

Aboriginal cultural heritage consultation requirements for proponents 2010

Part 6 National Parks and Wildlife Act 1974



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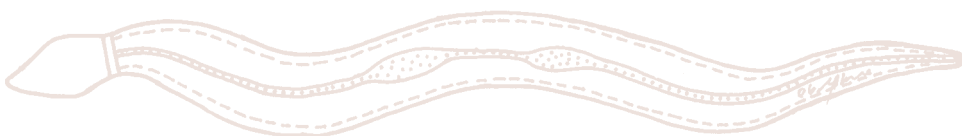
Aboriginal and Torres Strait Islanders are warned that this publication may contain images of deceased people.

Cover photos, clockwise from top left: Remant volcanic crater in Mougamarra Nature Reserve (Michael van Ewijk/DECCW); view of Mutawintji National Park from a rock art site (Patrick Laughton/DECCW); middens at Garie Beach in Royal National Park (Cultural and Heritage Division/DECCW); raven tracks in sand (DECCW); rock art in Gundabooka National Park (Andrew Drane/DECCW); fish engraving at The Basin, Ku-ring-gai Chase National Park (M Cooper/DECCW).

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Part 6 *National Parks and Wildlife Act 1974*



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Overview

The NSW Government acknowledges the Aboriginal people of Australia as part of the oldest and continuous living culture in human history. Aboriginal people's cultural heritage is recognised and valued as a unique and essential component of the identity of all Australian people.

Aboriginal people have occupied the NSW landscape for more than 42,000 years (Bowler et al, 2003). Evidence and important cultural meanings relating to this occupation are present throughout the landscape. Aboriginal cultural heritage also lives in the memories, stories and associations of Aboriginal people to their traditional land or Country.

Aboriginal cultural heritage provides essential links between the past and present – it is an essential part of Aboriginal people's cultural identity, connection and sense of belonging to Country. The effective protection and conservation of this heritage is important in maintaining the identity, health and wellbeing of Aboriginal people.

The *National Parks and Wildlife Act 1974* (NPW Act), administered by the Department of Environment, Climate Change and Water NSW (DECCW), is the primary legislation for the protection of Aboriginal cultural heritage in NSW. Under Part 6 of the NPW Act, the Director General of DECCW is responsible for the protection and conservation of Aboriginal *objects* and Aboriginal *places*.

The NPW Act provides specific protection for Aboriginal *objects* and Aboriginal *places* by providing offences for unauthorised harm. The NPW Act establishes the Director General of DECCW as the decision-maker for Aboriginal heritage impact permit (AHIP) applications. DECCW requires the effective consultation with Aboriginal people as a fundamental component of the AHIP assessment process and acknowledges that:

- Aboriginal people should have the right to maintain culture, language, knowledge and identity
- Aboriginal people should have the right to directly participate in matters that may affect their heritage
- Aboriginal people are the primary determinants of the cultural significance of their heritage.

This document focuses on the requirements for consultation with Aboriginal people as part of the heritage assessment process:

- to determine potential harm on Aboriginal cultural heritage from proposed activities
- that informs decision making for any application for an AHIP where it is determined harm cannot be avoided.

This document is broken down into the following sections.

- Section 1** Outlines the purpose, aim, scope, and application of these requirements along with the guiding principles and intended outcomes of consultation.

- Section 2** Outlines Aboriginal cultural heritage and the legislative framework for Aboriginal cultural heritage regulation in NSW.

- Section 3** Provides a broad overview of what consultation is, explains why DECCW requires consultation, and outlines the objectives of consultation, information required for decision-making, and the difference between consultation and employment.

- Section 4** Details the steps for consultation.

- Section 5** Outlines the roles, responsibilities and functions of the various participants in the consultation process.

Glossary

For the purposes of these requirements, the following definitions apply.

Aboriginal Heritage Impact Permit (AHIP)	<p>The statutory instrument that the Director General of DECCW issues under s.87 and/or s.90 of the NPW Act:</p> <p><i>s.87 Aboriginal Heritage Impact Permits</i> – required to disturb or move an Aboriginal object or disturb or excavate land for the purposes of discovering an Aboriginal object</p> <p><i>s.90 Aboriginal Heritage Impact Permits</i> – required to destroy, damage or deface an Aboriginal object or Aboriginal place.</p>
Aboriginal object	<p>A statutory term, meaning: ‘... any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises NSW, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains’ (s.5 NPW Act).</p>
Aboriginal owners	<p>Aboriginal owner is a term used under the <i>Aboriginal Land Rights Act 1983</i> and the <i>National Parks and Wildlife Act 1974</i>. Aboriginal owners are defined as ‘persons whose names are entered on the Register of Aboriginal Owners because of the persons’ cultural association with particular land.’ (ALR Act 1983)</p> <p>Registration as an Aboriginal owner under the <i>Aboriginal Land Rights Act 1983</i> provides statutory recognition of an Aboriginal person’s cultural associations with land. For more information about the ALR Act see section 2.2.4 of these requirements.</p>
Aboriginal place	<p>A statutory term, meaning any place declared to be an Aboriginal place (under s.84 of the NPW Act) by the Minister administering the NPW Act, by order published in the <i>NSW Government Gazette</i>, because the Minister is of the opinion that the place is or was of special significance with respect to Aboriginal culture. It may or may not contain Aboriginal objects.</p>

Cultural knowledge	For the purpose of these requirements, cultural knowledge is directly associated with Aboriginal lore. Aboriginal people connect to their land through their lore, and through lore, people acquire knowledge of all aspects of their environment along with responsibilities, obligations and behaviours that are required to sustain their survival. Cultural knowledge has been passed on through the generations in a complex system of stories, language, art, songs, dance, ceremonies and customs that have been practiced since the time of creation (Dreamtime). The lore continues to govern all aspects of life for Aboriginal people on their traditional land/Country and waters. While cultural knowledge can be interpreted to mean something that is 'in the past' or 'fixed' and 'unchanging', in the context of these requirements it is considered as a living, dynamic force that is adaptive and innovative and as belonging to living communities.
Decision-maker	The Director General of DECCW or delegate with authority to issue or refuse an AHIP.
Local Aboriginal Land Councils	Local Aboriginal Land Councils, or LALCs, are corporate bodies constituted under the <i>Aboriginal Land Rights Act 1983</i> . Under the ALR Act, LALCs have defined boundaries within which they operate. For more information about the ALR Act refer to section 2.2.4 of these requirements.
Native title	Native title refers to those rights and interests in land and water of Aboriginal and Torres Strait Islander people that are derived from the traditional laws and customs of their nations (see s.223 of the <i>Native Title Act 1993</i> (Cth) for a detailed statutory definition). For further information regarding native title refer to section 2.2.5 of these requirements.
NTSCORP Limited	NTSCORP, formerly NSW Native Title Services Ltd, is the body funded under s203FE of the <i>Native Title Act 1993</i> (Cth) to perform the functions of a native title representative body in NSW and the ACT.
Proponent	A person undertaking consultation which may lead to an application for an AHIP under the NPW Act.
Registered Aboriginal parties	Aboriginal people, Aboriginal organisations or their representatives who have registered an interest in being consulted in accordance with stage 1 of these requirements.
Registered native title claimant(s)	A person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land and waters. Note: The Register of Native Title Claims is administered by the National Native Title Tribunal.

Abbreviations

AHIP	Aboriginal heritage impact permit
ALR Act	<i>Aboriginal Land Rights Act 1983</i>
DECCW	Department of Environment, Climate Change and Water NSW
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EPRG	Environment Protection and Regulation Group
LALCs	Local Aboriginal Land Councils
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NSWALC	New South Wales Aboriginal Land Council
NTA	<i>Native Title Act 1993 (Cth)</i>

1 Introduction

The Director General of DECCW is responsible for protecting and conserving Aboriginal *objects* and Aboriginal *places* in NSW. Part 6 of the NPW Act provides specific protection for Aboriginal objects and declared Aboriginal places by providing offences for harm.

AHIPs are required for harm to Aboriginal objects and places in NSW. AHIPs are issued under s.87 and/or s.90 of the NPW Act.

DECCW acknowledges and respects the right of Aboriginal people to determine the cultural significance of their heritage. This document sets out the requirements for consulting with those Aboriginal people who can provide information about the significance of Aboriginal cultural heritage as part of the heritage assessment process that informs any application for an AHIP.

1.1 Purpose and aim

The purpose of this document is to establish the requirements for consultation with the registered Aboriginal parties as part of the heritage assessment process to determine potential impacts of proposed activities on Aboriginal objects and places and to inform decision making for any application for an AHIP.

The aim is to facilitate positive Aboriginal cultural heritage outcomes by:

- affording an opportunity for Aboriginal people who hold cultural knowledge relevant to determining the significance of Aboriginal objects(s) and/or place(s) in the area of the proposed project to be involved in consultation so that information about cultural significance can be provided to DECCW to inform decisions regarding applications for an AHIP
- providing Aboriginal people who hold cultural knowledge relevant to determining the significance of Aboriginal objects (s) and/or place(s) in the area of the proposed project with the opportunity to participate in decision making regarding the management of their cultural heritage by providing proponents information regarding cultural significance and inputting into management options.

1.2 Scope and application

All AHIP applicants are required by DECCW to undertake consultation with Aboriginal people who hold cultural knowledge relevant to determining the cultural significance of Aboriginal objects and/or places as relevant to the proposed project area in accordance with these requirements.

DECCW recommends that these requirements also be used where a proponent may be uncertain about whether or not their proposed activity may have the potential to harm Aboriginal *objects* or *places* and the proponent is required to undertake a cultural heritage assessment to establish the potential harm their proposal may have on Aboriginal objects and places.

These requirements:

- apply to all activities throughout NSW that have the potential to harm Aboriginal *objects* or *places* and that also requires an AHIP
- replace the *Interim Community Consultation Requirements for Applicants*, December 2004
- support other DECCW policies and procedures that provide direction and guidance for AHIP applicants in determining Aboriginal cultural heritage impacts.

The requirements apply to all applications lodged from 12 April 2010.

1.3 Consultation guiding principles

In recognising the rights and interests of Aboriginal people in their cultural heritage, all parties concerned with identifying, conserving and managing cultural heritage should acknowledge, accept and act on the principles that Aboriginal people:

- are the primary source of information about the value of their heritage and how this is best protected and conserved
- must have an active role in any Aboriginal cultural heritage planning process
- must have early input into the assessment of the cultural significance of their heritage and its management so they can continue to fulfil their obligations towards their heritage
- must control the way in which cultural knowledge and other information relating specifically to their heritage is used, as this may be an integral aspect of its heritage value.

In identifying and managing Aboriginal cultural heritage, uncertainty about Aboriginal cultural heritage values at a site should not be used to justify activities that might harm this heritage. Adhering to cultural restrictions on information about an Aboriginal cultural heritage site is important to maintaining its heritage value (Adapted from *Ask first – a guide to respecting Indigenous heritage places and values*, 2002).

For the purposes of these requirements:

- effective consultation requires a commitment by all parties to work in the spirit of cooperation, mutual understanding and respect
- the richness, ancient and ongoing significance of Aboriginal culture and heritage to Aboriginal people and the broader community should be appreciated, valued, protected and conserved for the benefit of current and future generations
- consultation with Aboriginal people is important and needs to be sustained throughout the heritage assessment process to ensure cultural perspectives, views and concerns are taken into account.

1.4 Intended outcomes

Effectively implementing these requirements should result in:

- decision making informed by Aboriginal people who hold cultural knowledge relevant to determining the cultural significance of objects and/or places regarding the conservation and management of Aboriginal objects and/or places
- the opportunity for effective involvement of Aboriginal people or groups with relevant cultural knowledge in the heritage-impact assessment processes
- credible and robust administrative and regulatory methods, standards and procedures throughout NSW for protection and conservation of Aboriginal cultural heritage
- greater clarity and certainty for all stakeholders
- Aboriginal people efficiently identifying those within their communities who hold cultural knowledge relevant to determining the cultural significance of Aboriginal objects and/or places
- more streamlined and refined lists of known Aboriginal people.

2 Background

2.1 What is Aboriginal cultural heritage?

Aboriginal cultural heritage consists of places and items that are of significance to Aboriginal people because of their traditions, observances, lore, customs, beliefs and history. It provides evidence of the lives and existence of Aboriginal people before European settlement through to the present.

Aboriginal cultural heritage is dynamic and may comprise physical (tangible) or non-physical (intangible) elements. It includes things made and used in traditional societies, such as stone tools, art sites and ceremonial or burial grounds. It also includes more contemporary and/or historical elements such as old mission buildings, massacre sites and cemeteries. Tangible heritage is situated in a broader cultural landscape and needs to be considered in that context and in a holistic manner.

Aboriginal cultural heritage also relates to the connection and sense of belonging that people have with the landscape and with each other. For Aboriginal people, cultural heritage and cultural practices are part of both the past and the present and that cultural heritage is kept alive and strong by being part of everyday life.

Cultural heritage is not confined to sites. It also includes peoples' memories, story-lines, ceremonies, language and 'ways of doing things' that continue to enrich local knowledge about the cultural landscape. It involves teaching and educating younger generations. It is also about learning and looking after cultural traditions and places, and passing on knowledge. It is enduring but also changing. It is ancient but also new.

Aboriginal cultural heritage provides crucial links between the past and present and therefore represents an essential part of the identities of Aboriginal people and all Australians.

For information on cultural knowledge, see DECCWs *Fact sheet 1: What is Aboriginal cultural knowledge?* For information on cultural landscapes, see DECCWs *Fact sheet 2: What is an Aboriginal cultural landscape?*

2.2 Relevant legislation

The following legislation provides the primary context for Aboriginal heritage management in NSW: the *National Parks and Wildlife Act 1974* (NPW Act), the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the *Heritage Act 1977* (the Heritage Act). Other relevant legislation includes the *Aboriginal Land Rights Act 1983*, the *Native Title Act 1993* (Cth) and the *NSW Native Title Act 1994* and other Australian Government legislation.

2.2.1 National Parks and Wildlife Act 1974

The NPW Act, administered by DECCW, is the primary legislation for the protection of some aspects of Aboriginal cultural heritage in NSW. One of the objectives of the NPW Act is:

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

Part 6 of the NPW Act provides specific protection for Aboriginal objects and places by making it an offence to harm them. If harm to Aboriginal objects and places is anticipated, apply for an AHIP. AHIPs can be issued under ss.87 and 90 of the NPW Act.

A list of declared Aboriginal places can be found at:
www.environment.nsw.gov.au/conservation/AboriginalPlacesNSW.htm

Further information on the NPW Act can be found at:
www.legislation.nsw.gov.au/viewtop/inforce/act+80+1974+first+0+N.

2.2.2 Environmental Planning and Assessment Act 1979

The EP&A Act, administered by NSW Department of Planning, provides planning controls and requirements for environmental assessment in the development approval process. It also establishes the framework for Aboriginal heritage values to be formally assessed in the land-use planning and development consent processes.

Further information on the EP&A Act can be found at: www.legislation.nsw.gov.au.

2.2.3 Heritage Act 1977

The Heritage Act, administered by NSW Department of Planning, protects this states' natural and cultural heritage. Aboriginal heritage is primarily protected under the NPW Act but may be subject to the provisions of the Heritage Act if the item is listed on the State Heritage Register or subject to an interim heritage order (IHO).

The Heritage Act established the NSW Heritage Council, which provides advice and recommendations to the Minister for Planning. The Minister approves the listing of items and places on the State Heritage Register and can also prevent the destruction, demolition or alteration of items of potential heritage value through an IHO until the significance of the item has been assessed.

Further information on the Heritage Act can be found at www.legislation.nsw.gov.au.

2.2.4 Aboriginal Land Rights Act 1983

The NSW *Aboriginal Land Rights Act 1983* (ALR Act), administered by NSW Department of Aboriginal Affairs, establishes the NSW Aboriginal Land Council (NSWALC) and Local Aboriginal Land Councils (LALCs). The Act requires these bodies to:

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

These requirements recognise and acknowledge the statutory role and responsibilities of NSWALC and LALCs.

The ALR Act also establishes the registrar whose functions include, but are not limited to, maintaining the Register of Aboriginal Land Claims and the Register of Aboriginal Owners.

Under the NSW *Aboriginal Lands Right Act 1983*, the Registrar is to give priority to the entry in the Register of the names of Aboriginal persons who have a cultural association with:

- (a) lands listed in Schedule 14 to the NPW Act
- (b) lands to which section 36A of the ALR Act applies.

Note Schedule 14 to the NPW Act lists lands of cultural significance to Aboriginal persons that are reserved or dedicated under that Act.

Section 36A of the ALR Act applies to lands that are the subject of a claim by one or more Aboriginal Land Councils under section 36 of this Act and that the crown lands Minister is satisfied would be claimable lands except for the fact that the lands are needed, or likely to be needed, for the essential public purpose of nature conservation.

2.2.5 Native title legislation

The *Native Title Act 1993* (Cth) (NTA) provides the legislative framework to:

- (a) recognise and protect native title
- (b) establish ways in which future dealings affecting native title may proceed, and to set standards for those dealings, including providing certain procedural rights for registered native title claimants and native title holders in relation to acts which affect native title
- (c) establish a mechanism for determining claims to native title
- (d) provide for, or permit, the validation of past acts invalidated because of the existence of native title.

The NSW *Native Title Act 1994* was introduced to ensure that the laws of NSW are consistent with the Commonwealth NTA on future dealings and validates past and intermediate acts which may have been invalidated because of the existence of native title.

The National Native Title Tribunal has a number of functions under the NTA including maintaining the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements and mediating native title claims.

2.2.6 Other Acts

The Australian Government *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) may be relevant if any item of Aboriginal heritage significance to an Aboriginal community is under threat of injury or desecration and state-based processes are unable to protect it. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) may also be relevant to some proposals, particularly where there are heritage values of national significance present.

3 Understanding community consultation

When administering its statutory functions under Part 6 of the NPW Act, DECCW requires proponents to consult with Aboriginal people about the Aboriginal cultural heritage values (cultural significance) of Aboriginal objects and/or places within the proposed project area.

For the purposes of these requirements, **community consultation** must be an open and honest two-way communication process between the proponent and Aboriginal people who have cultural heritage knowledge relevant to a proposed project area.

Effective consultation should consist of:

- consultation by proponents with Aboriginal people in the *early stages* of project planning
- building a shared understanding, between the proponent and Aboriginal people, of how advice from Aboriginal people will inform project design or decision-making processes
- building a shared understanding between the proponent and Aboriginal people of how timely feedback will be provided to participants to ensure their views were accurately taken into account and to show how the information provided by Aboriginal people contributed to the final outcome
- adherence to cultural restrictions by the proponent (e.g. Aboriginal men's business should only be discussed by men with men, and Aboriginal women's business only between women)
- avoiding culturally inappropriate days/times for consultation (e.g. NAIDOC week) and having a contingency plan should the planned consultation unexpectedly fall on the day of a funeral or other 'sorry business'
- consideration by the proponent of issues such as transport (how Aboriginal people get to meetings) and fitting in with work and family responsibilities.

Informed input made by registered Aboriginal parties relating to the significance of Aboriginal objects and/or places will usually require the collective input of a number of knowledge holders and therefore consultation should be designed to allow the internal decision-making processes of Aboriginal people to function effectively.

When undertaking consultation, proponents should use the services of people who are skilled and experienced in consultation and, in particular, consultation with Aboriginal people. These skills and experience may be available in-house or sourced from specialist service providers. Skills and competencies required to deliver effective consultation (adapted from *Community engagement skills profile*) include the ability to:

- plan community consultation
- develop and implement community consultation strategies
- select the right consultation method or strategy
- build and maintain community relationships, group facilitation skills and conflict resolution skills
- speak to large and small groups with influence
- reflect upon process and outcomes.

3.1 Why consult?

Consultation with Aboriginal people is necessary to understand their views and concerns about the proposed project but also to understand the cultural values present in the area that may be harmed.

DECCW also recognises that:

- Aboriginal cultural heritage has social/cultural, historic, aesthetic and scientific (archaeological) significance. All aspects should be given the same weight and assessed equally by the proponent in the Aboriginal cultural heritage assessment report.
- Aboriginal people are the primary determinants of the cultural significance of their heritage.
- The involvement of Aboriginal people should occur early in the assessment process. This is necessary to ensure their cultural values and concerns are taken fully into account and their decision-making structures are able to function effectively.

3.2 The objective of consultation

The objective of community consultation is to ensure that Aboriginal people have the opportunity to improve assessment outcomes by:

- providing relevant information about the cultural significance and values of the Aboriginal object(s) and/or place(s)
- influencing the design of the method to assess cultural and scientific significance of Aboriginal object(s) and/or place(s)
- actively contributing to the development of cultural heritage management options and recommendations for any Aboriginal object(s) and/or place(s) within the proposed project area
- commenting on draft assessment reports before they are submitted by the proponent to DECCW.

3.3 Information required for decision making

The AHIP application and determination process requires an assessment (by the proponent) and evaluation (by DECCW) of the Aboriginal heritage values of Aboriginal object(s) and place(s) potentially harmed by an activity.

Proponents must provide the opportunity for Aboriginal people who hold cultural knowledge relevant to determining the significance of Aboriginal objects and/or places as relevant to the proposed project area to be involved in consultation. The information provided through this process will assist DECCW to assess the cultural significance of objects and places that are the subject of an application to damage or destroy an Aboriginal object or place.

When evaluating an application, DECCW will consider, among other things, the:

- cultural and scientific significance of the Aboriginal object(s) and/or place(s)
- potential or likely impact of the proposal on the Aboriginal object(s) and/or place(s)
- adequacy of any proposed measures to avoid or reduce impacts
- the results of consultation with Aboriginal people.

The information required to inform the assessment of cultural significance includes:

- the location of the objects and places in this development area that are of cultural and social significance to the local Aboriginal community
- the types of objects/sites that occur across the development area (e.g. early occupation sites, dreaming sites, art sites, ceremonial, resource areas, quarries, missions etc)
- a description of the significance of all the Aboriginal *objects/sites* to Aboriginal people past and present.

This information will then be used by the proponent to:

- understand the cultural significance of objects and places
- identify any objects or places of high significance that the Aboriginal community considers a priority for conservation/protection
- apply the results of the assessment of cultural significance to inform the development of culturally appropriate archaeological survey and excavation methodologies (where required)
- inform negotiations with the registered Aboriginal parties to identify options for avoiding, minimising or mitigating damage to cultural heritage
- integrate the results of the assessment of cultural significance and the archaeological assessment into an Aboriginal cultural heritage assessment report that is submitted to support any application for an AHIP.

3.3.1 Who can provide this information?

Aboriginal people who can provide the information outlined in 3.3 above are, based on Aboriginal lore and custom, the traditional owners or custodians of the land that is the subject of the proposed project. Traditional owners or custodians with appropriate cultural heritage knowledge to inform decision making who seek to register their interest as an Aboriginal party are those people who:

- continue to maintain a deep respect for their ancestral belief system, traditional lore and custom
- recognise their responsibilities and obligations to protect and conserve their culture and heritage and care for their traditional lands or Country
- have the trust of their community, knowledge and understanding of their culture, and permission to speak about it.

In some cases, the information required for decision making will be held by Aboriginal people with statutory recognition for certain lands:

- Aboriginal owners in accordance with the NSW ALR Act
and/or
- Native title holders or registered native title claimants in accordance with the *Native Title Act 1993* (Cth) and NSW *Native Title Act 1994*

It is acknowledged that Aboriginal people who, through a historical presence in a particular area, may have developed cultural knowledge relevant to the Aboriginal objects and/or places based on knowledge passed down to them by Aboriginal people with a traditional connection to Country. DECCW respects the rights of Aboriginal people with a historical connection to Country to, with their permission, act on behalf of Aboriginal people with a traditional connection to Country. DECCW acknowledges that in some cases it will only be Aboriginal people with a historical connection to an area who have the knowledge to inform the assessment of cultural significance of certain objects/places; e.g. on Aboriginal reserves and missions.

3.3.2 The role of Local Aboriginal Land Councils

Under the LRA Act, Local Aboriginal Land Councils (LALCs) are required to:

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

In accordance with these requirements, LALCs may:

- assist a proponent to identify Aboriginal people who may have an interest in the proposed project area and who hold knowledge relevant to determining the cultural significance of Aboriginal objects and/or places through step 4.1.2
- and
- where the LALC has cultural knowledge relevant to determining the significance of Aboriginal objects and places in the proposed project area, register an interest to be involved in the consultation process.

In the case where LALCs have not registered an interest to be involved in the consultation process through the requirements, LALCs with the necessary skills and experience may be commissioned by a proponent to provide any of the following services:

- administration, such as organising meetings and arranging venues, transport etc
- facilitating aspects of the consultation on behalf of the proponent, especially Stage 2 – Presentation of information about the proposed project
- assisting registered Aboriginal parties to contribute to the consultation process; for example, assisting in writing submissions.

3.4 Consultation should not be confused with employment

The consultation process involves getting the views of, and information from, Aboriginal people and reporting on these. It is not to be confused with other field assessment processes involved in preparing a proposal and an application. Consultation does not include the employment of Aboriginal people to assist in field assessment and/or site monitoring. Aboriginal people may provide services to proponents through a contractual arrangement; however, this is separate from consultation.

The proponent may reimburse Aboriginal people for any demonstrated reasonable out-of-pocket expenses directly incurred in order to participate in the consultation process. A demonstrated reasonable expense would include documented loss of wages caused by the need to take time from paid employment to participate in meetings.

The proponent is not obliged to employ those Aboriginal people registered for consultation. Consultation as per these requirements will continue irrespective of potential or actual employment opportunities for Aboriginal people.

4 Consultation stages

The main phases of consultation with Aboriginal people are:

1. Informing Aboriginal people about the nature and scope of the proposal.
2. Understanding what might be present in the landscape and its cultural significance.
3. Determining the potential impacts and the proposed strategies to deal with them.
4. Reviewing the report.

All parties are expected to comply with and progress through the stages below in an efficient manner to ensure the successful achievement of the intended outcomes of these requirements (see section 1.4).

4.1 Stage 1 – Notification of project proposal and registration of interest

Aim

To identify, notify and register Aboriginal people who hold cultural knowledge relevant to determining the cultural significance of Aboriginal objects and/or places in the area of the proposed project.

- 4.1.1 Proponents are not required to comply with the requirements of steps 4.1.2 to 4.1.7 where there is an approved determination of native title that native title exists in relation to the proposed project area. In this circumstance, proponents need only consult with the native title holders. If a prescribed body corporate has been established to hold native title on behalf the native title holders then proponents should consult with the prescribed body corporate.

Where native title is determined to exist over part of the proposed project area, proponents are required to comply with the requirements of steps 4.1.2 to 4.1.7 in relation to the area not covered by the native title determination.

- 4.1.2 Proponents are responsible for ascertaining, from reasonable sources of information, the names of Aboriginal people who may hold cultural knowledge relevant to determining the significance of Aboriginal *objects* and/or *places*. Reasonable sources of information could include (a) to (g) below. Proponents must compile a list of Aboriginal people who may have an interest for the proposed project area and hold knowledge relevant to determining the cultural significance of Aboriginal *objects* and/or *places* by writing to:

- (a) the relevant DECCW EPRG regional office
- (b) the relevant Local Aboriginal Land Council(s)
- (c) the Registrar, *Aboriginal Land Rights Act 1983* for a list of Aboriginal owners
- (d) the National Native Title Tribunal for a list of registered native title claimants, native title holders and registered Indigenous Land Use Agreements
- (e) Native Title Services Corporation Limited (NTSCORP Limited)
- (f) the relevant local council(s)
- (g) the relevant catchment management authorities for contact details of any established Aboriginal reference group.

In that correspondence, proponents must include the information required in 4.1.3 (a) and (b).

See Appendix A (page 21) for a list of DECCW EPRG regional offices and a map of EPRG branch boundaries.

- 4.1.3 Proponents must write to the Aboriginal people whose names were obtained in step 4.1.2 and the relevant Local Aboriginal Land Council(s) to notify them of the proposed project. The proponent must also place a notice in the local newspaper circulating in the general location of the proposed project explaining the project and its exact location. The notification by letter and in the newspaper must include:
- (a) the name and contact details of the proponent
 - (b) a brief overview of the proposed project that may be the subject of an application for an AHIP, including the location of the proposed project
 - (c) a statement that the purpose of community consultation with Aboriginal people is to assist the proposed applicant in the preparation of an application for an AHIP and to assist the Director General of DECCW in his or her consideration and determination of the application
 - (d) an invitation for Aboriginal people who hold cultural knowledge relevant to determining the significance of Aboriginal object(s) and/or place(s) in the area of the proposed project to register an interest in a process of community consultation with the proposed applicant regarding the proposed activity
 - (e) a closing date for the registration of interests.
- 4.1.4 There must be a minimum of 14 days from the date the letter was sent or notice published in the newspaper to register an interest. The time allowed to register an interest should reflect the project's size and complexity.
- 4.1.5 The proponent must advise Aboriginal people who are registering an interest that their details will be forwarded to DECCW and the Local Aboriginal Land Council (LALC) unless they specify that they do not want their details released.
- 4.1.6 The proponent must make a record of the names of each Aboriginal person who registered an interest and provide a copy of that record, along with a copy of the notification from 4.1.3 to the relevant DECCW EPRG regional office and LALC within 28 days from the closing date for registering an interest.
- 4.1.7 LALCs holding cultural knowledge relevant to determining the significance of Aboriginal objects and places in the proposed project area who wish to register an interest to be involved in consultation must register their interest as an Aboriginal organisation rather than as individuals.
- 4.1.8 Where an Aboriginal organisation representing Aboriginal people who hold cultural knowledge has registered an interest, a contact person for that organisation must be nominated. Aboriginal cultural knowledge holders who have registered an interest may indicate to the proponent they have appointed a representative to act on their behalf. Where this occurs, the registered Aboriginal party must provide written confirmation and contact details of those individuals to act on their behalf.

4.2 Stage 2 – Presentation of information about the proposed project

Aim

To provide registered Aboriginal parties with information about the scope of the proposed project and the proposed cultural heritage assessment process.

- 4.2.1 The proponent must initiate arrangements for presenting the proposed project information to the registered Aboriginal parties (from Stage 1).
- 4.2.2 The presentation of proposed project information should provide the opportunity for:
 - (a) the proponent to present the proposal, outline project details relevant to the nature, scope, methodology, and environmental and other impacts
 - (b) the proponent to outline the impact assessment process including the input points into the investigation and assessment activities
 - (c) the proponent to specify critical timelines and milestones for the completion of assessment activities and delivery of reports
 - (d) the proponent and registered Aboriginal parties to clearly define agreed roles, functions and responsibilities
 - (e) the registered Aboriginal parties to identify, raise and discuss their cultural concerns, perspectives and assessment requirements (if any).
- 4.2.3 The proponent should record or document that the proposed project information has been presented. This record or documentation should include any agreed outcomes, and any contentious issues that may require further discussion to establish mutual resolution (where applicable). The proponent should provide a copy of this record or documentation to registered Aboriginal parties.
- 4.2.4 Depending on the nature, scale and complexity of the proponent's project, it may be reasonable and necessary for the proponent to:
 - (a) conduct additional project information sessions to ensure that all necessary information about the project is provided and enable registered Aboriginal parties to provide information about the cultural significance of Aboriginal object(s) and/or place(s) that may be present on the proposed project area
 - (b) create the opportunity for registered Aboriginal parties to visit the project site.

4.3 Stage 3 – Gathering information about cultural significance

Aim

To facilitate a process whereby registered Aboriginal parties can:

- (a) contribute to culturally appropriate information gathering and the research methodology
 - (b) provide information that will enable the cultural significance of Aboriginal objects and/or places on the proposed project area to be determined
 - (c) have input into the development of any cultural heritage management options.
- 4.3.1 The proponent must present and/or provide the proposed methodology(s) for the cultural heritage assessment to the registered Aboriginal parties.
 - 4.3.2 The registered Aboriginal parties must be given the opportunity to review and provide feedback to the proponent within a minimum of 28 days of the proponent providing the methodology.

The review should identify any protocols that the registered Aboriginal parties wish to be adopted into the information gathering process and assessment methodology and any matters such as issues/areas of cultural significance that might affect, inform or refine the assessment methodology. Comments should be provided in writing, or may be sought verbally by the proponent and accurately recorded.

- 4.3.3 As part of this consultation, the proponent must also seek cultural information from registered Aboriginal parties to identify:
- (a) whether there are any Aboriginal objects of cultural value to Aboriginal people in the area of the proposed project
 - (b) whether there are any places of cultural value to Aboriginal people in the area of the proposed project (whether they are Aboriginal places declared under s.84 of the NPW Act or not). This will include places of social, spiritual and cultural value, historic places with cultural significance, and potential places/areas of historic, social, spiritual and/or cultural significance.
- 4.3.4 Some information obtained from registered Aboriginal parties may be sensitive or have restricted public access. The proponent must, in consultation with registered Aboriginal parties, develop and implement appropriate protocols for sourcing and holding cultural information. In some cases the sensitive information may be provided to the proponent by an individual and the proponent should not share that information with all registered Aboriginal parties or others without the express permission of the individual.
- For further information on cultural knowledge and its protection see DECCWs *Fact sheet 3: Cultural knowledge and its protection*.
- 4.3.5 Information obtained in 4.3.4 is used to understand the context and values of Aboriginal object(s) and/or place(s) located on the proposed project site. This information must be integrated with the scientific (archaeological) assessment of significance. Together the context, values, and scientific assessment provide the basis for assessing Aboriginal heritage values and recommending management options.
- The information collected by the proponent during the consultation process must be used only to inform decision making for any application for an AHIP, unless the registered Aboriginal parties agree otherwise.
- 4.3.6 The proponent must seek the views of registered Aboriginal parties on potential management options. Management options will include ways to avoid or mitigate harm and/or conserve known Aboriginal object(s) and/or place(s). Management options should consider how Aboriginal people can continue their association with identified Aboriginal heritage values.
- 4.3.7 The proponent must document all feedback received in Stage 3 from registered Aboriginal parties in the final cultural heritage assessment report. This must include copies of any submissions received and the proponent's response to the issues raised. In some cases this may require an acknowledgment of sensitive information and a list of Aboriginal people who should be contacted for permission to receive further details.

4.4 Stage 4 – Review of draft cultural heritage assessment report

Aim

To prepare and finalise an Aboriginal cultural heritage assessment report with input from registered Aboriginal parties.

- 4.4.1 The proponent must prepare a draft cultural heritage assessment report.
- 4.4.2 The proponent must provide a copy of the draft cultural heritage assessment report to registered Aboriginal parties for their review and comment.
- 4.4.3 The proponent must give registered Aboriginal parties a minimum of 28 days from sending the draft report to make submissions. The time allowed for comment on the draft report should reflect the project's size and complexity. Comments should be provided in writing or, where provided verbally, accurately recorded.
- 4.4.4 After considering the comments received on the draft report the proponent must finalise the report. The final report must include copies of any submissions received, including submissions on the proposed methodology and on the draft report. The final report must also include the proponent's response to each submission. The report must then be submitted to DECCW for consideration with the proponent's application for an AHIP.
- 4.4.5 The proponent must provide or make available copies of the final cultural heritage assessment report and the AHIP application to registered Aboriginal parties and the relevant LALC(s) (whether or not the LALC is registered in Stage 1). The report and application must be provided or made available within 14 days of the AHIP application being made.

See Appendix B for a summary of the consultation process.

Note: Information about applying for an AHIP including application forms, supporting checklists, and other relevant information can be found at: www.environment.nsw.gov.au/licences/Section87Section90.htm.

5 Roles, responsibilities and functions

For the consultation process to be effective, all parties must appreciate and respect each other's perspective and understand each other's interests, roles and responsibilities.

5.1 Department of Environment, Climate Change and Water

The Director General of DECCW is the decision-maker who decides whether to grant or refuse an AHIP application. If an AHIP is issued, conditions are usually attached and DECCW is responsible for ensuring the AHIP holder complies with those conditions. When considering an application under Part 6 of the NPW Act, the Director General will review the information provided by proponents in line with its internal policies and procedures to assess potential or actual harm to Aboriginal objects or places (DECCW, 2009).

The Environment Protection and Regulation Group (EPRG) of DECCW is responsible for administering the regulatory functions under Part 6 of the NPW Act. A map and list of DECCW EPRG regional offices is in Appendix A.

DECCW expects proponents and Aboriginal people should:

- be aware that Part 6 of the NPW Act establishes the Director General or delegate of DECCW as the decision-maker
- recognise that the Director General's (or delegates) decisions may not be consistent with the views of the Aboriginal community and/or the proponent. However, DECCW will take into account all relevant information it receives as part of its decision-making process.

Further information about the structure of DECCW, and the roles and responsibilities of various groups and the services provided, such as EPRG, Culture and Heritage Division (CHD), and Parks and Wildlife Group (PWG) can be found at: www.environment.nsw.gov.au/whoware/planorgs.htm

5.2 Registered Aboriginal parties

The interests and obligations of Aboriginal people relate to the protection of Aboriginal cultural heritage. It is only Aboriginal people who can determine who is accepted by their community as being authorised to speak for Country and its associated cultural heritage. Where there is a dispute about who speaks for Country, it is appropriate for Aboriginal people, not DECCW or the proponent, to resolve this dispute in a timely manner to enable effective consultation to proceed.

It is expected that DECCW, proponents and service providers that act on their behalf should:

- display a meaningful appreciation, understanding and respect for the belief system, spiritual connection and sense of belonging that Aboriginal people have to their land, people and environment, which includes plants, animals, waterways, sacred sites and other places of cultural significance and importance
- uphold and respect the traditional rights, obligations and responsibilities of Aboriginal people who hold cultural knowledge in accordance with traditional lore and custom, particularly as these relate to the cultural business of men and women
- encourage active participation of culturally experienced and appropriate Aboriginal people who hold cultural knowledge in the consultation process
- encourage opportunities for the effective transfer of cultural knowledge from older to younger generations in accordance with traditional lore and custom through the consultation process
- have an awareness and understanding of how colonisation has impacted the Aboriginal people of Australia

- have an understanding and respect for the lore and customs, cultural practices, responsibilities and obligations that Aboriginal people have toward the continued care and conservation of Aboriginal *objects* and *places*.

Aboriginal people should:

- have an awareness and understanding of the commercial environment and constraints in which proponents operate
- develop and display an awareness and understanding of the opportunities to input into regulatory processes to contribute to decision making by proponents and government authorities.

5.2.1 NSW Aboriginal Land Council and Local Aboriginal Land Councils

The NSW Aboriginal Land Council (NSWALC) and Local Aboriginal Land Councils (LALCs) have statutory functions relevant to the protection of Aboriginal culture and heritage under the NSW *Aboriginal Land Rights Act 1983*. These requirements do not extend the role of NSWALC and LALCs in the significance assessment process. That is, these requirements do not provide NSWALC and/or LALCs any additional or specific decision-making role in the assessment of significance of Aboriginal object(s) and/or place(s) that are subject to an AHIP application under Part 6 of the NPW Act.

LALCs may choose to register an interest to be involved in the consultation process, or may assist registered Aboriginal parties to participate in the consultation process established by these requirements. In order to ensure effective consultation and the subsequent informed heritage assessment, LALCs are encouraged to identify and make contact with Aboriginal people who hold cultural knowledge in their area.

For further information on LALCs and the role they can play in these requirements, see DECCWs *Fact sheet 4: Local Aboriginal Land Councils*.

5.3 Proponents

Proponents operate within a commercial environment which includes:

- financial and management issues, priorities and deadlines
- the need to obtain broad community support and acceptance in order to secure any necessary approval/consent/licence/permit to operate
- the desire for clearer processes and certainty of outcomes
- the need for suitable access to land for the purpose of their development project
- a need to work efficiently within the project's time, quality and cost planning and management parameters
- the need for culturally appropriate assessment findings relevant to their project.

Under these requirements, proponents should:

- bring the registered Aboriginal parties or their nominated representatives together and be responsible for ensuring appropriate administration and management of the consultation process
- consider the cultural perspectives, views, knowledge and advice of the registered Aboriginal parties involved in the consultation process in assessing cultural significance and developing any heritage management outcomes for Aboriginal object(s) and/or place(s)
- provide evidence to DECCW of consultation by including information relevant to the cultural perspectives, views, knowledge and advice provided by the registered Aboriginal parties
- accurately record and clearly articulate all consultation findings in the final cultural heritage assessment report

- provide copies of their cultural heritage assessment report to the registered Aboriginal parties who have been consulted
- submit an application to DECCW for an AHIP in a timely manner and with all required information.

References

Aboriginal Land Rights Act 1983 (NSW), s.4, web document, NSW Department of Aboriginal Affairs, Sydney, NSW, viewed 11 March 2010, www.daa.nsw.gov.au/landandculture/landrights.html

Ask first – a guide to respecting Indigenous heritage places and values, pdf, 2002, Australian Heritage Commission, Canberra, ACT, viewed 11 March 2010, www.environment.gov.au/heritage/ahc/publications/commission/books/ask-first.html

Bowler J M, Johnston H, Olley JM, Prescott, JR, Roberts RG, Shawcross W and Spooner NA, 2003, 'New ages for human occupation and climatic change at Lake Mungo, Australia'. *Nature*, vol. 421, 30 January, pp. 837–40.

Community engagement skills profile, Engaging Queenslanders: managing community engagement, web document, Queensland Government, Brisbane, Qld, viewed 11 March 2010, www.onlinelearning.qld.gov.au/materials/ce/online/ce/info/learning/guide/t8s1.htm#act4

DECCW, 2009, *Operational policy: protecting Aboriginal cultural heritage*, Department of Environment, Climate Change and Water NSW, Sydney, viewed 11 March 2010, www.environment.nsw.gov.au/resources/cultureheritage/09122ACHOpPolicy.pdf

DECCW, 2009, *Guide to determining and issuing Aboriginal heritage impact permits* Department of Environment, Climate Change and Water NSW, Sydney, viewed 11 March 2010, www.environment.nsw.gov.au/resources/cultureheritage/09121AHIPGuide.pdf

Appendix A

DECCW EPRG regional offices

Metropolitan

Parramatta

Department of Environment,
Climate Change and Water
Planning and Aboriginal
Heritage Section
PO Box 668
Parramatta NSW 2124
Phone (02) 9995 5000
Fax (02) 9995 6900

North East

Coffs Harbour

Department of Environment,
Climate Change and Water
Planning and Aboriginal
Heritage Section
Locked Bag 914
Coffs Harbour NSW 2450
Phone (02) 6651 5946
Fax (02) 6651 6187

North West

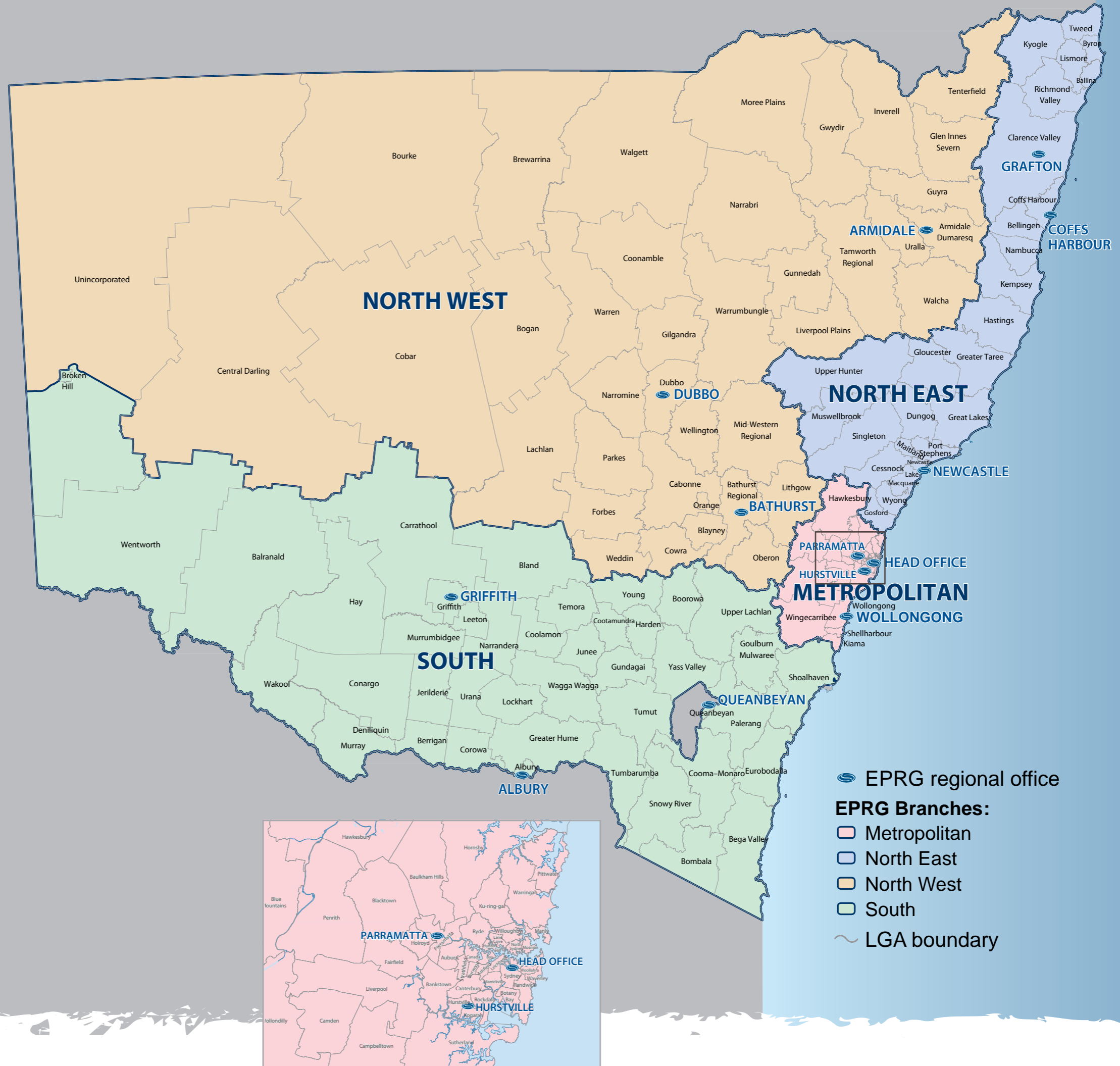
Dubbo

Department of Environment,
Climate Change and Water
Environment and
Conservation Programs
PO Box 2111
Dubbo NSW 2830
Phone (02) 6883 5330
Fax (02) 6884 9382

South

Queanbeyan

Department of Environment,
Climate Change and Water
Landscape and Aboriginal
Heritage Protection Section
PO Box 733
Queanbeyan NSW 2620
Phone (02) 6229 7000
Fax (02) 6229 7001



Summary of the consultation process



Stage 1

Notification of project proposal and registration of interest

Proponents must compile a list of Aboriginal people who may have an interest in the proposed project area and hold knowledge relevant to determining the cultural significance of Aboriginal *objects* and/or *places* from reasonable sources of information, which include writing to:

- a. the relevant DECCW EPRG regional office
- b. the relevant Local Aboriginal Land Council(s) (LALC)
- c. the Registrar, *Aboriginal Land Rights Act*
- d. the National Native Title Tribunal
- e. Native Title Services Corporation (NTSCorp)
- f. relevant local council(s)
- g. relevant catchment management authorities.

The notification by letter and in the newspaper must include:

- a. the name and contact details of the proponent
- b. a brief overview of the proposed project that may be the subject of an application for an AHIP, including the location of the proposed project
- c. a statement that the purpose of community consultation with Aboriginal people is to assist the proposed applicant in preparing an application for an AHIP and to assist the Director General of DECCW in his or her consideration and determination of the application
- d. an invitation for Aboriginal people who hold knowledge relevant to determining the cultural significance of Aboriginal object(s) and/or place(s) in the area of the proposed project to register an interest in a process of community consultation with the proposed applicant regarding the proposed activity
- e. a closing date for the registration of interests.

Proponent writes to the Aboriginal people whose names were provided by organisations **a to g** and LALC(s) to notify them of the proposed project and opportunity to be involved in consultation and places notification in the local newspaper.

Aboriginal people have a minimum of 14 days after the letter was sent or the notice was published in the newspaper to register an interest.

Proponent records names of Aboriginal people who have registered an interest in being involved in consultation – the 'registered Aboriginal parties'.

Stage 2

Presentation of information about the proposed project

Proponent presents and/or provides proposed project information to registered Aboriginal parties.

Proponent may create an opportunity for registered Aboriginal parties to visit the proposed project site.

Proponent provides a copy of the notification and record of the registered Aboriginal parties to DECCW and relevant LALC within 28 days of the closing date for registering an interest.

Proponent records or documents that information on the proposed project has been presented. This record or documentation should include any agreed outcomes and/or contentious issues that may require further discussion (where applicable).

Proponent should provide a copy of this record or documentation to registered Aboriginal parties.

Stage 3

Gathering information about cultural significance

Proponent presents and/or provides the proposed methodology(s) for the cultural heritage assessment to the registered Aboriginal parties for comment.

Registered Aboriginal parties have a minimum of 28 days after the proponent provides the methodology(s) to provide written or oral comment.

Proponent considers input provided by registered Aboriginal parties and finalises methodology for implementation. Proponent documents how the input has been considered.

Proponent seeks information from registered Aboriginal parties to identify:

- a. whether there are any Aboriginal objects of cultural value
- b. whether there are places of cultural value (whether or not they are Aboriginal places declared under Section 84 of the NPW Act).

Proponent seeks input from registered Aboriginal parties on potential management options.

Stage 4

Review of draft cultural heritage assessment report

Proponent prepares draft cultural heritage assessment report and provides it to the registered Aboriginal parties for review and comment.

Registered Aboriginal parties have a minimum of 28 days after the proponent provides the draft report to review and provide written or oral comment.

Proponent provides/makes available the final cultural heritage assessment report and AHIP application to the registered Aboriginal parties and relevant LALCs within 14 days of an AHIP application being made to DECCW.

Proponent finalises cultural heritage assessment report. The final report is submitted to DECCW for consideration with the proponent's AHIP application.

