

16 December 2021

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**Submission – Warragamba Dam Raising Project (SS1-8441)
Regarding Aboriginal Cultural Heritage Assessment**

1 Introduction

This submission has been prepared by Dr Paul Irish and Fenella Atkinson of Coast History and Heritage Pty Ltd on behalf of Gundungurra Traditional Custodian Kazan Brown in relation to the proposed Warragamba Dam Raising (SSI-8441). Specifically, it relates to the Aboriginal Cultural Heritage Assessment Report (ACHAR) and supporting documents prepared by Niche Environment & Heritage as part of the Environmental Impact Statement (EIS) for the proposal.

2 Summary of main conclusions

We do not support the proposal proceeding on Aboriginal heritage grounds.

Our strong view is that the ACHAR for the Warragamba Dam Raising does not meet the Secretary's Environmental Assessment Requirements (SEARs) and is manifestly inadequate to allow the Minister to make an informed decision about the project in relation to Aboriginal heritage. The ACHAR falls significantly short of both the general and specific desired performance outcomes in the SEARs because:

1. **The level of assessment undertaken is insufficient to define the extent and significance of Aboriginal heritage within the study area or to support the management recommendations.** The key recommendations of the report are to conduct further investigation after approval, but are precisely the actions required to obtain sufficient information on which to base an informed decision about the project on Aboriginal heritage grounds before approval is considered. Specifically,
 - ***The majority of Aboriginal heritage sites within the Project Upstream Inundation Area (PUIA) have not yet been located or recorded.*** A total of 43 archaeological sites and 11 other places of cultural value were recorded during the assessment, and a further 131 archaeological sites are estimated to be present within the PUIA. There is currently no information about the location, nature or significance of these unrecorded sites, and as we detail in this submission, this is likely to be an underestimate of the true number of archaeological sites. Without even this most basic of information, it is not possible to make an informed decision about whether harm to Aboriginal sites (which are not yet even known to exist) should be permitted.

- ***There is insufficient information about even the minority of Aboriginal heritage sites within the PUIA which have been recorded to some degree.*** Further investigations such as archaeological test excavation or detailed rock art recording, which are the minimum appropriate measures to investigate and document these sites for the purpose of impact assessment, have not been undertaken.
 - ***There is minimal consideration of what the actual impacts of inundation on Aboriginal sites will be*** e.g. a detailed review of comparative studies of inundation consequences, or research specific to the project.
 - ***Some elements of the proposal, such as some proposed infrastructure works, were not assessed.*** As the ACHAR states:
 - ‘The impacts of infrastructure does not form part of this document but will be managed through an Aboriginal Cultural Heritage Management Plan (ACHMP). All impacts from infrastructure will be assessed after the project is approved and does not form part of the EIS stage of the assessment.’¹
2. **The assessment does not meet the requirements of the SEARs** because it does not address several key requirements of the guideline documents to which the SEARs refer. This includes:
- key aspects of Aboriginal community consultation such as appropriately addressing the concerns and recommendations of Registered Aboriginal Parties to the project; and
 - critical required information about ‘effective survey coverage’ on which the key conclusions and extrapolations of the report rest.
3. **The assessment neither meets, nor attempts to meet, the Heritage (Key Issue 10) desired performance outcome** to seek ‘*to the greatest extent possible, the long term protection, conservation and management of...Aboriginal objects and places*’. Despite the clear deficiencies of the ACHAR in relation to archaeological assessment, Aboriginal community consultation, significance assessment and recommendations, the report nevertheless concludes that the Aboriginal heritage of the study area has a high degree of significance on all criteria upon which this is evaluated, and that all Aboriginal heritage sites within the PUIA will be impacted by the proposal. It also acknowledges that the majority of Registered Aboriginal Parties who commented on the project unequivocally oppose the proposal on Aboriginal heritage grounds. And yet, the assessment does not contemplate or conclude that the project should not proceed in its current form in order to facilitate ‘*long term protection, conservation and management*’.

¹ Niche 2021a: Appendix 8

3 Author qualifications

Dr Paul Irish is the Director of Coast History and Heritage and is a qualified archaeologist with more than 20 years experience in the investigation and assessment of Aboriginal cultural heritage in New South Wales. He is also a qualified historian who has extensively researched Aboriginal historical places across the greater Sydney region, including within the Burragorang Valley.

Fenella Atkinson is a Senior Heritage Consultant at Coast History and Heritage and is a qualified archaeologist with more than 20 years experience in the investigation and assessment of Aboriginal and non-Aboriginal heritage.

4 Documents referred to

- The ACHAR that was prepared for the Project, and comprises:
 - Niche Environment and Heritage. 2021a. 'Aboriginal cultural heritage assessment report: Warragamba Dam Raising Project, Warragamba NSW'. Report to WaterNSW.²
 - Niche Environment and Heritage. 2021b. 'Archaeological assessment report: Warragamba Dam Raising Project, Warragamba NSW.' Report to WaterNSW.³
 - Waters Consultancy. 2021. 'Warragamba Dam Raising: Aboriginal cultural values assessment report.' Report to Water NSW.
- Secretary's Environmental Assessment Requirements (SEARs) SSI 8441 (in particular Key Issues / Desired Performance Outcomes 3 and 10 as they apply to Aboriginal heritage)
- *Guide to investigating, assessing and reporting on Aboriginal Cultural Heritage in NSW.*⁴
- *Aboriginal Cultural Heritage Consultation requirements for proponents.*⁵
- National Parks and Wildlife Regulation 2019.⁶
- *Code of practice for archaeological investigation of Aboriginal objects in NSW.*⁷
- *The Burra Charter: the Australia ICOMOS Charter for Places of Cultural Significance.*⁸

² Note that Appendices 3-5 and 11 were not included in the documents exhibited as part of the EIS.

³ Note that Annex 1 was not included in the documents exhibited as part of the EIS.

⁴ OEH 2011

⁵ DECCW 2010a

⁶ <https://legislation.nsw.gov.au/view/html/inforce/current/si-2019-0408>

⁷ DECCW 2010b

⁸ Australia ICOMOS 2013

5 Key issues with the Aboriginal Cultural Heritage Assessment Report

In the following sections we outline in more detail the key deficiencies of the ACHAR in relation to

- the SEARs and the associated guidelines to which the SEARs Aboriginal heritage requirements refer;
- the *Burra Charter* which underpins those guidelines and the legislative and policy context of Aboriginal heritage management more broadly;
- obligations that arise under the World Heritage Convention⁹ and its Operational Guidelines¹⁰; and
- implications of the inclusion of part of the affected area on the National Heritage List.

5.1 Aboriginal heritage requirements of the SEARs

The table below summarises the specific SEARs Aboriginal heritage requirements and how these are addressed by this submission. In reviewing the SEARs requirements, we have been mindful of the following overarching desired performance outcomes and general assessment requirements that inform them:

- For the overall assessment of key issues, the desired performance outcome is that:
‘Key issue impacts are assessed objectively and thoroughly to provide confidence that the project will be constructed and operated within acceptable levels of impact.’
- The associated Requirement is that the
‘level of assessment must be commensurate to the degree of impact and sufficient to ensure that the Department and other government agencies are able to understand and assess impacts.’
- Heritage (both Aboriginal and non-Aboriginal) is identified as Key Issue 10, with the desired performance outcome that:
‘The design, construction and operation of the project facilitates, to the greatest extent possible, the long term protection, conservation and management of the heritage significance of items of environmental heritage and Aboriginal objects and places.’

In summary, the Requirements are that the Proponent identifies any direct or indirect impacts to the heritage significance of Aboriginal objects and places, and that consultation with Aboriginal people is undertaken in the event that archaeological investigation or impact to Aboriginal objects and/or places is proposed.

⁹ UNESCO 1972. Convention Concerning the Protection of the World Cultural and Natural Heritage (<http://whc.unesco.org/en/conventiontext/>; accessed 23/11/2021)

¹⁰ UNESCO 2021. The Operational Guidelines for the Implementation of the World Heritage Convention (<https://whc.unesco.org/en/guidelines/>; accessed 23/11/2021).

Requirement	Comment
<p>1. The Proponent must identify and assess any direct and/or indirect impacts (including cumulative impacts) to the heritage significance of:</p> <p>(a) Aboriginal places and objects, as defined under the <i>National Parks and Wildlife Act 1974</i> and in accordance with the principles and methods of assessment identified in the current guidelines;</p>	<p>The EIS does not meet this requirement in our opinion. See Section 5.3 and Section 5.5.</p>
<p>3. Where archaeological investigations of Aboriginal objects are proposed, these must be conducted by a suitably qualified archaeologist, in accordance with section 1.6 of the <i>Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW</i> (DECCW 2010b). Consultation with Aboriginal people must be undertaken prior to investigations. Significance of cultural heritage values for Aboriginal people who have a cultural association with the land must be documented in the EIS.</p>	<p>The EIS does not meet this requirement in our opinion. See Section 5.2, Section 5.3 and Section 5.4.</p>
<p>4. Where impacts to Aboriginal objects and/or places are proposed, consultation must be undertaken with Aboriginal people in accordance with the current guidelines.</p>	<p>The EIS does not meet this requirement in our opinion. See Section 5.2.</p>
<p>6. Where land is declared wilderness under the <i>Wilderness Act 1987</i> or on the World Heritage List as part of the Greater Blue Mountains World Heritage Area (GBMWhA) and lands declared as Wild Rivers under the NPW Act the Proponent:</p> <p>(a) must define the area and extent of impact on such lands;</p> <p>(b) provide evidence that the proposal is consistent with the <i>Wilderness Act 1987</i> and the management principles for wilderness areas;</p> <p>(c) assess impacts on land to be included on the National Heritage List.</p>	<p>The EIS does not meet this requirement in our opinion and does not provide specific requirements in relation to World Heritage or define the 'land to be included on the National Heritage List'. See Section 5.6.</p>

5.2 Aboriginal community consultation

Requirement 3: *Where archaeological investigations of Aboriginal objects are proposed...Consultation with Aboriginal people must be undertaken prior to investigations. Significance of cultural heritage values for Aboriginal people who have a cultural association with the land must be documented in the EIS.*

Requirement 4: *Where impacts to Aboriginal objects and/or places are proposed, consultation must be undertaken with Aboriginal people in accordance with the current guidelines.*

The specified guidelines note that engagement with Aboriginal stakeholders is required for two main reasons¹¹:

- The knowledge and skills of Aboriginal people are required in order to assess the nature and significance of Aboriginal cultural heritage associated with a particular place. Aboriginal people are the primary determinants of the cultural significance of their heritage.
- Aboriginal people have the right to be actively and directly involved in decision-making regarding the management of their cultural heritage, and matters that may affect their heritage.

This has not been achieved based on the documented consultation process. There has been a focus on meeting the procedural requirements of the relevant regulation and guidelines while disregarding overall principles and objectives. In particular:

- Registered Aboriginal Party (RAP) concerns regarding the adequacy of the assessment methodology have not been addressed to their satisfaction. That is, their specialist and expert advice regarding the identification and assessment of the Aboriginal cultural heritage significance and values of the Project area has not been adequately taken into account.
- RAPs have not been provided with sufficient resources to consider the potential Aboriginal heritage impact of the Project, and therefore have not been actively involved in decision making. Particular concerns raised have been the lack of time to consider the draft report, and the lack of information concerning the probable direct, indirect and cumulative impacts of the Project.

These issues show that the assessment does not adequately address the general and specific requirements of the SEARs, in particular that:

‘The level of assessment must be commensurate to the degree of impact and sufficient to ensure that the Department and other government agencies are able to understand and assess impacts.’

‘The Proponent must identify and assess any direct and/or indirect impacts (including cumulative impacts) to the heritage significance of Aboriginal places and objects.’

Early concerns were raised by some of the RAPs in relation to the adequacy of the proposed methodology and the information available to reliably assess the impact of the Project.¹² The following recommendations were made by the RAPs at that stage:

¹¹ DECCW 2010a: iii, 1, 2, 7; OEH 2011: 2

¹² Niche 2021a: Appendix 8

- Survey of the whole of the impact area, rather than a sample.
- Assess all of the elements of the Project, including infrastructure.
- Survey to address the Gundungurra creation story.

It is clear from the comments made following review of the draft ACHAR, that these recommendations were not addressed to the satisfaction of the RAPs.¹³ It is therefore disingenuous to state repeatedly that the methodology was developed ‘in conjunction with’ the RAPs, that it was an ‘agreed methodology’, or that it was developed in accordance with the consultation guidelines.¹⁴

Despite the lack of an agreed methodology, the assessment proceeded and a draft ACHAR was produced. The RAP review of the ACHAR was undertaken in two phases: an initial draft was provided for review in July 2019, and a revised draft was provided in April 2021. The comments provided by the RAPs are included in Appendix 7 of the final ACHAR. The following key comments and recommendations were made:

- The methodology was inadequate to assess the archaeological resource of the study area:
 - The whole of the impact area should have been surveyed.
 - Sub-surface archaeological investigation should have been undertaken.
 - The significance of the archaeological sites should be assessed according to all of the criteria specified in the *Burra Charter* and the *Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW*.¹⁵
 - The scientific significance assessment of the identified archaeological sites did not adequately address the research potential of the sites.
- The methodology was inadequate to assess the cultural values of the study area:
 - There was no consideration of the importance of interconnections between ecological and Aboriginal cultural heritage values of the study area.
 - There was insufficient consideration of the post-colonisation Aboriginal history, as significant in itself and as contributing to an understanding of the tangible and intangible heritage values of the study area.
 - The report did not address the totality of the cultural landscape, instead assessing individual archaeological sites separately.
 - The approach did not adequately understand or evaluate the importance of the Gurangatch and Mirrigan Dreaming/Creation Story because it was considered as a series of 45 places, rather than a cohesive and inseparable whole.
 - According to the survey methodology, all of the 45 identified places associated with the Gurangatch and Mirrigan Dreaming/Creation Story were to be surveyed, but this was not done.

¹³ Niche 2021a: Appendix 7

¹⁴ Niche 2021a Appendix 7

¹⁵ Australia ICOMOS 2013; OEH 2011

- The methodology was inadequate to assess the potential impact of the Project:
 - Not all components of the Project were included.
 - The definition of the impact area was flawed.
 - Insufficient detail was provided to assess the likely direct and indirect effects of the construction and operation of the Project.
 - There was no consideration of options to avoid or minimise Aboriginal heritage impact.
 - The potential for the project to have a disproportionate impact on Aboriginal people was not considered.
- Insufficient time and resources were allowed for RAP review of the ACHAR.
 - There was not enough time for the RAPs to consult within their own organisations and communities.
 - The document was large, complex and difficult to navigate.
 - No culturally-appropriate arrangements were offered to ensure that the report, its contents and the underlying data about Aboriginal sites were made accessible to potentially affected Aboriginal parties.
 - There was a lack of clarity and certainty in the recommendations for further investigation.

In general, the response to these concerns as included in the ACHAR was to:

- Refer back to the methodology and note that it was ‘agreed’ or developed ‘in conjunction with’ the RAPs.
- List the requirements of the SEARs and the relevant guidelines, and assert that these requirements had been met.
- Refer to other sections of the EIS and supporting reports.
- Advise that any further investigation and assessment may be included in the proposed Aboriginal Cultural Heritage Management Plan, which would be developed after approval.

That is, there was little to no engagement with the substance of the comments made by the RAPs. In addition, our understanding is that in many cases, these responses to RAP comments were provided only in the final report, rather than directly to the RAPs as part of an interactive process of discussion. The consultation process therefore did not comply with the objectives and principles of the specified guidelines, and does not fulfil some of the specific requirements. In particular:

- Aboriginal people must have an active role in any Aboriginal cultural heritage planning process.¹⁶
- The ACHAR should include evidence that the input by Aboriginal people has been considered when determining and assessing real or potential harm, developing options and making final recommendations to ensure that outcomes can be met by the proposed activity.¹⁷

¹⁶ DECCW 2010a: 2

¹⁷ OEH 2011: 19

- A reasonable amount of time should be allowed for RAP review of the assessment methodology and draft ACHAR.¹⁸ Consultation should be designed to allow the internal decision-making processes of Aboriginal people to function effectively.¹⁹ The time allowed for comment on the draft ACHAR should reflect the project's size and complexity.²⁰
- Documentation of the consultation must include the proponent's response to the issues raised by the RAPs.²¹
- Provide each RAP with detailed information regarding the activity.²²

5.3 Adequacy of archaeological research

Requirement 1: *The Proponent must identify and assess any direct and/or indirect impacts (including cumulative impacts) to the heritage significance of...Aboriginal places and objects, as defined under the National Parks and Wildlife Act 1974 and in accordance with the principles and methods of assessment identified in the current guidelines.*

Requirement 3: *Where archaeological investigations of Aboriginal objects are proposed, these must be conducted...in accordance with section 1.6 of the Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW (DECCW 2010).*

The ACHAR contains incomplete and insufficient field survey of the impact area, and inadequate investigation of even those sites that were identified prior to or during the assessment. The ACHAR does not meet the general Requirement 3.1 that the '*level of assessment must be commensurate to the degree of impact and sufficient to ensure that the Department and other government agencies are able to understand and assess impacts.*' There have been few projects of the scale and potential Aboriginal cultural heritage impact of the Warragamba Dam Raising in New South Wales in the period since current Aboriginal heritage policies and guidelines were established, yet the assessment opts for the minimal levels of information required by these guidelines, rather than pursuing a scale of assessment appropriate to the scale of the project. Even then, the assessment does not meet key requirements of the relevant guidelines, specifically in relation to the coverage of the field survey, which is the basis for all of the extrapolations and recommendations in the report.

Defining the study area

The complex definition of the study area and focus of impact assessment on the Project Upstream Impact Area [PUIA] has been roundly criticised by RAPs and in submissions to the 2019 Legislative Council Select Committee on the Proposal to Raise the Warragamba Dam Wall. We echo those sentiments, in particular because Requirement 3.1(c) states that assessment of all key issues must '*identify, describe and quantify (if possible) the impacts associated with the issue, including the likelihood and consequence (**including worst case scenario**) of the impact (comprehensive risk assessment), and the cumulative impacts*' [our emphasis in bold]. The sample survey of a small portion

¹⁸ NPW Regulation 2019 clause 60 (6) (b) and (8) (b)

¹⁹ DECCW 2010a: 6

²⁰ DECCW 2010a: 14

²¹ DECCW 2010a: 13, 14

²² NPW Regulation 2019, clause 60 (5) (c)

of the ‘worst case scenario’ upstream landscape for archaeological sites and without any substantial consideration of the intangible cultural values of this area clearly does not address this requirement.

Similarly, the ACHAR does not provide any assessment of potential impacts on either archaeological or intangible cultural values of Aboriginal sites within the downstream study area. It is simply assumed that the project ‘would not result in any negative impacts to Aboriginal cultural heritage downstream of Warragamba Dam’ because inundation levels downstream will not increase, and all Aboriginal sites downstream will have previously been inundated.²³ The archaeological report notes that the data on which this is drawn is largely more than 30 years old and there is no substantiation about if/how even a sample of these sites may have been impacted by the operation of the dam in the intervening years.²⁴ It is also not possible to determine based on the ACHAR whether discharge or overflow from the raised wall may have different (rather than increased) flow patterns that could physically affect downstream Aboriginal sites. Furthermore, few if any of these Aboriginal sites in the downstream study area have had their Aboriginal cultural values recorded. It is therefore not possible to state that the proposal will result in no impact to these values.

Survey Coverage

ACHARs must provide information about the nature of archaeological field survey coverage in relation to the study area, as per Requirement 10 of the DECCW 2010 *Code of practice for archaeological investigation of Aboriginal objects in NSW* (*‘Code of Practice’*). This is to ‘ensure that the survey data provides sufficient evidence for an evaluation of the distribution of objects across the landscape, taking into account archaeological potential. This information is essential to the assessment process and archaeological management recommendations (including any requirement for test excavations) that are derived from the assessment process.’²⁵

This is because walking across an area does not necessarily mean that has been surveyed effectively or completely. For example, if you are looking for stone artefacts on the ground surface (which comprise many of the recorded sites in this project), there is a big difference between walking along an exposed track where the ground is clear, and walking through heavily vegetated bushland, where the ground can’t be seen. Some other types of site such as scarred trees may also be harder to detect in thick vegetation. To calculate the type and number of sites which may remain unseen in areas that have apparently been ‘surveyed’, it is essential to provide sufficient data. It is also an explicit requirement of the *Code of Practice* that survey data is tabulated in a format that evaluates the ‘effective coverage’ of the survey. This is achieved by multiplying the area surveyed by

- The percentage of ground surface visibility (ie the amount of ‘exposures which might reveal artefacts or other archaeological materials’). In other words, a heavily vegetated area has less visibility and therefore a greater chance that Aboriginal objects will be missed; and
- the percentage of exposure (the degree to which exposures of the ground reveal information about the potential for buried artefacts or deposits e.g. through eroded or scoured ground that exposes artefacts).

²³ Niche 2021a: 66; Niche 2021b: 10.

²⁴ Niche 2021b: 10.

²⁵ DECCW 2010b: 18

The ACHAR contains neither of the required tables, nor any calculation of ‘visibility’ or ‘exposure’. This is highly significant because the ACHAR rests its claims of adequate survey coverage on a figure of 33% (464 hectares) of the PUIA being ‘surveyed’. However it is almost certain in dense and rugged terrain like the Burratorang Valley that this raw figure would be significantly reduced if calculations of ‘visibility’ and ‘exposure’ were applied, as the *Code of Practice* requires. A reduction of just 10% visibility from an assumed 100% in the report would reduce the effective survey coverage to less than 30% (29.7%), which is discussed as the minimum benchmark against which the predictive value of the survey is to be measured.²⁶ A modest reduction of 10-20% in either or both visibility and exposure decreases the effective survey coverage further still. And any decrease to effective survey coverage increases the estimated number of as yet unrecorded sites.

It is far more likely (as routinely found in surveys in rugged sandstone country) that either or both the ‘visibility’ and ‘exposure’ measures will be significantly less than 80-90%. Figures of 50% or less are typical for visibility and exposure in heavily vegetated and rugged areas like the PUIA. Even allowing for large margins of error, it is clear that if an effective survey measure is applied to the ACHAR, the predictive value falls below the report’s own measure of adequacy (30%) and both the scale of predicted impacts and the uncertainties around the number and type of as yet unrecorded Aboriginal sites, increases significantly. We note further that this is only a measure of physical/archaeological evidence and does not at all consider intangible heritage, which would further increase the potential impacts from the proposal. The underestimating of Aboriginal sites is not only highly problematic for the ACHAR, but also impacts other aspects of the EIS that rely on this data (see **Section 5.6**).

We note also that the use of a figure of 30% survey coverage is not in accordance with any guideline or requirement, but simply refers to a figure quoted in a 1989 study of Warragamba Dam. The ACHAR contains no discussion of why this should apply to the current proposal, and does not consider the methodologies of previous projects in similar environments in the Sydney region, such as the extensive field surveys within Holsworthy Army Base in 1996 for the proposed second Sydney Airport, in which issues of visibility and survey coverage were carefully discussed.²⁷

Defining the cultural heritage landscape

The guidelines referred to in the SEARs clearly require the ACHAR to consider the broader Aboriginal cultural landscape. The OEH 2011 *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW* specifically notes that:

‘Tangible heritage is situated in a broader cultural landscape, so it needs to be considered within that context and in a holistic manner,’²⁸ and

‘Although the NPW Act refers specifically to Aboriginal objects and places, the investigation requires a broader focus than just the objects or places. It must also uncover knowledge about their context.’²⁹

²⁶ Niche 2021a: 51, 84

²⁷ Navin Officer Heritage Consultants 1997.

²⁸ OEH 2011: 1

²⁹ OEH 2011: 2

The *Burra Charter* and associated practice notes also contain details of how cultural landscapes may be researched and evaluated.³⁰

The ACHAR fails to consider this broader context appropriately, focussing heavily on archaeological information, generally broken down into individual ‘sites’, rather than discussing them in relation to spatial and temporal context, connectivity, cultural values and the natural environment. The Archaeological Report contains only a cursory overview of the considerable and significant Aboriginal historical and cultural context of the Burratorang Valley. It does not reference key published research specific to the valley, and does not appear to have involved any original archival research.³¹ Not only does this limit an appreciation of the broader cultural landscape, it appears to have prevented an early appreciation of the potential archaeological traces of this history, which could have been factored into the methodology of the field survey. Many of these have been specifically discussed in published and easily accessible papers and point to more detailed research by the NSW Department of Environment, Climate Change and Water “Living Places Project” (2002-2005), which considered the historical Aboriginal archaeology of the Burratorang Valley.³² Consequently the ACHAR does not consider the possibility for carved trees (associated with documented burials within the Burratorang Valley) nor the full range of potential archaeological traces of the continuing 19th century use of the valley by Aboriginal people.

The limited investigation of these historical and cultural places only took place at the request of RAPs when it was clear that they had been overlooked. More than a year after the completion of all field survey work, the preparation of the Cultural Values Assessment report documented this history in more detail, but did not involve further field inspection or consultation.³³ These places and values therefore remain underinvestigated.

The ACHAR should be the document that draws together the findings of the Archaeological Report and Cultural Values Assessment to provide a comprehensive consideration of the archaeological sites and other cultural places as part of a broader landscape, allowing an assessment of the potential impact of the project. However it simply reproduces the cursory historical context of the Archaeological Report and largely keeps the findings of the Cultural Values Assessment and the results of the Aboriginal community consultation separate from the archaeological findings, except to count numbers of sites/places. Nowhere in the ACHAR is there a detailed consideration of what Aboriginal community knowledge, anthropological and historical recordings and archaeological evidence could say about how the Burratorang Valley functioned as a cultural landscape prior to the inundation of the valley from the construction of Warragamba Dam, and the enduring Gundungurra connections and reconnections with the area. Such a consideration is essential to provide an appropriate assessment of the significance of the Aboriginal heritage of the study area.

Quantifying impacts

The ACHAR acknowledges that the majority of Aboriginal sites likely to be present within the PUIA are as yet undocumented. As noted above, the effective survey coverage suggests that this may be a

³⁰ <https://australia.icomos.org/publications/burra-charter-practice-notes/> [accessed 22/11/21]

³¹ E.g. Smith 1991, 2016, Goodall 1996.

³² E.g. Irish & Goward 2012; Irish 2011.

³³ Waters Consultancy 2021.

significant underestimation of the number of Aboriginal archaeological sites actually present, not to mention intangible places and values. Either way, the failure to define all (or even a significant majority) of the Aboriginal sites present within the PUIA means that the ACHAR is unable to address Requirement 10.1 to *'identify and assess any direct and/or indirect impacts (including cumulative impacts) to the heritage significance of...Aboriginal places and objects, as defined under the National Parks and Wildlife Act 1974.'* The direct or indirect impacts to unrecorded sites cannot be defined, assessed or subject to any meaningful management decisions, nor can cumulative impacts be assessed.

This is acknowledged in the Aboriginal archaeological report in relation to rock art sites where it is stated that 'the Subject Area sample is not large enough to characterise the rock art of the Burratorang, however a number of general statements are possible with regard to the broader Sydney and Greater Blue Mountains regions'.³⁴ It is unclear why a larger sample was not recorded in order to be able to make more detailed and meaningful comparisons as the basis for significance assessment and management recommendations.

The problems presented by the unrecorded sites are further compounded by the lack of detailed recording of those sites within the PUIA that were located during the field survey (e.g. through detailed recording of art, or archaeological test excavation of potential open campsites and shelter floor deposits). Without this information it is not possible to define the significance of individual sites, assess the possible impacts of inundation, or devise appropriate management strategies.

5.4 Adequacy of Aboriginal heritage significance assessment

Requirement 3: *Where archaeological investigations of Aboriginal objects are proposed...Significance of cultural heritage values for Aboriginal people who have a cultural association with the land must be documented in the EIS.*

The guidelines for the preparation of the ACHAR require that the cultural significance of the Project area be assessed by identifying the values that are present and assessing why they are important.³⁵ There are four values that may be present: social or cultural, historic, scientific, and aesthetic. Significance assessment forms the key component of a heritage assessment, as it allows the potential impact to be understood, and appropriate management measures to be developed. There are a number of important concerns in the significance assessment of the Project area:

- Difficulties in incorporating RAP knowledge and values. As noted above, particular concerns raised by the RAPs were not addressed in depth, there were insufficient resources allowed for full involvement of the RAPs in the assessment process, and knowledge holders were not involved in the cultural values assessment.
- A focus on scientific value, at the expense of cultural, historic, and aesthetic values. The research was focussed on the pre-contact archaeology of the Project area, and was insufficient to address cultural, historic and aesthetic values.

³⁴ Niche 2021b: 95

³⁵ OEH 2011: 7-11

- Inconsistency between assessment of individual places and the assemblage of places as represented by the Project area as a whole. This is particularly evident in the case of the identified archaeological resource: 272 of the 334 identified sites were assessed to be of low scientific significance, whereas the Project area as a whole was assessed to be of high scientific significance.
- Poor integration of the findings of the Cultural Values Assessment and the Archaeological Report. The Cultural Values Assessment acknowledges the '*substantial gap in the cultural values assessment process*' resulting from the lack of RAP involvement.³⁶ As such, the report is rightly cautious in only identifying '*key themes of cultural value within the Study area and the provision of high-level assessments of cultural significance and broad management recommendations*'.³⁷ However the ACHAR takes the six identified themes (two Dreaming tracks/places, living places, cultural places, archaeological sites and waterways) and reproduces these discussions as an assessment of 'cultural values significance' without acknowledging the preliminary nature of these findings;³⁸ without relating them back to the significance assessment framework; and without recognising the overlap between clusters of neighbouring archaeological sites recorded as cultural places, and the individual sites comprising them, which are assessed solely for their archaeological/scientific significance in the ACHAR.

5.5 Appropriateness of recommendations

Requirement 1: *The Proponent must identify and assess any direct and/or indirect impacts (including cumulative impacts) to the heritage significance of...Aboriginal places and objects, as defined under the National Parks and Wildlife Act 1974 and in accordance with the principles and methods of assessment identified in the current guidelines.*

Based on the preceding discussion, it is evident that there is insufficient data in the ACHAR to support a meaningful assessment of direct, indirect or cumulative impact. Notwithstanding access limitations due to bushfire, it is not clear why further research was not undertaken to provide this information, or to defer assessment until that information could be obtained. Understanding the nature of the heritage resource as the basis for appropriate decision making is the bedrock principle of the Burra Charter. The Burra Charter underpins all heritage legislation and policy in Australia, including all of the guideline documents listed in the SEARs, and indeed the SEARs themselves. The absence of this understanding means that it is not yet appropriate to make a decision about the proposal in relation to Aboriginal heritage impacts.

The Aboriginal heritage recommendations are detailed in the ACHAR and summarised in Table 18-27 of the EIS document.³⁹ Of the 17 recommendations made, eight (ACH2, ACH11, ACH12, ACH13, ACH14, ACH15, ACH16 and ACH17) are for actions to better document Aboriginal heritage within the study area. These actions need to be completed partially or fully prior to the formulation of any final Aboriginal heritage impact assessment of the project. In other words, many recommendations read as

³⁶ Waters Consultancy 2021: 18

³⁷ Waters Consultancy 2021: 115

³⁸ Niche 2021a: 62-64

³⁹ SMEC 2021a: 18-70-18-72.

a list of the information this submission has identified as missing from the ACHAR, which is essential to the meaningful assessment of the potential impacts of the Warragamba Dam raising proposal.

5.6 Inconsistency with World Heritage Area and National Heritage assessment requirements

Requirement 6: *Where land is...on the World Heritage List as part of the Greater Blue Mountains World Heritage Area (GBMWHa)...the Proponent...must...assess impacts on land to be included on the National Heritage List.*

World Heritage

The PUIA includes 304 hectares of the Greater Blue Mountains World Heritage Area (GBMWHa) as well as an area of potential addition to the GBMWHa. Although Aboriginal cultural values do not yet form part of the GBMWHa listing, these values were recognised by the Australian and NSW Governments through their inclusion in the 1998 nomination of the Greater Blue Mountains to the World Heritage List, and there continues to be abundant evidence for these cultural values as tangible places and living Aboriginal traditions and practices.⁴⁰ They are also recognised in the 2009 Strategic Plan for the GBMWHa, which also specifically notes the ‘enormous potential for uncovering further significant sites which will contribute to a better understanding of Aboriginal use of the area over many millennia’ and that the ‘area is important to contemporary Aboriginal groups’.⁴¹

The official Statement of Outstanding Universal Value for the GBMWHa specifically outlines the importance of cultural context to the World Heritage property as follows:

*An understanding of the cultural context of the GBMA [Greater Blue Mountains Area] is fundamental to the protection of its integrity. Aboriginal people from six language groups, through ongoing practices that reflect both traditional and contemporary presence, continue to have a custodial relationship with the area. Occupation sites and rock art provide physical evidence of the longevity of the strong Aboriginal cultural connections with the land. The conservation of these associations, together with the elements of the property’s natural beauty, contributes to its integrity.*⁴²

The resulting need for engagement with Aboriginal stakeholders is included within the obligations that arise under Article 4 of the *World Heritage Convention*,⁴³ and its *Operational Guidelines*.⁴⁴

Relevantly, in 2019 the World Heritage Committee recognised that the inundation of areas within GBMWHa are ‘likely to have an impact on the Outstanding Universal Value [. . .] of the Greater Blue Mountains World Heritage Area’.⁴⁵ The World Heritage Committee also urged that the ‘process to

⁴⁰ Mackay 2015

⁴¹ NSW NPWS 2009: 13.

⁴² <https://whc.unesco.org/en/list/917/>

⁴³ UNESCO 1972

⁴⁴ UNESCO 2021

⁴⁵ World Heritage Committee Decision 43 COM 7B.2.4

prepare an Environmental Impact Statement (EIS) for the proposal fully assesses all potential impacts on the OUV of the property and its other values, including Aboriginal cultural heritage'.⁴⁶

The Aboriginal heritage values of the GBMWH are briefly addressed in the ACHAR, which is then used the basis for further statements in the specific World Heritage Assessment Report, and in Chapter 20 of the main EIS document.⁴⁷ The ACHAR provides only a cursory discussion of the potential impacts of the dam raising proposal on the GBMWH. Specifically, although the ACHAR acknowledges the cultural values of the GBMWH within the PUIA as part of its significance assessment,⁴⁸ the impact assessment considers only potential archaeological impacts, noting that: 'the GBMWH and PUIA overlap of land contains 8 known cultural heritage sites comprising 7 open sites containing stone artefacts, and one site with axe grinding grooves.'⁴⁹

The broader shortcomings of the ACHAR in relation to the adequate assessment of Aboriginal heritage impacts then flow through to the World Heritage Assessment Report and EIS Chapter which rely on its findings. In particular, the World Heritage Assessment Report states that the ACHAR was 'undertaken in compliance with relevant NSW guidelines', which is not the case in several key areas as we have outlined above.⁵⁰ That report also assumes that the total number of Aboriginal sites within overlapping portion of the GBMWH is known, and incorrectly equates this with the number of Aboriginal sites recorded in the entire PUIA.⁵¹ This is the basis for the report asserting that the EIS meets the requirements of the GBMWH Strategic Plan in relation to Aboriginal heritage, along with reference to 'mitigation measures to minimise impacts to Aboriginal cultural heritage' in the ACHAR, which consist merely of recording sites before destruction rather than protecting them.⁵² These measures do not meet the objective of the Strategic Plan to 'identify, formally recognise and protect the cultural heritage values of the GBMWH'.⁵³

Despite both the SEARs Requirement 10.1 to 'identify and assess any direct and/or indirect impacts (including cumulative impacts) to the heritage significance of...items listed on the National and World Heritage lists', and the specific request of the World Heritage Committee quoted above, the ACHAR does not 'fully assess' 'all potential impacts' because it does not provide comprehensive identification, adequate investigation or definitive assessment of the Aboriginal sites, objects and cultural heritage which may be affected and which form part of the integrity of the GBMWH's Outstanding Universal Value. Furthermore, the ACHAR does not address any additional requirements or guidelines that relate to the assessment of World Heritage places. This shortcoming is highlighted by the December 2019 submission of Australia ICOMOS to the Legislative Council Select Committee on the Proposal to Raise the Warragamba Dam Wall, which requests on the basis of best heritage practice that the EIS 'should follow the ICOMOS *Guidance on Impact Assessments for Cultural World Heritage Properties*, 2011' and should fully assess 'all potential impact on the OUV [Outstanding Universal

⁴⁶ World Heritage Committee Decision 43 COM 7B.2.4

⁴⁷ SMEC 2021b; SMEC 2021a, Chapter 20.

⁴⁸ Niche 2021a: 63-64

⁴⁹ Niche 2021a: 72

⁵⁰ SMEC 2021b: 76.

⁵¹ SMEC 2021b: 123.

⁵² SMEC 2021b: 123.

⁵³ NPWS 2009: 32.

Value] of the property and its other values, including Aboriginal cultural heritage.⁵⁴ It is almost inconceivable that in assessing heritage impacts within a World Heritage context, the ACHAR and EIS would not use the current best-practice approach of the official Advisory Body to the World Heritage Convention.

In addition, there has been a more-recent matter raised by the World Heritage Committee at its most recent Session in 2021. Noting that much of the GBMWHa was seriously damaged by bushfires in 2019-2020, the World Heritage Committee specifically requested, in relation to the proposed raising of the Warragamba Dam wall that 'the State Party [] thoroughly assess whether raising the wall could exacerbate bushfire impacts on the property'.⁵⁵ However, as noted earlier, the field survey undertaken for the ACHAR has not been repeated in fire-affected areas – not even on a sampling or cross checking basis. Therefore, because the potential effects of fire damage (including effects on visibility as well as potential physical damage or cause of erosion for example), have not been addressed through re-survey, the potential for the project to exacerbate fire impacts has not been addressed. This is a fundamental methodological flaw.

Article 4 of the *World Heritage Convention*⁵⁶, includes an obligation to do all that is possible to identify, protect, and conserve the cultural and natural heritage of a World Heritage property. The failure to address the many concerns and issues outlined above means that the ACHAR is inconsistent with these obligations and therefore does not fulfil a fundamental SEARS requirement.

National Heritage

The ACHAR and consideration of Aboriginal cultural values are also deficient with respect to the National Heritage List and National Heritage values. An area of 304 hectares of the PUIA is already included on the National Heritage List and other areas of the PUIA have been nominated to the National Heritage List and are currently included on the 'Priority Assessment List' and therefore under active assessment by the Australian Heritage Council. This process, which specifically includes assessment of potential Indigenous National Heritage values, is an essential prelude to a key action in the *Australian Heritage Strategy*, namely to 'Progressively review existing World Heritage places that have been listed for natural values only to identify whether the areas may contain internationally significant cultural heritage'.⁵⁷ It is a significant and inappropriate omission that the ACHAR does not specifically address possible National Heritage values in this context. It would also be inappropriate to finalise the EIS itself before the Australian Heritage Council has completed the current Priority Assessment List process and determined whether Indigenous cultural heritage that is within the PUIA has National Heritage value.

Under s324U of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, management of National Heritage must be in accordance with a management plan prepared under s324S of the Act. As a management plan has not yet been prepared for the National Heritage listed Greater Blue Mountains Area, s324U requires that 'the Commonwealth and each Commonwealth agency must take all reasonable steps to ensure that its acts (if any) relating to the place are not

⁵⁴ [Australia ICOMOS 2019. Legislative Council Select Committee on the Proposal to Raise the Warragamba Dam Wall, Interim Report, October 2021, Submission 384](#)

⁵⁵ World Heritage Committee Decision 44 COM 7B.180.5

⁵⁶ UNESCO 1972

⁵⁷ [Australian Heritage Strategy](#), Objective 1, Action 8, 2015: 19

inconsistent with the National Heritage management principles.’ The National Heritage management principles are articulated in Regulation 10.01E of the Environment Protection and Biodiversity Conservation Regulations 2000 – Schedule 5B. These include

2. *The management of National Heritage places should use the best available knowledge, skills and standards for those places, and include ongoing technical and community input to decisions and actions that may have a significant impact on their National Heritage values.*
5. *The management of National Heritage places should make timely and appropriate provision for community involvement, especially by people who:*
 - *have a particular interest in, or associations with, the place, and*
 - *may be affected by the management of the place.*
6. *Indigenous people are the primary source of information on the value of their heritage and the active participation of Indigenous people in identification, assessment and management is integral to the effective protection of Indigenous heritage values.*⁵⁸

Knowing that such Commonwealth assessment of the proposal will be required, the ACHAR should have addressed these requirements. However, as outlined in this submission the ACHAR contains serious shortcomings in relation to comprehensiveness and the respectful and adequate inclusion of Aboriginal community knowledge and views. In this regard, the ACHAR clearly does not meet the National Heritage Management principles, and cannot be considered an adequate assessment in relation to National Heritage issues.

5.7 Inadequacy of the EIS process

The Aboriginal cultural values of the Project area, as identified in the ACHAR, have been collated into six strands:

- Gurrangatch-Mirrigan Dreaming Track
- Buru (Kangaroo) Dreaming Story Places
- Living Places (history of occupation and use)
- Cultural Places (ritual life)
- Archaeological Sites (tangible record of traditional occupation and use)
- Waterways (the Wollondilly, Nattai, Warragamba, and Cocks Rivers and their tributaries).⁵⁹

Notwithstanding the shortcomings that have been identified in the ACHAR process, the results indicate that the Burratorang Valley, within which the Project area is situated, can best be understood as a cultural landscape. This is supported by the RAP comments included in the ACHAR appendices.

⁵⁸ National Heritage Management Principles (<https://www.awe.gov.au/parks-heritage/heritage/about/national/managing-national-heritage-places>, accessed 23/11/2021).

⁵⁹ Niche 2021a: iii; Waters Consultancy 2021: 23

The EIS process, as specified in the SEARs, is inadequate to assess the potential impact on the heritage values of the Burragorang Valley as an Aboriginal cultural landscape. In summary, the SEARs require that the EIS includes assessment of the potential for heritage impact on the following specific items:

- Aboriginal objects and places as defined under the NPW Act 1974

The Burragorang Valley is not an Aboriginal object or place under the NPW Act, although it includes Aboriginal objects. As the development is an SSI, there is no requirement for an Aboriginal Heritage Impact Permit under the NPW Act.

- Aboriginal places of heritage significance, as defined in the Wollondilly Local Environmental Plan 2011

The Burragorang Valley is not an Aboriginal place of heritage significance as defined in the LEP.

- Environmental heritage, as defined under the *Heritage Act 1977*

Environmental heritage means those places, buildings, works, relics, moveable objects, and precincts, of State or local heritage significance. The Burragorang Valley does not comprise buildings, works, relics or moveable objects, although again it does include such items. It is not listed as an item of State heritage significance on the State Heritage Register, as established by the Heritage Act. It is not listed as an item of local heritage significance as defined in the LEP. As the development is an SSI, there is no requirement for an Approval under the Heritage Act.

- Items listed on the National and World Heritage lists

Burragorang Valley extends into the Greater Blue Mountains Area (GBMA), as included in the National Heritage List and inscribed on the World Heritage List. The listing of the GBMA recognises its natural heritage values. Therefore an assessment of impact on the GBMA will not necessarily adequately address the cultural heritage values of that part of the Burragorang Valley that is included.

The cultural associations of the GBMA are recognised in the 'Greater Blue Mountains Area – Additional Values'. However, this is a Nominated Place on the National Heritage List, and is not provided with any statutory recognition or protection.

Concerns with the adequacy of the Aboriginal heritage assessment as completed for the project EIS have been raised by a number of parties. However, the information above indicates a more fundamental flaw, in that the EIS process specified in the SEARs does not allow for an assessment of the potential impact on the Burragorang Valley as a significant Aboriginal area.

6 Conclusions

The ACHAR is manifestly inadequate to support an informed decision about the potential impacts to Aboriginal heritage from the Warragamba Dam Raising proposal. It neither meets the project SEARs, nor key elements of the guidelines to which those SEARs refer. As we have outlined in this submission, the ACHAR is not compliant with key aspects of current guidelines regarding Aboriginal heritage assessment and Aboriginal community consultation.⁶⁰ It also does not respond to requirements that arise from the inclusion of part of the affected area on the World Heritage List and National Heritage List.

Extensive further research (archaeological, historical and anthropological) would need to be undertaken with the respectful and meaningful involvement of Aboriginal people with cultural and historical connections to the area, in order to provide the context in which the potential impacts of the proposal could be meaningfully assessed. This has consistently been called for by the Registered Aboriginal Parties to the project since its inception. The idea of approving impacts to places of Aboriginal cultural heritage before they are even documented goes against a foundational principle of heritage management - that management decisions should be based on an understanding of the place and its significance. Until such time as this principle and Aboriginal community views are respected and meaningfully addressed by the proponent and their consultants, there can be no ethical, moral or procedural justification for approving the proposal on Aboriginal heritage grounds.

Based on our review of the ACHAR and associated documentation we are strongly supportive of Recommendation 11 of the Interim Report, October 2021 from the Legislative Council Select Committee on the Proposal to Raise the Warragamba Dam Wall, namely:

*That the NSW Government not proceed with the Warragamba Dam wall raising project should Registered Aboriginal Parties not give free, prior and informed consent for the project to proceed, as required in advice provided to the NSW Government by the Commonwealth Department of Agriculture, Water and Environment.*⁶¹

As the ACHAR itself notes, additional consultation has occurred with the Registered Aboriginal Parties (RAPs) as part of the ACHAR review and 'it has been clearly communicated by the RAPs that they do not support the Project'.⁶² Those Traditional Custodian views and voices should be respected.

⁶⁰ OEH 2011; DECCW 2010a; DECCW 2010b

⁶¹ [Legislative Council Select Committee on the Proposal to Raise the Warragamba Dam Wall, Interim Report, October 2021](#)

⁶² Niche 2021a: iv

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