

# BLAKE DAWSON WALDRON

L A W Y E R S

Mr David Kitto  
Senior Environmental Planner  
Major Development Assessment  
Department of Infrastructure, Planning and Natural  
Resources  
20 Lee Street  
SYDNEY NSW 2000

## BY COURIER

Dear David

### Cowal Gold Project – Section 96(1A) Application to Modify Condition 3.3(b) of the Development Consent

**Attached** is Barrick's application to modify condition 3.3(b) of the Cowal Gold Project Development Consent (**Application**). Attached to the Application are:

1. Annexure 1 – list of affected land parcels;
2. Annexure 2 – description of modification;
3. Letters of consent from affected landholders;
4. Copies of the NPWS Approvals (Permit 1468, Consent 1467, Permit 1681 and Consent 1680) and the Research Design and Study Plan; and
5. Statement of Reasons published by the Federal Minister for the Environment and Heritage dated 28 July 2003 in relation to an application under s 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (provided by way of background information).

I note that a cheque for the application fee of \$2,500 has already been separately forwarded to you.

If you have any questions in relation to the Application please contact me or Leonie Flynn.

Yours sincerely

  
Mark Brennan

Level 41  
Grosvenor Place  
225 George Street  
Sydney NSW 2000

www.bdw.com

Tel + 61 2 9258 6000  
Fax + 61 2 9258 6999

DX 355 Sydney

Locked Bag N6  
PO Grosvenor Place  
Sydney NSW 2000  
Australia

Partner  
Mark Brennan  
Telephone (02) 9258 6072

Contact  
Leonie Flynn  
Telephone (02) 9258 6896

Our reference  
LKF MPB 1346 2168

13 November 2003

SYDNEY  
MELBOURNE  
BRISBANE  
PERTH  
CANBERRA  
LONDON  
PORT MORESBY  
JAKARTA  
SHANGHAI

112321106

# Application to modify a development consent



Department of  
Infrastructure, Planning  
and Natural Resources

Date received: \_\_\_\_/\_\_\_\_/\_\_\_\_ DA modification no: \_\_\_\_\_

You can use this form to apply to modify a development consent given by the Minister of Infrastructure, Planning and Natural Resources. If the changes you propose mean the development will not be substantially the same as that originally approved, please do not use this form. You will need to submit a new development application.

To complete this form, please place a cross in the boxes ☐ and fill out the white sections as appropriate. **To minimise delay in receiving a decision about your application, please ensure you submit all relevant information to us.** When your application has been assessed, you will receive a notice of determination.

## 1. Details of the applicant

NAME

Mr ☐ Ms ☐ Mrs ☐ Dr ☐ Other ☐

First name

Family name

Company/organisation

ABN

Barrick Australia Limited

75 007 857 598

STREET ADDRESS

Unit/street no.

Street name

Suburb or town

State

Postcode

POSTAL ADDRESS (or mark 'as above')

PO Box 210

Suburb or town

State

Postcode

West Wyalong

NSW

2671

CONTACT DETAILS

Daytime telephone

Fax

Mobile

(02) 6975 4700

(02) 6975 3407

N/A

Email

N/A

## 2. Identify the land

Unit/street no. (or lot no. for Kosciuszko ski resorts)

Street or property name

Suburb, town or locality

Postcode

Local government area

Lot/DP or Lot/Section/DP or Lot/Strata no. <sup>(1) (2)</sup>

Please ensure that you put a slash (/) between lot, section, DP and strata numbers. If you have more than one piece of land, you will need to separate them with a comma eg 123/579, 162/2.

See Appendix 1

(1) Note: You can find the lot, section, DP or strata number on a map of the land or on the title documents for the land, if title was provided after 30 October 1983. If you have documents older than this, you will need to contact Department of Lands for updated details.

(2) Note: If the subject land is located within the Kosciuszko ski resorts area, DP and strata numbers do not apply.

### 3. Details of the original development consent

Describe what the original consent allows

Construction and operation of an open cut gold mine, gold processing plant, a water supply pipeline and borefield and associated facilities.

What is the development application no.?

14/98

What is the date of consent?

25/3/99

What was the original estimated cost of development (including GST)?

\$154,200,000

### 4. Describe the modification you propose to make

Please indicate the type of modification you propose to make by placing a cross in the appropriate box ☐ below.

You need to submit with your application form a full description of the expected impacts of the modifications proposed, including relevant plans, drawings and compliance with relevant controls.

- ☐ A modification to correct a minor error, misdescription or miscalculation

Describe the error, misdescription or miscalculation

(Refer to section 96(1) of the *Environmental Planning and Assessment 1979* (EP&A) Act)

- ☒ A modification that will have minimal environmental impact

Describe the modification and its expected impact

(Refer to section 96(1A) of the EP&A Act)

See Appendix 2

- ☐ Any other modification

Describe the modification and its expected impact

(Refer to section 96(2) of the EP&A Act)

Will the modified development be substantially the same as the development that was originally approved?

- No ☐ ➤ Please submit a new development application.
- Yes ☐ ➤ Please provide evidence that the development will remain substantially the same. (If you need to attach additional pages, please list below the material attached).

See Appendix 2

If your proposal is within Kosciuszko ski resorts area, please attach a copy of the Interim Lease Variation Approval received from the National Parks and Wildlife Service to your application.

## 5. Number of jobs to be created

Please indicate the number of jobs this will create. This should be expressed as a proportion of full time jobs over a full year. (e.g. a person employed full-time for 6 months would equal 0.5 of a full-time equivalent job; six contractors working on and off over 2 weeks equate to 2 people working full-time for 2 weeks, which equals approximately 0.08 of an FTE job.)

Construction jobs (full-time equivalent)

300

Operation jobs (full-time equivalent)

200

## 6. Application fee

For development that involves a building or other work, the fee for your application is based on the estimated cost of the development.

Clause 258 of the Environmental Planning and Assessment Regulation 2000 and the table attached to that clause set out how to calculate the fee for an application for modification of a consent.

If your development needs to be advertised to the public you may also need to include an advertising fee. Clause 258 of the regulations includes details on these fees.

Note: Advertising fees attract GST, all other fees do not. Contact us if you need help to calculate the fee for your application.

Estimated cost of the development

Approx \$280 Million

Total fees lodged

\$2,500

## 7. Signatures

**The owner(s)\* of the land being developed must sign the application.**

If you are not the owner of the land, you must ask the owner(s) of the land to sign the application. If the land is Crown land, an officer of the Department of Infrastructure, Planning and Natural Resources (previously known as Department of Land and Water Conservation) must sign the application.

As the owner(s)\* of the above property, I/we consent to this application:

Signature

See attached letters of consent.

Name

Date

Signature

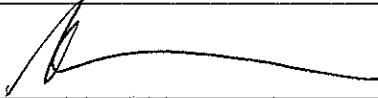
Name

Date

\* Note: For applications within the Kosciuszko ski resorts area, the approval of the lessee rather than owner is required.

**The applicant, or the applicant's agent, must sign the application.**

Signature



Name, if you are not the applicant

Mark Brennan

Date

13/11/03

In what capacity are you signing if you are not the applicant?

Solicitor for Barrick Australia Limited

## 8. Privacy policy

The information you provide in this application will enable us, and any relevant state agency, to assess your application under the *Environmental Planning and Assessment Act 1979* and other applicable state legislation. If the information is not provided, your application may not be accepted. If your application is for designated development or advertised development, it will be available for public inspection and copying during a submission period. Written notification of the application will also be provided to the neighbourhood. You have the right to access and have corrected information provided in your application. Please ensure that the information is accurate and advise us of any changes

## APPENDIX I

### SCHEDULE OF LAND

Part Lot 2 in DP 530299, Part Lot 23 in DP 753097, Part Lot 24 in DP 753097, Part Lot 25 in DP 753097, Lot 45 in DP 753083, Lot 7 in DP 753083, Lot 3 in DP 753083, Part Lot 11 in DP 753083, Part Lot 12 in DP 753083, Lot 4 in DP 753083, Lot 9 in DP 753083, Lot 44 in DP 753083, Lot 10 in DP 753083, Part Lot 38 in DP 39733, Part Lot 37 in DP 39733, Part of Travelling Stock Reserve 17085, Game Reserve 509 Crown Land adjacent to Burcher Road, Lot 18 in DP 753097, Lot 23 in DP 753097, Lot 24 in DP 753097, Lot 44 in DP 42918, Lot 45 in DP 42918, Lot 46 in DP 42918, Lot 47 in DP 42918, and various public roads and Crown Road Reserves.

## Appendix 2

### Cowal Development Consent - Section 96(1A) Application

#### 1. Background

The Minister for Urban Affairs and Planning granted development consent for the construction and operation of an open cut gold mine and associated facilities at Lake Cowal in western New South Wales on 26 February 1999 (**the Development Consent**).

Barrick has made an application to the Minister for Planning under s 96(1A) of the *Environmental Planning and Assessment Act 1979* (NSW) to modify condition 3.3(b) of the Development Consent.

This document sets out the details of the modification which is sought, an assessment of the impacts of the proposed modification and evidence that the development will remain substantially the same.

#### 2. Proposed amendment to condition 3.3(b) of the Development Consent

Condition 3.3 of the Development Consent provides:

##### **3.3 Heritage Assessment and Management**

- (a) The Applicant shall prior to commencement of construction works:
  - (i) prepare a Heritage Management Plan (HMP) to address non-indigenous heritage issues. The HMP shall be prepared in consultation with Bland District Historical Society, BSC and Lake landholders/residents and to the satisfaction of the Director-General;
  - (ii) prepare an Indigenous Archaeology and Cultural Management Plan (IACMP) to identify future salvage, excavation and monitoring of any archaeological sites within the DA area prior to and during development, and to address Aboriginal cultural heritage issues. The IACMP shall be prepared in consultation with NPWS, the Local Aboriginal Land Council, a consultant archaeologist, any other stakeholders identified by NPWS and to the satisfaction of the Director-General;
  - (iii) retain a Cultural Heritage Officer approved by the West Wyalong Local Aboriginal Land Council who is to be available on site during construction earthworks; and
  - (iv) submit to and have approved by the Director-General of NPWS, a Consent to Destroy application under section 90 of the National Parks and Wildlife Act 1974 for Aboriginal archaeological sites that have been identified to be damaged or destroyed as a result of the development prior to consent and/or by the archaeology and cultural management plan.
- (b) In the event that artefacts not previously identified, are identified in the DA area during development through earthworks, construction or operation of the mine, the Applicant shall immediately contact the NPWS and cease work in the relevant location pending investigation and assessment of its heritage value.

Barrick seeks a modification of the Development Consent to delete paragraph (b) of Condition 3.3.

### 3. **Matters to take into account in considering the impact of the requested modification**

In considering the impact of the requested modification, it is important to take into account the:

- legislation governing the management of Aboriginal cultural heritage in New South Wales (Part 6 of the *National Parks and Wildlife Act 1974* (NPW Act)); and
- cultural heritage management regime already established for the Cowal Gold Project by the permits and consents granted by the Director General of the National Parks and Wildlife Service pursuant to Part 6 of the NPW Act in relation to the DA Area (Permits 1468 and 1681 and Consents 1467 and 1681) (the NPWS Approvals).

#### 3.1 **Part 6 of the NPW Act**

Part 6 of the NPW Act regulates the management of Aboriginal cultural heritage objects and places in New South Wales.

It is an offence to disturb or move "Aboriginal objects" as defined in the NPW Act, or to disturb or excavate land for the purpose of discovering an Aboriginal object, without first obtaining a permit under s 87 of the NPW Act (s 86 NPW Act). It is also an offence to knowingly destroy, deface or damage an Aboriginal object without obtaining a consent under s 90 of the NPW Act (s 90 NPW Act). If the Director-General is of the opinion that an action is being, or is about to be carried that is likely to significantly affect an Aboriginal object, the Director-General may issue a stop work order (s 91AA NPW Act). An interim protection order may also be made (s 91A NPW Act).

In addition to the Director-General's powers to take steps to ensure the protection of Aboriginal objects, any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the NPW Act (s 176A NPW Act).

#### 3.2 **NPWS Approvals**

The NPWS Approvals have all been granted subsequent to the issue of the Development Consent.

The NPWS Approvals relate to all Aboriginal objects within the DA Area other than human skeletal remains. They establish a 2 stage system for cultural heritage management:

- Stage One – archaeological works – including conservation of certain sites; salvage of the scarred tree; collection of a representative sample of Aboriginal objects from within known sites; collection of a representative sample of Aboriginal objects from outside the known sites, but within certain archaeological zones; identification and recording of further concentrations of Aboriginal objects within one archaeological zone; excavations; further inspection and collection of Aboriginal objects after soil stripping has occurred; and analysis and recording of collected objects by an archaeologist and then storage of them in a "keeping place" within the DA Area; and



- Stage Two – monitoring - a cultural heritage officer retained by Barrick (and approved by the West Wyalong Local Aboriginal Land Council) must monitor construction earthworks. If an Aboriginal object (other than human skeletal remains) of a type that has not been previously identified during the Stage One archaeological works, is identified, it must be collected and then analysed, recorded and stored as set out in Stage One above. Other Aboriginal objects may be destroyed.

According to the NPWS Approvals, the only cultural heritage discovery that requires work to cease is the discovery of human skeletal remains. The discovery of any other type of Aboriginal object during construction does not have this effect, as the NPWS Approvals allow the object either to be collected or destroyed.

#### 4. Purpose of seeking the modification

Barrick proposes the deletion of condition 3.3(b) on the ground that it is redundant and also inconsistent with the Aboriginal cultural heritage management regime established by the NPWS Approvals.

Condition 3.3(b) is redundant because Part 6 of the NPW Act and the NPWS Approvals contain a comprehensive regime for the management of Aboriginal cultural heritage objects within the DA Area. That regime governs what happens pre-construction and also what is to occur if an artefact is identified during earthworks, construction or operation of the mine.

Condition 3.3(b) is inconsistent with the NPWS Approvals because the effect of the condition is to require work to cease, NPWS to be contacted and the heritage value of the identified Aboriginal object investigated and assessed, notwithstanding that the NPWS Approvals allow the relevant object to be collected or destroyed, depending on the circumstances. If an object is required to be collected pursuant to the NPWS Approvals, it must be analysed and recorded by an archaeologist and then kept in a "keeping place" within the DA Area, pursuant to the conditions of the NPWS Approvals. If the object need not be collected, this is because a representative sample of such objects has already been collected and NPWS considers that the remainder of such objects should be left in situ. In either case, no purpose would be served in stopping work and contacting NPWS.

Part 6 of the NPW Act provides for the enforcement of cultural heritage obligations. In addition to the offence provisions, the Director-General has power to issue stop work orders and interim protection orders. Further, any third party can commence proceedings to remedy a breach of the NPW Act.

The effect of the proposed s 96(1A) modification would be that work would not be required to cease on the discovery of an artefact *unless* this is required by Part 6 of the NPW Act and the NPWS Approvals. In other words, the purpose of the modification is to ensure that the Development Consent is not inconsistent with the comprehensive cultural heritage management regime established by Part 6 of the NPW Act and the NPWS Approvals.

#### 5. Environmental impacts

The proposed modification does not detract from the policy intent of condition 3.3(b), which is to ensure that cultural heritage management measures are taken during earthworks, construction and operation of the mine.

The proposed modification is of minimal environmental impact and will result in development which is substantially the same as that for which consent was originally granted. This is because:

- (a) the modification will not result in any change or expansion to the overall works the subject of the Development Consent; and
- (b) the impact of the approved development on Aboriginal cultural heritage will still be regulated by a management regime during earthworks, construction and operation of the mine. Barrick must comply with the comprehensive cultural heritage management regime contained in Part 6 of the NPW Act and the NPWS Approvals granted by the Director-General of NPWS.

CONSENT

TO: The Secretary  
Department of Planning  
GPO Box 3927  
SYDNEY NSW 2001

RE: Cowal Gold Project – Development Consent (DA 14/98)

Forbes Shire Council, the owner of public roads contained in the Development Consent (DA 14/98) area, grants its consent for Barrick to lodge applications under section 96 of the *Environmental Planning & Assessment Act 1979* (NSW) for modification of condition 3.3(b) of the above development consent.

Paul Bennett

Name

Director, Environmental Services

Position

P Bennett  
FORBES SHIRE COUNCIL

DATE: 29.9.03

CONSENT

TO: The Secretary  
Department of Planning  
GPO Box 3927  
SYDNEY NSW 2001

RE: Cowal Gold Project – Development Consent (DA 14/98)

Bland Shire Council, the owner of public roads contained in the Development Consent (DA 14/98) area, grants its consent for Barrick to lodge applications under section 96 of the *Environmental Planning & Assessment Act 1979* (NSW) for modification of condition 3.3(b) of the above development consent.

FRANK ZAKWICA

.....  
Name

GENERAL MANAGER

.....  
Position

BLAND SHIRE COUNCIL

DATE: 5/9/03



9. SEP. 2003 14:46

BDW SYDNEY 61 02 92586999

NO. 2882 P. 3/3

## CONSENT

TO: The Secretary  
Department of Planning  
GPO Box 3927  
SYDNEY NSW 2001

RE: Cowal Gold Project - Development Consent (DA 14/98)

The State of New South Wales, the owner of the land set out below, grants its consent for Barrick to lodge applications under section 96 of the *Environmental Planning & Assessment Act 1979* (NSW) for modification of condition 3.3(b) of the above development consent.

## Schedule of land:

Lot 23 in DP 753097 (23/753097); Lot 24 in DP 753097 (24/753097); Lot 25 in DP 753097 (25/753097); Lot 37 in DP 39733; Lot 45 in DP 42918; Lot 47 in DP 42918; Lake Cowal Wildlife Management Area (Game Reserve 509); Travelling Stock Reserve 17085; Travelling Stock Reserve 84719; Crown roads.



IAN C NEIST

Name

Manager

Crown Lands NSW

Position

Lands

Department

DATE: 9 September, 2003

## CONSENT

TO: The Secretary  
Department of Planning  
GPO Box 3927  
SYDNEY NSW 2001

RE: Cowal Gold Project - Development Consent (DA 14/98)

I, Ian William Low, the owner of the land comprised in lot 18 in deposited plan 753097, grant my consent for Barrick to lodge applications under section 96 of the *Environmental Planning & Assessment Act 1979* (NSW) for modification of condition 3.3(b) of the above development consent.

I understand that the modification will not change the location of the water supply pipeline to be used for the supply of water to the proposed Cowal Gold Mine. Further, I understand that my mere approval to the lodgment of the applications does not imply that I have considered and am personally in favour of the proposed modifications.



Ian William Low

DATE: 29<sup>th</sup> October 2003

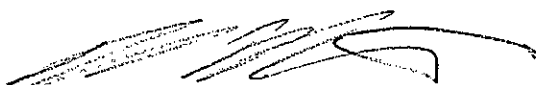
CONSENT

TO: The Secretary  
Department of Planning  
GPO Box 3927  
SYDNEY NSW 2001

RE: Cowal Gold Project – Development Consent (DA 14/98)

I, Brian Edwin Mattiske, the owner of the land comprised in lots 44 and 46 in deposited plan 42918, grant my consent for Barrick to lodge applications under section 96 of the *Environmental Planning & Assessment Act 1979* (NSW) for modification of condition 3.3(b) of the above development consent.

I understand that the modification will not change the location of the water supply pipeline to be used for the supply of water to the proposed Cowal Gold Mine. Further, I understand that my mere approval to the lodgment of the applications does not imply that I have considered and am personally in favour of the proposed modifications.



Brian Edwin Mattiske

DATE: 9 Sept 03.

## Attachment 5

### Cowal Gold Project – Aboriginal Heritage Section 90 Consent & Section 87 Permit Applications Research Design & Study Plan

The following research design / study plan is based on:

- the findings and recommendations of the archaeological surveys and assessments conducted for the Cowal Gold Project since 1995;
- the 1998 recommendations to North Limited made by the West Wyalong Local Aboriginal Land Council and the NSW Aboriginal Land Council; and
- the consultation programme conducted in association with the 2002 Section 90 and Section 87 applications.

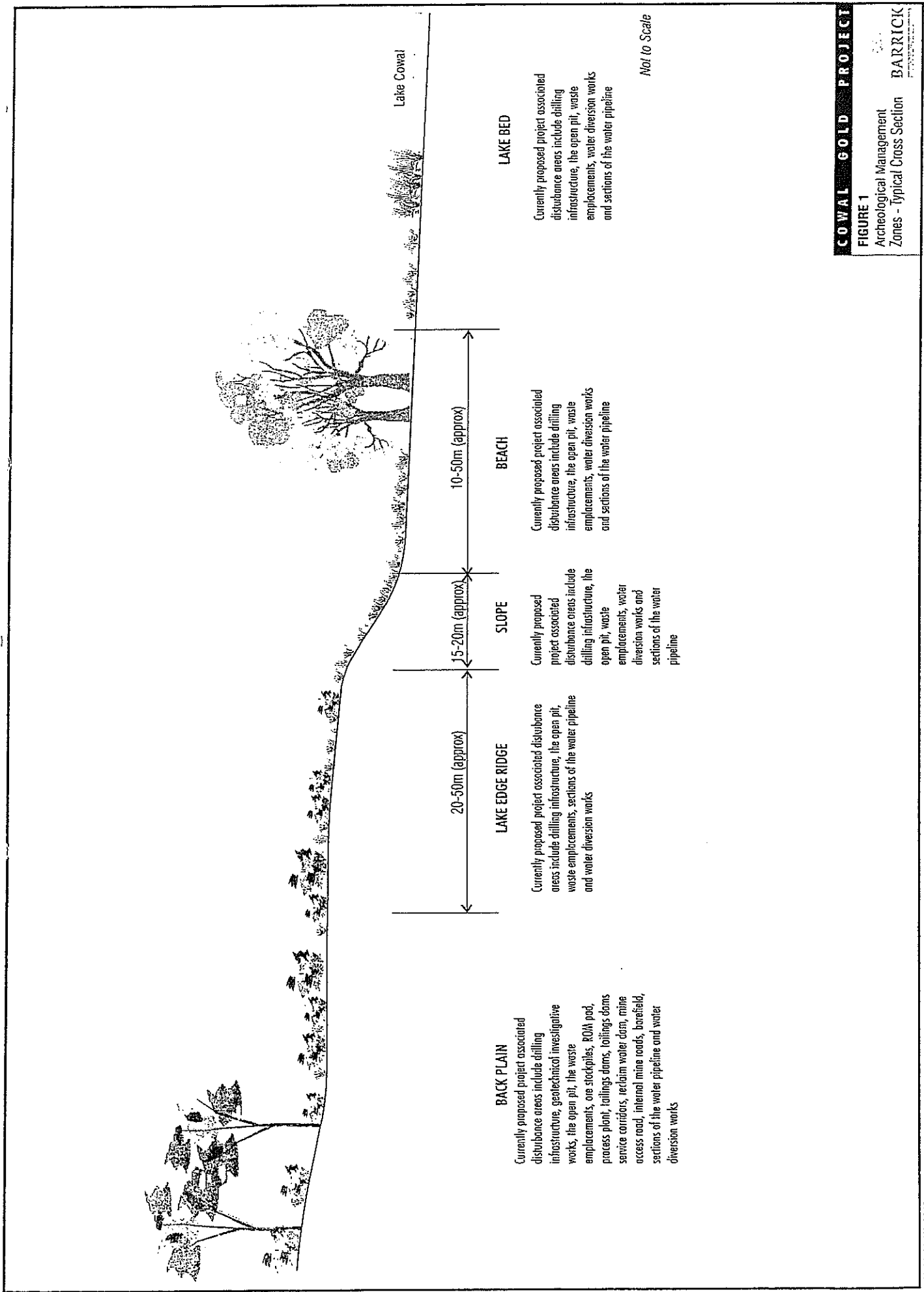
This research design provides for the collection, salvage, excavation, curation and/or replacement of relics from within the Application Area (including the NPWS registered sites) as well as the addition of information to the archaeological database for the Lake Cowal region. The research design includes the following general works:

- collection;
- recording;
- excavation;
- storage in Keeping Places; and
- replacement.

The above general works will be undertaken within zones of management at Lake Cowal (Figure 1). These zones are delineated by their local environment, including soils, potential erosion impact, observed archaeological record and potential for subsurface sites/features/relics. The zones are also practical landform units useful for both management purposes (similar to the Site Designation Units used by NPWS in the western region of NSW) and archaeological investigation. The management zones are as follows:

- Lake bed zone.
- Beach zone.
- Slope zone.
- Lake edge ridge zone.
- Back plain zone.





**COWAL GOLD PROJECT**  
**FIGURE 1**  
 Archeological Management  
 Zones - Typical Cross Section  
**BARRICK**

The location of the NPWS registered sites within the above zones is detailed in the table below.

| Management Zone | NPWS Registered Site (and Site Name)   | Sites Pending NPWS Registration |
|-----------------|--|---------------------------------|
| Lake Bed        | No registered sites occur in this zone   |                                 |
| Beach           | 43-4-8 (P2)  |                                 |
| Slope           | No registered sites occur in this zone   |                                 |
| Lake Edge Ridge | 43-3-21 (LC1)<br>43-3-22 (LC2)<br>43-3-23 (LC3)<br>43-3-24 (LC4)<br>43-4-7 (P1)  |                                 |
| Backplain       | 43-4-20 (A)<br>43-4-21 (B)<br>43-4-22 (C)<br>43-4-23 (D)<br>43-4-24 (E)<br>43-4-25 (F)<br>43-4-26 (G)<br>43-4-27 (H)<br>43-4-28 (I)<br>43-4-29 (J)<br>43-4-30 (K)<br>43-4-31 (L)<br>43-4-32 (M)<br>43-4-33 (N) | LCB9<br>LCB14                   |

#### ***Lake Bed Zone***

There are no known NPWS registered sites within this zone.

No specific management measures are proposed for this zone due to the low likelihood of the occurrence of relics in this zone and the low interpretation potential for relics if relics were to be identified in this zone. If relics were to be located, it is expected that they would have been transported from sites outside this zone (eg through erosion processes). For relics that might be found within this zone, none are expected to be *in situ*. They would have been relocated constantly by water movement within the lake. General archaeological works within this zone include:

- Co-ordination and management of Project works by a Land, Environment and Wiradjuri Heritage Officer and assistance of conduct of Project works by Wiradjuri Heritage Field Assistants. The Land, Environment and Wiradjuri Heritage Officer and/or Wiradjuri Heritage Field Assistant will be a representative of the Wiradjuri Council of Elders (Registered Native Title Claimants). In accordance with the Development Consent, works will stop in the relevant location when Barrick become aware of Aboriginal relics not previously identified during earthworks, construction or operation of the project. Individual relics will be collected. Necessary permits or consents already in place shall be complied with prior to the recommencement of work in the relevant area.

#### ***Beach Zone***

Site P2 is the known NPWS registered site located within this zone. Site P2 is a scarred tree.

Proposed archaeological work at site P2 will be carried out in the following manner:

1. Removal of the scarred section of the tree under supervision of Dr Pardoe or another qualified archaeologist and a Wiradjuri representative.
2. Treatment of the removed section to preserve the scarred section to prevent its deterioration (the tree has suffered from termite damage). Treatment would be undertaken by a suitably qualified curator.

3. Storage within a "Keeping Place" at Lake Cowal.
4. Relocation to a position as close as possible to its original location away from potential harm. When relocated, the scarred tree section would be sheltered to further protect it from weathering and damage.

Additional proposed archaeological work would be conducted on the alluvial fans which occur within the footprints of Project disturbance areas in this zone. Proposed archaeological work would be carried out in the following manner:

1. Dr Pardoe, or another qualified archaeologist, will inspect the land in the beach zone and identify surface relics within the proposed project disturbance areas. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in (eg recording and storage) works.
2. In relation an identified relic, Dr Pardoe or another qualified archaeologist will record its position with a GPS and/or map, measure and describe it, separately bag and label it and store it according to its zone location in a Keeping Place at Lake Cowal.
3. For the purpose of adding to the archaeological and Aboriginal heritage database for the Lake Cowal region, excavation at three separate alluvial fans are proposed.
4. Test excavations will be carried out on the fans in order to determine the integrity of the sediments. If archaeological relics or features were found in these test excavations, then a larger scale excavation would be carried out.
5. An area approximately 10m x 10m at each alluvial fan would be excavated to a depth of 0.3m or the extent of sediment deposition (which would be determined by the supervising archaeologist, but in any event the alluvial fans are not deeper than 0.3m) whichever comes first. Any identified relics would be dealt with in accordance with Step 2.
6. Excavations would be mapped with section diagrams and point-plotting of individual relics and features, if found. Standard excavation procedures would be followed, including sieving of all excavated soils, photographic record, plan and section drawings. Relics would be measured and analyzed.
7. Following the test excavations, and the larger excavations if warranted, the alluvial fans would be scraped with an earth mover in 5cm thick strips in order to verify that no human or dog burials are to be found within the fan deposits.
8. The earth moving of the upper soil layers of the alluvial fans would be monitored by Dr Pardoe, or another qualified archaeologist, and a representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC.

General archaeological works within this zone include:

- Co-ordination and management of Project works by a Land, Environment and Wiradjuri Heritage Officer and assistance of conduct of Project works by Wiradjuri Heritage Field Assistants. The Land, Environment and Wiradjuri Heritage Officer and/or Wiradjuri Heritage Field Assistant will be a representative of the Wiradjuri Council of Elders (Registered Native Title Claimants). In accordance with the Development Consent, works will stop in the relevant location when Barrick become aware of Aboriginal relics not previously identified during earthworks, construction or operation of the project. Individual relics will be collected. Necessary permits or consents already in place shall be complied with prior to the recommencement of work in the relevant area.

### *Slope Zone*

There are no known NPWS registered sites within this zone.

No specific management measures are proposed for this zone due to the low interpretation potential for these relics if relics were to be located in this zone. If relics were located, it is expected that they would have been transported by erosion and bioturbation from sites upslope of this zone. General archaeological works within this zone include:

- Co-ordination and management of Project works by a Land, Environment and Wiradjuri Heritage Officer and assistance of conduct of Project works by Wiradjuri Heritage Field Assistants. The Land, Environment and Wiradjuri Heritage Officer and/or Wiradjuri Heritage Field Assistant will be a representative of the Wiradjuri Council of Elders (Registered Native Title Claimants). In accordance with the Development Consent, works will stop in the relevant location when Barrick become aware of Aboriginal relics not previously identified during earthworks, construction or operation of the project. Individual relics will be collected. Necessary permits or consents already in place shall be complied with prior to the recommencement of work in the relevant area.

### *Lake Edge Ridge Zone*

Sites LC1, LC2, LC3, LC4 and P1 are the NPWS registered sites located within this zone. Sites P1, LC3 and LC4 are artefact scatters. Site LC1 is referred to as a "Men's site". Site LC2 is referred to as a "Base camp".

Proposed archaeological work at sites P1, LC3 and LC4 will be carried out in the following manner:

1. Dr Pardoe, or another qualified archaeologist, will inspect the land in the locations of these sites and identify surface relics. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in (eg recording and storage) works.
2. In relation to an identified relic, Dr Pardoe or another qualified archaeologist will record its position with a GPS and/or map, measure and describe it, separately bag and label it and store it according to its zone location in a Keeping Place at Lake Cowal.
3. These relics will be replaced in a location as close as possible to their original location at a time when works within the specific area do not pose a threat to the relics when they are to be replaced (eg during the rehabilitation programme). A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in replacement works.

Proposed archaeological works at Site LC1 will be carried out in the following manner:

1. Dr Pardoe, or another qualified archaeologist, will inspect the land in the location of this site and identify surface relics. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in (eg recording and storage) works.
2. In relation to identified relics, Dr Pardoe or another qualified archaeologist will record its position with a GPS and/or map, measure and describe it, separately bag and label it and store it according to its zone location in a Keeping Place at Lake Cowal.
3. An open area excavation will also be conducted for this site. The excavation will be sponsored by Barrick and undertaken by representatives of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC with a specialist archaeologist recommended by the Wiradjuri Council of Elders. The purpose of the excavation would be to determine the extent, chronology and function of the site with a view to understanding its purpose in the context of the Lake Cowal region.
4. The extent of the site would be determined by test excavations in some of the less eroded sediments. These are small hillocks less than 50cm in height. Scalds appear throughout the site.
5. The open area excavation would be set up adjacent to one of the scalds and extending away from the minor drainage gully. The excavation would proceed in an area approximately 5m x 10m to a depth of 0.5m or the extent of sediment deposition (which would be determined by the supervising archaeologist, but in any event the relatively less eroded sediments are not deeper than 0.5m) whichever comes first.
6. Excavations would be mapped with section diagrams and point plotting of individual relics and features. Standard excavation procedures would be followed, including sieving of all excavated soils, photographic record, plan and section drawings. Relics would be measured and analyzed.

7. Relics will be kept at the Keeping Place until such time as representatives of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC decide on future storage or rehabilitation.
8. If found, samples of organic material (charcoal or residues on grinding pieces) will be submitted for radiocarbon dating. Other dating techniques will be examined and might be used, however these would not be destructive.

Site LC2 is located close to the proposed location of the currently proposed northern waste emplacement. The predominant strategy for this site will be to avoid damage to this site. Avoidance works will be carried out in the following manner:

1. The area of the main artefact scatter concentration will be fenced and sign-posted. Sign-posting will be general in nature indicating the presence of "cultural materials" and placed so as not to draw attention to key components of the site. Fencing and sign-posting will be carried out by representatives of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC.

Should mine works proceed too close to this site to avoid damage, archaeological works will be carried out as for works outlined for Sites P1, LC3 and LC4 (above).

In addition to the works associated with the lake edge ridge zone NPWS registered sites, further archaeological works will be carried out in the following manner:

1. Dr Pardoe, or another qualified archaeologist, will inspect the land in the lake edge ridge zone and identify surface relics within the proposed project disturbance areas. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in (eg recording and storage) works.
2. In relation to each identified relic, Dr Pardoe or another qualified archaeologist will record its position with a GPS and/or map, measure and describe it, separately bag and label it and store it according to its zone location in a Keeping Place at Lake Cowal.
3. These relics will be replaced in a location as close as possible to their original location at a time when works within the specific area do not pose a threat to the relics when they are to be replaced (eg during the rehabilitation programme). Relic replacement will be supervised by Dr Pardoe, or another qualified archaeologist. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in replacement works.

General archaeological works within this zone include:

- Co-ordination and management of Project works by a Land, Environment and Wiradjuri Heritage Officer and assistance of conduct of Project works by Wiradjuri Heritage Field Assistants. The Land, Environment and Wiradjuri Heritage Officer and/or Wiradjuri Heritage Field Assistant will be a representative of the Wiradjuri Council of Elders (Registered Native Title Claimants). In accordance with the Development Consent, works will stop in the relevant location when Barrick become aware of Aboriginal relics not previously identified during earthworks, construction or operation of the project. Individual relics will be collected. Necessary permits or consents already in place shall be complied with prior to the recommencement of work in the relevant area.
- Collection of relics as described in s87 permit # 1361 'permit to carry out collection and excavate'.

### ***Back-Plain Zone***

Sites A, B, C, D, E, F, G, H, I, J, K, L, M and N are the NPWS registered sites located within this zone. Two sites are currently pending NPWS registration (LCB9 and LCB14). These sites are artefact scatters on a denuded plain. The plain has been subject to widespread erosion, leaving a lag surface of small (pea-sized) gravel. Artefacts are to be found throughout this area at different densities. The registered sites are concentrations of relics that probably relate to the ephemeral water sources of the gilgai depressions. Relics are to be found only rarely dispersed through this region away from the concentrations.

The predominant strategy for sites B, C, D, E, H and N will be to avoid damage to these sites. Avoidance works will be carried out in the following manner:

1. The area of the main artefact scatter concentrations will be fenced and sign-posted. Sign-posting will be general in nature indicating the presence of "cultural materials" and placed so as not to draw attention to key components of the site. Fencing and sign-posting will be carried out by representatives of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC.

Should mine works proceed too close to these sites to avoid damage, archaeological works will be carried out in the following manner:

1. Dr Pardoe, or another qualified archaeologist, will inspect the land in the location of these sites and identify surface relics. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in (eg recording and collection) works.
2. In relation to relics which are representative of each of these sites, Dr Pardoe or another qualified archaeologist will record their position with a GPS and/or map, measure and describe them, separately bag and label them and store them according to their zone location in a Keeping Place at Lake Cowal.
3. These relics will be replaced in a location as close as possible to their original location at a time when works within the specific area do not pose a threat to the relics when they are to be replaced (eg during the rehabilitation programme). Relic replacement will be supervised by Dr Pardoe, or another qualified archaeologist. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in replacement works.
4. Remaining relics will be collected with soil during soil stripping operations and stored temporarily in soil stockpiles before being replaced during rehabilitation activities (ie. when soil is replaced on mine landforms as a component of the revegetation programme).

Proposed archaeological works at sites A, F, G, I, J, K, L and M will be carried out in the following manner:

1. Dr Pardoe, or another qualified archaeologist, will inspect the land in the location of these sites and identify surface relics. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in (eg recording and collection) works.
2. In relation to relics which are representative of each of these sites, Dr Pardoe or another qualified archaeologist will record their position with a GPS and/or map, measure and describe them, separately bag and label them and store them according to their zone location in a Keeping Place at Lake Cowal.
3. These relics will be replaced in a location as close as possible to their original location at a time when works within the specific area do not pose a threat to the relics when they are to be replaced (eg during the rehabilitation programme). Relic replacement will be supervised by Dr Pardoe, or another qualified archaeologist. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in replacement works.
4. Remaining relics will be collected with soil during soil stripping operations and stored temporarily in soil stockpiles before being replaced during rehabilitation activities (ie. when soil is replaced on mine landforms as a component of the revegetation programme).

In addition to the works associated with the back-plain zone NPWS registered sites, further archaeological works will be carried out in the following manner:

1. Dr Pardoe, or another qualified archaeologist, will inspect the land in the back-plain zone and identify all concentrations of surface relics within the proposed project disturbance areas. A representative of the Wiradjuri Council of Elders (the Registered Native Title Claimants) and/or the West Wyalong LALC will be consulted on the programme and will be invited to observe and, where appropriate, participate in (eg recording and storage) works.

2. Artefact densities across this zone will be measured in approximately 15 places. Areas of approximately 10m x 10m will be inspected for relics. This information will provide a better indicator of the nature of the distribution and density of relics (almost exclusively flaked stone pieces) across the landscape.
3. Relics located in this zone are not expected to contribute to the diversity or interpretation values of the Lake Cowal regional archaeology. In relation to each identified concentration of relics, Dr Pardoe or another qualified archaeologist will record its position with a GPS and/or map, measure and describe it. The relics will be left *in situ* to be collected with soil during soil stripping operations and stored temporarily in soil stockpiles before being replaced during rehabilitation activities (ie. when soil is replaced on mine landforms as a component of the revegetation programme).

General archaeological works within this zone include:

- Co-ordination and management of Project works by a Land, Environment and Wiradjuri Heritage Officer and assistance of conduct of Project works by Wiradjuri Heritage Field Assistants. The Land, Environment and Wiradjuri Heritage Officer and/or Wiradjuri Heritage Field Assistant will be a representative of the Wiradjuri Council of Elders (Registered Native Title Claimants). In accordance with the Development Consent, works will stop in the relevant location when Barrick become aware of Aboriginal relics not previously identified during earthworks, construction or operation of the project. Individual relics will be collected. Necessary permits or consents already in place shall be complied with prior to the recommencement of work in the relevant area.

## STATEMENT OF REASONS

1. I, David Kemp, Minister for the Environment and Heritage, provide the following statement of reasons for my decision of 11 June 2003, not to make a declaration under section 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the Act) for protection of a specified area at Lake Cowal, being the Mining Lease Area 45 ('the specified area'). The decision was made in relation to an application dated 17 October 2002, by Mr Neville Williams, that was remitted to me on 30 May 2003 by Justice Wilcox in the Federal Court for further consideration and determination according to law. I made my original decision not to make a declaration in relation to this application on 9 December 2002.

### Legislation

2. Subsection 9(1) of the Act provides:

Where the Minister:

- (a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration; and
- (b) is satisfied:
  - (i) that the area is a significant Aboriginal area; and
  - (ii) that it is under serious and immediate threat of injury or desecration;

he or she may make a declaration in relation to the area.

3. Subsection 3(1) of the Act defines a significant Aboriginal area as:
  - (a) an area of land in Australia or in or beneath Australian waters;
  - (b) an area of water in Australia; or
  - (c) an area of Australian waters;being an area of particular significance to Aboriginals in accordance with Aboriginal tradition. Aboriginal tradition is defined as the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.
4. Under paragraph 3(2)(a) of the Act, an area shall be taken to be injured or desecrated if:
  - (i) it is used or treated in a manner inconsistent with Aboriginal tradition;
  - (ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
  - (iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition.



5. For the purposes of the Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated (subsection 3(3)).

#### **Factual background**

6. Barrick Australia Limited (formerly Homestake Australia Ltd) is developing an open pit gold mine (the Cowal Gold Project) on Mining Lease Area 45 (MLA45) adjacent to and within a section of Lake Cowal, New South Wales.
7. On 20 June 2002, I had considered an application (first application) by Mr Williams under section 9 of the Act for an area of Lake Cowal, specifically Lots 23 and 24 in Deposited Plan 753097 and the Lake Cowal Game Reserve. I declined to make a declaration as, on balance, I was not satisfied that the specified area to which the first application related was a significant Aboriginal area.
8. On 17 October 2002, I received a second application from Mr Williams seeking emergency (section 9) protection over a larger area of land at Lake Cowal than the first application. The specified area comprised MLA45. I again declined to make a declaration as, on balance, I was not satisfied that the specified area to which the second application related was a significant Aboriginal area.
9. Under the provisions of the *Administrative Decisions (Judicial Review) Act 1977*, Mr Williams challenged my decision of 9 December 2002 on the second application on several grounds. The matter was heard by Justice Wilcox on 21 May 2003 and his judgment was handed down on 30 May 2003.
10. Justice Wilcox's conclusion, based on the statement of reasons for my decision, was that I "failed to give proper, genuine and realistic consideration to the significance of the specified area, as distinct from the wider Lake Cowal area". Justice Wilcox set aside my decision not to make a section 9 declaration and remitted Mr Williams' application to me for further consideration and determination according to law. Justice Wilcox said that his finding did not reflect any view about the degree of Aboriginal significance that attaches to the specified area nor whether a declaration under section 9 of the Act should be made.
11. The Lake Cowal area, including the specified area MLA45, has been heavily disturbed for grazing and cropping purposes for many years. Mineral exploration in the Lake Cowal area began in 1981 by North Gold (WA) Limited, (Barrick's predecessor) and culminated in the discovery of gold in 1988. Between 1988 and 1994, 450 drill holes were placed in the specified area by North Gold (WA) Limited. Barrick purchased the Cowal Gold Project in May 2001. The company submitted a Development Application (under the New South Wales *Environmental Planning and Assessment Act*) in 1995 but was refused on

environmental grounds. This led to an Environmental Commission of Inquiry that supported the decision to reject the Development Application, but allowed for re-submission of the application if environmental concerns could be addressed. Following a re-assessment of the project, the preparation of a detailed Environment Impact Statement (EIS) and revised Development Application in 1998, and after a further Commission of Inquiry, the New South Wales Minister for Urban Affairs and Planning granted development consent on 26 February 1999. Barrick Gold of Australia Limited, on 28 June 2002, changed their name to Barrick of Australia and subsequently acquired Homestake.

12. Barrick commenced exploration on the site in 2001. The construction of the Cowal Gold Project cannot proceed until Barrick obtains a mining lease under the New South Wales *Mining Act 1992*. Before a lease can be granted, Barrick must reach agreement with the registered native title claimants, the Wiradjuri Council of Elders, pursuant to the right to negotiate provisions of the *Native Title Act 1993*.
13. Mr Neville Williams sought an interlocutory injunction in the New South Wales Land and Environment Court in January 2002 to prevent Barrick from moving machinery and conducting exploratory drilling on Lot 23 and the Game Reserve. The original request was dismissed but a further request was upheld. A permanent injunction granted on 17 May 2002 was made subject to the opportunity for the mining companies to seek discharge if they obtained a permit pursuant to sections 87 or 90 of the New South Wales *National Parks and Wildlife Act 1974* (State Act). A Permit to Carry out Collection and Excavate under section 87 of the State Act was granted to Dr Colin Pardoe, consultant archaeologist for Barrick, on 23 May 2002. The injunction was consequently lifted. Mr Williams then challenged the validity of the permit and sought an interlocutory injunction to prevent collection. The Land and Environment Court dismissed the claim for interlocutory relief on 3 June 2002 and also a subsequent claim on 6 September 2002. Mr Williams, on 25 November 2002, again sought an interlocutory injunction against Barrick.
14. On 23 November 2002, and again on 27 November 2002, the NSW NPWS issued Barrick a revised section 87 (Permit to Carry out Preliminary Research, Excavate, Salvage and Collect) permit and a new section 90 (Consent to Carry out the Destruction of and Aboriginal Place/Object) permit under the State Act. According to Mr Williams, the reason for the re-issuing of a revised section 87 permit was to correct administrative errors on the original permit(s). Both of these permits cover the specified area, the subject of Mr Williams' application under the Act.
15. On 27 November 2002, Ms Jane Morrison, on behalf of Mr Williams, submitted copies of those permits. According to Mr Williams, Barrick intended to act on the section 90 application on Monday 2 December 2002. Also on 27 November

2002, Mr Williams submitted additional information for inclusion in his application, including a claim of an opalised artefact being highly significant.

16. On 29 November 2002, Mrs Flora Landen submitted a hand written letter in support of Mr Williams' application.
17. On 4 December 2002, Ms Jane Morrison, on behalf of Mr Williams advised my Department that the New South Wales Land and Environment Court recently granted Mr Williams an "...interim injunction to suspend the operations and consents issued by the NSW NPWS. The Company [Barrick], however, is still allowed to collect artefacts under the previous section 87 permit".
18. Mr Williams challenged the decisions to issue the section 87 and section 90 permits in the NSW Land and Environment Court. In a judgment handed down on 19 May 2003, Bignold J dismissed Mr William's application.
19. For the purposes of my reconsideration of Mr Williams' second application, I considered that the serious and immediate threats identified by Mr Williams still existed since collection of artefacts and exploratory drilling were currently being conducted under the provisions of the section 87 and section 90 permits.

#### **The application**

20. On 17 September 2002, Mr Neville Williams telephoned my office indicating that he wished to make a second application under section 9 in relation to Lake Cowal. Following consultation by my Department with Mr Williams and other relevant parties, a consolidated application was received on 17 October 2002. It sought emergency (section 9) protection over a larger area of land (ie MLA45) at Lake Cowal than the first application to prevent:
  - (i) the collection of Aboriginal artefacts; and
  - (ii) the destruction of Aboriginal artefacts by Barrick Gold's exploration drill rigs.

#### **Consultation with NSW Minister as to whether there was effective protection of the specified area under NSW law**

21. On 23 May 2002, the National Parks and Wildlife Service (NPWS) issued a permit (number 1361) under section 87 of the *National Parks and Wildlife Act 1974* (the State Act) to "carry out collection and excavate" to Dr Colin Pardoe, the archaeologist engaged by Barrick. This permit covered collection from 6 May 2002. The specific conditions of the permit require, *inter alia*, all collected relics to be retained in the Barrick Cowal Gold Project compound in a locked, waterproof shed that may only be accessed by the Site Coordinator, the archaeologists, Aboriginal Community representatives and NPWS staff.

22. In accordance with subsection 13(2) of the Act, my Chief of Staff wrote to his counterpart at the office of the NSW Minister for the Environment on 15 October 2002, seeking the State Minister's advice regarding 'effective protection'. On 22 November 2002, I received a response from the State Minister. The State Minister, in his letter, indicated that permit applications had been received under both section 87 and section 90 of the *National Parks and Wildlife Act 1974* and were currently being assessed by his Department.
23. On 23 November 2002, the NPWS issued Barrick with an amended section 87 permit and a new section 90 (Consent to Destroy) permit, both of which cover the specified area.
24. The State Act provides the primary basis for the legal protection and management of Aboriginal sites in New South Wales. On the basis of the information before me, and in light of the issue of permits under section 87 and 90 of the State Act, I was not satisfied that there was effective protection of the area from the claimed threat of injury or desecration under the law of New South Wales, within the meaning of the Act.

**Evidence or material on which my findings were based**

25. In making my decision of 11 June 2003 in relation to application made on 17 December 2002, I considered the following material:
- A Departmental brief (Sub 03/1249) dated 6 June 2003.
  - The original Departmental brief (Sub 02/2536) on the second application.
  - A matrix table, compiled by my Department, of issues relevant to claims of significance.
  - Map of the Lake Cowal Gold project area and the 'specified areas' for the first and second applications.
  - Map of EIS registered Aboriginal sites within the specified area.
  - Map of cleared drill lines.
  - My Statement of Reasons dated 7 August 2002 for my decision of 20 June 2002 regarding Neville Williams' first section 9 application.
  - My Statement of Reasons dated 6 February 2003 for my decision of 9 December 2002 regarding Neville Williams' second section 9 application (which was set aside by Justice Wilcox's decision of 30 May 2003).
  - Facsimile of 30 May 2003 from the Australian Government Solicitor with transcript of the Federal Court's decision under the *Administrative Decisions (Judicial Review) Act 1977* in relation to the matter of *Williams v Minister* held on 21 May 2003.
  - The application from Neville Williams dated 17 October 2002, including covering letter and support letter from the Australian Archaeological Survey Consultants.

- The following supporting documentation annexed by Mr Williams to his application:
  - Annexure 1 – Birth Certificate of Grandfather Tom Coe
  - Annexure 2 – Statement by Neville Williams dated 13 October 2002, including annexure photos A1, A2, B1, B2, C, D and E.
  - Annexure 3 – Affidavit of Neville Williams, affirmed 11 February, for Mooka #2 Native Title claim A6001 of 2002 including Annexure 3A: Letters from Neville Williams dated 24 May 2002, Annexure 3B Letter from Neville Williams dated 5 August 2002 and Annexure 3C: Affidavit from Neville Williams dated 6 June 2002
  - Annexure 4A and 4B – Statements of 15 October 1999 and 9 October 2002 by Mrs Flora Landen (nee Gilbert), Wiradjuri Traditional Owner and Custodian, born on the 'Murie', Condobolin, 24 April 1931.
  - Annexure 5 – Wiradjuri petitions
  - Annexure 6 – Affidavits from Ernest William Wighton, sworn 27 May 2002 (6A), Beryl Hutchings, sworn 27 May 2002 (6B), Valerie Daley, affirmed 18 June 2002 (6C), Mary Ellen Sloan, sworn 27 May 2002 (6D), Pauline Martin, affirmed 18 June 2002 (6E), John Daley, affirmed 18 June 2002 (6F), Letter from Ron Gardiner to North Mines dated 27 September 1999 (6G), Media Release of 27 November 2001 from Condobolin Aboriginal Community (6H) and unsigned statements by Ron Gardner (6I and 6J).
  - Annexure 7A - Summary by Jason Ardler for Director-General of the National Parks and Wildlife Service of Consultations by Sam Wickman for Barrick Gold's s.87 permit to collect and excavate and
  - Annexure 7B – The West Wyalong Local Aboriginal Land Council letter dated 22 October 1998 (unsigned), 7C – Wiradjuri Elders' Council Petition (2 February 2002), 7D 'Lake Cowal and the Wiradjuri People, Have Your Say', article in the *National Indigenous Times*, 24 August 2002, pp 13-14, 7E – Aboriginal Community at Condobolin, Press Release dated 30 November 2002 and 7F Aboriginal Place Nomination.
  - Annexure 8 – My Statement of Reasons for my earlier decision regarding Neville Williams' first section 9 application.
  - Annexure 9 – Map of the Lake Cowal Gold Project (the specified area) and
  - 9A – Affidavit of Eleanor Mary Gilbert, sworn 18 January 2002 and 23 January 2002.
  - Annexure 10 – Letter from Mr Neville Williams to Mr Brian Gilligan, Director-General NP&WS, 3 October 2002, No Consent to destroy artefacts and cultural objects at Lake Cowal, Annexure 10A Affidavit of Mr David Johnston, sworn 13 March 2002, Annexure 10B Article headlined 'Mining halted temporarily', in the Koori mail 3 April 2002, Annexure 10C Photographs describing IMMEDIATE THREAT, Annexure 10D – Affidavit of Wilfred Shawcross, sworn 17 June 2002.

Annexure 11 – Letter from Brian Gilligan, Director-General (NSW NPWS), dated 30 September 2002.

Annexure 12 – Letter from Blake Dawson and Waldron containing (1) Notice Affidavit of Mr Roger Bennetts, sworn 4 October 2002, (2) Affidavit of Roger Bennetts sworn 4 October 2002, (3) Notice of Motion seeking an order that the name of “Homestake Australia Limited” be changed to “Barrick Australia Limited” and (4) Affidavit of William Thomas Oxby sworn 11 October 2002.

Annexure 13A – Affidavit of Mr Neville Williams, sworn 23 September 2002, Annexure 13B - Affidavit of Ms Jane Morrison, sworn 23 September 2002, Annexure 13C – Map of ‘cleared’ drill lines, Annexure 13D – Letter from Dr Pardoe to NP&WS dated 3 October 2002.

Annexure 14 - Affidavit of Mr Neville Williams, sworn 3 October 2002.

Annexure 15 – Affidavit of Mr Wilfred Shawcross, sworn 16 October 2002.

Annexure 16 – Permit to Carry Out Collection and Excavate under the New South Wales *National Parks and Wildlife Service Act, 1974*, issued to Dr Colin Pardoe.

Annexure 17 – Affidavit of Professor John Chappell, sworn 2 May 2002.

Annexure 18 – Affidavit of Neville Williams, sworn 14 March 2002.

Annexure 19 – Affidavit of Neville Williams, sworn 18 January 2002.

Annexure 20A – Cowal Gold Project – Arrangement between Homestake and NSW NPWS dated 24 January 2002, Annexure 20B - Affidavit of Neville Williams, sworn 23 January 2002.

[Annexure 21: Missing]

Annexure 22A – Affidavit of Neville Williams sworn 30 May 2002,

Annexure 22B – Letter to Brian Gilligan, Director General (NSW NPWS) from Neville Williams dated 19 September 2002, Annexure 22C – Letter to

Mr Brian Gilligan Director-General (NSW NPWS) from Neville Williams dated 23 May 2002, Annexure 22D – Letter to Mr Brian Gilligan Director-General (NSW NPWS) from Neville Williams dated 24 May 2002, Annexure 22E - Letter to Colin Pardoe from Michael Wright (National Parks and Wildlife Service) dated 24 May 2002, Annexure 22F - Letter to Vince Fallico (Mineral Resources NSW) from Dave Robson (National Parks and Wildlife Service) dated 14 January 2002.

Annexure 23A – Photos of Police preventing Neville Williams and other Traditional Owners access to the Barrick Gold site, Annexure 23B – Letter to Neville Williams from Blake Dawson Waldron dated 4 September 2002 (I noted that the letter had missing page(s)).

Annexure 24A – Letter to Mr Mark Brennan (Blake Dawson Waldron) from Roger Bennetts (Barrick Gold of Australia) dated 11 July 2002.

Annexure 25 – Affidavit of Neville Williams, sworn 19 April 2002.

Annexure 26 – Extract from Barrick Gold’s Application for s87 and s90 permits at lake Cowal, Annexure 26A – Report by Dr Peter Hiscock “Appraisal of Archaeological Studies at Sandon Point”, August 2002,

Annexure 26D1 – Letter to Mr Brian Gilligan (NPWS) from Neville Williams

dated 18 September 2002, Annexure 26E -Letter to Director General (National Parks and Wildlife Service) from Russell Hetherington (Hetherington Exploration and Mining Title Services Pty. Ltd.) and Annexure 26F – Letter to Mr Obeid (Minister for Mineral Resources and Fisheries) from Neville Williams dated 19 October 2001.

Annexure 27A1 – Letter to Neville Williams from Brian Gilligan dated 21 May 2002, Annexure 27A2 – Letter to Bob Debus (Minister for Environment) from Neville Williams dated 5 August 2002, Annexure 27A3 – Various letters and notes relating to Exploration License 2865, Annexure 27B and 27C– Cowal Gold Project information including Department of Land and Water Conservation licenses.

Annexure 28 – Draft United Nations declaration on the rights of indigenous people dated 26 August 1994.

Annexure 29 – Affidavits of Neville Williams, sworn 19 April 2002, 2 May, 30 May, 21 June, Annexure 29A – National Parks and Wildlife Site Record (Scarred Tree at Lake Cowal), Annexure 29B – *Campsites at Lake Cowal An Archaeological Survey in Central NSW*, report by Scott Cane March 1995, Annexure 29C – Preliminary Archaeological Site Inspection of Lake Cowal by Dave Johnston dated 21 February 2002, Affidavit of David Johnston, sworn 20 March and 2 May 2002, Annexure 29D – Affidavit of Francis Wilfred Shawcross, sworn 16 June 2002.

Annexure 30 – Lake Cowal Preliminary Literature Search Submission to the Australian Heritage Commission by Jane Morrison 23 September 2002.

Annexure 31 – Threatened Animals and Migratory Birds at Lake Cowal, NSW, News Article “Shades of Coronation Hill”, found in the Australian Mining Monthly, June 2002, Annexure 31B – Submission to The Commonwealth Minister for Health via NICAS within the Department of Health and Ageing on the use of Cyanide on Gold Mining by John Wilson, Annexure 31C – News Article “Poisoned Birds Fear Sparks Gold Mine Enquiry” from the Telegraph Mirror dated 27 October 2002, Annexure 31E – Article on the Minimization of the environmental and health hazards of gold production.

- Barrick’s response - submission dated 4 November 2002 which included the following annexures:
  - Annexure 1: Extract from EIS
  - Annexure 2: Extract from transcript of proceedings in the Land and Environment Court
  - Annexure 3: Letter from Russell Dunn dated 5 August 2002.
  - Annexure 4: Amended native title claim by Wiradjuri Council of Elders.
  - Annexure 5: Statutory Declaration of Colin Pardoe dated 3 November 2002.
  - Annexure 6: Statutory Declaration of Johan Kamminga dated 3 November 2002.
  - Annexure 7: Statutory Declaration of Frederick James Allen dated 3 November 2002.

Annexure 8: Statutory Declaration of Johan Kamminga dated 14 October 2002.

Annexure 9: Affidavit of Richard Wright dated 14 October 2002.

Annexure 10: Affidavit of Johan Kamminga dated 15 May 2002.

Annexure 11: Affidavit of Johan Kamminga dated 11 June 2002.

Annexure 12: Statutory Declaration of Roger Bennetts dated 2 November 2002.

Annexure 13: Affidavit of Roger Bennetts dated 4 October 2002.

Annexure 14: Letter from Colin Pardoe to Barrick dated 1 November 2002 (Phase 4 Clearance).

Annexure 15: Extract from Section 90 Application.

Annexure 16: Research and design study plan.

- Mr Williams' response (dated 23 November 2002) to Barrick's comments on his application including Affidavit of Beryl Smith dated 2 October 2002; Gaynor MacDonald report on Wiradjuri affiliation to land in the Lake Cowal area dated 19 August 2002, List of artefact locations and descriptions.
- Additional submission by Jane Morrison, regarding the Section 87 and 90 permits issued to Barrick by NSW NPWS on 23 November 2002.
- Mr Williams' additional submission to the application, dated 27 November 2002, including: a letter to Mr Bob Debus (New South Wales Minister for the Environment) dated 26 November 2002, requesting the Minister to stop the issuing of the both the section 87 and 90 permits to Barrick; a letter from Dr Luke Godwin, on behalf of the Wiradjuri Council of Elder (registered Native Title Claimants), dated 7 November 2002 opposing the Cultural Heritage Management Plan developed by Barrick for the Lake Cowal Gold Project Area enclosed, an undated letter from the Wiradjuri Council of Elders also opposing the Cultural Heritage Plan developed by Barrick; a facsimile from Allan Hutchins, dated 13 November 2002, regarding changes to the section 90 permit conditions including a copy of the *Wiradjuri Heritage Management Plan* developed by Barrick for the Lake Cowal Gold Project area; the NSW NPWS brief dated 26 November summarising consultation and significance including ss 87 (1468) permit and 90 (1467) consent dated 27 November 2002.
- Letter from the NSW Minister dated 18 November 2002, responding to my request about whether there is, under a law of New South Wales, effective protection of the area specified by Mr Williams from the threat of injury or desecration.
- Barrick's response of 2 December 2002 to the additional submissions by Mr Williams and/or people on his behalf.



- An undated hand-written facsimile from Mrs Flora Landen received on 29 November 2002.
- Extract from the Cowal Gold Project, Environmental Impact Statement Volume 4 pp 8-17 locating and identifying registered sites within the Cowal Gold Project Area.

**Consideration of claim that the specified area is a "significant Aboriginal area"**

26. In order to make a protective declaration under section 9 of the Act in relation to the specified area, I had to be satisfied that the area was of particular significance to Aboriginals in accordance with Aboriginal tradition. Aboriginal tradition is defined in the Act as the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships. The question I had to consider was whether I was satisfied that the specified area was of particular significance. I examined each of the claims of significance to see whether they supported the claim that the specified area is of particular significance in Aboriginal tradition. As a number of the claims related to the Lake Cowal area generally it was necessary to examine those claims to determine whether they supported the claim that the specified area is of particular significance.
27. I considered firstly the evidence presented to support the claims that the specified area is a Massacre site.
28. I considered a handwritten statement dated 9 October 2002 by Mrs Landen, a 71 year old Wiradjuri Traditional Owner and Custodian, referring to a massacre site at Lake Cowal. She stated: "I....do not, will not give my permission in any way or form for mining to continue, where our people were poisoned through waterholes, drinking places, peoples that were murdered by the invaders settlers of this country and hid evidence of their dark deeds in bottom of Lake Cowal. Our Ancestors fished, hunted, until they were poisoned with their waterways, FLOUR or just shot down by the early invaders".
29. I noted that this supported a similar claim made by Mrs Valerie Daley in an affidavit sworn on 18 June 2002. In that affidavit, Mrs Daley affirmed, "I have always said Lake Cowal is a sacred site....because I was told by my uncle Bobby Newman who has passed on....there was a big massacre out there and they were killing off the Old People and this is why survivors moved away and they travelled to Condobolin....I have been told and I believe our ancestors' bones are still out there and we do not want them disturbed."

30. I found that Ms Daley and Mrs Landen's affidavits were not specific as to the location of the claimed massacre site other than within Lake Cowal, generally. There is no evidence that these sites were in the specified area.
31. I noted that Mr Williams also attested to a massacre site at Lake Cowal. I considered his statement: "Our story is that many of our people were massacred at Lake Cowal in the 1800's. Our people died where they fell and their bodies were carried away by surviving warriors to secret locations".
32. I found that Mr Williams was also not precise as to the location of the massacre site or the 'secret locations' in relation to the specified area.
33. I reviewed a 1995 report by Scott Cane, an archaeological consultant, entitled *Campsites at Lake Cowal: An Archaeological Survey in Central NSW*. I considered Mr Cane's statement: "It is well known that the Wiradjuri were in a state of virtual warfare with the settlers until about 1840. Records indicate that hostilities in the interior were much greater than publicly known."
34. I also considered advice from my Department (Sub 03/1249) that a preliminary examination of key secondary sources had found no reference to an Aboriginal massacre at Lake Cowal. I took into account, however, my Department's advice in the brief that it is widely acknowledged that not all massacres are likely to have been recorded, and that it is accepted that there are not likely to be physical remains at all massacre sites.
35. I also took account of Barrick's claim in their submission dated 4 November 2002 that, "There is no evidence that the specified area was a massacre site".
36. Furthermore, I took account of the following analysis by the NSW National Parks & Wildlife Service: "The claims of a massacre site in the area also remain unsubstantiated. This appears to have been first mentioned during Native Title negotiations and it is acknowledged that a massacre may have occurred since many such events went unrecorded. However, Lake Cowal is characterised by an intensive land use history and the mark of agricultural implements is notable almost everywhere. It seems unlikely that, if the interment site for the alleged massacre victims remains on Lake Cowal and its surrounds, it has not been previously revealed. As it stands only two burials have been recorded from the Lake Cowal area, one from the Bland Creek some 10 kilometres south of the MLA, and one from Bogeys Island some 13 kilometres north of the MLA. Both were traditional burials."
37. Having carefully considered all these views, I concluded that the NPWS was correct in concluding that claims of a massacre site in the Lake Cowal area, remain unsubstantiated at the present time. I concluded that there is not sufficient evidence to confirm that a massacre occurred in the larger Lake Cowal area or the

specified area. In the absence of more compelling evidence, I could not be satisfied that the specified area had particular significance in Aboriginal tradition on the basis of the claims of a massacre site either within the specified area or in the larger Lake Cowal area.

38. Next I considered the claims about restricted areas. I took account of Mrs Landen's statement that "The Bland or Lake Cowal area was forbidden in some parts, not touched, as sacred sites, on the other parts were used for hunting and breeding grounds for wildlife".
39. I considered Mr Williams' statement that "my grandfather told us we could not allow cattle or sheep to go into certain areas because of the sacredness of the areas....even though we travelled and camped....around Lake Cowal we did not take the sheep or cattle to drink the water of Lake Cowal". Mr Williams implies that the Game Reserve has a special status: 'even though the Game Reserve is next to the travelling stock route, we never used it when we were droving sheep or cattle past Lake Cowal.' I noted that the Game Reserve was within the specified area. I also noted that Mr Williams did not provide any explanation regarding the basis of the "sacredness", for example, why his grandfather would not allow sheep and cattle to be within the Game Reserve or drink from the waters of Lake Cowal.
40. I referred to Scott Cane's report and considered his statement that "the geographic context of Lake Cowal adds to speculation as to its prehistory significance. The lake seems to be strategically placed: in the heart of Wiradjuri country and mid way between the Lachlan and Murrumbidgee Rivers, and an equivalent distance from the foothills of the Blue Mountains and the Great Dividing Range. It is, in geographic terms, the sort of place one would expect to have been the fulcrum of large tribal gatherings, and major ceremonial events - to be rich in oral tradition and ethnographic documentation, possibly battered by historic conflict and dispossession, but definitely littered in archaeological remains and the focus of a number of past archaeological investigations. But this does not seem to be the case.....Preliminary historical searches hint tantalisingly at past associations, but the record is subsequently threadbare". I noted that Mr Cane also referred to research information from the Bland Historical Society (1994) and the Department of Water Resources (1993) stating "the lake was dry 9 times in the past 49 years (between 1946 and 1994) and dry for 26 years in the last 63 years (1930-1993).
41. I considered Mr Williams' claim that Scott Cane's failure to locate artefacts was the result of faulty methodology.
42. I also considered Barrick's statement in their submission dated 4 November 2002 that, "The archaeological evidence does not support the applicant's assertion that the specified area is a sacred, spiritual or religious area and dreaming place".

Barrick's view was based on statements by Dr Pardoe and other archaeologists, Johan Kamminga, Emeritus Professor Wright and Frederick James Allen that:

- (a) Sacred sites or areas (used in the religious sense) would normally have had access restricted to particular people versed in religious knowledge. Other members of the community would not have lived or camped on such land and therefore sacred sites or areas do not show evidence of occupation such as debitage from the making of stone tools".
- (b) The archaeological evidence shows that people lived or camped on the western bank of Lake Cowal, which is inconsistent with this area being a sacred or religious area.

- 43. I noted my Department's advice (Sub 03/1249) that its officers are aware of some instances in northern Australia where camping sites are located immediately adjacent to restricted areas.
- 44. I considered Barrick's statement that the presence of traditional restricted areas within the specified area was not raised as an issue by the Wiradjuri people consulted in the various inquiries and preparation of the Environmental Impact Statement (EIS) for the Lake Cowal project.
- 45. I also considered the NPWS conclusion that the claims made for spiritual significance by supporters of the application "are never specific as to particular affinities nor do they ever relate to a specific area."
- 46. In weighing up these opposing views, I noted that Mrs Landen did not indicate whether the specified area was a "forbidden" area. Dr Cane's remarks speculated about the possible prehistory importance of the Lake Cowal area but concluded that little evidence could be found to substantiate this speculative importance. He did not refer to the specified area. Apart from the reference to the Game Reserve by Mr Williams, there was no information that located traditional restricted areas within the specified area, nor did Mr Williams provide any information that explained the "sacredness" of the Game Reserve in Aboriginal tradition. In the absence of such information, I was not satisfied that the specified area is a restricted area or contains a restricted area. As a result, I was not satisfied that the specified area is of particular significance because of the presence of traditional restricted areas.
- 47. I then looked at the claims of Dreaming Tracks. I noted Mrs Landen's claim that "Lake Cowal is the dreaming tracks of our people who were shot poisoned around that territory, it explains why there are so many relics etc that Barrick mine has dug up from the depth of Lake Cowal." I also noted her statement that "this Lake and waterways are the dreaming of the Rainbow Snake, where he made the creeks and rivers & rested. The dreaming tracks of our people go from Condobolin, Euabalong, Lake Cargelligo, Forbes, Goobang Creek - Condo up along the road to

Parkes crossover to and fro along the Lachlan River from Booberie station to Lake Cowal, West Wyalong – thru Tallimba, Weethalie and back to Condobolin.” Mrs Landen also stated that women gathered at Lake Cowal for women’s business including replenishing food and reeds and grasses for dilly bags and bedding before travelling along the dreaming tracks east to Sydney and to South Australia. She also mentions that a small mountain was used for men’s business, as well as hunting by the lake.

48. I considered Mr Williams’ statement that “The specified area in this application is part of a larger cultural landscape and should not be considered in isolation....Lake Cowal is a Dreaming Place, which connects to other places, such as Manna Mountain, Wamboyne Mountain and the hill now called Porter’s Mount.”

49. I considered also Wilfred Shawcross’ statement that “the importance of Mount Manna was brought home to me as being part of the Aboriginal landscape, of which Lake Cowal formed another, seamlessly connected part.”

50. I noted that the NPWS say that “To the best knowledge of NPWS, social significance via major Dreaming associations in the area centre on Manna Mountain approx. 20 kilometres to the north of Lake Cowal and focus on the Milky Way and other stellar constellations forming linkages to the Lachlan River”.

51. I also noted that Barrick, in their response to the application, quoted from the anthropological report of Dr Macdonald:

I know that they also visit areas of cultural heritage value from time to time and I was myself was taken, with Mrs Agnes Coe and Ms Pauline ‘Biddy’ Coe, to Manna Mountain by Charlie Coe in 1983. Other areas of importance include Sandy Creek, Mount Hope, Yathon, Sandhills and Nine Mile Creek (this is an illustrative and not an exhaustive list).

I have long been aware in a generalised way that the whole of the area of which Lake Cowal is a part is of importance to Wiradjuri people, and in particular the Condobolin people. I first learnt about the area when taken on a visit in 1983 by Mr Charlie Coe of Condobolin, in the company of Mrs Agnes Coe and Ms Pauline Coe of Cowra to the Manna State Forest area to its north. However, it has not until now been the focus of discussions about its significance and I have done no particular study of it.”

52. In coming to my conclusions regarding the relationship of Dreaming Tracks to the specified area, I was again confronted by claims that tended to be at the level of assertion rather than a description in sufficient detail to explain how Aboriginal tradition rendered the specified area significant. I found that the claims by Mrs Landen provided only a broad geographical perspective regarding dreaming tracks

and, apart from the general reference to the Rainbow Snake (discussed below); discussed the utilitarian use of Lake Cowal for food and resource gathering. Her specific reference to a site associated with "men's business" was to a small mountain, clearly not the specified area. Several sources seemed to agree that Mount Manna has some significance but this is about 20 km north of Lake Cowal. I found that the comments made by those supporting a linkage between Mount Manna and Lake Cowal were more in the nature of general assertions rather than providing any detail or explanation of the linkage. The available material does not establish that any Dreaming Tracks passed through the specified area as distinct from the claims made more generally about Dreaming Tracks in the Lake Cowal area.

53. Because of these reasons, I was not satisfied that the specified area was of particular significance because of its relationship to Dreaming Tracks.
54. Next I considered the claims relating to the Rainbow Snake and Bunyip. I took account of Mrs Landen's claim that the "Lake and waterways are the dreaming of the Rainbow Snake, where he made the creeks and rivers and rested.... Our Sacred Lake dream path to Euabalong to Lake Cargelligo, Booberi. Back to Parkes, Orange and further on. (a small map included) further the beginning of the Lachlan River, Murrumbidgee, Murray to South Australia. Rainbow Snake made these waterways and creeks. Bunyip lived in most of them".
55. I noted that Mrs Landen was the only person to make a claim of the presence of the Rainbow Snake and the Bunyip and she was not specific in her statement as to the location of the Rainbow Snake or Bunyip in relation to the specified area. Nevertheless, I recognized that Mrs Landen's claim might have some relevance to a portion of the specified area because my Department advised (Sub 03/1249) that it appears that the Lake, when full, floods the eastern portion of the specified area.
56. In assessing the claims by Mrs Landen, I considered the following issues. I understand that Rainbow Snakes and Bunyips are often associated with waterbodies and watercourses in Aboriginal tradition. For that reason, I considered that it would not be implausible for a similar relationship to exist with Lake Cowal or its associated watercourses. Nonetheless, I am also aware that in other cases, different portions of water systems may be of greater or lesser significance to the Rainbow Serpents/Snakes and Bunyips. It is also the case that the presence of the Rainbow Snake or Bunyip is often well known to all members of the relevant Aboriginal community because special behaviours, such as not entering the water or rituals to ensure safety, are required. In this case, as Mrs Landen was the only person to raise this issue, there did not seem to be the same widespread awareness within the community. The claimed association with the Rainbow Serpent and Bunyips does not seem to have deterred Wiradjuri people from living beside the Lake, as I noted a statement by Beryl Hutchings that "As

the Lake rose and fell, my father's people would build their mai mai (shelters) closer and further as the Lake moved".

57. I also noted that Mrs Landen extends the Rainbow Snake Dreaming to many of the major waterways of the Murray-Darling Basin including the River Murray. This raised the issue for me of whether Lake Cowal has any greater claim to "particular significance" because of the Rainbow Snake Dreaming than these very extensive watercourses and waterbodies. In other cases, I was aware that major geographical features might be associated with creation beliefs, such as a river with the Rainbow Snake, but that special places along the river have specific stories associated with particular actions involving the Rainbow Snake. Such places may be of "particular significance" compared with the significance attached to the whole river. In this case, no story or other explanation has been provided to help me be satisfied that Lake Cowal is of particular significance.
58. I found that there was a lack of evidence indicating wider community awareness of the Rainbow Snake's association with Lake Cowal, and a lack of detail about this cultural belief that might enable me to understand the particular significance of Lake Cowal. Consequently, I was not satisfied that the specified area is of particular significance because of the presence of Rainbow Serpents/Snakes and Bunyips.
59. I then considered a claim by Mrs Flora Landen that "Lake Cowal has a underground river (besides deep salt lakes underground) which will come to the surface with mining and the underground river will be destroyed." I considered that she was not explicit about whether the underground river and salt lakes have particular significance in Aboriginal tradition other than the strong association between Aboriginal people and the natural environment. I noted that she did not connect, for example, the underground river with the Rainbow Snake and Bunyip that she mentioned in her affidavits.
60. As no explanation was given for the significance in Aboriginal tradition of the underground river and salt lakes and since the issue was not raised by anyone else, I concluded that there was not sufficient evidence for me to be satisfied that the specified area is of particular significance because of the claimed presence of an underground river and salt lakes beneath Lake Cowal.
61. I next considered the claims regarding the Lake Cowal Complex or Cultural Landscape. I noted that Wilfred Shawcross and David Johnston, archaeologists who support Mr Williams' application, stated that "Lake Cowal as a whole is very socially significant place for many Wiradjuri people who have traditional affiliations to it." They referred to the "protection of a specified area within the Lake Cowal complex."

62. Several people, including Mr Williams and Mrs Landen, had claimed that the whole of the Lake Cowal area was significant to them. I noted Mr Williams' claim that the specified area was part of a larger cultural landscape and that it should not be considered in isolation as it was connected to other places, such as Manna Mountain, Wamboyne Mountain and Porter's Mount.
63. On the other hand, Dr Colin Pardoe says that Lake Cowal is not a site because there is a discontinuous distribution of artefacts, and is not a site complex because site complexes contain a number of sites or specific areas, that are demonstrably interrelated.
64. My Department had advised me (Sub 03/1249) that, in Aboriginal tradition, there are several different patterns of cultural significance across landscapes, including:
- places where the entire landscape within an area has uniform significance
  - interrelated individual sites of high significance linked by dreaming tracks or song lines within a matrix of lower significance (often referred to as a site complex)
  - interrelated individual sites of high significance within a matrix of lower significance (often referred to as a site complex)
  - individual sites in the landscape that are not interrelated.
65. My Department further advised me (Sub 03/1249) that to determine whether a specified area, claimed to be part of a larger cultural landscape, is a "significant Aboriginal area" for the purposes of the Act, I might need to have sufficient information to distinguish between these patterns. My Department also advised that evidence for Aboriginal occupation and use of a landscape does not necessarily establish that all parts of the landscape reach the threshold required by the Act for "particular significance". The Department cited case law (Kiefel J, page 265, *Norvill v Chapman*; *Tickner v Chapman* (1995) 133 ALR 226) that states the purposes of the Act, pursuant to section 4, are not to apply restrictions and prohibitions upon request, nor is it intended that a declaration be made with respect to any area of some significance, but to those of 'particular' significance.
66. With the limited information available, which seemed to me more in the nature of assertions which are not supported by evidence, I was not able to determine the nature of the traditional associations between locations across the Lake Cowal landscape, which embraces many square kilometres. The assertions of Mrs Landen and Mr Williams did not provide sufficient detail of the traditional beliefs linking Lake Cowal to other locations to sufficiently explain how Aboriginal tradition rendered the area significant. This meant that I was not able to assess the role and significance of the specified area within the claimed "cultural landscape" and I was not convinced of the case for a "cultural landscape". As a result, I was not satisfied that there is a "larger cultural landscape" that is of particular significance or that the specified area acquires particular significance because of its role and significance within a "cultural landscape".



67. Next, I considered whether there were any Aboriginal burial sites. I noted that, despite historical and contemporary speculation about the presence of burials, the NPWS say that "only two burials have been recorded from the Lake Cowal area, one from the Bland Creek some 10 kilometres south of the MLA [ie the specified area], and one from Bogeys Island some 13 kilometres north of the MLA." I noted that no burials have been found within the specified area.
68. I considered comments by Dr Pardoe as to why burials would have been less likely to occur on the western side of Lake Cowal and why the extensive past disturbance to the mining lease area, such as the ripping of rabbit burrows, should have exposed any human remains.
69. I noted that the NSW section 87 and section 90 permits do not allow the collection or destruction of human remains.
70. Given that no burials have yet been found within the specified area despite significant ground disturbance, and there does not seem to be persuasive traditional or historical evidence for the likelihood of burials in the specified area, I was not satisfied that the specified area is of particular significance because of Aboriginal burials.
71. Next, I considered the evidence for ceremonial areas. I noted that Mr Williams said that: "During our very restricted inspections of Lots 23, 24 and the Game Reserve and travelling stock routes we have uncovered evidence of ceremonial activity in the specified area. We have found:
- A – Hand-held smoothed red ochre used in Wiradjuri Law ceremony
  - B – Small quartz crystal, very smoothed at one end, used traditionally
  - C – Hand-held grinding stone, similar ones are known to have been used with a larger bottom stone to grind quandong kernels for oil, which is used for oiling the hair. Another use is for grinding ochre, used in ceremony.
  - D – Pink and yellow chert spearpoint traditionally.
  - E – Traditionally used knife."
72. I noted the refutation by Drs Pardoe, Kamminga and Allen (statutory declarations dated 3 November 2002) of these claims by Mr Williams and the archaeologists advising him (see discussion of Aboriginal stone artefacts below).
73. I noted the statement by the NPWS that:  
 To support his claims of high social significance Mr Williams asserts that the high number of scarred trees and the finding of a quartz crystal and ochre pieces is strong evidence of the ceremonial use of Lake Cowal. However this is selective use of information that is unfortunately not strictly balanced. Firstly, scarred trees are by far the most common site type in the Western Directorate and more correctly point to the removal of bark objects for utilitarian purposes, ie bowls, shelter, shields etc rather than ceremonial

functions. Secondly, there is considerable doubt about the cultural authenticity of the majority of the scarred trees in the area. Most professional observers believe the scars to have originated from either branch falls or by cockatoo chewing, but Mr Williams denies these causal agents. Only one scar is validated and a second is subject to argument by Mr Williams' archaeologist.

Quartz crystals, similar to the one found by Mr Williams, are ethnographically recorded as being used by Aboriginal people. However, their use was principally by clever men as an aid to healing ailments rather than specifically for communal ceremonial functions. People likewise carried small parcels of red ochre and, while ochre was used in ceremonial contexts, it was also used to simply decorate articles and smear on the body for beautification purposes before being discarded when too small. Even allowing importation into the area by Aboriginal means there is no guarantee that either was used for ceremonial purposes. In fact the quartz could equally have reached the area by natural means through flood deposition into the lake where the Lachlan River floodway bisects the mountain range to the west. Red ochre is conservatively estimated to occur in about 10 to 15% of all open sites.

74. I preferred the evidence and contentions put forward by Barrick's archaeologists and by the NPWS regarding the nature and use of the artefacts said to be found within the specified area. I was not convinced that the artefacts indicated the presence of ceremonial areas within the specified area. As a result, I was not satisfied that the specified area was of particular significance due to the claimed traditional use for ceremonial purposes, despite the presence of the stone artefacts, ochre and trees with marks or scars (discussed further below).
75. Next, I considered the evidence relating to scarred or carved trees. Mr Shawcross said that he had located what he believed to be a Canoe Tree on the Game Reserve within the specified area although, in a later affidavit, he stated, "From the evidence of my measurements I conclude that this was not a 'canoe tree' because it is neither the right size nor proportion for a watercraft. I conclude that the scar may have a symbolic or ceremonial purpose".
76. Mr Shawcross's opinion that the tree is a scarred tree was disputed by Dr Pardoe, with the support of other archaeologists, who suggested that the scar was not humanly made because:
  - "(1) the scar is asymmetrical and irregular;
  - (2) there is breakage of the trunk and regrowth immediately above the scar;
  - (3) there is a burnt area at the base of the scar;
  - (4) there is no evidence of axe marks;
  - (5) the scar is on an inside bend of the tree, which would render it the wrong curvature for a canoe or coolamon".

77. I noted that Mr Williams identified three different categories of "modified trees": carved trees, scarred trees and marked trees. I also noted that he described carved trees as "living spiritual symbols in Wiradjuri culture....very sacred and are equivalent to the 'tjuringas' of the Central Desert people".
78. I noted that Barrick (submission dated 4 November 2002) disputed that Mr Williams had provided any evidence of such trees remaining in the specified area or any expert evidence of the significance of such trees.
79. Ms Jane Morrison had undertaken a preliminary literature survey and had provided, in support of Mr Williams' application, a summary of the historical evidence for the presence of carved trees. She referred to one of two burial trees from Lake Cowal Station 1912-13 marking the position of a grave north-west of Marsdens, and one on Bland Creek cut down in 1932, with others being present in the region. The locations of these trees are on the southern and south-eastern sides of Lake Cowal, and not within or near the specified area.
80. Ms Morrison also quoted William J English writing in *Around the Cowal* in the 1970s as saying of the situation when the first settlers arrived at Lake Cowal "many of the aged, dead gum trees along the western banks of the lake showed extensive carvings on their trunks."
81. Although there was this generic comment supporting the presence of carved trees along the western banks of Lake Cowal, apparently made many years after the event, none of the historically identified carved trees of known location come from the specified area.
82. Mr Williams appeared to agree that some trees other than the carved trees may be scarred for "more prosaic purposes, for coolamons, canoes etc". I also noted that Mr Williams, Barrick and NPWS all appeared to agree that there is a scarred tree of this kind within the specified area that has been registered as NPWS site 43-4-8 (also noted as P2 in various reports). As part of Barrick's section 90 Consent to Destroy permit application under the State Act, they stated that a "Section of the scarred tree [is] to be removed, conserved and stored or displayed at an onsite 'Keeping Place'".
83. Mr Williams also referred to marked trees which he described as trees that "are not carved, but sections of their bark have been removed as 'markers' interconnected with sacredness. The depth of the surrounding bark can be an indicator of the age of the scar and that it has been kept 'open' for a long period of time". Mr Williams referred to the tree disputed by Mr Shawcross and Dr Pardoe as "the marked tree with a long scar".
84. In evaluating this material, I considered that, under the Act, archaeological objects are relevant to particular significance only if they are important to living

Aboriginal people in accordance with their tradition. A scarred tree originally created for a utilitarian purpose such as the creation of a canoe or a coolamon would not traditionally have been accorded ritual or spiritual significance. A carved tree created originally for ceremonial purposes might be expected to have higher significance.

85. I noted that Mr Williams appeared to accept that there might be degrees of significance associated with different kinds of modified trees.
86. It appeared to me that all parties agreed that no "carved trees" were to be found within the specified area. I found that there is no historical evidence to establish that carved trees definitely occurred within the specified area, although it remains possible that such trees may once have occurred there.
87. On the question of "marked" as distinct from "carved" trees, I was faced with Barrick's submission that any scars on trees within the specified area, other than the one registered tree, were not humanly made, while Mr Williams claimed that they were marked by Aboriginal people. Given the conflicting evidence, I was not satisfied that "marked trees" existed within the specified area. I was not satisfied that the presence of the single scarred tree registered by NPWS within the specified area was sufficient for me to be satisfied that the specified area was an area of particular significance.
88. I then considered the claims relating to Aboriginal stone artefacts. I found that there was no dispute that Aboriginal stone artefacts occur within the specified area. The location and nature of the artefacts identified during the EIS process between 1995 and 1998 were documented in Volume 4 of the EIS report. One of these sites (site LC1) was thought to be a men's activity area. I noted that it was proposed in the EIS that the site be excavated by the Local and Regional Land Councils to determine the chronology and function of the site.
89. There was considerable dispute between Mr Williams and Barrick about the significance of the artefacts, including those artefacts found since 1998 within the specified area.
90. As indicated in paragraph 71 above, I had noted that Mr Williams had described some of the Aboriginal artefacts found within the specified area as being "evidence of ceremonial activity". He had also claimed that "There are very rare and culturally very significant artefacts located in the specified area. The opalised 'artefact' is evidence of objects being carried in from far away, as opalised rock does not occur locally". I noted that Mr Williams was referring to an artefact identified in Barrick's collection as 'artefact 618 and described as an "exceptional stone material; [with] opalized clasts in an extremely fine grain".

91. I noted, however, that Barrick had responded to this, with advice from consultant archaeologist Dr Kamminga, stating that:
  - "the artefact is a piece of silcrete, which is the second most common stone material used to make artefacts in Australia;
  - [Dr Kamminga] used the term 'exceptional' to describe the artefact because it is the first item of silcrete in the assemblage of artefacts being examined that is characterised by this variety of microscopic clasts. The use of the term 'exceptional' in this context did not mean that the artefact was significant in any way;
  - there is no evidence that the artefact comes from other than a local source; and
  - the artefact is not a piece of opalised rock".
92. Dr Pardoe, with the support of other archaeologists, disputed all of the items claimed by Mr Williams as being used for ceremony or for other traditional purposes by Aboriginal people, excluding the hand-held grinding stone where he had formed the view that it was for secular purposes.
93. Furthermore, Dr Pardoe, and supporting archaeologists, also stated that the artefacts and the site type were not considered rare in comparison with other similar artefacts and site types in the Lachlan and Murrumbidgee River region. I noted that, in relation to the pink and yellow chert spearpoint, Dr Kamminga had stated:
  - "Mr Johnson [consultant archaeologist for Mr Williams] may have been mistaken in classifying 'the object';
  - artefacts like this do not naturally occur in the specified area and were not made by Aboriginal people in this region. The chances of such an artefact being brought from its usual source (north west Queensland) to the specified area by prehistoric import or trade are very small;
  - it is [probable] that, if Mr Johnson was correct in his identification of the object, that it was planted or 'salted' on the site by persons unknown".
94. Barrick have been storing all collected artefacts in a temporary keeping place on the Barrick Gold site in accordance with their section 87 Permit under the State Act.
95. I noted that Mr Williams had attested to the significance of the specified area due to the high frequency and diversity of artefacts found within the specified area. He had provided a list of artefacts and a similar list that had been supplied to him by Barrick's consulting archaeologists. I also noted that Mr Williams claimed that Wilfred Shawcross "was impressed by the quality and quantity of different types of artefacts". Mr Williams had also stated "Back in Canberra I gave my cousin a copy of the list of artefacts and the GPS readings....She counted up the number of pieces collected as 1933 and she worked out the estimated number of actual artefacts collected from the drill lines to be about 1600".

96. Barrick had provided an affidavit from consultant archaeologist Richard Wright in which he disputed Mr Williams' claim that the quantity of artefacts found within the specified area was particularly high. I noted that, from his estimations, Mr Wright had concluded that "Nothing I saw at Lake Cowal suggests to me that the frequency of stone artefacts there is of special quantitative importance".
97. I also took into account a statutory declaration by Dr Pardoe in which he affirmed "More than 90% of the artefacts identified in the specified area, [are] in keeping with stone technology the world over, are the by-product of manufacture and constitute what is called 'debitage'". I considered Dr Pardoe's disputation of Mr Williams' claim that the artefacts are highly diverse and rare. He stated that "apart from the small chips and fragments of stone (debitage), the other artefacts identified in the specified area are small in number and not rare".
98. On the other hand, I also took into account statements by Mr Johnston and Mr Shawcross that "We believe the archaeological or scientific significance has the potential to be much greater than is being espoused by Barrick and the NSW NPWS. We believe firmly, that further archaeological research, in particular sub-surface archaeological testing/excavation should be carried out before a conclusive statement of scientific significance can be determined".
99. I considered Barrick's response that "there is no evidence to support the assertion that the specified area is a significant Aboriginal area because of the potential for subsurface deposits to exist". I took into account Dr Pardoe's affidavit of 3 November 2002 in which he states several reasons why he believes the potential for sub-surface artefacts to be low. I noted that Dr Pardoe had carried out 54 archaeological excavations of the drill hole sites in the lakebed and margins and, from these excavations, he had concluded that the "only areas within the specified area that may contain subsurface artefacts are fluvial fans (areas of sands eroded from the sand plain along small drainage gullies) on which Aboriginal people may have resided in the past".
100. I took into account the fact that the NSW NPWS had previously recorded a number of Aboriginal sites within the specified area, including a scarred tree, campsite and artefact scatters and that these sites are protected under the State Act. In addition to these registered sites and as a condition of Barrick's section 87 permit, all Aboriginal relics located by Barrick are required to be recorded and collected and retained in the Barrick Gold compound in a locked, waterproof shed that may only be accessed by the Site Coordinator, the archaeologists, Aboriginal Community representatives and NPWS staff.
101. I also considered Mr Williams' claims concerning spiritual malevolence. I took into account his statement that:

What is happening at Lake Cowal is like tearing the pages out of the Bible,

chapter by chapter. It is very distressing and painful and denies us our religious freedom, economic social and cultural rights, and the rights for our children and grandchildren to grow up within our cultural ways at Lake Cowal. It is causing spiritual and mental and physical harm to the group. Some of our more sensitive people are receiving visions and Dreams about Lake Cowal. Recently, in many of the main families associated with the Lake, a family member has passed on or has had a heart attack. This is a very serious matter and it is our people who suffer the consequences for not protecting Sacred Lands and Waters. This is Wiradjuri Law.

102. I also took into account Mr Williams' quotation from an anonymous article "Lake Cowal and the Wiradjuri People, Have Your Say" in the National Indigenous Times:  
We know that as Aboriginal people that we must not pick up or remove objects from any area. It is recognised that those who remove objects are likely to become very sick and perhaps even die. Medical experts cannot explain the reasons or cure for the sickness. It is a passed down Law, which we all understand.
103. I considered the fact that Dr Kamminga accepted, as sincerely held beliefs, the assertions, by Ms Mary Sloan and Ms Beryl Hutchings, of spiritual malevolence if relics were touched or removed, but noted that he said that there was no evidence to support this belief. Dr Kamminga, who had attended site inspections at Lake Cowal with Wiradjuri Elders, claimed that "at no time have these Wiradjuri Elders stated to me that they believe that the area is ceremonial or 'sacred' ground and that they fear that spiritual malevolence pertains to the stone artefacts relics occurring there." (Affidavit sworn 11 June 2002.)
104. I also considered the fact that Barrick disputed the claim by Mr Williams that 10 of the original 13 Wiradjuri men employed by Barrick soon refused to work "because they felt how spiritually powerful the specified area is".
105. I took into account Mr Shawcross' affidavit of 17 June 2002 in which he puts a case for the way in which stone tools can be important to Aboriginal people. He observes that Mr Williams and many other Aboriginal people have "exceptional visual acuity for spotting stone artefacts" and an "eagerness to find more". He states "When I have carefully questioned such enthusiastic searchers an answer emerges along the lines that they were made by ancestors and that in some sense the spirit of the ancestors adheres to the stone."
106. In reviewing the information presented about the stone artefacts within the specified area, I considered that, under the Act, archaeological objects are relevant to particular significance only if they are important to living Aboriginal people in accordance with their tradition. I concluded, therefore, that the arguments about the scientific importance of the quantity of artefacts were less relevant to the Act than the State legislation. I considered that, if the artefacts had been originally created for ceremonial purposes, then there might be stronger evidence for the

significance in Aboriginal tradition of the specified area. I found, however, that the arguments and information put forward by the archaeologists engaged by Barrick disputing that the objects were created for ceremonial purposes were persuasive that I was not satisfied that the objects had been created for ceremonial purposes.

107. I then considered the issue of spiritual malevolence; that is, whether disturbing the artefacts had adverse physical and mental impacts for Wiradjuri people and whether such an impact was based in Aboriginal tradition. My Department had advised me (Süb U3/1249) that there is abundant evidence in Aboriginal tradition, that the contravention of customary law can cause serious anxiety and mental disturbance for the Aboriginal person concerned. My Department also advised me that there is abundant evidence in Aboriginal tradition for belief that certain places and objects have great power which can be malevolent if wrongly treated.
108. In this case, it is unlikely that utilitarian objects, when originally created, would have had such power for their creator. I also considered whether a belief in spiritual malevolence could have developed since the objects were created, thereby increasing their significance, and whether that belief has been handed down from generation to generation so that it has the required traditional character to satisfy the requirements of "Aboriginal tradition", as defined by the Act. Alternatively it could be that the belief is one that has developed recently and is not traditional. In this regard, I noted that it appeared that the belief was present to different degrees within the Lake Cowal Aboriginal community, given that some Aboriginal groups had agreed with the management recommendations within the EIS and participated in surveys and collection of the artefacts.
109. I also noted that, over many years, much of the specified area had been heavily disturbed and artefacts destroyed because of vehicle traffic, farm cultivation, active erosion and grazing impacts. As well, there had been extensive exploratory drilling (450 drill holes) by the previous mining company within the specified area. I considered Barrick's statement that throughout the long history of investigations, inquiries and approval processes for the mining operation, there had not previously been claims that Lake Cowal was a sacred place or place of spiritual significance.
110. I concluded that the recent genesis of the claims regarding spiritual malevolence and the restricted number of people making the claims made me unsure whether the belief was one based on Aboriginal tradition, as defined by the Act. Also, while I appreciated that many Aboriginal people may prefer that even utilitarian evidence of past occupancy should not be disturbed, I was not satisfied that this was a sufficient basis for me to be satisfied that an area containing utilitarian artefacts was of particular significance in Aboriginal tradition within the meaning of the Act.

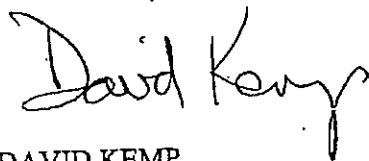


111. As a result, I was not satisfied that the specified area was of particular significance because of the presence of the artefacts within the specified area or because of the claimed physical and mental impacts for some Wiradjuri people arising from the disturbance of the artefacts.

**Finding with regard to significance of the specified area**

112. On the basis of all of the evidence and submissions before me, I was not satisfied that the specified area was a significant Aboriginal area.
113. I was able to make a declaration under section 9 of the Act only if I was satisfied that the specified area was a significant Aboriginal area, and that it was under a serious and immediate threat of injury or desecration.
114. In light of my finding that I was not satisfied that the specified area was a significant Aboriginal area within the meaning of the Act, I declined to make a declaration under section 9 of the Act.

Dated ..28/7/03



DAVID KEMP