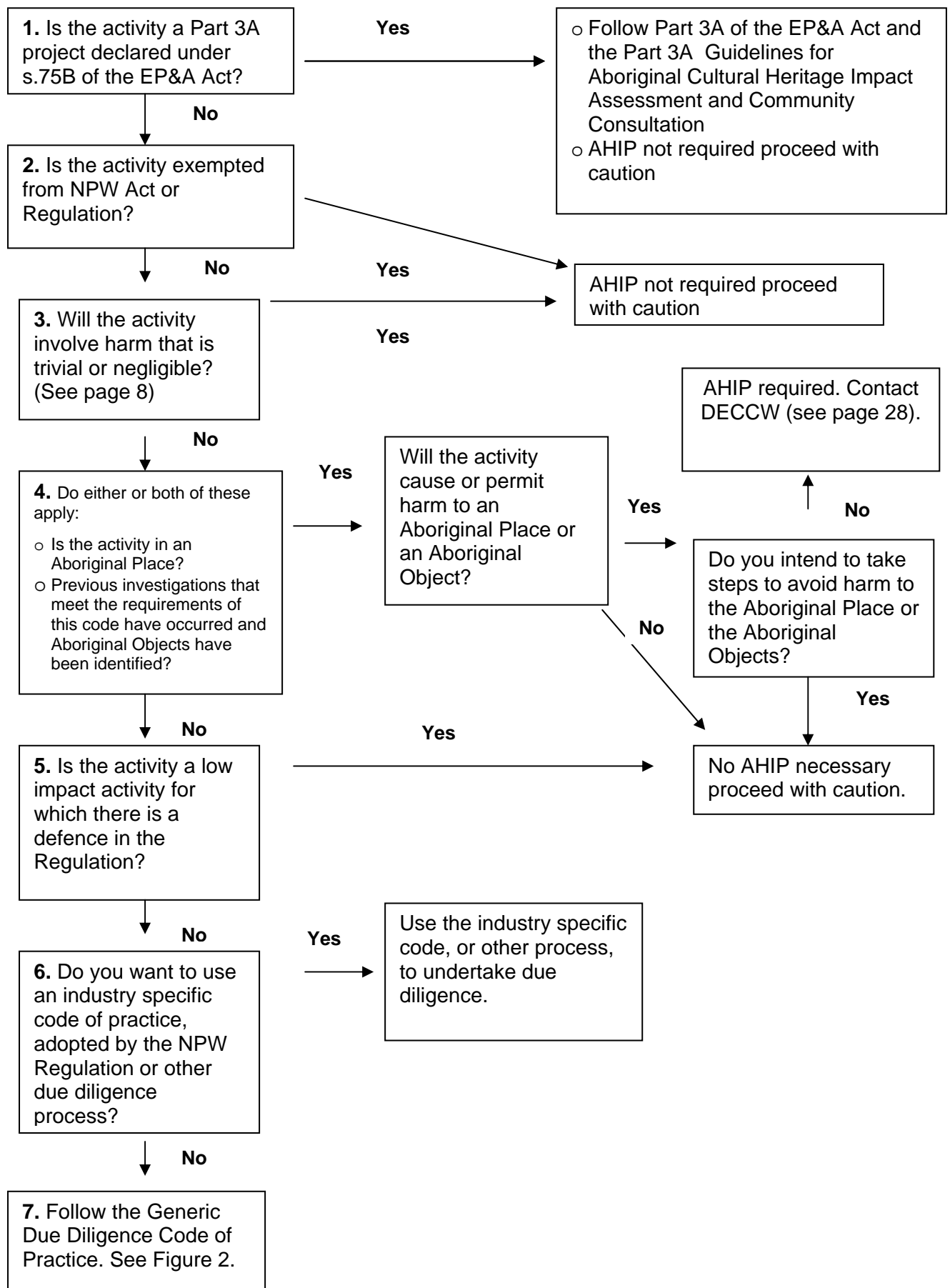


# **Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW**

***REVISED CONSULTATION DRAFT  
25 February 2010***

**FIGURE 1 - DO YOU NEED TO USE THIS DUE DILIGENCE CODE?**



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## Purpose of this code of practice

This code of practice is to assist individuals and organisations to exercise due diligence when carrying out activities that may harm Aboriginal objects and to determine whether they should apply for consent in the form of an Aboriginal Heritage Impact Permit (AHIP).

The *National Parks and Wildlife Act 1974* (NPW Act) provides that a person who exercises due diligence in determining that their actions will 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 NPW Act allows for a generic code of practice to explain what due diligence means. Carefully following this code of practice, which is adopted by the Regulation made under the NPW Act, would be regarded as “due diligence”.

This code sets out the reasonable and practicable steps which individuals and organisations need to take in order to:

1. Identify whether or not Aboriginal objects are, or are likely to be, present in an area;
2. Determine whether or not their activities are likely to harm Aboriginal objects (if present); and
3. Determine whether an AHIP application is required.

If Aboriginal objects are present or likely to be present **and** an activity will harm those objects then an AHIP application will be required. Information about the permits and how to apply for them can be obtained through the NSW Department of Environment, Climate Change and Water (DECCW) website at:

<http://www.environment.nsw.gov.au/licences/index.htm>

## Who should use this code?

Figure 1 explains if you need to follow the due diligence process described in this code. This code can be used by individuals or organisations who are contemplating undertaking activities which could harm Aboriginal objects. This code will provide a process whereby a reasonable determination can be made as to whether or not Aboriginal objects will be harmed by an activity, whether further investigation is warranted and whether the activity requires an AHIP application.

If through this or any other process that meets the standards of this code, such as an environmental impact assessment, you have already taken reasonable steps to identify Aboriginal objects in an area subject to a proposed activity and it is already known that Aboriginal objects will be harmed or are likely to be harmed by an activity, then an application should be made for an AHIP.

## How does the code link to other planning processes?

### Development under Part 4 EP&A Act and activities under Part 5 EP&A Act

Consideration of the potential impacts of development on Aboriginal heritage is a key part of the environmental impact assessment process under the *Environmental Planning and Assessment Act 1979* (EP&A Act). The standards in this code can be used or adapted by proponents to inform the initial assessment of the environmental impacts of an activity on Aboriginal heritage. An environmental impact assessment which meets all of the requirements of this code will satisfy the due diligence test. Alternatively, you could adapt the requirements of this code, provided it still meets the ordinary meaning of exercising due diligence (see section 7 on page 11).

If it is found through this initial assessment process that Aboriginal objects will or are likely to be harmed, then further investigation and impact assessment will be required to prepare information about the types of objects and the nature of the harm. This is further explained at step 5 on page 15. If you are going to harm a known Aboriginal object you will need to apply for an AHIP. In this situation, the need to obtain the AHIP is in addition to any approval under the EP&A Act (unless the project is subject to Part 3A EP&A Act).

### Major projects under Part 3A EP&A Act

If your activity is a declared Part 3A project under s.75B of the EP&A Act you should refer to the 2005 (draft) '*Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation*' (as amended from time to time). These guidelines are available from the Department of Planning. Refer to page 7.

### Exempt and complying development under the EP&A Act

The due diligence process can still apply to an activity that is exempt or complying development within the meaning of the EP&A Act. However, if the exempt or complying development is a low impact activity as defined by the NPW Regulation then you may have a defence under the NPW Act and do not need to follow due diligence in carrying out the activity. Refer to page 9.

## Do I need to consult?

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 informing decision-making.

## What are the advantages of 'due diligence'?

In the context of protecting Aboriginal cultural heritage, due diligence involves taking **reasonable and practicable measures** to determine whether your actions will harm an Aboriginal object and if so what measures can be taken to avoid that harm.

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 land managers and developers about appropriate measures for them to take;
- Encourages a precautionary approach;
- Provides a defence against prosecution if the process is followed; and
- Results in more effective conservation outcomes for Aboriginal cultural heritage.

## Do you need to use this Due Diligence Code?

Figure 1 (inside front cover) provides guidance on questions you need to ask to determine whether you need to follow this due diligence process.

### 1. Is the activity a declared project under Part 3A under the EP&A Act?

Where a project is seeking approval under Part 3A you will need to identify, in the project application or concept plan application and any accompanying Preliminary Environmental Assessment, if the project will harm Aboriginal objects. If your project is a declared Part 3A project under s.75B of the EP&A Act, and you have been issued Director General's requirements in relation to Aboriginal objects, you do not need to apply for an AHIP to harm Aboriginal objects under the NPW Act provided you follow these Director-General's requirements and any conditions of approval.

You should refer to the 2005 (draft) '*Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation*' (as amended from time to time). These guidelines are available from the Department of Planning.

The above does not apply in the following circumstances:

- 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 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.

In these situations you should follow the steps in figure 2 on page 12 of this code or some other due diligence process.

### 2. Is the activity an exempt activity listed in the NPW Act or other legislation?

#### National Parks and Wildlife Act

The NPW Act provides exemptions to the offences of harming Aboriginal objects and Aboriginal Places in certain circumstances. These are for:

- Aboriginal people and their dependants when carrying out non-commercial traditional cultural activities,
- Emergency fire fighting activities and emergency bush fire hazard reduction works 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, and
- Any thing specifically required or permitted under the express terms of a conservation agreement entered into under Division 12 of Part 4 of the NPW Act.

## **Rural Fires Act**

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*.

In cases where a Bush Fire Hazard Reduction Certificate has not been issued, the NPW Regulation provides an exemption from the offences in s86 for bush fire hazard reduction works that are carried out in accordance with the document entitled *Conditions for Hazard Reduction and Aboriginal Heritage* referred to in the *Bush Fire Environmental Assessment Code for NSW* published by the NSW Rural Fire Service and dated February 2006.

### **3. Will the activity involve harm that is trivial or negligible?**

Section 86 of the NPW Act sets out a number of offences about 'harm' to an Aboriginal object. 'Harm' means any act or omission that:

- destroys, defaces, or damages the object;
- moves the object from the land on which it had been situated; or
- 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

### **4. Is the activity in an Aboriginal Place or are you already aware of Aboriginal objects on the land?**

#### **Aboriginal places**

Aboriginal Places are declared by the Minister under s.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). The places are also listed on the DECCW website. The due diligence defence is not available for activities which harm Aboriginal places. If you wish to undertake an activity which may 'harm' an Aboriginal place, you must apply for an AHIP.

#### **Known Aboriginal objects**



If as a result of previous investigations that meet the requirements of this code you already know that Aboriginal objects are in the area and that harm to these objects cannot be avoided, then you need to apply for an AHIP. If the previous investigation includes an AHIMS search which is over 12 months old you must search AHIMS again to ensure that the information is still current.

## **5. Is the activity a low impact activity for which there is a defence in the regulation?**

The NPW Regulation removes the need to follow the due diligence process if you are carrying out a specifically defined low impact activity. As a result, you are not required to follow this code or any other due diligence process if your activity is listed below.

It is important to note that this defence does not apply to situations where you already know there is an Aboriginal object (see 4 above). This defence does not authorise harm to known Aboriginal objects.

The following activities are prescribed in the regulation as a defence against the strict liability s86 (2) offence.

- i. Maintenance work of the following kind on land that has been disturbed by previous activity:
  - Maintenance of existing roads, fire and other trails, and tracks,
  - Maintenance of utilities and other similar services (such as above or below ground electrical infrastructure, water and sewerage pipelines), or
- ii. The following kind of farming and land management work on land already disturbed by previous activity:
  - cropping, grazing, and leaving paddocks fallow,
  - maintenance of grain, fibre or fertiliser storage areas,
  - construction of new fences or the maintenance or replacement of existing fences,
  - water storage works (such as construction and maintenance of farm dams, water storages or water tanks),
  - construction or maintenance of irrigation infrastructure, ground water bores, or flood mitigation work, or
  - the construction and maintenance of erosion control or soil conservation works (such as contour banks).
- iii. The removal of isolated dead and dying vegetation, but only if there is minimal disturbance to the surrounding ground surface, or

- iv. Environmental rehabilitation works (such as bush regeneration and weed removal but not including erosion control or soil conservation works such as contour banks), or
- v. An activity that comprises exempt development or was the subject of a complying development certificate issued under the Environmental Planning and Assessment Act 1979, but only if it occurred on land that had already been disturbed by previous activity, or
- vi. The following kinds of work,
  - o geological mapping,
  - o or geophysical (but not seismic) surveys,
  - o downhole logging,
  - o sampling and coring using hand-held equipment, or
- vii. The following kind of work on land already disturbed by previous activity:
  - o geochemical surveys,
  - o seismic surveys
  - o costeaning or bulk sampling,
  - o drilling.

The low impact activities prescribed by the NPW Regulation do not apply in relation to any harm to an Aboriginal scarred tree.

If your activity is included in this list you are not required to go through the due diligence process. Proceed with caution, and if Aboriginal objects are later found when you are carrying on your activity, you must stop work, notify DECCW and apply for an AHIP if you intend to harm those known objects.

If your activity is not on this list go to 6.

## **6. Do you want to use an industry specific code of practice?**

The NPW Act also provides that due diligence may be exercised by complying with a code of practice which is adopted under the National Parks and Wildlife Regulation 2009. These codes provide due diligence guidance tailored for specific types of activities or industries. Codes which have been adopted are:

- o The Plantation and Reafforestation Code (Forming part of the Plantations and Reafforestation (Code) Regulation 2001)

- The Private Native Forestry Code of Practice (which can be accessed at <http://www.environment.nsw.gov.au/pnf/index.htm> )
- The NSW Minerals Council Code of Practice for the Mining Industry
- The NSW Forests Operational Guide for Aboriginal Cultural Heritage.

If your activity is subject to an industry specific code that has been adopted by the NPW Regulation, you can follow that code instead of the requirements of this generic code.

Other industry associations may wish to develop codes of practice and DECCW will consider their adoption on a case by case basis.

If your activity is not subject to an industry specific code, go to 7.

## **7. Do you wish to follow your own procedure?**

You can follow your own due diligence process and manage your own risk. However, should you be prosecuted for causing harm to an Aboriginal object you will need to satisfy a court that you were being duly diligent in following your own procedure.

Due diligence amounts to taking reasonable and practicable steps to protect Aboriginal objects. This generic code provides one process for satisfying the due diligence requirements under the NPW Act.

It is not mandatory to follow this code. An individual or corporation can take other measures, provided that such measures are objectively reasonable and practicable and meet the ordinary meaning of exercising due diligence.

For example, if your proposed activity requires environmental impact assessment under the EP&A Act which includes appropriate Aboriginal cultural heritage assessment, then due diligence could be exercised through that assessment rather than doing a separate assessment that specifically follows the steps in this code. A Statement of Environmental Effects (SEE), a Review of Environmental Factors (REF) or an Environmental Impact Statement (EIS) under Part 4 or Part 5 of the EP&A Act can be used to satisfy the due diligence process if it adequately addresses Aboriginal cultural heritage issues.

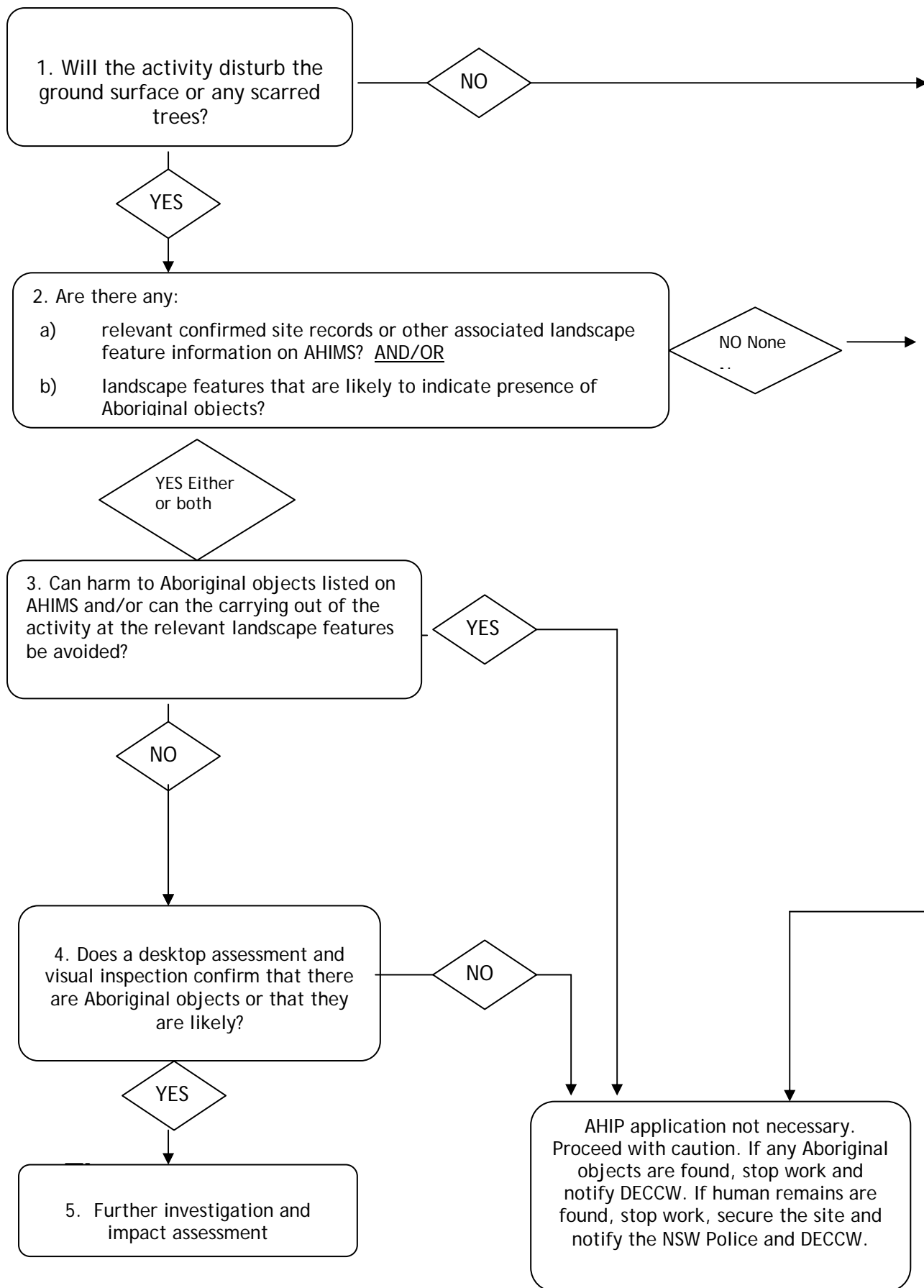
It is important that your due diligence measures are documented clearly and that these records are kept.

DECCW will not approve or certify a person's compliance with their due diligence requirements carried out under this or any other code. This is a personal responsibility.

## **8. Follow the due diligence code of practice**

If none of the above steps apply to your activity, to establish due diligence you must proceed through the generic due diligence process outlined in figure 2 on page 12 and explained further at pages 13 to 16 of this code.

Figure 2 -  
THE DUE DILIGENCE PROCESS



## **Generic Due Diligence Process (Figure 2)**

### **Step 1. Will the activity disturb the ground surface?**

The first question to ask in the due diligence process is – Will your activity disturb the ground surface or any scarred trees? If an activity will disturb the ground surface there is a higher likelihood that Aboriginal objects will be harmed.

Disturbance of the ground surface is often significant when machinery is used to dig, grade, bulldoze, scrap, plough, or drill the ground surface for the purpose of, for example, building a structure or removing vegetation.

If your activity will not disturb the ground surface or any scarred trees then you can proceed with caution without applying for an AHIP.

If the activity will disturb the ground surface or any scarred trees then check the AHIMS database - step 2a.

### **Step 2a. Search the Aboriginal Heritage Information Management System (AHIMS)**

You should search the Aboriginal Heritage Information Management System (AHIMS) and check whether any Aboriginal sites have been recorded in relation to the area where you are proposing to carry out your activity. There may also be additional landscape or other contextual information available relevant to your area on AHIMS.

Information on AHIMS searches is available on DECCW's website at:

<http://www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm>.

The initial web-based search of AHIMS is free and you will be able to print out the results of your search for record keeping purposes. For the purposes of due diligence you may rely on the search results for 12 months. (See page 17 for record keeping recommendations for the due diligence process.)

If the results of the initial AHIMS search indicates that AHIMS contains information about recorded Aboriginal objects in the area of your proposed activity you must obtain copies of those records. Contact the AHIMS registrar by faxing the request form or submitting the request form over the internet (see internet link above) to obtain copies of that information. Costs may apply depending on the type of information you are asking for. There may also be restrictions in providing culturally sensitive information to you.

After obtaining records from AHIMS of any recorded Aboriginal objects you should confirm that these objects can actually be located in the area where your activity is proposed. If you think the information on AHIMS is not up to date or is inaccurate you should contact the AHIMS registrar on 02 9585 6471 or 02 9585 6345 or 02 9585 6157 for further advice.

Go to step 2b.

### **Step 2b. Activities in areas where landscape features indicate the presence of Aboriginal objects**

Regardless of whether your AHIMS search indicates known Aboriginal objects, you still need to consider whether Aboriginal objects are likely to be in the area of the proposed activity having regard to the following landscape features.

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.

Consequently if your proposed activity is:

- within 200m of waters<sup>1</sup> ; or
- located within a sand dune system<sup>2</sup>; or
- located on a ridge top, ridge line, or headland; or
- located within 200m below or above a cliff face; or
- within 20m of or in a cave, rock shelter, or a cave mouth.

and is on land that is not disturbed land then you must go to step 3. "Disturbed land" is defined on page 21.

If as a result of completing steps 2a and 2b 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 you can proceed with caution without applying for an AHIP.

### **Step 3. Can you avoid harm to the object or disturbance of the landscape feature?**

This step only applies if your activity is on land that is not disturbed land or contains known Aboriginal objects.

Where as a result of step 2a you think it is likely that there are Aboriginal objects present in the area of the proposed activity you need to decide whether you can avoid the harm to those objects.

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<sup>1</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 of tidal waters is defined as the high water mark.

<sup>2</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.

Where as a result of step 2b you have concluded that the landscape features listed above are present, you need to decide whether you can move your activity away from the area with the landscape feature(s) so as to avoid disturbing any Aboriginal objects which may be present.

If you can't avoid harm to the object or disturbance of the landscape feature(s) you must go to step 4.

If you can avoid harm to the object and disturbance of the landscape feature(s) you can proceed with caution without applying for an AHIP.

#### **Step 4: Desktop assessment and visual inspection**

This step only applies if your activity is on land that is not disturbed land or contains known Aboriginal objects.

The assessment process is primarily a desktop exercise that involves examination and collation of the 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, including any archaeological studies on AHIMS. There may be some restrictions in providing culturally sensitive information to you. Where this is the case DECCW will provide advice on how to proceed.

You must undertake a visual inspection of the area 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 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, 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. Go to step 5.

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

#### **Step 5: Further investigations and impact assessment**

DECCW's website has further information about how to do a detailed investigation and impact assessment and the procedures for applying for an AHIP.

If after this detailed investigation and impact assessment you decide that harm will occur to Aboriginal objects then an AHIP application must be made.

See

<http://www.environment.nsw.gov.au/conservation/aboriginalculture.htm#whattodo> for information that is required to support an application for an Aboriginal Heritage Impact Permit (including impact assessment and community consultation) and other relevant information.

### **If you decide an AHIP application is not necessary**

If you have followed this code and at any point have reasonably decided 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, you can proceed with caution.

If, however, whilst undertaking your activity you find an Aboriginal object you must stop work and notify DECCW and you may need to apply for an AHIP. Some works may not be able to resume until you have been granted an AHIP and you follow the conditions of the AHIP. Further investigation may be required depending on the type of Aboriginal object that is found.

If human skeletal remains are found during the activity, you must stop work immediately, secure the area to prevent unauthorised access and contact the NSW Police and DECCW.

The NPW Act requires that, if a person finds an Aboriginal object on land and the object is not already recorded on AHIMS, they are legally bound under s.89A of the NPW Act to notify DECCW as soon as possible of the object's location. This requirement applies to all people and to all situations, including when you are following this code.

If a person finds an Aboriginal object which is not recorded on AHIMS, they should contact DECCW as soon as practicable. Notification procedures can be found at: <http://www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm>

The due diligence process is shown diagrammatically on page 12.



## **What do I do with the results of due diligence?**

Once you have gone through the due diligence process and you want to go ahead with your activity, you have several options including:

1. Proceeding with the activity without an AHIP if you have found no evidence of Aboriginal objects using this due diligence code.
2. Amending the proposed activity to avoid harming Aboriginal objects then proceed without applying for an AHIP.
3. Applying for an AHIP, and if an AHIP is granted, following the AHIP conditions as you proceed with the activity.

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

## **Record keeping**

Under the NPW Act, a person has a defence to any prosecution alleging harm to an Aboriginal object if they show 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.

## **Some 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 cultural heritage is also represented in documents and in the memories, stories and associations of Aboriginal people.

### **DECCW's responsibilities for protecting Aboriginal cultural heritage**

Under the NPW Act DECCW is responsible for protecting Aboriginal objects and Aboriginal places throughout New South Wales.

Specifically, DECCW is responsible for protecting Aboriginal objects and Aboriginal places by assessing the impacts of proposed activities on Aboriginal objects and Aboriginal places and only allowing acceptable impacts to occur. DECCW assesses applications for AHIPs to harm Aboriginal objects and places, and includes conditions in AHIPs to minimise damage to or disturbance of those objects and places. DECCW is also responsible for assessing proposals for Aboriginal places and making recommendations to the Minister to declare Aboriginal places to protect both their tangible and intangible values.

DECCW works closely with Aboriginal communities on conservation works for Aboriginal cultural heritage, such as the protection and restoration of Aboriginal objects such as rock art, middens, burials and scarred trees, and is also involved in the repatriation of Aboriginal human remains.

## What is an Aboriginal object?

This code applies only to Aboriginal objects as defined in the NPW Act (see definition on page 21). Appendix 1 provides some examples and guidance on objects. Examples of Aboriginal objects include, but are not limited to:

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

## Offences for harming Aboriginal objects

Section 86 of the NPW Act sets out a number of offences about 'harm' or desecration to an Aboriginal object. 'Harm' means any act or omission that:

- destroys, defaces or damages the object;
- moves the object from the land on which it had been situated; or
- 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.

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

1. An offence of harming or desecrating an object which a person knows is an Aboriginal object (a 'knowing offence'); and
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 or \$275,000 (depending whether there are aggravating circumstances) and 1 or 2 years goal for an individual. For a corporation the maximum penalty for the knowing offence is \$1.1 million for a corporation. The maximum penalty for the strict liability offence is \$110,000 or \$55,000 (depending whether there are aggravating circumstances) for an individual or \$220,000 for a corporation.

## Defences or exemptions for harming Aboriginal objects

The NPW Act and Regulation provide several defences and exemptions for both types of offence relating to harm to an Aboriginal object. Some of these defences and exemptions are explained in Figure 1. The due diligence defence for the strict liability offence is explained in Figure 2. It is also a defence if a person holds a current AHIP and complies with the conditions of the AHIP.

In addition to the defences in the NPW Act and Regulation the general defence of “honest and reasonable mistake” would also apply to the strict liability offence.

## Definitions

Aboriginal heritage impact permit	a permit issued by the Director-General of DECCW (or their delegate) allowing a person to desecrate or harm an Aboriginal Place or Aboriginal objects.
Aboriginal object (as defined in <i>National Parks and Wildlife Act 1974</i> )	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.
Aboriginal place (as defined in <i>National Parks and Wildlife Act 1974</i> )	<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>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>
Aboriginal scarred tree (as defined in <i>National Parks and Wildlife Regulation</i> )	a tree that has been scarred or carved by an Aboriginal person by the deliberate removal by traditional methods of bark or wood from the tree before or concurrent with (or both) the occupation of the area in which the tree is located by persons of non-Aboriginal extraction.
activity	means a project, development, activity or work (ie this term is used in its ordinary way, and does not just refer to an activity as defined by Part 5 EP&A Act)
disturbed land or land already disturbed by previous activity	Land that has been previously subjected to any activity that has resulted in clear and observable changes to the land's surface. Examples include: soil that has been ploughed; urban development that has occurred; existing rural infrastructure such as dams and fences; existing roads, trails and walking tracks; and other existing infrastructure such as pipelines, transmission lines and stormwater drainage.
due diligence	Taking reasonable and practicable steps to avoid harm and protect Aboriginal objects.
harm an Aboriginal object (as defined in <i>National Parks and Wildlife Act 1974</i> )	<ul style="list-style-type: none"> <li>• destroy, deface, damage an object;</li> <li>• move an object from the land on which it is situated; or</li> <li>• cause or permit an object to be harmed.</li> </ul>
Minister	Minister administering the NPW Act

## Acronyms and abbreviations

AHIMS	Aboriginal Heritage Information Management System (maintained by DECCW's Culture and Heritage Division)
AHIP	Aboriginal Heritage Impact Permit
DECCW	NSW Department of Environment, Climate Change and Water
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NPW Regulation	<i>National Parks and Wildlife Regulation 2009</i>

## Appendix 1

### Examples of Aboriginal objects

**Stone artefacts** are both the finished implement and the debris or by-product of its manufacture. Stone artefacts include stone tools, spear points, and other implements that may have been used in the preparation of food or to make nets, baskets and other tools. These artefacts can be found across the landscape but particularly in sand dunes, rock shelters, caves, on ridges and near watercourses.



Stone Artefacts. Photo by Mark Flanders, Northern CHD, DECCW

**Rock paintings** are of high cultural significance to Aboriginal people. They generally occur in rock overhangs, caves and shelters where, for example, stencils of hands and objects, paintings or drawings of animal/people figures and animal tracks were created using ochre, white pipeclay or charcoal.



Mutawinji hand stencils. Photo by Pat Laughton DECCW



**Shell Middens** are found near the coast and estuaries and near inland lakes and rivers where freshwater shellfish occur. They are the remains of Aboriginal meals and camps. They can vary in size and depth of deposits and contain artefacts such as stone tools. Middens are sometimes associated with burials.



Shell Midden. Photo by Warren Mayers ACHO Northern CHD, DECCW

**Axe grinding grooves** may be found in areas of sandstone and often near water. Axe grinding grooves are the result of rubbing harder rock types on the sandstone to shape and sharpen the tool. This was usually done close to water and results in a series of elongated grooves.



Axe Grinding Stones. Photo by Hilton Naden Northern CHD, DECCW



**Scarred or carved trees** are trees that show the scars caused by the removal of the bark or wood for the making of, for example, canoes, containers, boomerangs and other wooden implements. The shape and size of the scar may indicate the purpose for which the bark or wood was removed from the tree. Carved trees are trees with carved intricate designs often with a ritual significance for Aboriginal people and may be associated with other significant sites such as burial sites or ceremonial sites.



Carrington Scarred Tree. Photo by Warren Mayers ACHO Northern CHD, DECCW

**Quarry sites** are 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 relics such as flaking debris. They can often be associated with other nearby sites and relics.



Daruka Axe Quarry Tamworth. Photo by Bruce Cohen ACHO Northern CHD, DECCW



**Stone arrangements** include large circular or linear arrangements, stone cairns and rock markers. Stone arrangements have significant cultural heritage value because they are usually related to ceremonies, however they are generally rare due to their vulnerability to disturbance. They are often found near water.



Pindara Downs Stone Arrangement. Photo by M Sharp, DECCW

## **Appendix 2: Contact details for DECCW EPRG Regional Offices**

### **Metropolitan**

#### ***Parramatta***

Department of Environment, Climate Change & Water NSW  
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 & Water NSW  
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 & Water NSW  
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 & Water NSW  
Landscape and Aboriginal Heritage Protection Section  
PO Box 733  
Queanbeyan NSW 2620

Phone: (02) 6229 7000

Fax: (02) 6229 7001

A map of DECCW EPRG branch boundaries is provided on the next page.

