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cc. Nicole Davis (via email): [Nicole.Davis@environment.nsw.gov.au](mailto:Nicole.Davis@environment.nsw.gov.au)

Dear Richard,

**Re: Draft Dolwende Quarry Aboriginal Heritage Impact Assessment (AHIP), 13 April 2015,  
McCardle Cultural Heritage (MCH)**

Tocomwall, as a Registered Aboriginal Party and, as the organisation that acts on behalf of the Plains Clan of the Wonnarua People (PCWP), the Registered Native Title Claimants for the Hunter Valley region, would like to bring to your attention serious issues associated with the aforementioned MCH managed project. There are in essence three points that we would like to raise in regard to the overall process:

1. Serious failures by MCH during the life-cycle of the project to date to engage in a respectful and meaningful manner in relation to the OEH *Aboriginal cultural heritage consultation requirements for proponents 2010* (Consultation);
2. Inadequate reporting on the potential and actual archaeology of the study area through an inadequate consideration of geomorphology and landscape (Archaeology); and
3. Failure to provide additional information in order to inform decisions by Tocomwall on the draft AHIP – a fact exasperated by the problems of points 1 and 2 above (Additional Information).

The following document lists and describes these three issues. At the conclusion of this letter, Tocomwall respectfully asks that the OEH engage in a mediation role between MCH (the Proponent) and Tocomwall (the Claimant) as soon as possible in order to expedite this process. Tocomwall would also like the approval process to be suspended ***immediately*** until the process of mediation has been concluded to our satisfaction and that we are given the opportunity to visit the study area when certain conditions are met. We also request that the additional information that we have continuously requested is provided. Should issues arise with the final point – i.e. additional information (see below for more detail) – Tocomwall recommends that MCH engage an ***independent geoarchaeological company or individual*** approved by Tocomwall, the OEH and MCH to conduct subsurface investigations of the **unconsolidated soils and sediments** in the form of borehole investigations of the study area in order to provide an unbiased and informed report on the nature, significance and potential of subsurface contexts in regards to Aboriginal archaeology.

## Consultation

As all parties are aware, consultation with Aboriginal communities in NSW in regard to heritage assessments is undertaken through OEH's *Aboriginal cultural heritage consultation requirements for proponents 2010* ('the requirements'). For the benefit of the Project proponent – Upper Hunter Holdings (UHH) – and in order to present the case with regard to the inadequate consultation process undertaken by MCH, certain sections of the requirements will be quoted in order to highlight the issues that Tocomwall wish to address.

The purpose and aim set out in the OEH's requirements is summarised to (2010: 1):

*"... facilitate positive Aboriginal cultural heritage outcomes by:*

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

Furthermore, this document (*ibid*: 2) goes on to state:

*"For the purposes of these requirements:*

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

MCH initially contacted Tocomwall in December 2014 informing them of the project (see Annex A in the *Draft Dolwende Quarry Aboriginal Heritage Impact Assessment (AHIP)*, 13 April 2015; this document is appended at the end of this letter). The first - and in many ways fundamental - problem was that Tocomwall were excluded from paid participation in the survey (*ibid*: 12/02/15). Although the requirements clearly state in Section 3.4 (pp9) that '*Consultation should not be confused with employment*', this presents a considerable and insurmountable issue for participation in that this effectively excludes any individual and/or organisation from attending and participating in fieldwork because insurance companies **will simply not insure individuals and/or organisations if they are engaged in a voluntary capacity**. Unless an individual and/or organisation is engaged in a paid capacity to participate – a fact well known and exploited by MCH to effectively exclude the Registered Native Title Claimants (the PCWP) – it is the same as, in effect, completely excluding them

from participation in the fieldwork. In the absence of this opportunity, how are the Registered Native Title Claimants expected to revisit their Traditional Lands that form part of the study area, review the exact condition of these lands and impart cultural knowledge to the heritage specialists and thereby engage in informed decision making in relation to the proposed impacts by the proponent?

In light of what the requirements clearly identify in regard to Registered Native Title Claimants, this is a serious failure by MCH in the consultation process of engaging with the Native Title Claimants, namely (pp8):

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

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

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

In fact, MCH makes several statements throughout her report that **seem** to support this process:

*'...Thus, it is important to obtain information from the correct people: those that hold the appropriate knowledge of those sites and/or areas relevant to the project. It is noted that only the Aboriginal community can identify and determine the accepted knowledge holder(s) not archaeologists or proponents (pp19; second paragraph).'*

And,

*'...Thus it is important for MCH to engage in effective and long term consultation to ensure knowledge is shared and managed in a suitable manner that will allow for the appropriate management of that significance (pp19; third paragraph).'*

Tocomwall clearly has not been part of this process and unfortunately, the above quotes illustrate the lip-service and tokenism that MCH is party to: in fact, they have strategically excluded Tocomwall from the process of consultation.

As the OEH clearly identifies throughout the requirements, consultation (and in particular) with *'Aboriginal people with a traditional connection to country (ibid: 8)'* is essential in order to provide the opportunity for *'Aboriginal people who hold cultural knowledge relevant to determining the significance of Aboriginal objects (s) and/or place(s) in the area of the proposed project with the*

*opportunity to participate in decision making regarding the management of their cultural heritage (ibid: 1).'*

MCH, in an email dated 4 May 2015 (paragraph 3; it is also appended to this document) stated:

*'...Unfortunately, although invited to participate in the field survey, Tocomwall made the decision not to send a representative to the survey. MCH and the client have followed the consultation process throughout this project and have been in constant communications with OEH ensuring all requirements have been followed.'*

The worrying trend is that this is not an isolated example in the exploitation of certain loop-holes in the consultation process as set out in the requirements, that is, the exclusion of Aboriginal individuals and/or groups because of the issue of insurance cover. Tocomwall made the decision not to send a representative to the survey not out of choice, but because they would be in breach of workplace legislation. It provides heritage consultants with the opportunity to exclude whomever they wish from effective, meaningful and informed consultation and participation in the decision process with **absolutely no recourse** for Aboriginal stakeholders. The issue is further exasperated by the fact that heritage consultants often do not have an intimate cultural or scientifically based perspective on the areas that they are investigating, therefore providing inadequate assessments by the (mis)use of approaches such as extrapolation to justify one of two extreme approaches: no further work or, excessive fieldwork – often without any consideration of subsurface conditions (see Archaeology section below for more detail). The fact is that Proponents are often led to believe by their heritage consultants that the blame for these supposed onerous problems are created by the Aboriginal stakeholders, when in fact the issues arise from inadequate and inappropriate consultation practices and poor, uninformed and incongruous archaeological practices.

Tocomwall, in common with many Aboriginal stakeholders, are frustrated with the current project and the lack of transparency, the use of loop-holes by MCH in the consultation process to exclude them and the continued destruction of their Traditional Lands. Tocomwall are more than simply heritage consultants or a RAP: they are Aboriginal Traditional Owners who have deep cultural roots with the study area and are committed to "Integrating archaeology, landscape science and Aboriginal Cultural Knowledge for our sustainable future." If there are to be any positive long-term outcomes from the current project for both the Aboriginal community and the wider Australian community in terms of intergenerational equity, MCH really need to come to the negotiation table in order to meet the requirements to ensure (*ibid: 2*):

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

Tocomwall anticipates that through mediation by the OEH, the Proponent and MCH, the Claimants can fulfil the expectations of the requirements and begin engaging in a meaningful consultation process with positive outcomes for all parties.

### Archaeology

This section reviews the report itself. However, it should be emphasised at this point that the following section deals exclusively with the scientific aspect of Aboriginal heritage. The review is not exhaustive: the main points considered relate only to the geomorphology and the recommendations. Tocomwall believes that a review of only two subjects is enough to demonstrate the inadequacy of the report: however, should comment on a wider range of subjects be required, Tocomwall are happy to respond.

To illustrate part of the issue, I quote MCH's email received on the 4 May 2015 in response to Tocomwall's request for further information and in particular, for geotechnical information:

*'I am sure you are fully aware that such information [borehole data] is rarely available for archaeological assessments and assessments are typically completed without such information. The Hunter Valley geomorphology is easily understood and viewed in the field. (third paragraph)'*

In response to the first line, Tocomwall would like to clearly acknowledge the fact that the process of archaeology is **fundamentally a stratigraphic exercise**. The first question an archaeologist should be asking during the course of a survey and/or excavation program is simply 'is the archaeology located in a primary (*in situ*) or secondary (reworked) context?' Without this question being considered, archaeologists cannot make any subsequent interpretation of the archaeological record for the simple reason that they cannot ascertain whether the archaeological patterning they are investigating is a product of human behaviour or geomorphic processes.

The subsurface data is usually recorded in geotechnical – and rarely, in archaeologically targeted borehole programs – and while not widely used by archaeologists in cultural resource management in Australia, is becoming more commonplace on projects with scientific rigour.

To explain the concept of archaeology being a stratigraphic exercise, we will first outline some basic paradigms in relation to the archaeological record of 'hunter-gatherers' in contrast to agricultural and post-agricultural societies, in order for MCH to fully appreciate subsequent statements.

From a stratigraphic perspective, the archaeological record of hunter-gatherer societies is *usually* found in natural contexts, i.e. resident within natural soil, buried soils, paleosols and sedimentary environments. We qualify this statement by adding that although stratigraphic sequences can be modified by man-made features disturbing the profile (for example post holes, hearths, oven mounds, burials etc), the most common site type is either the isolated artefact or the artefact scatter located within natural soils and/or sediments. Furthermore, we understand that part of the Aboriginal archaeological record has been subject to modification as a result of post-Contact land management practices. For example, land clearance has led to large-scale erosion of hillsides, buried lower slopes and valley's under (sometimes several metres of) extensive reworked sediment blankets, as well as causing the entrenchment or silting up of creeklines. What this means in practice is that:

1. Pre-Contact land surfaces are often drastically truncated down to bedrock or deposits that predate the Aboriginal occupation of Australia: in this case, artefacts are simply 'lag-gravels' with little or no surviving contextual data; and
2. Conversely, pre-Contact land surfaces can also be buried under extensive post-Contact sediment blankets where original surfaces are obscured: in this scenario, even 'normal' excavation programs rarely penetrate further than 1-1.2m below ground surfaces and as a result, the archaeology recovered comes from sediments reworked in the post-Contact period, and the significant extant archaeology still buried beneath these sediment blankets is not investigated.

In contrast, agricultural and post-agricultural societies – in Australia represented by European or historic heritage – tend to modify the landscape and create archaeological sites where the main agent of deposition or disturbance is anthropogenic. Examples include landscape clearance, the construction of roads, buildings and other infrastructure such as dams, the modification of soils through ploughing etc. Clearly, the archaeological 'signatures' of hunter-gatherer versus agricultural and post-agricultural societies are very different: the former **requires** consideration of stratigraphic profiles in order to determine the location, visibility and geomorphology (site formation and post-depositional changes) of contexts; the latter, whilst obviously benefitting from 'landscape' approaches, does not necessarily require this input in order to interpret the archaeological record because of the bias towards anthropogenic rather than natural processes on these archaeological sites.

Regardless of any other consideration (cultural, scientific, aesthetic or social), **logic** dictates that without an informed review of subsurface conditions via boreholes, it is simply impossible and unreasonable to assume that simple surface survey can provide this information.

With this 'contextual approach' explained, we can move on to the specifics of the MCH report in regard to the statements from the email of the 4 May 2015 and in particular, lines two and three:

*'The Hunter Valley geomorphology is easily understood and viewed in the field. The survey revealed the landscape, disturbances and geomorphology clearly and the report identify all this, also clearly.'*

We shall therefore review the relevant sections in the MCH report.

In the review of the geomorphology (pp 25-27), MCH provides a general summary of the Hunter Valley's geomorphology: so general in fact, that it could be applied to a large cross-section of sites at a very generic level. Tocomwall suspects that this section is a simple cut-and paste from previous reports and has no significance – particularly with regards to site-specific geomorphology, of the study area. Compare the following statement from the MCH report with points 1 and 2 above:

*'The archaeological importance of foot slopes and valley floors...is enhanced by the fact that the interaction between alluvial and colluvial deposition can result in the formation of sealed deposits (pp27).'*



Unfortunately, although MCH flag this issue of ‘sealed deposits’, nowhere in their report do they actually take the necessary step to investigate these phenomena. Furthermore, MCH state in the review of soils that:

*‘Erosional soil landscapes, such as the project area, have been sculptured and defined by erosive actions of running water... These processes appear to have been moderate within the study area (pp28).’*

Again, this is a bold statement and no evidence has been provided within the report to substantiate the claim. To complete the review of the overview sections of the MCH, we would like to present one further example from section 3.9’s Discussion (pp32):

*‘Because of the natural and cultural processes discussed above, site integrity cannot be assumed for the study area. However, the existence of in situ cultural materials cannot be ruled out.’*

Once again, a statement that has not, in anyway, been investigated within the context of the MCH report. To illustrate this, we will now move on to review the site specific data concerning the geomorphology, site formation processes and post-depositional disturbance that, according to the email dated to the 4 May 2015, i.e. ‘...revealed the landscape, disturbances and geomorphology clearly and the report identify all this, also clearly.’

Tocomwall will illustrate the MCH report provides statements identified above that do not substantiate and demonstrate the conclusions of the report. It will be made clear that – in the absence of any data revealing the nature, extent and potential significance of subsurface contexts (e.g. boreholes) – the statements cannot be authenticated.

The MCH report describes the disturbance observed during the surface survey that ‘included clearing, fences, grazing, tracks and geotechnical investigations (pp50).’ Furthermore, the report states ‘...the most common landform for artefacts are simple slopes. However, the landscape is heavily disturbed with significant sheet wash and it remains unknown if the artefacts derived from further up slope, were moved through clearing, grazing, and/or tracks (pp54).’ The slope forms are only identified as ‘simple’ with no indications of slope angles. However, from a basic review of the mapping (Figure 6.1: pp49; also photographs Figures 6.8 and 6.9: pp 53) it would seem that slope angles are low, certainly less than 10 degrees (a drop of 30m on survey unit 4 across an approximate distance of around 600m in a north westerly direction). This means that artefacts over a size of 2-3cms in length are highly unlikely to move any distances greater than 10-20m – certainly not across the landform themselves. There is simply not enough ‘energy’ in the absence of significant slope inclinations for colluvial processes to initiate any substantial movement. **Figure 1** below illustrates these geomorphic processes. Please note that for transportational slopes to be effective upslope in transporting larger material like gravels or cobbles downslope (of which artefacts would form a part), slope inclination would have to be in the range of 26-35 degrees: way in excess of the slope inclination of survey unit 4. Furthermore, the erosion of sediments and soils over time can create time-transgressive sequences with historical overlap<sup>1</sup>, a very common occurrence because most

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<sup>1</sup> A time-transgressive sequence with historical overlap is simply the process where soils and sediments move laterally (usually because of slope forms) and overlap one another; this contrasts with time-transgressive

natural processes are space and time-transgressive. The implications for this are not considered in the MCH report.

It should become increasingly clear that observations on the nature of the landscape's condition couldn't be demonstrated. Tocomwall strongly disagrees with the MCH statements regarding integrity:

*'...Subsurface integrity can only be assessed through controlled excavation that allows for the examination of both the horizontal and vertical distribution of cultural materials (caused by natural and/or human impacts) and by conjoining artefacts. Land uses and their impacts as well as natural impacts within the investigation area have been discussed in Section 6.3 and are generally considered to be high. In particular, the entire investigation area included grassy pastures that (subject to clearing, ploughing, grazing) typically exhibit moderate levels of ground disturbance. Additionally, severe sheet wash has occurred throughout revealing the gravely B horizon and tracks, a dam and geotechnical investigations have also occurred. Archaeological sites on the lower simple slopes of the investigation area have been identified within exposures (caused by erosion, water run-off, tracks, animal activity) by virtue of exposure through disturbances and erosion exhibiting high surface disturbances. Additionally, surface sites identified on the lower slopes may have derived from the upper slope and moved down slope due to erosion and water-run-off (pp60).'*

This statement comes back to what Tocomwall identified as an issue regarding logical approaches to landscape archaeology. The information does not provide any substantial evidence to support anything beyond a surface appraisal of the study areas integrity. In fact the following sentence precedes the above statement:

*'The integrity of the identified sites and the remainder of the investigation area can mainly be assessed **only for surface integrity** through the assessment of past and present land uses and their impacts (first line on page 60; **my emphasis**).'*

Tocomwall agrees with the above statement: however, it does contradict what MCH had previously identified and subsequently conclude, namely that:

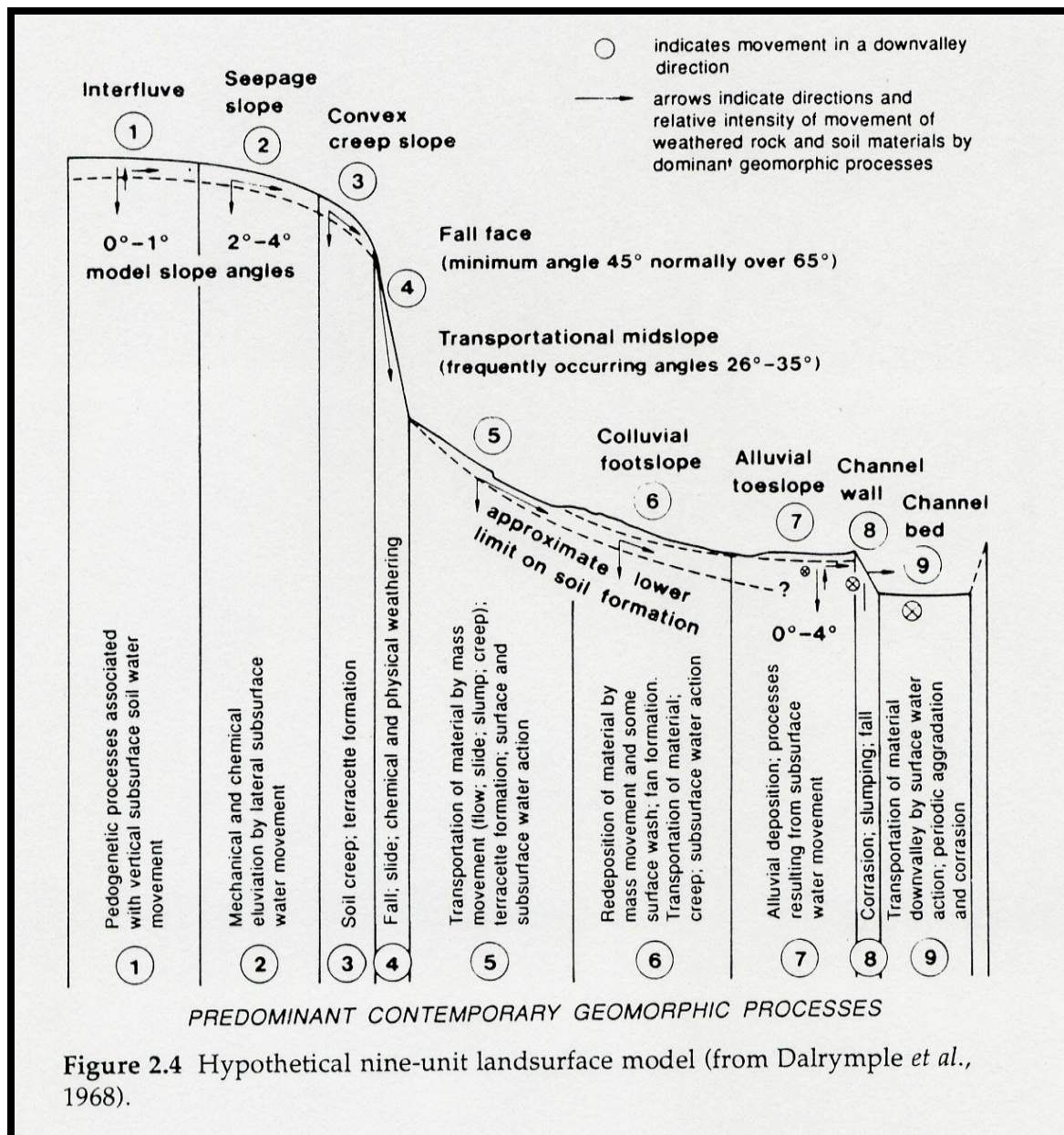
*'The investigation area has been subject to extensive land uses and erosion resulting in a highly disturbed landscape that would have also disturbed any sites in its local (pp65).'*

For the reasons outlined above in relation to (the lack of) consultation and the absence of evidence to support the landscape assessment, Tocomwall do not agree with MCH's significance assessment.

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sequences without historical overlap where stratigraphy is vertically stacked (see A.J. Gerrard. 1992. Soil Geomorphology: 7; for more detailed explanation).





**Figure 1: Hypothetical nine-unit landsurface model illustrating predominant contemporary geomorphic processes based on slope inclination (after Dalrymple, J.B., Blong, R.J. and Conacher, A.J. 1968. An hypothetical nine-unit land surface model. In *Zeitschrift für Geomorphologie* 12: 60-76. )**

What should be clear from the above discussion is that MCH have not provided sufficient information to substantiate uses of terms like 'heavily disturbed'. Questions regarding the depth and lateral extent of disturbance need to be quantified for conclusions regarding the degree of disturbance to be assessed. Clearly, this level of detail is not found within the MCH report.

MCH have approached the study area with the usual preconceptions afforded to the Hunter Valley by consulting archaeologists: namely, that they are relatively simple, shallow, with little scientific value. In the absence of a review of available borehole data and thereby presenting a non-

stratigraphic approach to the archaeological record, MCH have not considered the possibility of anomalies within the stratigraphic record. This is of prime importance within the context of the study area because it is a rapidly dwindling resource and the proposed impacts are extensive.

The review conclusively illustrates that we cannot accept statements in regards to the identification of PAD, their integrity or extent. It also explains why this review does not cover any other evidence: it should be clear that in the absence of any clear evidence regarding the subsurface conditions across the study area, all other forms of evidence should be circumspect. Furthermore, it demonstrates an absence of scientific rigour and an over-reliance on archaeological interpretation built upon unfounded generalisations and the abuse of 'extrapolation'.

### **Additional Information**

Tocomwall's final point concerns the failure to present additional information, as indicated in the final paragraph of an email dated 4 May 2015:

*'MCH and our client have been more than patient and attempted to respond to all communications regarding this issue. The status of the information being commercial in confidence will not change no matter how many e-mails, phone calls or threats to put in formal complaints to the Environmental Line are made. MCH and our client cannot be any clearer about this issue.'*

In light of this and as identified on page one of this document, Tocomwall recommends that MCH engage an ***independent geoarchaeological company or individual*** approved by Tocomwall, the OEH and MCH to conduct subsurface investigations of the ***unconsolidated soils and sediments***<sup>2</sup> in the form of borehole investigations of the study area in order to provide an unbiased and informed report on the nature, significance and potential of subsurface contexts in regards to Aboriginal archaeology. There is simply no other way to progress this impasse brought on by the Proponent and Consultant.

Tocomwall respectfully asks that the OEH engage in a mediation role between MCH (the Proponent) and Tocomwall (the Claimant) as soon as possible in order to expedite this process. Tocomwall would also like the approval process to be suspended ***immediately*** until the process of mediation has been concluded to our satisfaction, that we are given the opportunity to visit the study area when certain conditions are met<sup>3</sup>.

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<sup>2</sup> A geoarchaeological study of unconsolidated soils/buried soils/paleosols and sediments will not infringe on any commercial in confidence agreements since these overlying deposits have no bearing on the hardrock geology (sandstone and conglomerate) that is planned to be extracted by the Proponent.

<sup>3</sup> Either the proponent covers Tocomwall's insurance for the duration of the fieldwork as well as any reasonable costs associated with travel, accommodation etc. Or, if this is not acceptable, Tocomwall will provide the Proponent with a costing for the fieldwork in order for our insurance policies to be valid.

## Conclusion

The fundamental issue confronting Aboriginal people in general, but in particular the Registered Native Title Claimants within the Hunter Valley is due to the fact that this area has been subject to some of the highest densities of development (in particular mining operations) anywhere in Australia. Many of the concerns stem not only from the high level of impact and the rapidly diminishing cultural resources, but the fact that there is no regional plan or strategy from any Government body (be it Federal or State) to manage and conserve the remaining precious cultural resource. This is compounded by the lack of meaningful consultation and the absence of scientific rigor in many archaeological reports.

Overall, Regulatory bodies provide a 'knee-jerk' response to individual parcels of land – like the current study area – the separation of which de-values the significance of the whole of (the remaining) cultural resource. To quote Aristotle, "The whole is greater than the sum of its parts." From the perspective of cultural heritage, this underlines the fact that the actual cultural and scientific significance of the remaining resource can only be determined in partnership with the Registered Native Title Claimants by a strategic regional approach that would subsequently guide and manage the future of development within the context of the Hunter Valley.

It is a sad indictment of the way that Aboriginal heritage is carried out but, the question that the OEH reviewers, the Consultant and the Proponent need to ask themselves is simply this: should Tocomwall decide that it is necessary to take this matter to court and have a judge make a ruling on the above 'discussion' – whether it be from the perspective of the consultation or the science – do they feel confident that the MCH archaeological report will stand up to scrutiny in front of independent expert witnesses? And, if the answer to that question is 'no', then can Tocomwall proceed (with the OEH as mediator) to either have the necessary information provided to them in the form of geotechnical data or, that MCH engage an independent study by geoarchaeologists that the OEH, MCH, Tocomwall and the proponent agree to? Tocomwall have tried throughout the consultation process to be reasonable and to ask for their views to be considered during the consultation process (e.g. additional information) in order to come to an informed decision with regards to the study area.

And last but not least, all parties must consider what exactly Tocomwall seeks from this process? Unlike the Proponent who will receive financial gain once the quarry is in operation, the Consultant who is being paid to undertake this study and with all due respect, the OEH staff who are paid to undertake this work, Tocomwall is the one party in this whole process who are not receiving any financial gain. As the Registered Native Title Claimants, Tocomwall in representing the PCWP are simply trying to make an informed decision with regards to their Aboriginal heritage about what impacts this quarry will have. Tocomwall's perspective in all of this has already been quoted above, but we repeat it to emphasise our position: "Integrating archaeology, landscape science and Aboriginal Cultural Knowledge **for our sustainable future**." We sincerely hope that all other parties involved in this project can come together and actually engage in order to help make this a reality.

Regards,



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## **Appendix A**

### **MCH Report**