



Plate 26. Looking south along ED6



Plate 27. Looking north along ED6



Plates 28 and 29 Artefacts identified at ED6



Plate 30. Artefacts identified at ED6

Table 12. Details of artefact identified at ED6.

Class	Raw Material	Measurements (mm)	State	% Cortex	Measures of Reduction
Flake	Silcrete, grey	19 x 14 x 2	Distal portion	0	5 dorsal scars, no dorsal rotations, feather termination.
Flake	Silcrete, grey	24 x 14 x 2	Complete	0	6 dorsal scars, no dorsal rotations, focal platform, overhang removal present, feather termination.

Class	Raw Material	Measurements (mm)	State	% Cortex	Measures of Reduction
Flake	Silcrete, grey	32 x 23 x 9	Complete	0	6 dorsal scars, no dorsal rotations, overhang removal present, edge damage visible, feather termination.
Flake	Silcrete, variegated	33 x 27 x 8	Complete	0	3 dorsal scars, no dorsal rotations, no overhang removal, 3 scar platform, feather termination.
Flake	Chert, brown	40 x 26 x 11	Complete	0	4 dorsal scars, no dorsal rotations, step termination.
Core, discoidal	Silcrete, cream	32 x 36 x 16	Complete	0	12 scars from 2 platforms, worked around entire perimeter, heavily weathered.
Flake	Chert, black	29 x 13 x 7	Complete	0	6 dorsal scars, 1 dorsal rotation, overhang removal present, feather termination.
Flake	Chert, grey	21 x 17 x 6	Complete	0	4 dorsal scars, no dorsal rotations, feather termination.
Flake	Chert, grey	19 x 28 x 7mm	Proximal portion	0	3 dorsal scars, no dorsal rotations, no overhang removal.

6.1.4 Discussion

These results accord well with the predictive model which indicated that open artefacts scatters where the most common site type anticipated in the study area, with highest numbers of sites and artefacts being located on elevated, locally flat landforms in close proximity to permanent water sources.

Figures 10 and 11 illustrate previous and newly recorded site locations relative the current development and to local topography and demonstrate a clear area of heightened or more intense occupation along a relatively broad and gentle ridgeline, located immediately adjacent to the Queanbeyan River (to the west) and surrounded by a series of ephemeral drainage lines to the north and east. While the ridgeline slopes gently to nearby drainage lines to the north and east, the drop to the Queanbeyan River to the south and southwest, and to Jumping Creek in the southeast, is considerably steeper. Aboriginal occupation appears to have been focused upon those areas of the ridgeline that are relatively flat, and slope gently towards drainage lines to the north and east.

Along this ridgeline, sites seem to have been identified wherever visibility has been sufficient to allow it. The distinction between the various sites along this landform therefore appears to be artificial, with none more than 40m from one another. Sites 57-2-0066/428, 57-2-0074, 57-2-0075, 57-2-635, ED4 and ED5 are much more likely to represent different expressions of the same large, but relatively sparse site, which extends along the ridgeline, with a number of artefacts moving down along the sideslopes through

various post-depositional processes. Sites 57-2-0068 and 57-2-0087 fall outside the current study area but are likely to be a part of the same spread of artefacts.

Also in keeping with the predictive model, no sites were found along that portion of the route characterized by steep landforms (i.e. Curtis Land), despite the drainage line running along the centre of the study area, but reappear again when the gentle basal slopes return (sites 57-2-351 and 57-2-352).

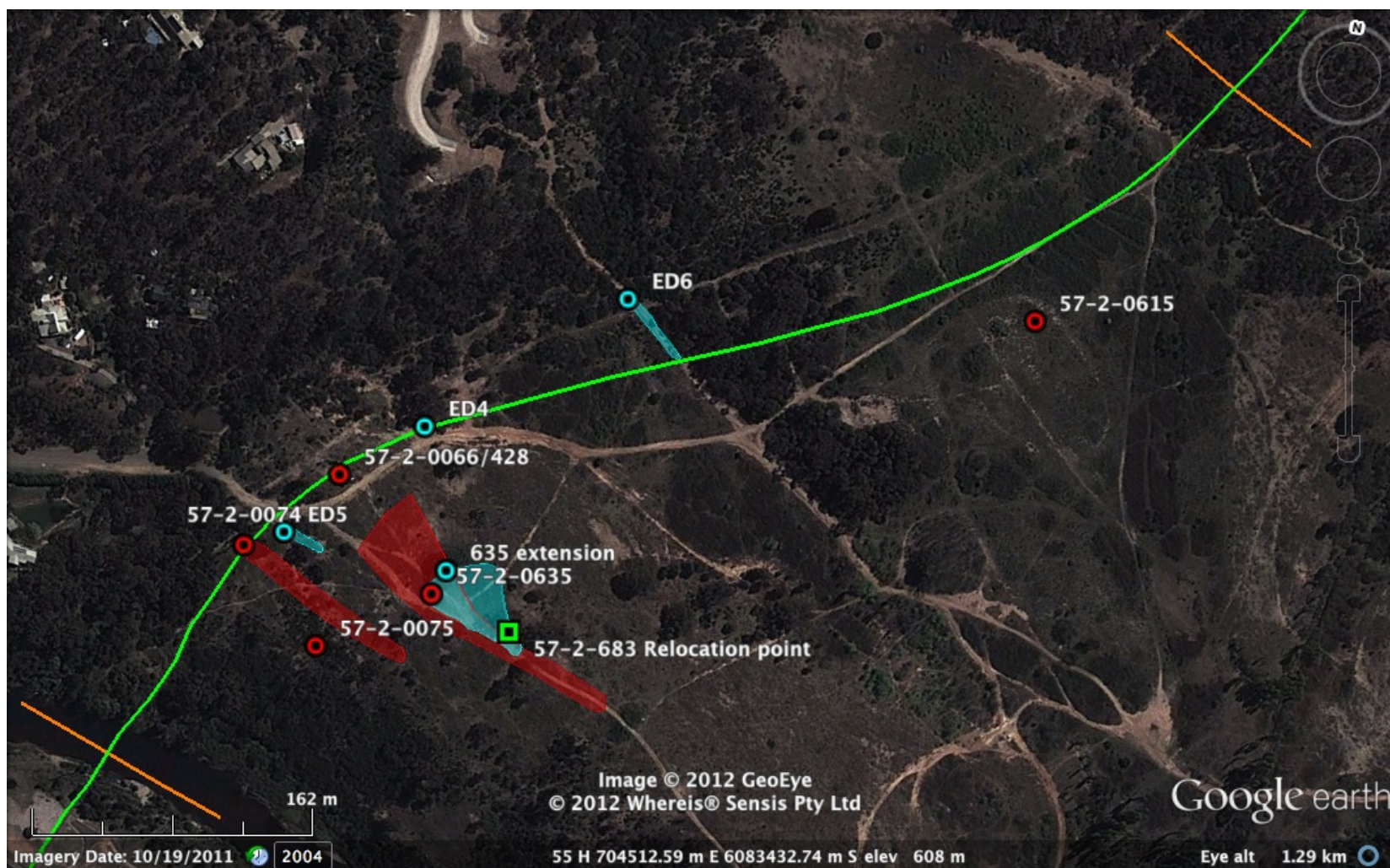


Figure 10. Locations of previous and newly recorded sites (middle section only) within the impact area for the road corridor, showing site clustering on the end of the crest of a gentle ridge.

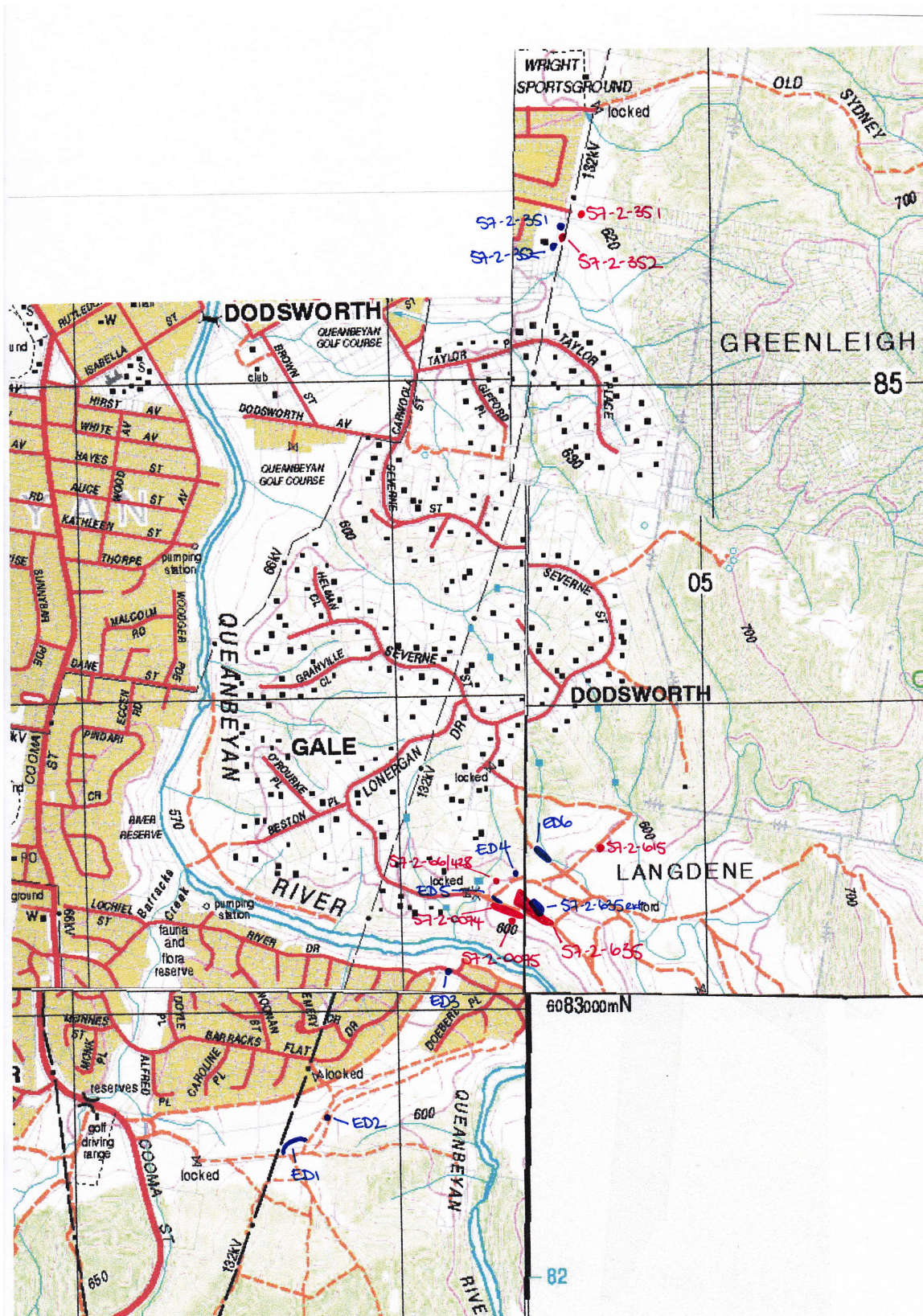


Figure 11. Topographic map pieced together from Topoview Raster 2006 (Department of Lands). Study area crosses into four 1:250,000 maps – from top left in a clockwise direction: Canberra 87273N, Bungendore 87272N, Hoskinstown 87272S and Tuggeranong 87273S.

6.2 Historic Heritage

There were no historic heritage sites identified during the current investigations and no previously recorded historic heritage sites occur within the study area.

7.0 Cultural Heritage Values and Statement of Significance

7.1 Assessment Guidelines

There are several different ways of defining types of significance, and many practitioners have developed their own system of significance assessment. However, as Sullivan and Pearson (1995) point out, there seems to be a general advantage in using a set of criteria, which is already widely accepted. In Australia cultural significance is usually assessed against the Burra Charter guidelines and the Australian Heritage Commission guidelines (ICOMOS 1988, 1999, Lennon and Mathews 1996).

7.2 The Burra Charter

Under the guidelines of the Burra Charter 'cultural significance' refers to the 'aesthetic, historic, scientific, social or spiritual value for past, present or future generations' of a 'place' (ICOMOS 1999:2). The guidelines to the Burra Charter comment:

"Although there are a variety of adjectives used in definitions of cultural significance in Australia, the adjectives 'aesthetic', 'historic', 'scientific' and social' ... can encompass all other values".

The following provides the descriptions given for each of these terms.

Aesthetic Value

Aesthetic value includes aspects of sensory perception for which criteria can and should be stated. Such criteria may include consideration of the form, scale, colour, texture and materials of the fabric; the smells and sounds associated with the place and its use (Marquis-Kyle & Walker 1992).

Historic Value

A place may have historic value because it has influenced, or has been influenced by, an historic figure, event, phase or activity. It may also have historic value as the site of an important event. For any given place the significance will be greater where evidence of the association or event survives in situ, or where the settings are substantially intact, than where it has been changed or evidence does not survive. However, some events or associations may be so important that the place retains significance regardless of subsequent treatment (Marquis-Kyle & Walker 1992).

Scientific Value

The scientific or research value of a place will depend upon the importance of the data involved or its rarity, quality or representativeness and on the degree to which the place may contribute further substantial information.

A site or a resource is said to be scientifically significant when its further study may be expected to help current research questions. That is, scientific significance is defined as research potential (Marquis-Kyle & Walker 1992).

Social Value

The social value of a place is perhaps the most difficult value for heritage professionals to substantiate (Johnston 1994). However, social value is broadly defined as ‘the qualities for which a place has become a focus of spiritual, political, natural or other cultural sentimental to a majority or minority group’ (ICOMOS 1988:30). In What is Social Value, Johnston (1994) has provided a clear definition of social value:

“Social value is about collective attachment to places that embody meaning important to a community, these places are usually community owned or publicly accessible or in some other way ‘appropriated’ into people’s daily lives. Such meanings are in addition to other values, such as the evidence of valued aspects of history or beauty, and these meanings may not be apparent in the fabric of the place, and may not be apparent to the disinterested observer”. (Johnston 1994:10)

Although encompassed within the criterion of social value, the spiritual value of a place is a new addition to the Burra Charter (ICOMOS 1999:1). Spiritual value is predominantly used to assess places of cultural significance to Indigenous Australians.

The degree to which a place is significant can vary. As Johnston (1994:3) has stated when trying to understand significance a ‘variety of concepts [are] used from a geographical comparison (‘national’, ‘state’, ‘local’) to terms such as ‘early’, ‘rare’, or ‘seminal’. Indeed the Burra Charter clearly states that when assessing historic significance, one should note that for:

‘any given place the significance will be greater where evidence of the association or event survives in situ, or where the setting are substantially intact, than where it has been changed or evidence does not survive (ICOMOS 1988:29).’

7.3 Significance Criteria Relevant to Aboriginal Sites

Aboriginal heritage sites and places may have educational, tourism and other values to groups in society. However, their two principal values are likely to be in terms of their cultural / social significance to Aboriginal people and their scientific / archaeological significance. These are the two criteria that are commonly used in establishing the significance of Aboriginal sites. The following provides an explanation of these criteria.

1) Aboriginal Cultural / Social Significance

This relates to the value placed upon a site or suite of sites by the local or regional Aboriginal community. Almost all Aboriginal heritage retains contemporary significance to Aboriginal people as it represents an important tangible link to their past and to the

landscape. The identification and assessment of those sites that are significant to Aboriginal people is a matter for Aboriginal people. This assessment can only be made by the appropriate Aboriginal representatives of the relevant communities.

2) Scientific (Archaeological) Significance

Archaeological significance values (or scientific values) generally are assessed on the potential of a site or place to generate knowledge through archaeological research or knowledge. Bowdler (1984) states that the scientific significance should be assessed according to timely and specific research questions (research potential) and site representativeness.

Research potential entails the potential of a site or suite of sites for scientific research and excavation. This is measured in terms of a site's ability to provide information on aspects of Aboriginal culture. In this respect, the contents of a site and their state of preservation are important considerations.

Representativeness takes account of how common a site type is (Bowdler 1984). That is, it allows sites to be evaluated with reference to the known archaeological record within the given region. The primary goal of cultural resource management is to afford the greatest protection to a representative sample of sites throughout a region. The corollary of a representative site is the notion of a rare or unique site. These sites may help to understand the patterning of more common sites in the surrounding area, and are therefore often considered of archaeological significance. The concept of a rarity cannot be easily separated from that of representativeness. If a site is determined to be rare, then it will by definition be included as part of the representative sample of that site type. The concepts of both research potential and representativeness are ever changing variables. As research interests shift and archaeological methods and techniques change, then the criteria for assessing site significance are also re-evaluated. As a consequence, the sample of site types, which are used to assess site significance, must be large enough to account for the change in these variables.

Acknowledging the fact that Aboriginal people are the only suitable people to assign levels of cultural significance to sites, the following assessment focuses the potential scientific/archaeological significance of the sites identified within the study area. The statements of significance provided in no way imply that scientific values override or should be prioritized over cultural values. The scientific significance values provided here must not lessen the importance of the opinions of the Aboriginal community.

7.4 Scientific (Archaeological) Significance of Aboriginal Sites Identified in the Study Area

An assessment of the scientific (archaeological) significance for Aboriginal sites ED1 through to ED6,(awaiting AHIMS site numbers) Sites 57-2-351, 57-2-352, 57-2-0066/428, 57-2-0074 and 57-2-0075, and the remainder of the study area together are summarized in table 13, along with the rationale behind the assessment.

Table 13. Significance assessment for Aboriginal heritage sites occurring within the study area.

Site Name	Site Type	Significance Assessment	Conservation Value
57-2-66/428, 57-2-74, 57-2-75, 57-2-635, ED4 and ED5	Large open artefact scatter	This site is assessed as being of low-medium scientific significance. The site shows the same range of raw materials and artefact classes as have been identified elsewhere in the region, however its size is relatively unusual in the area. The potential also exists for the site to be much larger than what is currently visible. The site has been affected by various post-depositional processes and is consequently of relatively low integrity. There is no potential for sub-surface deposits that may be of a high research value.	Moderate
57-2-351, 57-2-352	Small open artefact scatter	This site is assessed as being of low scientific significance. The site shows the same range of raw materials and artefact classes as have been identified elsewhere in the region and as such does not represent rare or unusual types. The range of artefact and material types represented is limited. The site has been affected by various post-depositional processes and is consequently of relatively low integrity. There is no potential for sub-surface deposits that may be of a high research value.	Low
ED1	Small open artefact scatter	This site is assessed as being of low scientific significance. The site shows the same range of raw materials and artefact classes as have been identified elsewhere in the region and as such does not represent rare or unusual types. The range of artefact and material types represented is limited. The site has been	Low

Site Name	Site Type	Significance Assessment	Conservation Value
		affected by various post-depositional processes and is consequently of relatively low integrity. There is no potential for sub-surface deposits that may be of a high research value.	
ED2	Isolated artefact	This site is assessed as being of low scientific significance. The site type is well represented in the archaeological record of the region and as such does not represent a rare or unusual type. The site has been affected by various post-depositional processes and is consequently of relatively low integrity. There is no potential for sub-surface deposits that may be of a high research value.	Low
ED3	Small open artefact scatter	This site is assessed as being of low scientific significance. The site shows the same range of raw materials and artefact classes as have been identified elsewhere in the region and as such does not represent rare or unusual types. The range of artefact and material types represented is limited. The site has been affected by various post-depositional processes and is consequently of relatively low integrity. There is no potential for sub-surface deposits that may be of a high research value.	Low
ED6	Open Artefact Scatter	This site is assessed as being of low scientific significance. The site shows the same range of raw materials and artefact classes as have been identified elsewhere in the region and as such does not represent rare or unusual types. The range of artefact and material types represented is limited. The site has been affected by various post-depositional processes and is consequently of relatively low integrity. There is no potential for sub-surface deposits that may be of a high research value.	Low

It is likely that artefacts are retained beneath the vegetation and grass cover in the portion of the road corridor that passes through the areas surrounding Jumping Creek and Environs. However, it is likely that the artefacts present include the same range of raw material types and artefact classes as have already been identified. Due to the lack of soil depth in the area, these areas are assessed as being of moderate archaeological sensitivity.

Those portions of the proposed route alignment that are outside of the areas around Jumping Creek and Environs are assessed as being of very low archaeological sensitivity. Almost the entire route crosses skeletal soils with volcanic shales exposed throughout. As such, there is no soil depth within which archaeological deposits may be retained. The shallow soils also mean that even low levels of disturbance such as vehicle exposure and erosion have a dramatic effect on context. The majority of the route has been subject to considerable disturbance by vehicles and recreational bike use.

The northern portion of the route cuts through the steeply inclined ridges of Curtis Land, which is dissected by drainage lines that would have been cold and damp and unappealing for habitation. No sites were identified along this section of the route and it is believed that this is a true reflection of site distribution and not an artificial construct of survey strategy or visibility.

8.0 Statutory Obligations

The following provides a summary of State and Commonwealth legislation relevant to the protection and management of Aboriginal heritage. During the current investigations, no heritage items listed for indigenous values under the *NSW Heritage Act 1977*, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, *Environment Protection and Biodiversity Conservation Act 1999* or the *Australian Heritage Council Act 2003*, were identified. However, Aboriginal sites/objects summarized in section 6 of this report are protected under the *NSW Parks and Wildlife Act 1974*.

8.1 Commonwealth Legislation

The primary legislation providing protection to heritage in NSW is enacted by the State (see section 8.2), however several Acts administered by the Commonwealth are also relevant. The main Acts comprise the *Environment Protection and Biodiversity Conservation Act 1999*, *The Australian Heritage Council Act 2003* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1987*.

Environment Protection and Biodiversity Conservation Act 1999 (Comm)(EPBC Act)

This Act is the primary Commonwealth legislation for the management and protection of areas of national environmental significance. In 2003 the EPBC Act was amended to through the Environment and Heritage Legislation Amendment Act (No1) 2003 to provide protection for cultural heritage sites, in addition to the existing aim of protecting environmental areas and sites of national significance.

The 2003 amendments to the Environment Protection and Biodiversity Conservation Act 1999 have resulted in the inclusion of indigenous and non-Indigenous heritage sites and areas. These heritage items are defined as:

‘indigenous heritage value of a place means a heritage value of the place that is of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history;

The environmental assessment process within the EPBC Act protects matters of national environmental/heritage significance where actions are proposed on/will take affect on, Commonwealth land or where Commonwealth agencies are proposing to take action. The Act also promotes the ecologically sustainable use of natural resources, biodiversity and the incorporation of community consultation and knowledge.

Any proposal identified as having the potential to significantly impact on a matter of national environmental significance (including cultural heritage) requires the proponent to refer the project to the Department of Sustainability, Environment, Water, Population and Communities. The matter is then made public and referred to state, territory and

Commonwealth ministers for comment, before the Minister decides whether or not the project must be assessed under the EPBC Act. The action may be approved, not approved or approved with conditions, following assessment by the Minister.

Items identified under this legislation are given the same penalty as actions taken against environmentally sensitive sites. Specific to cultural heritage sites are §324A-324ZB.

In addition to the above amendments to the *Environment Protection and Biodiversity Conservation Act 1999* to include provisions for the protection and conservation of heritage, the Act also enables the identification and subsequent listing of items for the Commonwealth and National Heritage Lists (ss. 341D & 324D respectively). The Act establishes the *National Heritage List*, which enables the inclusion of all heritage, natural, Indigenous and non-Indigenous, and the *Commonwealth Heritage List*, which enables listing of sites nationally and internationally that are significant and governed by Australia.

Substantial penalties (and, in some instances, goal sentences) can be imposed on any person who damages items on the National or Commonwealth Heritage Lists (ss. 495 & 497) or provides false or misleading information in relation to certain matters under the Act (ss.488-490). In addition, the wrongdoer may be required to make good any loss or damage suffered due to their actions or omissions (s.500).

Australian Heritage Council Act 2003 (Comm.)

The *Australian Heritage Council Act 2003* established an independent body of experts – the Australian Heritage Council – whose role it is to advise the Minister on all matters relating to heritage and on the listing and protection of heritage places in particular.

Until 19 February 2012 the Australian Heritage Council facilitated the management of the Register of the National Estate (RNE), which comprised a list of more than 13,000 heritage places throughout Australia (compiled since 1976 by the former Australian Heritage Commission). The RNE is no longer a statutory list and currently acts as an archive of information with relevant heritage places now listed on state or commonwealth registers. References to the RNE no longer occur within the EPBC Act or the *Australian Heritage Council Act 2003*.

The Aboriginal and Torres Strait Islander Heritage Protection Act 1987.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1987* provides protection for Aboriginal heritage, in circumstances where it could be demonstrated that such protection was not available at a state level. In certain instances the Act overrides relevant state and territory provisions.

The major stated purpose of the Act is to preserve and protect from injury and desecration, areas and objects of significance to Aborigines and Islanders. The Act enables immediate and direct action for protection of threatened areas and objects by a

declaration from the Commonwealth minister or authorised officers. The Act must be invoked by, or on behalf of an Aboriginal or Torres Strait Islander or organisation.

Any Aboriginal or Torres Strait Islander person or organization may apply to the Commonwealth Minister for a temporary or permanent 'Stop Order' for protection of threatened areas or objects of significant indigenous cultural heritage.

The Commonwealth Act 'overrides' State legislation if the Commonwealth Minister is of the opinion that the State legislation (or undertaken process) is insufficient to protect the threatened areas or objects. Thus, in the event that an application is made to the Commonwealth Minister for a Stop Order, the Commonwealth Minister will, as a matter of course, contact the Queensland Environmental Protection Agency to ascertain what protection is being imposed by the State and/or what mitigation procedures have been proposed by the land user/developer.

In addition to the threat of a 'Stop Order' being imposed, the Act also provides for the following:

- If the Federal Court, on application from the Commonwealth Minister, is satisfied that a person has engaged or is proposing to engage in conduct that breaches the 'Stop Order', it may grant an injunction preventing or stopping such a breach (s.26). Penalties for breach of a Court Order can be substantial and may include a term of imprisonment;
- If a person contravenes a declaration in relation to a significant Aboriginal area, penalties for an individual are a fine up to \$10,000.00 and/or 5 years goal and for a Corporation a fine up to \$50,000.00 (s.22);
- If the contravention is in relation to a significant Aboriginal object, the penalties are \$5,000.00 and/or 2 years goal and \$25,000.00 respectively (s.22);
- In addition, offences under s.22 are considered 'indictable' offences that also attract an individual fine of \$2,000 and/or 12 months goal or, for a Corporation, a fine of \$10,000.00 (s.23). Section 23 also includes attempts, inciting, urging and/or being an accessory after the fact within the definition of 'indictable' offences in this regard.

The Commonwealth Act is presently under review by Parliament and it is generally accepted that any new Commonwealth Act will be even more restrictive than the current legislation.

8.2 State Legislation

The protection of Indigenous cultural heritage in New South Wales is principally governed by two pieces of legislation, the *National Parks and Wildlife Act 1974 (NPW Act)* (as amended) and the *Environment Planning and Assessment Act 1979*.

The National Parks and Wildlife Act 1974 (NPW Act)

The NPW Act provides the primary basis for the legal protection and management of Aboriginal sites within NSW. The implementation of the Aboriginal heritage provisions of the Act is the responsibility of the NSW Department of Environment and Conservation (DEC).

The general rationale behind the Act is the prevention of unnecessary, or unwarranted destruction of relics, and the active protection and conservation of relics which are of high cultural significance.

Section 90 of the Act provides statutory protection for all Aboriginal 'objects', whereby it is an offence (without the Minister's consent) to:

damage, deface or destroy Aboriginal sites without the prior consent of the Director of the National Parks and Wildlife Service.

The Act defines an 'object' as:

any deposit, object or material evidence (not being a handicraft for sale) relating to Indigenous and non-European habitation of the area that comprises New South Wales, being habitation both prior to and concurrent with the occupation of that area by persons of European extraction, and includes Aboriginal remains.

The Act, together with the policies of the NPWS provide the following constraints and requirements on land owners and managers.

- It is an offence to knowingly disturb an Aboriginal artefact or site without an appropriate permit.
- Prior to instigating any action which may conceivably disturb an 'object' (generally land surface disturbance or felling of mature trees), archaeological survey and assessment is required.
- When the archaeological resource of an area is known or can be reliably predicted, appropriate land use practices should be adopted which will minimize the necessity for the destruction of sites/objects, and prevent destruction to sites/objects which warrant conservation.
- Documented and appropriate consultation with relevant Aboriginal Community representatives is required by the OEH as part of the prerequisite information necessary for endorsement of consultant recommendations or the provision of Consents or Permits by the OEH.

Section 86 of the NP&W Act specifies the offences and penalties relating to harming or

desecrating Aboriginal places and objects:

- 1) A person must not harm or desecrate an object that the person knows is an Aboriginal object.

Maximum Penalty:

- (a) in the case of an individual – 2,500 penalty units or imprisonment for one year, or both or (in circumstances of aggravation) 5,000 penalty units or imprisonment for two years, or both, or
- (b) in the case of a corporation – 10,000 penalty units (currently \$1,100 000).

- 2) A person must not harm an Aboriginal object ('strict liability offence').
 - (a) in the case of an individual – 500 penalty units or (in circumstances of aggravation) 1,000 penalty units, or
 - (b) in the case of a corporation – 2,000 penalty units (currently \$220,000).

Under s86(4) of the Act it is an offense for a person to harm or desecrate an Aboriginal place, with maximum penalties of 5,000 penalty units or imprisonment for two years, or both, for individuals and 10,000 penalty units for corporations.

The protection provided to Aboriginal objects applies irrespective of the level of their significance or issues of land tenure. However, areas are only gazetted as Aboriginal Places if the Minister is satisfied that sufficient evidence exists to demonstrate that the location was and/or is of special significance to Aboriginal culture.

Harm to an Aboriginal object or place is defined under s5(1) as any act or omission that:

- (a) destroys, defaces or damages the object or place, or
- (b) in relation to an object – moves the object from the land on which it had been situated
- (c) is specified by the regulations
- (d) causes or permits the object or place to be harmed in a manner referred to in paragraph (a), (b) or (c), but does not include any act or omission that:
- (e) desecrates the object or place, or
- (f) is trivial or negligible, or
- (g) is excluded from this definition by the regulations.

Exemptions and defenses to offences under s86 of the Act to exist and include the following:

- Offences under s86(1), (2) and (4) have a defense against prosecution under s87(1) in which the harm or desecration was authorized by an Aboriginal Heritage Permit (AHIP) and the conditions to which the AHIP were subject have not been

contravened.

- The strict liability offense under s86(2) has a defense against prosecution under s87(2) if the person exercised *due diligence* to determine whether the act or omission constituting the alleged offence would harm an Aboriginal object and reasonably determined that no Aboriginal object would be harmed. Due diligence may be achieved through compliance with industry specific Codes of Practice approved by the Minister, such as the DECCW (2010a) *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW*.

The 'due diligence' process is intended to provide a defense against the strict liability offense under s86(2) of the Act, if an activity where subsequently to unknowingly harm an Aboriginal object without the presence of an AHIP. If Aboriginal objects are present or likely to be present and an activity will harm them, an AHIP application is required (excluding Part 3A Projects).

The DECCW (2010a) *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* outlines procedures to determine the presence or likely presence of Aboriginal objects, the identification of activities that may harm Aboriginal objects and the need for AHIPs, the level of assessment is not generally sufficient to satisfy the assessment requirements outlined under Parts 5 and 5 of the EPBC Act (see below).

- A second defense to the strict liability offense under s86(2) is provided under section 87(4) if the person shows that the act or omission constituting the alleged offense is prescribed by the regulations as a low impact act or omission. Clause 80B of the National Parks and Wildlife Regulation 2009 describes low impact acts or omissions, most of which centre around land that is considered to be already disturbed. For the purposes of clause 80B, land is classified as 'already disturbed' if it 'has been the subject of a human activity that has changed the land's surface, being changes that remain clear and observable' (for example soil ploughing, construction of rural infrastructure such as dams and fences, construction of roads, tracks and trails, clearing of vegetation, construction of buildings, installation of utilities, substantial grazing involving the construction of rural infrastructure, or construction of earthworks related to the above).
- The defense of honest and reasonable mistake of fact applies under s86(5) to the strict liability offense of s86(2) and to offenses against Aboriginal places under s86(4).
- Offenses under s86(1) and (2) do not apply under s86(6) with respect to an Aboriginal object that is dealt with in accordance with s85 (see below)

- Exemptions are also available under s87A to s86(1)-(4) for emergency situations pertaining to conservation works and agreements
- And exemptions are available under s87B to S86(1), (2) and (4) for Aboriginal people in relation to the carrying out of traditional cultural activities.

Consent regarding the use of or destruction of relics is managed through the OEH Aboriginal Heritage Impact Permit (AHIP) system, as outlined in s90 of the NP&W Act clauses 80D and 80E of the Regulations. The issuing of permits is dependent upon adequate archaeological review and assessment, together with an appropriate level of Aboriginal community liaison and involvement. Failure to do so will result in a rejection of the permit application and the inability to undertake any collection of artefactual material (outside of the developmental area) or sub-surface testing.

Aboriginal archaeological assessments must be undertaken in accordance with the OEH (2011a) *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW*, which involves conducting an assessment in accordance with the DECCW (2010b) *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW* and consultation with the Aboriginal community in accordance with the DECCW (2010c) *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010* policy.

In accordance with the DECCW (2010b) *Code of Practice for Archeological Investigation of Aboriginal Objects in NSW*, the key features required for heritage assessments include:

- Investigations must be undertaken by people with appropriate skills and experience as specified in s1.6.
- Archaeological sub-surface investigation will be necessary when it can be demonstrated through Requirements 1, 2, 3, 4 and 5 of the Code that sub-surface Aboriginal objects with potential conservation value have a high probability of being present in an area, and the area cannot be avoided by the proposed activity (irrespective of whether or not there are objects present on the surface).
- A s90 AHIP is not necessary for test excavations undertaken in compliance with the Code (however in all cases implementation of the Aboriginal Cultural Heritage Consultation Requirements for Proponents Policy must be undertaken).

Clause 80D of the NP&W Regulation 2009 dictates that the cultural heritage assessment report which accompanies an AHIP must address the following:

- The significance of the Aboriginal objects and/or places that are the subject of the application;
- The actual or likely harm to those Aboriginal objects/places from the proposed

activity that is the subject of the application;

- Any practical measures that may be taken to conserve/protect those Aboriginal objects/places;
- Any practical measures that may be taken to avoid or mitigate any actual or likely harm to those Aboriginal objects/places;
- Include any submission received from registered Aboriginal parties under clause 80C and the applicant's response to that submission.

Evaluations of AHIP applications are guided by the OEH (2011a) *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW*, OEH (2011b) *Applying for an Aboriginal Heritage Impact Permit: Guide for Applicants*, and OEH (2011c) *Guide to Aboriginal Heritage Impact Permit Processes and Decision-Making Policy*.

AHIPs may be issued in relation to Aboriginal objects, places, land activities or persons or specified types or classes of Aboriginal objects, places, land, activities or persons. They may be transferred or varied at the approval of the Director General, and may also be refused. An application is taken to be refused 60 days after the date of receipt by the Director-General (unless otherwise granted or refused earlier).

The Director-General may attach any conditions deemed necessary to any AHIP granted, with failure to comply with a condition deemed a contravention of the Act (under s90J). Such offences may result in a maximum penalty of 1,000 penalty units for each day the offence continues for an individual: these fines are doubled for a corporation.

Under s90K of the Act the Director-General must consider the following matters when making a decision in relation to an AHIP:

- a) The objects of the Act;
- b) Actual or likely harm to the Aboriginal objects/place that are the subject of the permit;
- c) Practical measures that may be taken to protect and conserve the Aboriginal objects/place that are the subject of the permit;
- d) Practical measures that may be taken to avoid or mitigate any actual or likely harm to the Aboriginal objects/place that are the subject of the permit;
- e) The significance of the Aboriginal object/place that are the subject of the permit;
- f) The results of any consultation by the applicant with Aboriginal people regarding

the Aboriginal objects/place that are the subject of the permit (including submissions made by Aboriginal people as part of the consultation required by the regulations);

- g) Whether the consultation process complied with the consultation requirements set out in the regulations (specified in s90 of the NP&W Act, clause 80C of the NP&W Regulation 2009 and in the DECCW Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010);
- h) The social and economic consequences of making the decision;
- i) Accompanying documentation including public submissions made under the EP&A Act in connection to the activity which is the subject of the permit and that has been received by the Director-General;
- j) Any other matter prescribed by the regulations.

Appeals against the decisions made on an AHIP can be made to the Land and Environment court under s90L of the NP&W Act. The appeal must be made within 21 days following notice of the decision that is being appealed. However, the decision of the Land and Environment Court is final and binding on both the Director-General and the applicant.

Section 85A of the NP&W Act allows the Director-General to 'dispose' of Aboriginal objects that are the property of the 'crown' in the following ways:

- a) By returning the Aboriginal objects to an Aboriginal owner/s entitled to and willing to accept possession, custody or control of the Aboriginal objects in accordance with Aboriginal tradition, or
- b) By dealing with Aboriginal objects in accordance with any reasonable directions of an Aboriginal owner/s referred to in paragraph (a), or
- c) If there is/are no such Aboriginal owner/s – by transferring the Aboriginal objects to a person, or a person of a class, prescribed by the regulation for safekeeping (implemented by way of a Care Agreement between the OEH and the Aboriginal person/organization).

Section 85A(3) of the NP&W Act makes provision as to the resolution process for any dispute concerning the entitlement of an Aboriginal owner/s to possession, custody or control of Aboriginal objects for the purposes of this section.

Section 91AA of the NP&W Act allows the Director-General to place a stop work order for

up to 40 days, should they be of the opinion that any action is being or is about to be carried out that is likely to significantly affect an Aboriginal place/object or any other item of cultural heritage situated on land reserved under the Act. Emergency situations are exempt from this section of the Act, as are approved developments under the EP&A Act. Contravention of a stop work order may result in penalties up to 1,000 penalty units with an additional 100 units for every day the offence continues (10,000 units and 1,000 units respectively in the case of a corporation). Under s91A, the Director-General may also make recommendations to the Minister for an Interim Protection Order in respect of land which has cultural significance, including Aboriginal objects, for up to 2 years duration. The existence of an AHIP does not prevent the making of a stop work order or an interim protection order (Section 90D).

Section 91L of the NP&W Act provides for remediation work to Aboriginal places or objects that have been harmed as a result of offences under the Act. This work may involve protection, maintenance, conservation, remediation or restoration of the harmed Aboriginal object or place. The maximum penalties under s91Q for contravening a remediation direction are 2,000 penalty units and 200 penalty units for each day the offence continues for a corporation.

Environment Planning & Assessment Act (1979)

The EP&A Act and its regulations, schedules and associated guidelines require that environmental impacts are considered in land use planning and decision making. Environmental impacts include cultural heritage assessment.

The EP&A Act has three main parts that are of direct relevance to Aboriginal cultural heritage. These are part III which governs the preparation of planning instruments, Part 4 which relates to development assessment processes for local government (consent) authorities and Part 5 which relates to activity approvals by governing (determining) authorities.

Part 3 deals primarily with development planning in which sites and places sacred or significant to Aboriginal communities are to be assessed and are to be taken into consideration in initial studies. Planning New South Wales (formerly DUAP) has produced guidelines on the preparation of planning instruments such as State Environmental Planning Policies (SEPP's), Development Control Plans (DCPs) and Local Environmental Plans (LEP's) that explicitly list Aboriginal sites and places of significance as values which should be assessed as part of initial planning studies.

Part 4 of the Act deals with decisions to be made within the context of development applications (Das). As a component of this legislative section, an Environmental Impact Study will, under Section 90 (1)9b include consideration of the potential impacts a proposed development may have on Aboriginal cultural heritage. If Aboriginal objects are

known to exist on the land to which the DA applies prior to the application being made, Part 4 of the EP&A Act requires the use of an 'Integrated Development Application' (IDA). Any IDAs approved for development must therefore be consistent with the General Terms of Approval or requirements provided by the relevant State Government agency (such as OEHL).

Part 5 of the Act relates primarily to activities that do not require consent but still require an environmental evaluation, such as proposals by government authorities. State Government agencies which act as the determining authority on the environmental impacts of proposed activities must consider a variety of community and cultural factors in their decision making, including Aboriginal and Historic cultural heritage values.

The *Environmental Planning and Assessment Act, 1979*, as amended, provides for the listing of heritage items and conservation areas and for the protection of these items or areas through environmental planning instruments (like LEPs or REPs) at the Local government and State planning levels. These statutory planning instruments usually contain provisions for the conservation of these items and areas as well as an assessment process to reduce the impacts of new development on the heritage significance of a place, building or conservation area.

In 2005, the NSW Parliament passed amendments to the EP&A Act, which were designed to facilitate major and critical infrastructure developments. Part 3A of the Act was repealed under these amendments, however under Division 4.1 of Part 4 'State Significant Development' is treated in a similar manner to the former Part 3A. Under Part 3A of the amended EP&A Act, separate approvals or permits are not required from DECCW, with regard to cultural heritage issues, although the DECCW may be consulted to ensure that best practices are being undertaken.

A complex interplay therefore exists between the NP&W Act and Regulation and the planning system. The specific level of Aboriginal heritage assessment and community consultation required for a given development, as well as the requirement for an AHIP is therefore dependent on the nature of the proposal, the Part and Division of the EP&A Act under which planning approval is required, the NP&W Act and Regulation, any particular project requirements imposed by the DP&I and/or the OEHL and the presence/absence or potential for Aboriginal objects to occur (Kuskie 2012).

8.3 Local Legislation

In accordance with the Environmental Planning and Assessment Act 1979 (EP&A Act) the Minister may produce planning instruments such as Local Environment Plans to be administered at a local level. These plans establish the objectives and developmental controls for land in local government areas.