

Roads and Traffic Authority

Pacific Highway Upgrade -
Oxley Highway to Kempsey
Aboriginal Heritage Working Paper

September 2010

GHD Pty Ltd
ABN 39 008 488 373
Level 3, GHD Tower
24 Honeysuckle Drive
NEWCASTLE NSW 2300
Phone: +61 2 4979 9999
Fax: +61 2 4979 9988
Email: ntlmail@ghd.com

2. Statutory obligations

2.1 Overview

The Minister for Planning has declared under Section 75C of the *Environmental Planning and Assessment Act 1979* (EP&A Act), by order dated 5 December 2006 published in the NSW Government Gazette (No. 175), that development for the purposes of upgrading segments of the Pacific Highway is a project to which Part 3A of the EP&A Act applies (the 'declared project'). One of the segments is the Oxley Highway to Kempsey upgrade. The Minister has also declared by Order dated 8 December 2006 published in the Gazette (No. 175) that the same development is a critical infrastructure project under Section 75C of the EP&A Act. Copies of the Minister's Orders are included in Appendix C of the *Oxley Highway to Kempsey Upgrading the Pacific Highway Environmental Assessment* (GHD 2010).

The Proposal would, therefore, be assessed under Part 3A of the EP&A Act.

For approved Part 3A projects, Section 75U of the EP&A Act states that a permit under Section 87 or consent under Section 90 of the *National Parks and Wildlife Act 1974* is not required.

2.2 Statutory context

The primary legislation offering protection to Aboriginal heritage in NSW is enacted by the State, whilst several Acts administered by the Commonwealth may also be relevant.

This section provides the statutory context for management and protection of Aboriginal heritage evidence at both a Commonwealth and State level.

2.2.1 NSW legislation

Legislative provisions

The *National Parks and Wildlife Act 1974* (NP&W Act) provides the primary basis for the legal protection and management of Aboriginal heritage sites within NSW. Implementation of the Aboriginal heritage provisions of this Act in relation to development proposals is the responsibility of DECCW.

The rationale behind the Act is to prevent unnecessary or unwarranted destruction of Aboriginal objects and to protect and conserve objects where such action is considered warranted (DECC 2009a and 2009b).

With the exception of some artefacts in collections, the Act generally defines all Aboriginal objects to be the property of the Crown. The Act then provides various controls for the protection, management and destruction of these objects. Section 5(1) of the NP&W Act defines an 'Aboriginal object' as '*any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains*'.

Under the terms of the NP&W Act, it is an offence for a person to:

- Knowingly destroy, damage or deface an Aboriginal object or place, or knowingly cause or permit the destruction, defacement or damage to an Aboriginal object or place, without first obtaining the consent of the Director-General of DECCW.
- Disturb or excavate any land, or cause any land to be disturbed or excavated, for the purpose of discovering an object, without first obtaining the consent of the Director-General of DECCW.
- Collect on any land an object that is the property of the Crown, other than an object under the control of the Australian Museum, without obtaining appropriate authorisation from the Director-General of DECCW.

Consents regarding the use or destruction of Aboriginal objects are managed through the DECCW Aboriginal Heritage Impact Permit system in accordance with the *Guide to Determining and Issuing Aboriginal Heritage Impact Permits* (DECC 2009a). Relevant permits are:

- Section 87 permits to disturb or move an Aboriginal object or disturb land for the purposes of discovering an Aboriginal object.
- Section 90 consents to allow any impacts to (for example to destroy, damage or deface) an Aboriginal object or Aboriginal place.

A research design specifying the aims and methods is an essential component of an Aboriginal Heritage Impact Permit application and therefore requires DECCW approval. The application must also comply with the relevant DECCW Aboriginal consultation policy.

As stated above a permit under Section 87 or consent under Section 90 of the NP&W Act is not required for projects approved by the Department of Planning under Part 3A of the EP&A Act. A permit under Section 87 of the NP&W Act is also not required for the investigation of artefact deposits where the investigation is being undertaken for the purpose of complying with the Director-General's environmental assessment requirements.

The Minister also has substantial powers under Section 12 of the EP&A Act to direct DECCW to carry out works and activities, either generally or in a particular case, in relation to the identification, conservation and protection of, and prevention of damage to, Aboriginal objects and places.

Under Section 30K of the NP&W Act, 'Aboriginal areas' may also be declared over private land, where Aboriginal objects or places are located, with the consent of the owner or occupier. The purpose of reserving land as an 'Aboriginal area' is to identify, protect and conserve areas associated with a person, event or historical theme, or containing a building, place, object, feature or landscape of natural or cultural significance to Aboriginal people, or of importance in improving public understanding of Aboriginal culture and its development and transitions.

Under Section 84 of the NP&W Act, 'Aboriginal places' may be declared by the Minister, by order published in the Gazette, over a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture. Aboriginal places may or may not contain Aboriginal objects.

Under Section 91AA of the NP&W Act, if the Director-General is of the opinion that any action is being, or is about to be carried out that is likely to significantly affect an Aboriginal object or Aboriginal place or any other item of cultural heritage situated on land reserved under the Act, the Director-General may make a stop-work order for a period of 40 days.

Under Section 91 of the NP&W Act, a person who is aware of the location of an Aboriginal object that is the property of the Crown or, not being the property of the Crown, is real property, and does

not, in the prescribed manner, notify the Director-General thereof within a reasonable time after the person first becomes aware of that location is guilty of an offence against this Act unless the person believes on reasonable grounds that the Director-General is aware of the location of that Aboriginal object. The 'prescribed manner' is currently taken to be Site Recording Forms published on the DECCW internet site (DECC 2009b).

Under Section 85A of the NP&W Act, the Director-General may 'dispose' of Aboriginal objects that are the property of the Crown:

- a) *'By returning the Aboriginal objects to an Aboriginal owner or Aboriginal owners entitled to, and willing to accept possession, custody or control of the Aboriginal objects in accordance with Aboriginal tradition, or*
- b) *By otherwise dealing with the Aboriginal objects in accordance with any reasonable directions of an Aboriginal owner or Aboriginal owners referred to in paragraph (a), or*
- c) *If there is or are no such Aboriginal owner or Aboriginal owners - by transferring the Aboriginal objects to a person, or a person of a class, prescribed by the regulations for safekeeping (commonly known as a Care Agreement that is implemented between DECCW and the Aboriginal person or community organisation).'*

Under Section 85A(3) of the NP&W Act, the regulations may make provision as to the manner in which any dispute concerning the entitlement of an Aboriginal owner or Aboriginal owners to possession, custody or control of Aboriginal objects for the purposes of this section is to be resolved.

Relevance to the Proposal

This assessment has identified that the Aboriginal objects protected under the NP&W Act are present in the vicinity of the Proposal.

The Proposal is subject to assessment under Part 3A of the EP&A Act, and should the Minister for Planning approve the Proposal a permit under Section 87 or consent under Section 90 of the NP&W Act is not required.

During the course of the assessment potential archaeological deposits were identified and investigated. In accordance with Section 75U of the EP&A Act a Section 87 permit was not required as the investigations were undertaken to address the Director-General's environmental assessment requirements.

2.2.2 Commonwealth legislation

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, provides for the protection of areas and objects which are of significance to Aboriginal people in accordance with Aboriginal tradition. The Act allows Aboriginals to apply to the Minister to seek protection for significant Aboriginal areas and objects. The Minister has broad powers to make such a declaration should the Minister be satisfied that the area or object is a significant Aboriginal area or object and is under immediate threat of injury or desecration.

Under the Section 5 of the Act:

- Aboriginal tradition means:
'the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships'.

- Significant Aboriginal area refers to:
'An area of land or water in Australia being of 'particular significance to Aboriginals in accordance with Aboriginal tradition'.
- Significant Aboriginal object refers to:
'An object (including Aboriginal remains) of 'particular significance to Aboriginals in accordance with Aboriginal tradition'.
- An area or object is considered to be injured or desecrated if:
 - a) *'in the case of an area, it is used or treated in a manner inconsistent with Aboriginal tradition; or the use or significance of the area in accordance with Aboriginal tradition is adversely affected by reason of anything done in or near the area; or passage through or over, or entry upon the area by any person occurs in a manner inconsistent with Aboriginal tradition'; and*
 - b) *'in the case of an object, it is used or treated in a manner inconsistent with Aboriginal tradition'.*

A new national heritage system commenced on 1 January 2004, largely replacing the previous *Australian Heritage Commission Act 1975*. Its primary features under the amended *Environment Protection and Biodiversity Conservation Act 1999* and the *Australian Heritage Council Act 2003* include:

- A National Heritage List of places of national heritage significance.
- A Commonwealth Heritage List of heritage places owned or managed by the Commonwealth.
- Creation of the Australian Heritage Council – an independent expert body to advise the Minister on the listing and protection of heritage places.
- Continued management of the Register of the National Estate, a list of more than 13,000 heritage places around Australia that has been compiled by the former Australian Heritage Commission since 1976.

Relevance to the Proposal

There are no heritage items or areas listed under Commonwealth legislation in the vicinity of the Proposal.

2.2.3 Local environmental plans

Under the EP&A Act the Minister may make various planning instruments such as local environmental plans. The Minister made the *Hastings Local Environmental Plan 2001* and *Kempsey Local Environmental Plan 1987* under this Act. The Plans set out objectives and controls for the development of land in these local government areas.

Schedule 4 of the *Hastings Local Environmental Plan 2001* lists items of heritage significance and nominates several heritage zones within the Port Macquarie-Hastings local government area, although predominantly these relate to non-Aboriginal heritage and no Aboriginal items are listed that occur within the vicinity of the Proposal.

Schedule 1 of the *Kempsey Local Environmental Plan 1987* lists a number of items that are considered to be of local significance in relation to the heritage of the Kempsey Shire, none of which relate to Aboriginal heritage in the vicinity of the Proposal.

Relevance to the Proposal

As the Proposal has been declared a Part 3A project under the EP&A Act, the heritage provision of both local environmental plans do not apply.

THIS PAGE IS INTENTIONALLY BLANK