



# Myall Coast Archaeological Services

"Tall Pines" Phone: 49971011 Mobile: 0403071922  
Tea Gardens. 2324 Email: [archaeology@myallcoast.net.au](mailto:archaeology@myallcoast.net.au) ACN: 002 992 430

## Aboriginal Heritage Due Diligence and Peer Review Assessment

of

**Lot 1 DP 1119830, Marshall Way, Bellwood.**



**Report to  
Geoff Smyth and Associates  
Coffs Harbour NSW  
7th, October, 2016**

*By Len Roberts B.A. (Arch/Hist); Grad. Dip. Comp; Dip. Sp. Ed.*

**Myall Coast Archaeological Services**  
(“Tall Pines”, Tea Gardens. 2324 Ph: 49 971011)

# **Aboriginal Heritage Assessment**

## **Table of Contents**

<b>1. Introduction</b>	<b>page 2</b>
<b>2. OEH Concerns</b>	<b>page 4</b>
<b>3. Review</b>	<b>page 10</b>
<b>4. Recommendations</b>	<b>page 11</b>
<b>5. Certification</b>	<b>page 11</b>
<b>6. Appendix</b>	<b>page 12</b>

## 1. Introduction

### 1.1 Background

This report has been prepared at the request of Geoff Smyth and Associates, Coffs Harbour, NSW, to peer review previous archaeological and cultural assessments over of land now known as Lot 1 DP 1119830, Marshall Way, Bellwood.

The original lot was Lot 101 DP 882258 that became lot 115 DP 1057175 due to a minor boundary alteration and subsequently became Lots 1 and 2, DP 1119830. Each of these subdivisions was approved without any Aboriginal heritage values being identified as a concern.

In 2014, the Joint Regional Planning Panel (JRPP) after due consideration of extensive Aboriginal Cultural assessments, approved the further residential subdivision of lot 2. That approval conditioned the protection of the known cultural value identified across the total area of Lot 101. The approval particularly made reference to specific protection to the Diamond tree and associated area of significance.

This proposal is for further subdivision of lot 1 which was not identified in any assessment as containing any heritage significance.

**It must be noted with the approval of the subdivision into Lots 1 and 2, DP 1119830 that the Aboriginal cultural heritage values of the area centred on the area containing the Diamond Tree that is excised from the proposal and protected into perpetuity.**

**In addition when the further subdivision of Lot 2 was considered in 2014, the JRPP conditioned additional protection/enhancement of cultural heritage values of the area associated with the Diamond tree.**

The purpose of the review was to determine:

1. Whether or not Aboriginal objects are, or are likely to be, present in an area;
2. Whether or not the proposed activity (subdivision) is likely to harm Aboriginal objects (if present);
3. Whether an Aboriginal heritage Impact Permit (AHIP) application is required;
4. The adequacy of the assessments to date to support the proposal;
5. What further work, if any, is required to protect Aboriginal heritage values.

A requirement for this report was also to address the concerns of the Office of Environment and Heritage (OEH), in their advice to council on 11/7/2016. Those concerns consisted of:

- i. The subject land not having been assessed for Aboriginal heritage values
- ii. If it was assessed the age and comprehensiveness of such survey
- iii. Lack of consultation with the Aboriginal community
- iv. The need to undertake further assessment

The concerns of OEH shall be addressed first, and then the heads of consideration for the peer review shall be addressed generally as a Due Diligence process for Aboriginal Heritage to reflect current requirements.

### **1.1 Assessment Personnel**

This review was 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 and currently Honorary CEO of Karuah Local Aboriginal Land Council. He was a part time member of the Local Government Appeals Tribunal before it became the Land and Environment Court. He has been an expert witness before the Land and Environment court on Aboriginal heritage matters. Len has also taught at Beifang University, Yinchuan, China.

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.

## 2. OEH Concerns

Before addressing the concerns of OEH it is pertinent to outline the legislative process requirements for the consideration of Aboriginal Heritage values in the planning process; and in undertaking an activity.

### 2.1 *Legislative Context*

The *Environmental Planning and Assessment Act 1979* requires a “relevant planning authority to take into consideration the impacts to the environment (both natural and built) and the community of proposed development or land-use change.” Most development requires a Statement of Environmental Effects detailing the impacts to both natural and human environments, which should be taken into consideration by the planning authority, while larger projects require a more thorough Environmental Impact Assessment. Aboriginal Cultural Heritage is one of the heads to be considered.

The requirement to protect Aboriginal cultural heritage in planning proposals is stated in Local Planning (section 117) Direction 2.3 Heritage Conservation:

"A planning proposal must contain provisions that facilitate the conservation of:

- a) items, places, buildings, works, relics, moveable objects or precincts of environmental heritage significance to an area, in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item, area, object or place, identified in a study of the environmental heritage of the area,
- b) Aboriginal objects or Aboriginal places that are protected under the National Parks and Wildlife Act 1974, and
- c) Aboriginal areas, Aboriginal objects, Aboriginal places or landscapes identified by an Aboriginal heritage survey prepared by or on behalf of an Aboriginal Land Council, Aboriginal body or public authority and provided to the relevant planning authority, which identifies the area, object, place or landscape as being of heritage significance to Aboriginal culture and people."

Planning proposals should identify whether Aboriginal cultural heritage values are known or are likely to occur.

The *National Parks and Wildlife Act 1974*, administered by the Office of Environment and Heritage (OEH), is the primary legislation for the protection of some aspects of Aboriginal cultural heritage in NSW. Section 86 of that Act deals with harming and desecrating Aboriginal Objects.

Since October 2010, amendments to the *National Parks and Wildlife Act 1974*, have codified the way in which planning authorities and proponents are to consider Aboriginal cultural heritage values.

Local Environmental Plans (LEP) and their accompanying Development Control Plans formalise constraints and landuse of a particular parcel of the land. Once an LEP is gazetted, it dictates how the land can be used. If there are particular constraints to the land the LEP reflects those constraints.

Prior to the adoption of an LEP or planning proposal to amend an LEP a thorough investigation of Aboriginal Cultural Heritage in accordance with the archaeological code for Aboriginal investigations is required so that the heritage value is known to allow for future subdivision and development activities without the need for extensive studies for each and every future permissible activity.

Aboriginal cultural heritage values should be considered as early as possible in the planning process to provide greater certainty for heritage and development outcomes. OEH recommends that planning authorities assess and consider Aboriginal heritage values (tangible and intangible) when they prepare planning proposals. Early assessment provides:

- the best opportunity to avoid, mitigate and manage impacts to Aboriginal heritage
- an opportunity to engage with Aboriginal stakeholders so they can have meaningful input to the decision-making process
- greater certainty at the development application stage

Any activity is then subject to a Due Diligence assessment to ensure that the activity will not impact an Aboriginal Object or place.

*'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.

Due diligence is not an assessment of Aboriginal cultural heritage values. It is important to note that The Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales (2010) should not be used to support a planning proposal. Due diligence is an assessment of likely harm and not a detailed assessment of Aboriginal cultural heritage values. Due Diligence is a voluntary process that provides an individual with a defence against prosecution for the strict liability offence if they later unknowingly harm an Aboriginal object without an Aboriginal Heritage impact Permit.

## 2.2 Response to OEH Concerns

- i. The subject land not having been assessed for Aboriginal heritage values

*We noted that the subject lands did not appear to have ever been surveyed or assessed for ACH values. Despite the two figures in the 2009 Appleton report (Figures 1 and 5) suggesting the site subject to the current DA was surveyed, the report consistently refers to Lot 2, DP 1119830. We further note that during the consultation process for the 2002 survey all letters and notifications to the Aboriginal community referred only to Lot 2, DP 1119830. The OEH notes that the lands currently being assessed do not include or even border on, Lot 2 DP 1119830 so the council should seek clarification and supporting evidence to show that the subject lands have been subject to archaeological survey and consultation.*

With the utmost respect to the OEH officer who compiled these comments, this concern is not only without foundation but beggar's belief that it was ever made. To state that despite the Appleton report showing that it was surveyed that it wasn't because the land identifiers did not appear to match is simply obtuse and says more about the ability of the officer to assess the report. I do not know Appleton, the report author, but I have read many of his reports and the work is always solid. Not only are the transects of the investigation mapped, but the description of the survey is also accurate. The land subject to this proposal was assessed. As stated in the background section of this review the land in question has had its folio identifier changed with subsequent subdivisions.

**Comment: This concern is unfounded and unjustified.**

- ii. If it was assessed the age and comprehensiveness of such survey renders the survey unreliable

*The OEH further notes that the report, dated December 2009, actually refers to survey and analysis which was conducted in 2002. In general, reports greater than five years old cannot be accepted without corroborating recent data for planning decisions. This is due to a number of factors, primarily the fact that natural and anthropogenic taphonomic processes (land disturbances) that significantly alter the visual archaeological signature are likely to have occurred over longer periods of time. The OEH notes a number of major flood and weather events since 2002 that are almost certain to have resulted in significant variation in the visible archaeology of the subject lands. Furthermore the OEH notes that in the 2009 report refers to the surface conditions in 2002 when the fieldwork was conducted as "so dense in many places that it was only possible to perform a sample survey."*

*The OEH advises that, even in the event that evidence is provided that the subject lands were surveyed in 2002, the survey was conducted 14 years ago under conditions which precluded the identification of any Aboriginal sites or objects which may be present. Furthermore, given the size of the area purportedly covered in 2002, the OEH considers that archaeological survey carried out in one day over an area as large as that could not have constituted a comprehensive and effective archaeological assessment.*

This comment is also unwarranted and incredulous, particularly with respect to the comprehensiveness of the survey. More importantly, the 2009 report by Appleton was written to satisfy the requirements of the Director General under Part 3A. This is spelt out very clearly on page iv of the executive summary.

*"In early 2009 ASR was engaged to revise the 2002 archaeological report, both to address the issue of the destruction of the scarred tree, and to comply with the requirements for approval under 'Part 6 Approvals' of the National Parks and Wildlife Act 1974 (as amended), and to address the issues raised by the Department of Planning in its review of the application for Part 3A approval, in order that it fully complies with the Director-General's requirements. In November 2009 the proponent received the Director-General's Environmental Assessment Requirements which arose from the application for Part 3A approval. One of the issues that were to be addressed was an email sent on 27th October 2009, to NSW Department of Planning from Louise Robinson, CEO, Nambucca Heads LALC, raising several issues of cultural concern."*

Part 3A DGR's required best practice, comprehensive assessment. This author has compiled assessments under Part 3a and they needed to be written to undergo public scrutiny. The 2009 Appleton report was unequivocally comprehensive and best practice at the time. The report still meets current standards.

Surveys of large areas are not meant to have each square metre forensically examined, but archaeologists are meant to target sample areas based on landscape attributes and areas of likely significance. Appleton did this methodically and the strategy of targeted assessment is outlined in the report at sections 5 and 6. Pertinent paragraphs are cited below.

*"The first objective of any archaeological investigation must be to observe and record sufficient of the archaeological record that is present to be able to propose that it is representative of the record as a whole. The investigative strategy is therefore directed and designed to detect that which is representative of the record in the particular study area, and naturally, as different study areas will comprise variations in environment, vegetation, topography, etc., so the investigative strategy must be designed to best suit the circumstances. The objective must be to detect material evidence, and so it is necessary to consider the extent to which artefactual material may be present, and the degree to which it is visible or might be discovered" (p17)*

*"The survey technique was the most appropriate one to use in the circumstances, and the results are believed to be generally representative of the archaeological record in the survey area, in which it was predicted there would be very little artefactual material. Although the entire area was sample surveyed, the groundcover was a constraint to the effectiveness of the survey." (p22)*

With respect to the age of the study, as noted in the OEH comment, in general, reports over 5 years old are considered out of date. The key words here are "in general". This study is not out of date; as the study was used within the standard timeframe, to inform at least 2 development proposals, to ensure Aboriginal Heritage values are protected. Given that consideration of the Aboriginal Heritage values were considered early in the planning process and accommodated, further development of the site does not warrant further assessment. The Appleton Study was less than 5 years old when provided to council for consideration for this assessment.

This author is somewhat bemused by the comment of the OEH officer that *"primarily the fact that natural and anthropogenic taphonomic processes (land disturbances) that significantly alter the visual archaeological signature are likely to have occurred over longer periods of time"*, as a reason for ruling out a study is absurd in the extreme. Taphonomic processes are processes that fossilise living organisms after their death. It is not a process that disturbs land and alters visual archaeological signature. Fossilisation generally occurs over eons not decades. Storms and weather events can affect the visibility of archaeological evidence, but Appleton in his study, clearly accounted for this in his assessment when formulating his predictive model.

**Comment: This concern is unfounded and unjustified.**

iii. Lack of consultation with the Aboriginal community

*Furthermore, the OEH notes the existence of at least one report, prepared by the local Aboriginal community and submitted directly to the council to inform the determination process. This report identified very significant cultural heritage values directly associated with the subject lands. We also note that that report clearly stated that no opportunity to carry out any ACH survey on the subject lands had been provided, nor consultation with, any member of the Nambucca Heads Aboriginal community to date.*

*The additional information provides a single paragraph response to the ACH concerns we raised, stating that no ACH values exist within the subject lands and that significant consultation with 'local Aboriginal representatives' has taken place. No evidence to support this response has been provided.*

Section 2 of the Appleton report clearly sets out the lengthy process undertaken for the Aboriginal community consultation. The consultation had to meet the requirements of the DGR's for Part 3A. Appleton states;

"In June 2009, on being advised by the proponents that approval was being sought for the proposed subdivision as a Part 3A Major Project, Appleton advised the client of the procedure that would now be required to comply with the "Guidelines For Aboriginal Cultural Heritage Impact Assessment and Community Consultation" (DECC 2005). Accordingly, and in compliance with the guidelines, advertisements were placed in the 'Mid Coast Observer' and the "Nambucca Guardian News", inviting all Aboriginal stakeholders with an interest in the project to register their interest. A copy of the advertisement as it appeared in the newspapers is included as **Appendix ii**. The only response to the advertisements was from Nambucca Heads Local Aboriginal Land Council (included as **Appendix iii**). ASR waited a further five days after the 14 days on which the advertisement was published had expired, in case there had been some reasons for the delay in responding, but no other responses were received." (p7)

The consultations undertaken by Appleton not only meet the requirements but also meet the requirements if undertaken today. In addition, the previous consents for which the assessment was used found no flaws in the consultation process.

This author cannot understand how the OEH officer can claim that there was a lack of consultation.

iv. The need to undertake further assessment

*Based on the aforementioned points the OEH considers that an updated Aboriginal cultural heritage assessment report (ACHAR) should be prepared to inform the proposal. The updated ACHAR should be informed by, and include the results of, a new survey of the subject lands to ensure confidence and adequacy in the assessment process and consultation with Aboriginal knowledge holders. That report should be submitted to the OEH for review prior to the council determining the development application.*

Despite the concern not only is further assessment is not required particularly as the Appleton report is sufficient for the planning authority to make a determination, the request by OEH for further assessment to be submitted to them for review is *ultra vires*.

Whilst consideration of heritage values in planning proposals can be reviewed by OEH under gateway requirements, other such assessments cannot and will not be considered by OEH. 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.

Aboriginal Heritage values have been considered in the report, recommendations for protection of Aboriginal heritage accounted for in previous approvals.

**Comment: This concern is unfounded and unjustified.**

The concerns of OEH appear to be at odds with previous consents and heritage considerations over the land, as well as, OEH's own *intra vires*. The concerns appear to be based on misunderstandings of the planning process to date which has allowed several subdivisions and changes in subsequent Land Title descriptions. The concerns also fail to understand the comprehensive assessment consideration of heritage values in previous consents regarding the larger study area.

### 3.0 The Review

#### 1. Are Aboriginal objects, or are likely to be, present in the area subject to the proposal

Based on the comprehensive Appleton 2009 report written for Part 3A requirements, predictive modelling, landscape and landuse, it is unlikely that Aboriginal objects are present within the landscape. If they are, contextual integrity would be compromised.

#### 2. Will the proposed activity (subdivision) likely to harm Aboriginal objects (if present)

No, as all known and likely Aboriginal cultural values have been assessed and protected through previous consents over the land.

#### 3. Is an Aboriginal heritage Impact Permit (AHIP) application is required

No.

#### 4. The adequacy of the assessments to date to support the proposal

The assessments undertaken by Appleton and submitted with this proposal meets the requirements under the EP and A Act, 1979, in that Aboriginal Cultural heritage values have been assessed and protected. The proposal, whilst not a planning proposal, has had Aboriginal heritage assessed under the process for a planning proposal, in that it was initially formulated for a Part 3A assessment.

The current heritage assessment requirement for a subdivision is for the proponent to ensure, Due Diligence has been undertaken with respect to Aboriginal heritage values. Although this review, along with the Appleton report, can be used for Due Diligence, only the proponent can accept that to be the case. OEH, the Aboriginal community, nor a planning authority have any role in ensuring due diligence has been met.

#### 5. What further work, if any, is required to protect Aboriginal heritage values

Further heritage assessment of the land is not required but the recommendations of the Appleton Report, 2009, should be followed, as well as, the recommendations of this review.

## 4.0 Recommendations

- After reviewing the Appleton assessment and the OEH concerns and given that any Aboriginal heritage constraints have been identified and protected in previous consents covering the larger study area; it is reasonably concluded that there is no constraint to subdivision provided that the consent authority conditions any approval with the following conditions:
  1. This consent does not give approval to harm an Aboriginal object. Under the NPW Act 1974, it is the responsibility of all persons to ensure that harm does not occur to an Aboriginal object. 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.
  2. A Cultural Education Program should be developed by the proponent for the induction of personnel involved in the construction activities in the project area. The proponent has a duty of care to ensure each worker is aware of individual responsibilities under the Act. The Local Aboriginal Land Council may be able to assist in delivery of such induction.

And;

- That recommendations of the in the Appleton report 2009 should be further considered if not already implemented.

## 5.0 Certification

This report was prepared in accordance with the brief given by Geoff Smyth and Associates to assess and review 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 or guarantee that due diligence has been met. It is the responsibility of the individual or proponent to ensure that they have undertaken due diligence.

**Signed**



**(Archaeologist)**

29/9/2016