demonstrate that they have exercised due diligence.

Consequently, it is strongly recommended that the actions and decisions taken in exercising due diligence are thoroughly documented and records maintained.

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<sup>1</sup> Visit [www.alc.org.au](http://www.alc.org.au) for contact details of all Local Aboriginal Land Councils in NSW.

<sup>2</sup> Advice about native title holders and registered claimants can be obtained through the National Native Title Tribunal [www.nntt.gov.au](http://www.nntt.gov.au).

<sup>3</sup> NTSCORP assists Traditional Owners through Native Title and related processes. Visit [www.ntscorp.com.au](http://www.ntscorp.com.au) for contact details.

<sup>4</sup> Visit [www.oralra.nsw.gov.au](http://www.oralra.nsw.gov.au) for contact details.

## **2.6 NOTIFICATION OF OBJECTS DISCOVERED**

The NPW Act requires that, if a person discovers an Aboriginal object on land and the object is not already recorded on the Aboriginal Heritage Information Management System (AHIMS), they must stop work and notify DECCW as soon as possible of the object's location. If human skeletal remains are found during the activity, work must be stopped immediately, the area secured to prevent unauthorised access and contact made with NSW Police and DECCW.

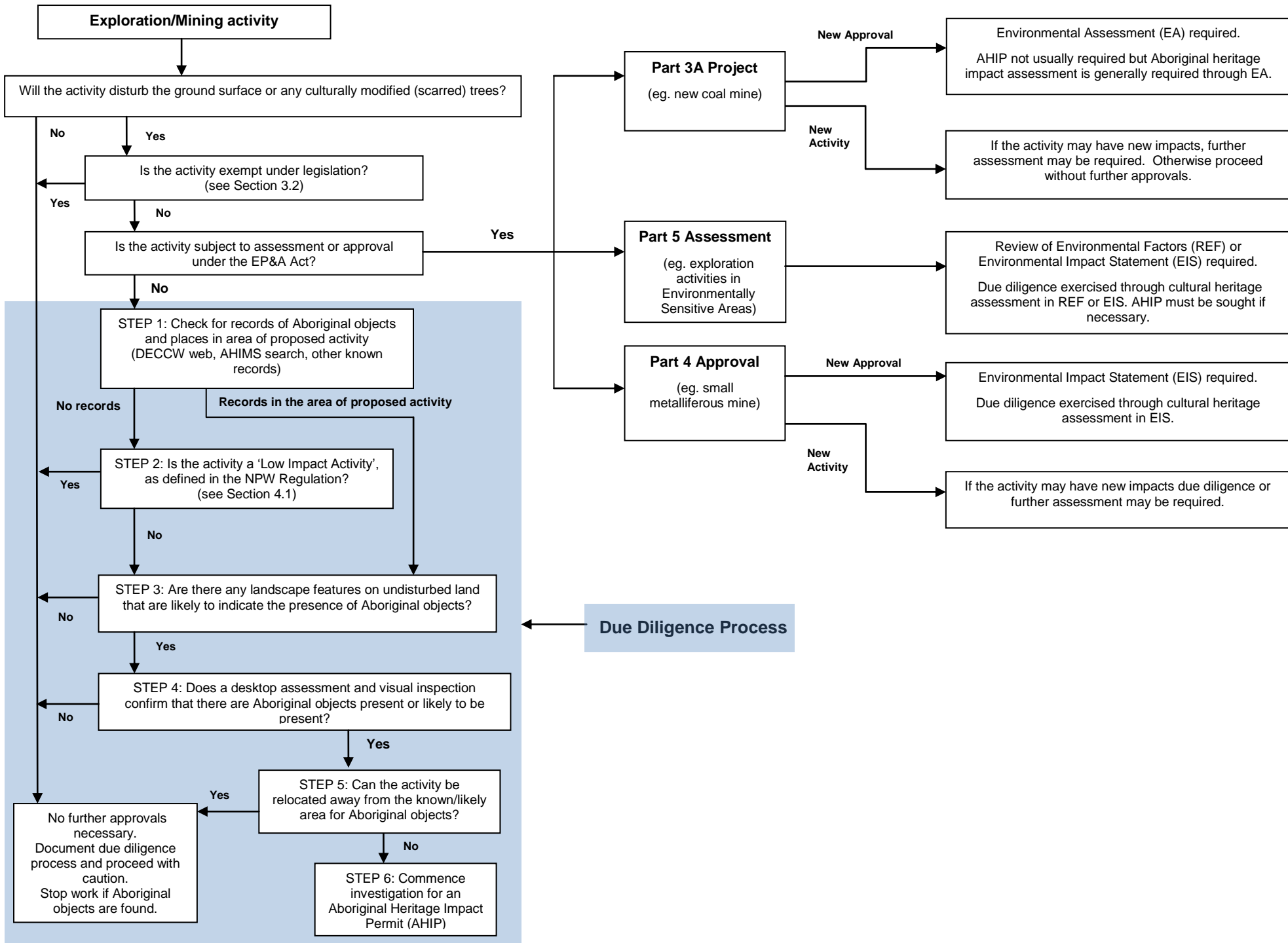
This requirement applies to all people and to all situations, including people exercising due diligence in accordance with this Code of Practice. Further approval will be required before the activity is continued.

Notification procedures can be found at: <http://www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm>.

## **SECTION 3 - PROCESS FOR THE PROTECTION OF ABORIGINAL HERITAGE**

The process for the protection of Aboriginal cultural heritage for the minerals industry is summarised in Figure 1 and detailed in the steps below.

**Figure 1: Process for the Protection of Aboriginal Heritage for NSW Minerals Industry**



### **3.1 WILL THE ACTIVITY DISTURB THE GROUND SURFACE OR ANY ABORIGINAL CULTURALLY MODIFIED (SCARRED) TREES?**

The first question to ask is whether the proposed activity will disturb the ground surface or any Aboriginal culturally modified (scarred) trees. An activity which disturbs the ground surface will have a higher likelihood that Aboriginal objects may be harmed. Disturbance of the ground surface includes use of machinery such as bulldozers and drill rigs.

'Trivial or negligible acts' will not significantly disturb the ground surface and so will not cause harm to Aboriginal objects. Examples of what might be a trivial or negligible act are prescribed in the DECCW Code as "picking up and replacing a small stone artefact, breaking a small Aboriginal object below the surface when you are gardening, or crushing a small Aboriginal object when you walk on a track, picnicking, camping or other recreational activities". Examples from the minerals industry would include driving or walking along a track, most activities involved with geological mapping and soil sampling with hand tools.

Aboriginal culturally modified trees may not be disturbed by any activity without DECCW approval. Aboriginal culturally modified trees are trees which have been scarred or carved by an Aboriginal person. The trees show the deliberate removal by traditional methods of bark or wood. Appendix 2 provides photos and further details on Aboriginal culturally modified trees and other examples of Aboriginal objects.

Harm may occur when activities are not trivial or negligible. 'Harm' is defined in the NPW Act as any act or omission that:

- Destroys, defaces, or damages the object
- Moves the object from the land on which it had been situated
- Causes or permits the object to be harmed.

For areas where activities will go beyond 'trivial or negligible acts', undertaking the due diligence process is required. **In all cases, company personnel should be trained in cultural heritage in case Aboriginal objects are discovered during field activities.**

### **3.2 IS THE ACTIVITY EXEMPT UNDER LEGISLATION?**

Some activities are exempt from prosecution under the NPW Act. These exemptions are for:

- Aboriginal people and their dependants when carrying out non-commercial traditional cultural activities.
- Any emergency fire fighting act or bush fire hazard reduction work within the meaning of the *Rural Fires Act 1997* that is authorised or required to be carried out under that Act.
- Emergency activities carried out under the *State Emergency and Rescue Management Act 1989* that are reasonably necessary in order to avoid an actual or imminent threat to life or property.
- Works by or directed by authorised DECCW officers to protect or conserve Aboriginal objects.
- Anything specifically required or permitted under the express terms of a conservation agreement entered into under Division 12 of Part 4 of the NPW Act.

### **3.3 IS THE ACTIVITY SUBJECT TO ASSESSMENT OR APPROVAL UNDER THE EP&A ACT?**

Most activities which are subject to Parts 3A, 4 or 5 of the EP&A Act require an assessment of cultural heritage which will generally include a more detailed assessment than this Code of Practice. All other activities should follow this Code of Practice or otherwise exercise due diligence to ensure the preservation of Aboriginal heritage.

Following successful exercise of due diligence, an activity may be undertaken but always with caution. Work should be stopped and DECCW notified if any objects are found. The due diligence defence does

not authorise continuing harm. **Documentary evidence of this process and related records must be retained.**

### ***Activities Subject to Part 3A of the EP&A Act***

The majority of **new mines** are assessed under the requirements of Part 3A of the EP&A Act. Projects declared as Part 3A projects require the proponent to prepare an Environmental Assessment (EA).

The Director-General's environmental assessment requirements for Part 3A projects are likely to include an assessment of Aboriginal heritage. In these circumstances the proponent would need to carry out an Aboriginal heritage impact assessment as part of the EA for the project application or concept plan application, which would satisfy due diligence requirements. The DoP *Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation* gives guidance on this process.

Under Section 75U(d) of the EP&A Act, an AHIP is not required for a project approved under Part 3A. Projects approved under Part 3A usually require a Cultural Heritage Management Plan (CHMP) over the area likely to be disturbed, and the approved project can proceed provided it is undertaken in compliance with the CHMP and the agreed management strategies.

In certain circumstances, due diligence and an AHIP may be required for a project with Part 3A approval. This includes:

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

**Exempt and Complying Development provisions** (under Clauses 10 and 11 of the Mining SEPP) allow certain activities without additional approvals. Before activities are undertaken under the Exempt and Complying Development provisions, the development must be “of minimal environmental impact”. Part of the assessment of “minimal environmental impact” must include due diligence for Aboriginal objects.

**For modifications to an existing Part 3A approval**, a Section 75W application under the EP&A Act must be made. DoP should be consulted regarding the exact assessment requirements in this application, which will vary depending on the nature of the modification.

### ***Activities Subject to Part 5 of the EP&A Act***

Some exploration and mining activities are assessed under Part 5 of the EP&A Act. For these activities, a Review of Environmental Factors (REF) or Environmental Impact Statement (EIS) is required. Due diligence is exercised through cultural heritage assessment in the REF or EIS. The standards in this Code of Practice can be used or adapted in the initial assessment of the environmental impacts of an activity on Aboriginal heritage.

If it is found through this process that Aboriginal objects are likely to be harmed, then further investigation and further assessment is required to determine the types of objects and the nature of the harm. If harm to a known Aboriginal object is unavoidable, then an application must be made for an AHIP. In this situation, the need to obtain the AHIP is in addition to any approval under Part 5 of the EP&A Act.

### ***Approvals Subject to Part 4 of the EP&A Act***

Some applications for mining developments are assessed under Part 4 of the EP&A Act. Mining developments which are assessed under Part 4 of EP&A Act are generally classified as ‘designated’ and ‘integrated’ developments. Development consents under Part 4 require the preparation of an EIS and public consultation.

Due diligence is exercised by undertaking cultural heritage assessments as part of the EIS. If it is found through this process that Aboriginal objects will or are likely to be harmed, then further investigation is required to determine the types of objects and the nature of the harm. If harm to a known Aboriginal object is unavoidable, then an application must be made for an AHIP. In this situation, the need to obtain the AHIP is in addition to any approval under the EP&A Act.

**Exempt and Complying Development provisions** (under Clauses 10 and 11 of the Mining SEPP) allow certain activities without additional approvals. Before activities are undertaken under the Exempt and Complying Development provisions, the development must be “of minimal environmental impact”. Part of the assessment of “minimal environmental impact” must include due diligence for Aboriginal objects.

**For modifications to an existing Part 4 approval**, an application should be sought under Section 96 of the EP&A Act (some Part 4 approvals can also be modified under 75W of the EP&A Act). DoP should be consulted regarding the exact assessment requirements in this application, which will vary depending on the nature of the modification.

## SECTION 4 - THE DUE DILIGENCE PROCESS

In the minerals industry in NSW, this due diligence process would usually be exercised before:

- Most exploration activities, especially surface disturbing activities in areas which have not previously been disturbed.
- New activities undertaken under the Exempt and Complying Development provisions of the Mining SEPP.
- Other activities which are not exempt under the NPW Act or have not had more detailed assessment under the EP&A Act.

Strictly, the 'Low Impact Activities' prescribed in the NPW Regulation (detailed in Step 2 below) may be undertaken without exercising due diligence. NSWMC recommends that leading practice and good business practice would include a check of records for Aboriginal objects and places (Step 1 below) prior to these activities. Section 5 provides worked examples of where due diligence is exercised in the minerals industry.

The due diligence process is shown in Figure 1 and explained below in Steps 1 to 7. The process culminates in a decision either that 'no further approvals are required' before undertaking the activity or that investigations must be commenced for an AHIP. Detailed records must be kept of the actions in undertaking the due diligence process.

Where possible, it is always recommended to relocate activities away from known Aboriginal objects or places. If this is not possible, an AHIP may need to be sought to undertake activity which may harm Aboriginal objects.

### 4.1 STEPS IN THE DUE DILIGENCE PROCESS

#### **Step 1: Check for Records of Aboriginal Objects and Places in the Area of Proposed Activity**

If a company has minimal knowledge of Aboriginal places or objects and no Cultural Heritage Management Plan, a check of **records of Aboriginal objects** through a search on AHIMS should be undertaken at: <http://www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm>.

The initial web-based search of AHIMS is free. The results of the free search will simply indicate the number of records in the designated area. A printout of the results of the search should be kept for record keeping purposes. The data is valid for 12 months so regular AHIMS searches must be undertaken.

If the results of the initial AHIMS search indicate that AHIMS contains records in the area of proposed activity, a copy of the records must be requested. Requests for records may be made by fax or submission of the request form at the website. Searches may be undertaken by tenement and GIS information can be attached to the request to indicate the exact area. Costs may apply depending on the type of information requested. There may also be restrictions in providing culturally sensitive information.

Onsite confirmation of the recorded information should be undertaken. If the records on AHIMS appear to be inaccurate, the AHIMS registrar should be contacted on 02 9585 6471 or 02 9585 6345 or 02 9585 6157 for further advice.

**Aboriginal Places** are declared by the Minister under Section 84 of the NPW Act. The location of Aboriginal places is made available to the public via the government gazette (available through the NSW Department of Commerce). Aboriginal places are also listed on the DECCW website at <http://www.environment.nsw.gov.au/conservation/AboriginalPlacesNSW.htm>. The due diligence defence is not available for activities which harm Aboriginal places. An activity which may 'harm' an Aboriginal place will require an AHIP. Appendix 1 and 2 details background information on Aboriginal objects and places.



If no records of Aboriginal objects or places are shown in the area of new activity, then before commencing fieldwork, the **landholder should also be consulted** as to whether they are aware of any sites or reports of Aboriginal objects in the area. Readily available previous studies, reports or surveys should also be reviewed to identify whether Aboriginal objects are present.

Where the records indicate that there are (or are likely to be) Aboriginal objects in the area of the proposed activity, then an assessment of landscape features (step 3) should be undertaken.

Where the records or visual inspection does not indicate that there are (or are likely to be) Aboriginal objects, then Step 2 should be assessed.

## **Step 2: Is the Activity a ‘Low Impact Activity’, as Defined in the NPW Regulation?**

‘Low Impact Activities’, as prescribed by the *National Parks and Wildlife Amendment Regulation 2010* (NPW Regulation) may be undertaken without the need for due diligence. These activities are a clear defence against the strict liability offence in the Regulation. This does not apply in situations where there are known Aboriginal objects, nor does it authorise the harm to known Aboriginal objects.

The following ‘Low Impact Activities’ are prescribed in the NPW Regulation, as a defence against the strict liability offence. Note Clauses 80B (1) (f) and (g) directly relate to the minerals industry. Clause 80B of the Regulation reads:

- (1) *It is a defence to a prosecution for an offence under section 86 (2) of the Act, if the defendant establishes that the act or omission concerned:*
- (a) *was maintenance work of the following kind on land that has been disturbed:*
    - (i) *maintenance of existing roads, fire and other trails and tracks,*
    - (ii) *maintenance of existing utilities and other similar services (such as above or below ground electrical infrastructure, water and sewerage pipelines), or*
  - (b) *was farming and land management work of the following kind on land that has been disturbed:*
    - (i) *cropping and leaving paddocks fallow,*
    - (ii) *the construction of water storage works (such as the construction of farm dams or water tanks),*
    - (iii) *the construction of fences,*
    - (iv) *the construction of irrigation infrastructure, ground water bores or flood mitigation works,*
    - (v) *the construction of erosion control or soil conservation works (such as contour banks), or*
  - (c) *was farming and land management work that involved the maintenance of the following existing infrastructure:*
    - (i) *grain, fibre or fertiliser storage areas,*
    - (ii) *water storage works (such as farm dams or water tanks),*
    - (iii) *irrigation infrastructure, ground water bores or flood mitigation works,*
    - (iv) *fences,*
    - (v) *erosion control or soil conservation works (such as contour banks), or*
  - (d) *was the grazing of animals, or*
  - (e) ***was an activity on land that has been disturbed that comprises exempt development or was the subject of a complying development certificate issued under the Environmental Planning and Assessment Act 1979, or***
  - (f) ***was mining exploration work of the following kind on land that has been disturbed:***
    - (i) ***costeaming,***

*(ii) bulk sampling,*

*(iii) drilling, or*

**(g) was work of the following kind:**

*(i) geological mapping,*

*(ii) surface geophysical surveys (including gravity surveys, radiometric surveys, magnetic surveys and electrical surveys), but not seismic surveys,*

*(iii) sub-surface geophysical surveys that involve downhole logging,*

*(iv) sampling and coring using hand-held equipment, except where carried out as part of an archaeological investigation or*

**Note: Clause 3A of this Regulation provides that act carried out in accordance with the Code of Practice for Archaeological Investigation in NSW is excluded from meaning of harm an object or place for the purposes of the Act.**

**(h) was the removal of isolated, dead or dying vegetation, but only if there is minimal disturbance to the surrounding ground surface, or**

**(i) was work of the following kind on land that has been disturbed:**

*(i) seismic surveying,*

*(ii) the construction and maintenance of ground water monitoring bores, or,*

**(j) was environmental rehabilitation work, including temporary silt fencing, tree planting, bush regeneration and weed removal, but not including erosion control or soil conservation works (such as contour banks).**

**(2) Subclause (1) does not apply in relation to any harm to an Aboriginal culturally modified tree.**

**(3) In this clause, Aboriginal culturally modified tree means a tree that, before or concurrent with (or both) the occupation of the area in which the tree is located by persons of non-Aboriginal extraction, has been scarred, carved or modified by an Aboriginal person by:**

*(a) the deliberate removal, by traditional methods, of bark or wood from the tree, or*

*(b) the deliberate modification, by traditional methods, of the wood of the tree.*

**(4) For the purposes of this clause, land is disturbed if it has been the subject of a human activity that has changed the land's surface, being changes that remain clear and observable.**

**Note 1. Examples of activities that may have disturbed land include the following:**

*(a) soil ploughing,*

*(b) construction of rural infrastructure (such as dams and fences),*

*(c) construction of roads, trails and tracks (including fire trails and tracks and walking tracks),*

*(d) clearing of vegetation,*

*(e) construction of buildings and the erection of other structures,*

*(f) construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines, stormwater drainage and other similar infrastructure),*

*(g) substantial grazing involving the construction of rural infrastructure*

*(h) construction of earthworks associated with any thing referred to in paragraphs (a)–(g).*

The Low Impact Activities prescribed by the NPW Regulation do not apply in relation to any harm to an Aboriginal culturally modified (scarred) tree.

Strictly, a check of records of Aboriginal objects (Step 1 above) does not need to be undertaken if the activity is prescribed under the 'Low Impact Activities' in the NPW Regulation. NSWMC, however, recommends that leading practice and good business practice would include this check of records prior to any activity.

If Aboriginal objects are later found during low impact activity, work must be stopped and DECCW notified. An application for an AHIP may be required.

**Documentary evidence of exercising the due diligence process must be retained with related records (including AHIMS searches and feedback from landholders).**

### ***Step 3. Are there any Landscape Features on Undisturbed Land that are Likely to Indicate the Presence of Aboriginal Objects?***

If the area is undisturbed, then even when the AHIMS search indicates no known Aboriginal objects, the landscape features should be considered in assessing the likelihood of Aboriginal objects located in the area of the proposed activity.

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

Further investigation will be required if the proposed activity is not on disturbed land and:

- Within 200m of waters<sup>5</sup>
- Located within a sand dune system<sup>6</sup>
- Located on a ridge top, ridge line, or headland
- Located within 200m below or above a cliff face
- Within 20m of or in a cave, rock shelter, or a cave mouth.

Exploration and mining occur in almost all landscapes and environments across NSW. Very often exploration occurs on or near land with rock outcrops, in sand dunes or near waterbodies.

If it is reasonable to conclude that there are no known Aboriginal objects or a low probability of objects occurring in the area of the proposed activity, then the activity may proceed with caution without applying for an AHIP.

### ***Step 4: Does a Desktop Assessment and Visual Inspection Confirm that there are Aboriginal Objects Present or Likely to be Present?***

If the area is undisturbed and there may be landscape features which indicate the presence of Aboriginal objects, desktop assessment and a visual inspection may be required.

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

At a minimum the information reviewed as part of the desktop assessment should include existing knowledge of Aboriginal cultural heritage gleaned from previous heritage studies or reports for the area,

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<sup>5</sup> **Waters** means the whole or any part of: any river, stream, lake, lagoon, swamp, wetlands, natural watercourse, tidal waters (including the sea). Note: the boundary or tidal waters is defined as the high water mark.

<sup>6</sup> Refers to sand ridges and sand hills formed by the wind, usually found in desert regions, near a lake or in coastal areas. In areas of Western NSW, windblown dunes can occur along the eastern edges of ephemeral lakes (called lunettes dunes). They can also occur along the banks of rivers.

including any archaeological studies on AHIMS. There may be some restrictions in providing culturally sensitive information. Where this is the case, DECCW will provide advice on how to proceed.

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

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

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

### **Step 5: Can the Activity be Relocated Away from the Known/Likely Area for Aboriginal Objects?**

Relocation of the activity is the preferred alternative when an activity is planned for an area which has, or has been shown in the due diligence process to be likely to have, Aboriginal objects. This may be possible, especially in the early stages of exploration and mining activities. Buffer zones around the known object should be made.

If this is not possible, and due diligence has shown that a planned activity may harm Aboriginal objects, further assessment and consideration of an AHIP application should be made.

### **Step 6: Commence Investigations for an AHIP**

The DECCW website has further information about how to undertake a detailed investigation and impact assessment as well as the procedures for applying for an AHIP. See <http://www.environment.nsw.gov.au/conservation/aboriginalculture.htm#whattodo> for information that is required to support an application for an AHIP (including impact assessment and community consultation) and other relevant information. Professional advice should be sought in the preparation of an AHIP application.

All AHIP applicants must undertake consultation in accordance with the *National Parks and Wildlife Regulation 2009*. These requirements may also be followed where there is uncertainty about potential harm and a cultural heritage assessment is being undertaken.

## **4.2 WHEN 'NO FURTHER APPROVALS ARE NECESSARY'**

If this Code of Practice has been followed and it has been concluded that an AHIP application is not necessary (either because Aboriginal objects are not present, or if they are present, harm to those objects can be avoided), the activity may be undertaken with caution.

If, however, whilst undertaking the activity an Aboriginal object is found then work must be stopped and DECCW notified. Some works may not be able to resume until an AHIP has been granted and its conditions are followed. Further investigation may be required depending on the type of Aboriginal object that is found.

Where an Aboriginal object has been identified as present or is likely to be present but the proponent has decided to proceed without a permit because harm to the Aboriginal object can be avoided, a range of appropriate measures can be taken to ensure Aboriginal objects are not harmed. Appendix 2 has some suggested management options for various Aboriginal site types. Note that Appendix 2 gives general advice, and is not a comprehensive list of all site types and features, nor does it include all possible management options. Aboriginal groups with responsibility for cultural heritage protection in the area may also be able to recommend appropriate options for managing the area, such as developing a plan to avoid harm to the Aboriginal object.

### **4.3 RESULTS OF DUE DILIGENCE**

Once the due diligence process has been exercised there are the following options:

- Proceeding with the activity without an AHIP if there is no evidence of Aboriginal objects using this Code of Practice.
- Amending the proposed activity to avoid harming Aboriginal objects, then proceeding without applying for an AHIP.
- Applying for an AHIP, and if an AHIP is granted, following the AHIP conditions before, during and after the activity.

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

### **4.4 RECORD KEEPING**

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

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

## SECTION 5 - CASE STUDIES/EXAMPLES

The following worked examples are provided to assist in understanding the application of the Code of Practice only.

### CASE STUDY 1: AN EXPLORER WITH A NEW EXPLORATION LICENCE

An exploration company has applied for an exploration licence around an old prospect. If the company plans a full exploration program due diligence should be exercised. On acceptance of their exploration licence application (or granting of the exploration licence), the company would immediately undertake a search on AHIMS for any known Aboriginal objects and the DECCW listing of Aboriginal places. Following are two scenarios depending on the results of the searches.

- No records found
  - If no recorded objects are in the exploration licence, then upon negotiating land access the company would question the landholder on their knowledge of any known Aboriginal objects, and check any known reports or surveys.
  - If there is no additional information, then exploration included in the 'Low Impact Activities' of the NPW Regulation may proceed.
  - If there is evidence of additional information and landscape features on undisturbed land then a desktop assessment or visual inspection should be undertaken. If either indicates that there are (or are likely to be) Aboriginal objects in the area of proposed activity, then a more detailed desktop assessment and visual inspection should be undertaken.
  - If the desktop assessment or visual inspection does not indicate that Aboriginal objects are present or likely to be present, then exploration may proceed. If the desktop assessment or visual inspection does indicate the presence of Aboriginal objects then the activity should be relocated away from the object or investigations commenced for an AHIP.

Records of the AHIMS search, information from the landholder/reports/surveys must be recorded as part of due diligence. Additional searches on AHIMS must be undertaken every 12 months when the AHIMS data validity expires.

- Records found
  - If objects are registered, no surface disturbing activities may be undertaken near the objects.
  - The company may choose to alter their exploration so that all surface disturbing activities are undertaken to avoid the known objects.
  - If this is not possible, then the company would make a visual inspection of the area to confirm that there are Aboriginal objects present. If this is a positive result, and surface disturbance activities could not be moved, then investigations would be commenced into an AHIP.

### CASE STUDY 2: AN EXPLORER WITH A CURRENT EXPLORATION LICENCE HAS A NEW DRILLING PROGRAM PLANNED

An exploration company has held an exploration licence for a year and plans a new drilling program over a cropped area. As the company has planned activities over a previously disturbed area, due diligence is not generally required. Undertaking a search on AHIMS for any known Aboriginal objects and the DECCW listing of Aboriginal places is recommended. If the drilling program was planned for a land which had not been previously disturbed, full due diligence must be exercised.

### **CASE STUDY 3: AN EXPLORER PLANS TO UNDERTAKE ENVIRONMENTAL MONITORING AND VEGETATION SURVEYS IN PREPARATION FOR ENVIRONMENTAL APPROVAL APPLICATIONS**

Most environmental assessments would be considered of 'trivial or negligible' impact as they simply require vehicular access on current tracks followed by walking over an area with hand held equipment. If any surface disturbing activities are planned (for example the installation of fixed noise or dust monitoring equipment), then the due diligence process would be required.

### **CASE STUDY 4: A MINING COMPANY PLANS TO UNDERTAKE CROPPING AND TREE PLANTING ON LAND WHICH IS IN THE BUFFER ZONE AROUND A MINE**

Most farming and land management activities on land which has been previously disturbed are prescribed in the NPW Regulation as 'Low Impact Activities' and so due diligence is not required. Tree planting is classified with 'environmental rehabilitation works' under the list of 'Low Impact Activities' which are prescribed by Regulation as a defence against the strict liability offence. An AHIMS search and check of the DECCW listing of Aboriginal places is recommended prior to the activity to check whether there are any known Aboriginal objects or places in the vicinity of the activity.

### **CASE STUDY 5: A MINING COMPANY SEEKS TO OPEN A NEW MINE**

A mining company seeks to apply for a new mine development.

If the new mine is subject to assessment under **Part 5 of the EP&A Act**, then a REF or an EIS may be required. Due diligence will be exercised through the cultural heritage assessment in the REF or EIS. An AHIP must be sought if necessary. The standard of the cultural heritage assessment undertaken should be at least equivalent to the due diligence process outlined in Section 4.

If the new mine requires a development consent under **Part 4 of the EP&A Act**, an EIS will be required. Due diligence will be exercised through the cultural heritage assessment in the EIS. An AHIP must be sought if necessary. The standard of the cultural heritage assessment undertaken should be at least equivalent to the due diligence process outlined in Section 4.

If the new mine is subject to project approval under **Part 3A of the EP&A Act**, an EA will be required. It is usually unnecessary to apply for an AHIP after a Part 3A approval has been granted. The standard of the cultural heritage assessment undertaken as part of the EA should be at least equivalent to the due diligence process outlined in Section 4.

### **CASE STUDY 6: A MINING COMPANY HAS A PROPOSED MODIFICATION OR EXTENSION TO AN EXISTING MINE**

A mining company seeks to undertake a new activity in its **EP&A Act Part 4 approved** mine. If the activity is permitted the Exempt and Complying Development provisions of the Mining SEPP (for example building a new car park), the development must be assessed to be "of minimal environmental impact". Part of the assessment of "minimal environmental impact" must include due diligence for Aboriginal objects.

If the modification goes beyond the activities permitted in the Exempt and Complying Development provisions, an application should be sought under Section 96 of the EP&A Act (some Part 4 approvals can also be modified under 75W of the EP&A Act). DoP should be consulted regarding the exact requirements in this application.

Another mining company seeks to undertake an extension to its **EP&A Act Part 3A approved** mine. If the activity is permitted the Exempt and Complying Development provisions of the Mining SEPP (for example building a new car park), the development must be assessed to be "of minimal environmental impact". Part of the assessment of "minimal environmental impact" must include due diligence for Aboriginal objects.

If the modification goes beyond the activities permitted in the Exempt and Complying Development provisions or has a new potential impact, a Section 75W application should be sought. DoP should be consulted for advice.



# APPENDIX 1 - BACKGROUND AND CONTEXTUAL INFORMATION

## ABORIGINAL PEOPLE AND THEIR CULTURAL HERITAGE

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

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

## ABORIGINAL OBJECTS

This Code of Practice applies only to Aboriginal objects as defined by the NPW Act 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’.

Examples of Aboriginal objects include, but are not limited to:

- Human skeletal remains
- Middens
- Stone artefacts
- Raised earth rings
- Grinding grooves
- Rock shelters
- Aboriginal culturally modified trees
- Rock art (paintings & engravings)
- Earth Mounds
- Hearths
- Stone arrangements

Appendix 2 provides some examples and guidance on objects.

## SUBSURFACE OBJECTS

The occurrence of Aboriginal objects which are in the ground (subsurface) is particularly difficult to predict. Extra care should be undertaken where previous surveys or reports indicate the potential presence of subsurface objects. If objects are known then they must be avoided or an AHIP applied for. Subsidence caused by mining operations is unlikely to affect these objects.

## OFFENCES FOR HARMING ABORIGINAL OBJECTS

Under Section 86 of the NPW Act, it is an offence to ‘harm’ an Aboriginal object. ‘Harm’ means any act or omission that:

- Destroys, defaces or damages the object
- Moves an object from the land on which it is situated
- Causes or permits the object to be harmed.

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

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

1. An offence of harming an object which a person knows is an Aboriginal object (a 'knowing offence').
2. An offence of harming an object whether or not a person knows it is an Aboriginal object (a 'strict liability offence').

The maximum penalty for the knowing offence is \$550,000 for an individual or \$1.1 million for a corporation and a 1 or 2 year gaol term. The maximum penalty for the strict liability offence is \$110,000 for an individual or \$220,000 for a corporation. These maximum penalties apply for offences by individuals where the offence is committed in aggravating circumstances. Aggravating circumstances are defined as a second or subsequent offence or where a person has acted for financial gain.

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

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

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

## DEFENCES OR EXEMPTIONS FOR HARMING ABORIGINAL OBJECTS

The NPW Act and Regulation provide several defences and exemptions for both types of offence. Where a person either **knows** or **does not know** they are harming an Aboriginal object, a person has a defence where:

1. The harm was authorised by an AHIP, and there has been compliance with all conditions of the AHIP or
2. The harm occurred during the exercise of a power or function under the *State Emergency and Rescue Management Act 1989* (for emergencies as defined under that Act) or
3. The harm was specifically required or permitted under the terms of a conservation agreement entered into under the NPW Act (only where the agreement was entered into or modified after the commencement of the *National Parks and Wildlife Amendment Act 2010*) or
4. The harm is trivial or negligible.

For the strict liability offence where a person **does not know** they are harming an Aboriginal object, they have additional defences to prosecution if:

- They were undertaking a Low Impact Activity prescribed in the *National Parks and Wildlife Regulation 2009* or
- They exercised due diligence to determine whether the Act would harm an Aboriginal object and determined that no Aboriginal object would be harmed (a 'due diligence defence') or
- They made an "honest or reasonable mistake of fact".

## EXEMPTIONS

The NPW Act and other legislation provides exemptions to harming Aboriginal objects in certain circumstances. These are for:

- Aboriginal people and their dependants when carrying out non-commercial traditional cultural activities
- Emergency fire fighting activities authorised under the *Rural Fires Act 1997*

- Activities carried out under the *State Emergency and Rescue Management Act 1989* that are reasonably necessary in order to avoid an actual or imminent threat to life or property
- Works by or directed by authorised DECCW officers to protect or conserve Aboriginal objects
- Anything specifically required or permitted under the express terms of a conservation agreement entered into under Division 12 of Part 4 of the NPW Act.

In addition, the *Rural Fires Act 1997* provides an exemption from the offences of harming Aboriginal objects and places where the activities are managed bush fire hazard reduction work in accordance with a *Bush Fire Hazard Reduction Certificate* issued under the *Rural Fires Act 1997*.

## **ABORIGINAL PLACES**

An Aboriginal place, declared under Section 84 of the NPW Act, is “a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture”. Information about the location of Aboriginal places in NSW can be found on the DECCW website at: <http://www.environment.nsw.gov.au/nswcultureheritage/PlacesOfSignificance.htm>

## **OFFENCES FOR HARMING ABORIGINAL PLACES**

There is an additional strict liability offence related to harming an Aboriginal place. The maximum penalty for harming an Aboriginal place is \$550,000 for an individual or \$1.1 million for a corporation. These maximum penalties apply for offences by individuals where the offence is committed in aggravating circumstances. These circumstances are defined as a second or subsequent offence or where a person has acted for financial gain.

As the locations and boundaries of Aboriginal places are made available to the public via DECCW's website, there is no provision in the Act for a due diligence defence for Aboriginal places. If a person wishes to undertake activities which may 'harm' an Aboriginal place, they must obtain an AHIP.

## APPENDIX 2 - EXAMPLES OF ABORIGINAL OBJECTS

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

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

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

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

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



*Stone Artefacts. Photo by Mark Flanders, DECCW*

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

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

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

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



*Hearth Site. Photo by Steve Meredith*

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

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

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

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



*Mutawintji hand stencils. Photo by Pat Laughton DECCW*

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

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

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

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



*Shell Midden. Photo by Warren Mayers, DECCW*

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

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

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



*Axe Grinding Stones. Photo by Hilton Naden, DECCW*



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

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

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

It is important to note that the defence to a prosecution contained in Clause 80B of the *National Parks and Wildlife Regulation 2009* relating to certain low impact activities does not apply in relation to any harm to an Aboriginal scarred tree. Ensuring that scarred trees are not harmed will likely include insuring effective buffer zones are used, as their significance is often part of the broader landscape.

For more information see *Aboriginal scarred trees in New South Wales, a field manual* (DEC and Andrew Long 2005), available at: <http://www.environment.nsw.gov.au/conservation/AboriginalScarredTrees.htm>.



*Carrington Scarred Tree. Photo by Warren Mayers, DECCW*

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

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

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

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



*Daruka Axe Quarry, Tamworth. Photo by Bruce Cohen, DECCW*

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

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

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



*Stone Arrangement. Photo by M Sharp, DECCW*

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

Aboriginal ancestral remains are very sensitive and significant to Aboriginal people. If human remains are found or disturbed, it is requirement that a person:

- Not further disturb or move these remains
- Immediately cease all work at the particular location
- Notify DECCW's Environment Line on 131 555 and the local police as soon as practicable and provide available details of the remains and their location, and
- Not recommence any work at the particular location unless authorised in writing by DECCW.

For more information about burials see:

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

### **Landscape features and natural sacred sites**

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

Significant landscape features:

- May be recorded on AHIMS as Aboriginal objects
- May have been designated 'Aboriginal places' under the *National Parks and Wildlife Act*, in which case disturbance of the area is unauthorised without a permit.
- May be marked with signage
- May have been recorded through other regional mapping processes undertaken by DECCW, the local CMA, heritage assessment of the Local Council or Local Aboriginal Land Council.

For more information about cultural landscapes see: *Cultural landscapes and park management: a literature snapshot. A report for the cultural landscapes: connecting history, heritage and reserve management research project* (Department of Environment and Climate Change 2008), available at: <http://www.environment.nsw.gov.au/resources/cultureheritage/07137cultlandresearch.pdf>

## Further information about Aboriginal sites in NSW

*Aboriginal Cultural Heritage Standards and Guidelines Kit* (NSW National Parks and Wildlife Service, 1997), available online

*Code of Practice for Archaeological Investigation in NSW* (DECCW, 2010), available at: <http://www.environment.nsw.gov.au/licences/achregulation.htm>

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

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

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

*Aboriginal culturally significant landscapes in the Hunter-Central Rivers Region* (Hunter-Central Rivers CMA guide, 2009), available at: <http://www.hcr.cma.nsw.gov.au/uploads/res/Publications/acsl.pdf>

*Site Identification*, Victorian Mini Poster Series (Department of Planning and Community Development, 2008), available at: <http://www.aboriginalaffairs.vic.gov.au/web7/aavmain.nsf/headingpagesdisplay/publications+forms+and+resourcesaav+mini-poster+series>



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