

ANNEXURE 3

Aboriginal Heritage Assessment

prepared by

Myall Coast Archaeological Services



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Aboriginal Heritage Due Diligence Assessment

**Lot 20 DP 1151501
Old Saddleback Road,
Kiama. NSW**

**Report to
Cowman Stoddart Pty Ltd
Nowra. NSW
Tuesday 9th April, 2013**

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Myall Coast Archaeological Services

Aboriginal Heritage Assessment

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1. Introduction

1.1 Background

This report has been prepared at the request of Cowman Stoddart Pty Ltd, NOWRA NSW; to assess the possible impact a proposed Planning Proposal (to correct a zoning boundary anomaly) may have on Aboriginal Cultural Heritage over a small portion of land at 43 Old Saddleback Road, Kiama. This portion is part of a larger area of which the majority of the site was rezoned for residential purposes in the Kiama LEP 2011.

The above mentioned portion was not included at that time.

The report has been requested in order to demonstrate due diligence by:

1. Identifying whether or not Aboriginal objects are, or are likely to be, present in an area;
2. Determining whether or not their activities are likely to harm Aboriginal objects (if present); and
3. Determining whether an Aboriginal heritage Impact Permit (AHIP) application is required.

1.2 Legislative Context

The *National Parks and Wildlife Act 1974*, administered by DECCW, is the primary legislation for the protection of some aspects of Aboriginal cultural heritage in NSW. Section 86 of that act has been amended and deals with harming and desecrating Aboriginal Objects.

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

Under section 86 of the NPW Act, it is an offence to 'harm' an Aboriginal object. 'Harm' means any act or omission that:

- destroys, defaces, damages or desecrates the object
- moves the object from the land on which it had been situated, or
- causes or permits the object to be harmed.

The NPW Act provides several defences to prosecution for an offence. Where a person either knows or does not know they are harming an Aboriginal object, a person has a defence under section 87 where:

- The harm or desecration concerned was authorised by an Aboriginal heritage impact permit, and the conditions to which that Aboriginal heritage impact permit was subject were not contravened.
- Due diligence was undertaken and it was reasonably determined that no Aboriginal object would be harmed.
- Was work on land that has been disturbed for maintenance of existing roads, fire and other trails and tracks, maintenance of existing utilities and other similar services
- Land is disturbed if it has been the subject of human activity that has changed the land's surface, being changes that remain clear and observable.

Harm does not include something that is trivial or negligible.

2. The Due Diligence Process

Due diligence amounts to taking reasonable and practicable steps to protect Aboriginal objects. The Department of Environment and Heritage (OEH) has developed a generic code that provides one process for satisfying the due diligence requirements under the National Parks and Wildlife Act 1974 (as amended). It is not mandatory to follow this code. An individual or corporation can take other measures, provided that such measures are objectively reasonable and practicable and meet the ordinary meaning of exercising due diligence.

The purpose of due diligence is to identify whether Aboriginal objects are present in an area, and to determine whether a proposed activity will have impacts on Aboriginal objects. Therefore it is essential to identify and understand all the expected impacts of the proposed activity. There are two categories of activity used for assessing impacts:

- Activities involving no additional surface disturbance
- Activities causing additional surface disturbance.

For activities causing additional surface disturbance, it is necessary to determine whether an activity is proposed for:

- a) A developed area or a previously disturbed area, or
- b) An undisturbed area.

For activities in previously developed or disturbed areas, it is then necessary to determine whether the new activity will create significant additional surface disturbance. If it will, then the process for undisturbed areas will apply.

Disturbed land has been defined in the OEH due diligence process as Land that has been previously subjected to any activity that has resulted in clear and observable changes to the land's surface.

OEH will not approve or certify a person's compliance with their due diligence requirements carried out under this or any other code. It is the responsibility of the individual or proponent to ensure that they have undertaken due diligence.

According to the OEH Due diligence Code of practice at 7.7 it states that:

"You can follow your own due diligence process and manage your own risk. Due diligence amounts to taking reasonable and practicable steps to protect Aboriginal objects. This generic code provides one process for satisfying the due diligence requirements of the NPW Act.

It is not mandatory to follow this code. An individual or corporation can take other measures, provided that such measures are objectively reasonable and practicable and meet the ordinary meaning of exercising due diligence."

This Due Diligence Assessment follows the OEH generic due diligence code.

2.1 Assessment Personnel

The research, visual assessment and report were undertaken by Len Roberts, (BA [Arch.], Grad. Dip. Comp., Dip Sp. Ed.,) who also holds a certificate in Archaeological fieldwork, from Tel Aviv University, Israel. Len has worked on archaeological projects in Australia and overseas. Len is a member (since 1990) and was Deputy Chairperson (2007 -2011) of Karuah Local Aboriginal Land Council. He has over 20 years' experience as a local government councillor on city and regional councils. He is currently Deputy Mayor of Great Lakes Council. He was appointed, in 1977, (under S32AV of the Local government Act 1919) as a part time, non- judicial expert (having, special knowledge of and experience in law, local government administration or town planning administration) member of the Local Government Appeals Tribunal from 1977 until it was replaced by the Land and Environment Court in 1980. He has been an expert witness before the Land and Environment court on Aboriginal heritage matters. Len has also taught English and Society (Australiana) at Beifang University, Yinchuan, China as an invited lecturer in second semester 2011.

Len is currently undertaking a Masters in Indigenous Knowledge through Charles Darwin University (traditional Aboriginal law, society and practices).

Len has undertaken archaeological work for various planning and surveying companies, as well as large organizations such as AMP, Department of Public Works, RTA, Local Government Authorities, Energy Australia, Australian Rail and Track Corporation, Rio Tinto, Woolworths and numerous other clients. The projects have ranged from small aquaculture (at sea), industrial and residential projects to large rezoning proposals, as well as linear surveys for sewerage treatment upgrades, pipelines, transmission lines, wind farms, rail line upgrades and highways.

The assessments have included Due Diligence assessments, gateway determinations, as well as assessments under, Parts 3A, 4 and 5 of the EP & A Act.

Len has completed various S90 applications, as well as identifying and recording in excess of 1,000 Aboriginal objects and has authored in excess of 120 reports in the last 15 years.

3.0 The Assessment

3.1 Description of Land and Activity

The proposed development area (hereafter referred to as the study area) is located at 43 Old Saddleback Road, Kiama. The property description is known as lot 20 DP 1151501. The study area is located to the west of the Princess Highway and bordered by Caliope Road an unmade road on the south.

Figure 1 shows the regional location of the study area and figure 2 sets out the study area in approximate relation to the overall context of the property and surrounding landuse. An existing house and associated infrastructure straddles the middle of the study area. The study area has been disturbed by settlement and agricultural practices over many decades particularly since the 1930s with the property being used for grazing cattle. However, the greatest evidence of disturbance is the house situated within the study area and by the reduction in natural vegetation.

THE PROPOSED DEVELOPMENT

The proposal is to rezone the study area to correct a planning zoning anomaly. Figure 3 illustrates the extent of the anomaly and relation of study area to existing development.

EXTENT OF PROPOSED IMPACTS UPON THE STUDY AREA

As the proposal is basically changing the changing of colour on a zoning map the proposal will have absolutely no impact upon Aboriginal heritage in any way.

Future possible land use i.e. subdivision and construction may introduce the potential for impact upon Aboriginal Heritage if unknown objects exist within the study area. However that is a matter for future consideration when and if any potential is realised. However, the potential for harm is negligible as the study area is considered disturbed land.

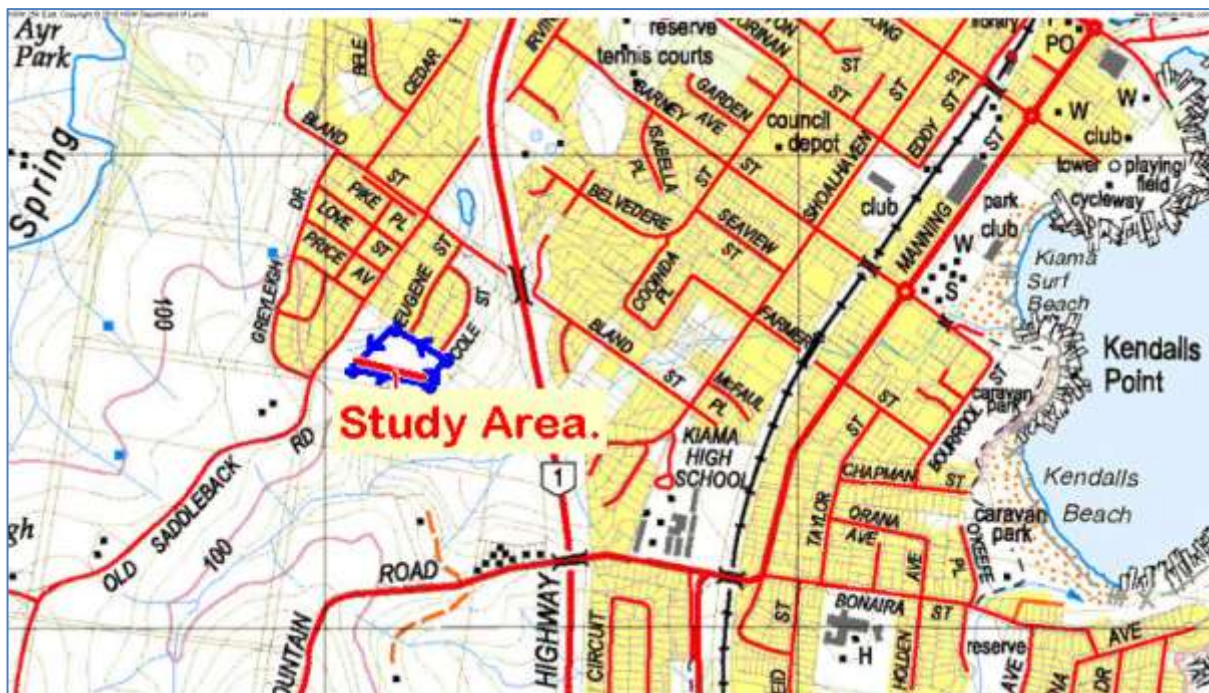


Figure 1 Location of Study Area

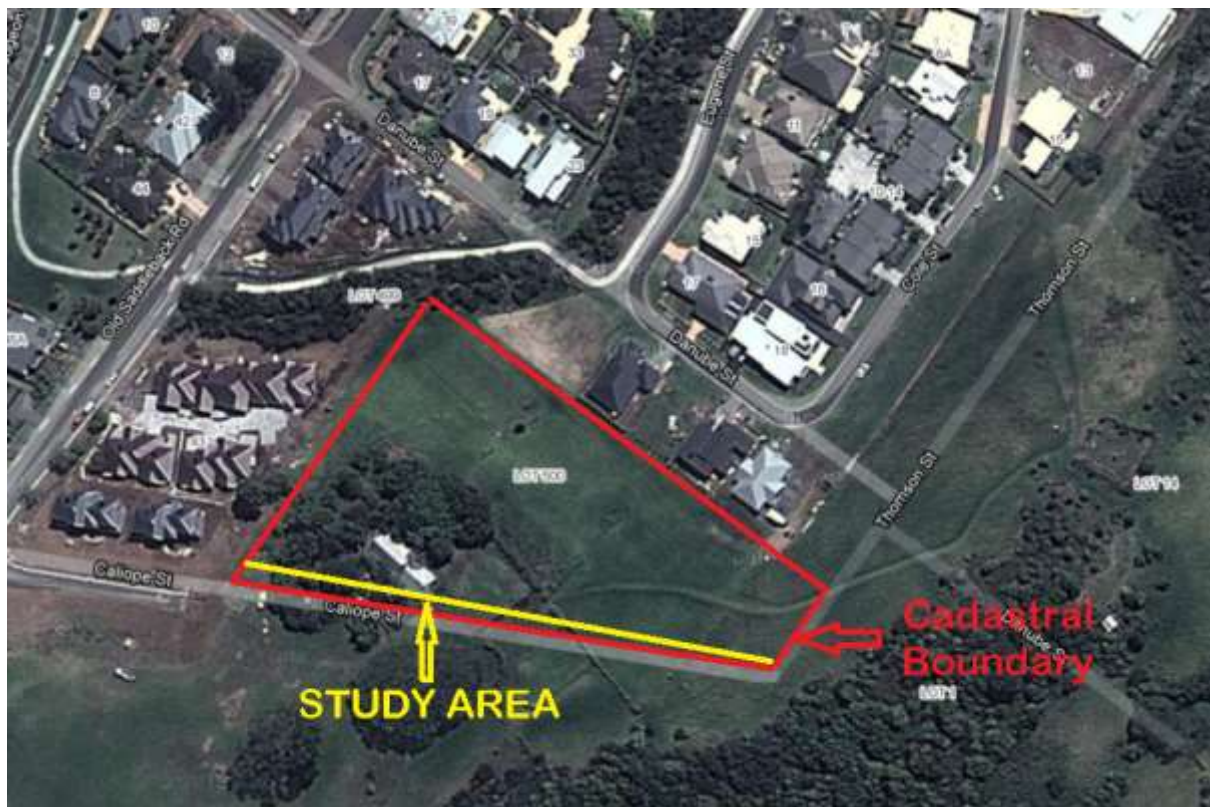


Figure 2 Study area

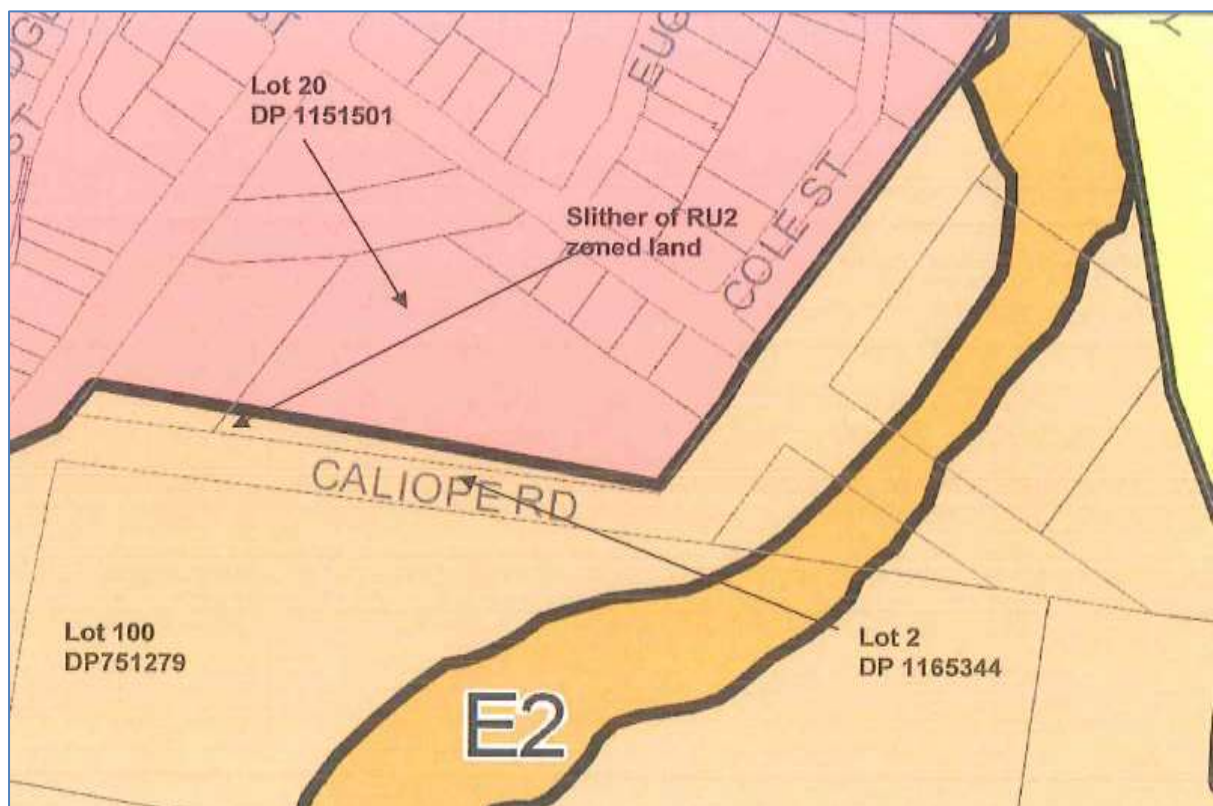


Figure 3 Zoning Anomaly

3.2 Is the Land defined as “Disturbed Land” or an exempt or complying development?

The proposal is not exempt or complying development and the land can be considered disturbed through anthropological processes associated with past land use. It can be regarded as disturbed under the definition of disturbed land under the NPW Act.

3.3 Is the activity exempt?

No

3.4 Will the activity involve harm that is trivial or negligible?

No

3.5 Is the activity in an Aboriginal Place or are you already aware of Aboriginal objects on the land?

No

3.6 Is the activity a low impact activity for which there is a defence in the regulation?

No

3.7 Will the activity disturb the ground surface?

No. Future possible land use i.e. subdivision and construction may introduce the potential for impact upon Aboriginal Heritage if unknown objects exist within the study area. However that is a matter for future consideration when and if any potential is realised. However, the potential for harm is negligible as the study area is considered disturbed land.

3.8 Does the Aboriginal Heritage Information Management System suggest potential?

No. There are no objects on the land or within 200m of the land. There is one Aboriginal Object within a 1km radius of the land. The lack of recorded objects is probably reflective of the lack of studies rather than Aboriginal occupation. Nonetheless the lack of evidence within 1km does suggest limited opportunity for observation of archaeological evidence. The AHIMS searches are attached at appendix A.

3.9 Is there archaeological potential because the proposal is:

- **within 200m of waters;**

No

- **located within a sand dune;**

No

- **located on a ridge top, ridge line, or headland;**

No, but Old Saddleback Road tends to follow a ridgeline and would likely have been an Aboriginal Song Trail (Walking corridor). However, the study area would not have been of any consequence to such Song Trail.

- **located within 200m below or above a cliff face;**

No

- **within 20m of or in a cave, rock shelter, or a cave mouth;**

No

3.10 Can harm be avoided to the object or disturbance of the landscape feature?

Yes. There is no physical development being undertaken. Future possible land use i.e. subdivision and construction may introduce the potential for impact upon Aboriginal Heritage if unknown objects exist within the study area. However that is a matter for future consideration when and if any potential is realised. However, the potential for harm is negligible as the study area is considered disturbed land.

3.11 Is Desktop assessment and visual inspection required?

No. An additional visual assessment is not required as the study area meets the definition of disturbed land under the NPW Act

3.12 Are Further investigations and impact assessment required?

No.

4.0 Impact Assessment

The study area is part of the hills of the Kiama landscape and sits at about 80m AHD. It would have been an area that Aboriginal people would have passed through on their journeys between the coast and the Saddleback ranges. The landscape near where Old saddleback Road meets Saddleback Mountain Road, some 2-3km to the southwest of the study area, suggests probable ceremonial areas. To the east of the study area closer to the coast, intensive Aboriginal occupation occurred.

The landscape context suggests that the study area would be unlikely to have been used intensively by the Aboriginal people. It particularly lacks permanent fresh water and would not have been conducive to even short occasional camping.

The landscape also suggests that the study area is not conducive to retaining Aboriginal objects, but rather any Aboriginal Objects originating on site would have been removed by natural process to depositional areas lower down. The study area does not lend itself to subsurface deposits.

Key principles in determining Occupation Pattern

Roberts, (2009 in an *Aboriginal Heritage Assessment Newdell Junction, Ravensworth, NSW*. Report to TRANSPORT EXPRESS JV ARTC Strategic Alliance- Northern Improvement NSW, Newcastle. NSW) formulated 7 key principles to determine probable Aboriginal land use of a particular area.

Using those principles it is possible to place the study area into Aboriginal occupation context and use.

1. Proximity to water

The nearest reliable water is s Spring Creek some 2km to the NW of the study area.

2. Food resource

The study area does not appear to contain any unusual food resource that would not be found within the region and does not appear to have contained any particular vegetation

3. Geological features

There is no unusual, unique and prominent geological attributes within the study area.

4. Ease of access

Whilst the study area is easily accessible on foot for all age groups from on top of the ridgeline in a sw-ne direction it is not easily accessible directly from the south, west or east.

5. Connectivity

The study area does appear to link other areas. There is a nearby ridgeline that Old saddleback Rod roughly follows that was probably a Song Trail that would have connected the coast to the hills.

6. Safety

The study area is not dangerous or close to dangerous or unhealthy landscapes. There does not appear to be natural protection from harsh and extreme weather. There are views, particularly to the southwest, but not especially different from elsewhere within the overall landscape context of the area.

7. Archaeological evidence

Given the disturbed nature of the land and past landuse archaeological evidence is unlikely to be observed within the study area. Evidence or potential was not identified from the Aboriginal Heritage Management system. However no visual assessment was undertaken.

Comment

Although the majority of the study area has been disturbed, it is still possible to suggest the occupation context and landuse. The information from the above 7 principles indicate:

- The study area was probably only occupied when opportunistic occasions arose and not especially used by the Aboriginal community. Occasional food resources were available and there are no access constraints from the Song Trail. However there are no indications that any of the study area was intensively or extensively used on a permanent or regular basis. The landscape and archaeological evidence not too distant from the study area indicate more favourable areas for occasional and more intensive camping.

Irrespective of the landscape context of the study area, the study area meets the definition of disturbed land in that it has undergone activity that has resulted in clear and observable changes to the land's surface. That is it has been used for residential purposes associated with agricultural use of the land.



Figure 4 Topography and landscape context of the study area

Given the disturbed nature of the study area, its lack of depositional qualities and infrequent occupation it is highly unlikely that Aboriginal objects exist on or below the land.

It is therefore reasonably concluded that Aboriginal objects will not be harmed by existing activities but more importantly by the proposed planning proposal and subsequent activity.

5.0 Recommendations

1. That further assessment from an Aboriginal heritage and Archaeological perspective is NOT required as it is disturbed land under the NPW Act (1974) as amended.
2. That the proponent be advised that under the NPW Act 1974, it is the responsibility of all persons to ensure that harm does not occur to an Aboriginal object. Whilst undertaking works, if an Aboriginal object is found, work must stop and DECCW notified. An application for an AHIP may also be required. Some works may not be able to resume until an AHIP has been granted. Further investigation may be required depending on the type of Aboriginal object that is found. If human skeletal remains are found during the activity, work must stop immediately, the area secured to prevent unauthorised access and the NSW Police and OEH contacted. The NPW Act requires that, if a person finds an Aboriginal object on land and the object is not already recorded on AHIMS, they are legally bound under s.89A of the NPW Act to notify OEH as soon as possible of the object's location. This requirement applies to all people and to all situations.

6.0 Certification

This report was prepared in accordance with the brief given by Cowman Stoddart to assess the impact of the proposed development on Aboriginal heritage and was undertaken to demonstrate due diligence.

Whilst every care has been taken in compiling this report to determine the impact the proposal may have on Aboriginal Heritage and to demonstrate a due diligence process, MCAS cannot warrant that due diligence has been met. It is the responsibility of the individual or proponent to ensure that they have undertaken due diligence.

Signed



5/4/2013

APPENDIX

AHIMS Searches

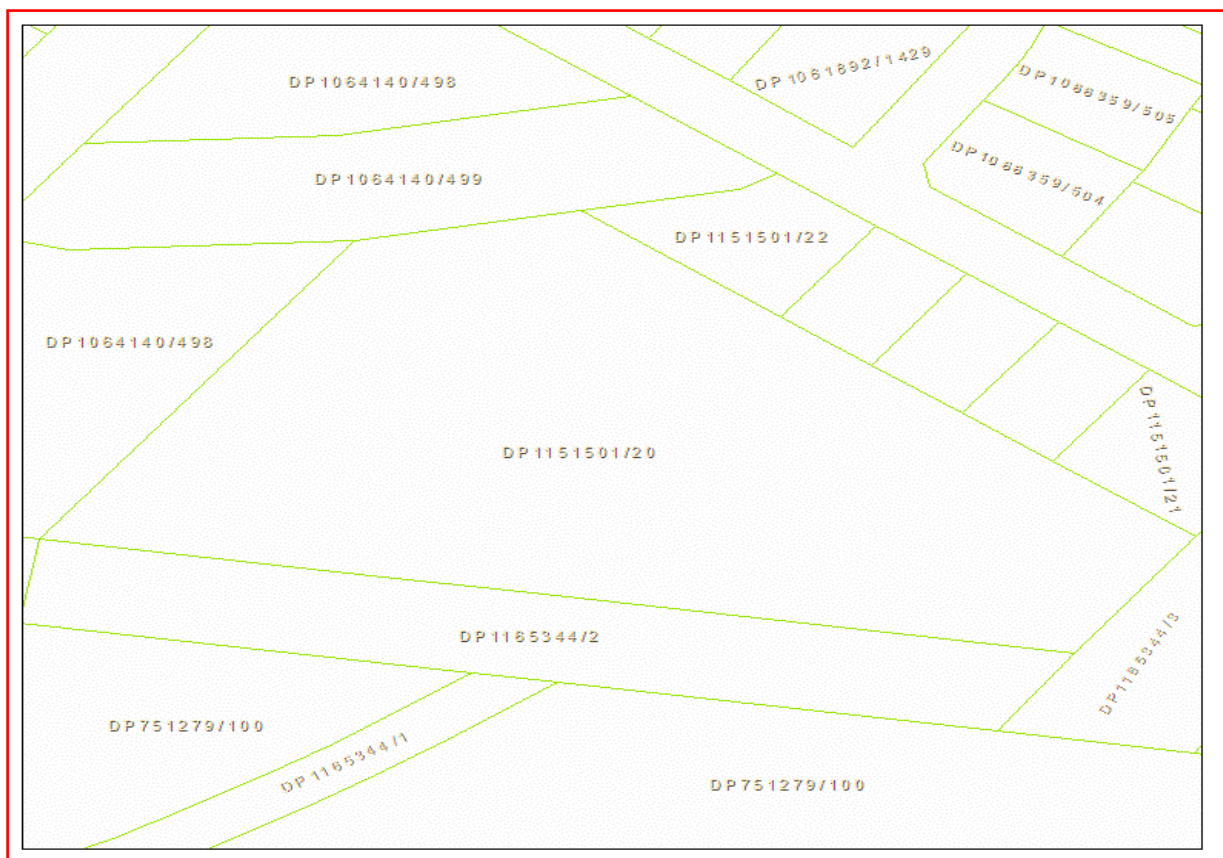
Lennard Roberts
6783 Pacific Highway
Tea Gardens New South Wales 2324
Attention: Lennard Roberts
Email: len@myallcoast.net.au

Date: 10 April 2013

Dear Sir or Madam:

AHIMS Web Service search for the following area at Lot : 20, DP:DP1151501 with a Buffer of 0 meters, conducted by Lennard Roberts on 10 April 2013.

The context area of your search is shown in the map below. Please note that the map does not accurately display the exact boundaries of the search as defined in the paragraph above. The map is to be used for general reference purposes only.



A search of the Office of the Environment and Heritage AHIMS Web Services (Aboriginal Heritage Information Management System) has shown that:

0	Aboriginal sites are recorded in or near the above location.
0	Aboriginal places have been declared in or near the above location. *

If your search shows Aboriginal sites or places what should you do?

- You must do an extensive search if AHIMS has shown that there are Aboriginal sites or places recorded in the search area.
- If you are checking AHIMS as a part of your due diligence, refer to the next steps of the Due Diligence Code of practice.
- You can get further information about Aboriginal places by looking at the gazettal notice that declared it. Aboriginal places gazetted after 2001 are available on the [NSW Government Gazette \(http://www.nsw.gov.au/gazette\)](http://www.nsw.gov.au/gazette) website. Gazettal notices published prior to 2001 can be obtained from Office of Environment and Heritage's Aboriginal Heritage Information Unit upon request

Important information about your AHIMS search

- The information derived from the AHIMS search is only to be used for the purpose for which it was requested. It is not to be made available to the public.
- AHIMS records information about Aboriginal sites that have been provided to Office of Environment and Heritage and Aboriginal places that have been declared by the Minister;
- Information recorded on AHIMS may vary in its accuracy and may not be up to date. Location details are recorded as grid references and it is important to note that there may be errors or omissions in these recordings,
- Some parts of New South Wales have not been investigated in detail and there may be fewer records of Aboriginal sites in those areas. These areas may contain Aboriginal sites which are not recorded on AHIMS.
- Aboriginal objects are protected under the National Parks and Wildlife Act 1974 even if they are not recorded as a site on AHIMS.
- This search can form part of your due diligence and remains valid for 12 months.

Lennard Roberts
 6783 Pacific Highway
 Tea Gardens New South Wales 2324
 Attention: Lennard Roberts
 Email: len@myallcoast.net.au

Date: 10 April 2013

Dear Sir or Madam:

AHIMS Web Service search for the following area at Lot : 20, DP:DP1151501 with a Buffer of 200 meters, conducted by Lennard Roberts on 10 April 2013.

The context area of your search is shown in the map below. Please note that the map does not accurately display the exact boundaries of the search as defined in the paragraph above. The map is to be used for general reference purposes only.



A search of the Office of the Environment and Heritage AHIMS Web Services (Aboriginal Heritage Information Management System) has shown that:

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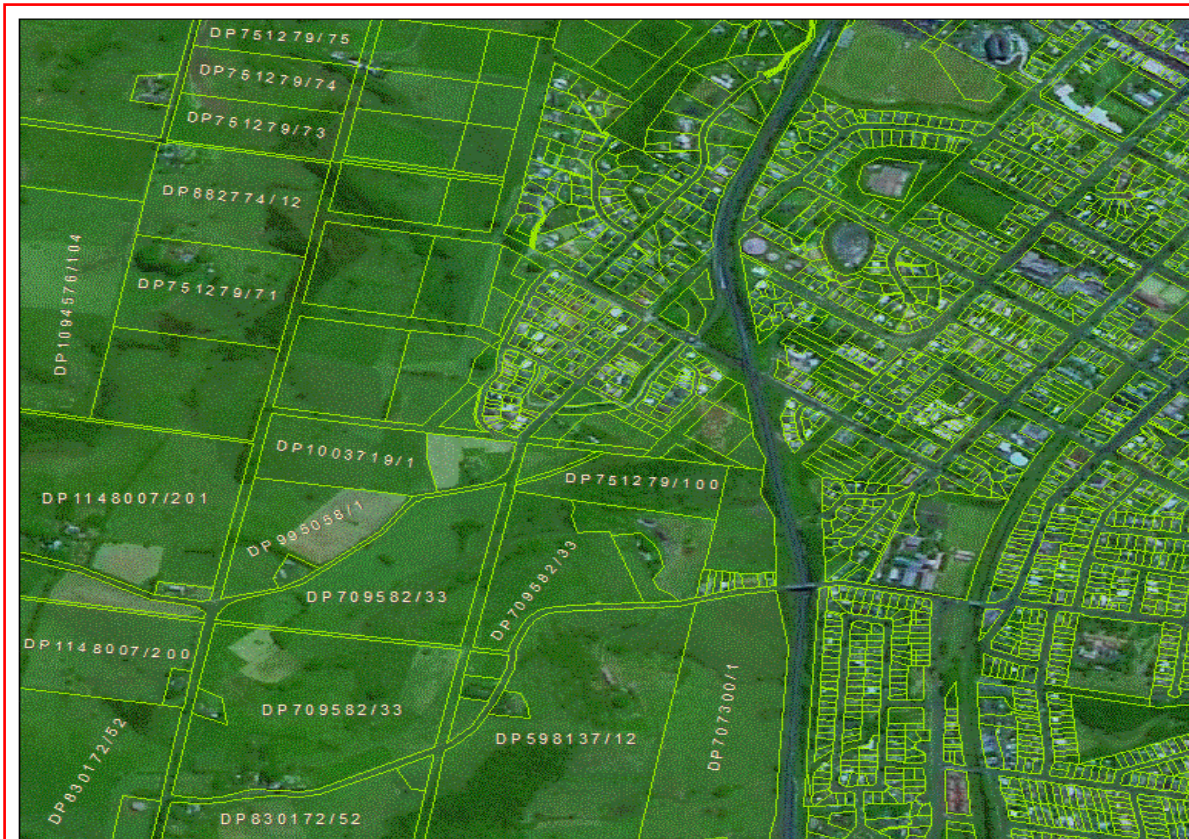
Lennard Roberts
6783 Pacific Highway
Tea Gardens New South Wales 2324
Attention: Lennard Roberts
Email: len@myallcoast.net.au

Date: 10 April 2013

Dear Sir or Madam:

AHIMS Web Service search for the following area at Lot : 20, DP:DP1151501 with a Buffer of 1000 meters, conducted by Lennard Roberts on 10 April 2013.

The context area of your search is shown in the map below. Please note that the map does not accurately display the exact boundaries of the search as defined in the paragraph above. The map is to be used for general reference purposes only.



A search of the Office of the Environment and Heritage AHIMS Web Services (Aboriginal Heritage Information Management System) has shown that:

1	Aboriginal sites are recorded in or near the above location.
0	Aboriginal places have been declared in or near the above location. *

If your search shows Aboriginal sites or places what should you do?

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Important information about your AHIMS search

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