

Chapter B12 – Aboriginal Heritage

1.0 Introduction

1.1 Scope of this Chapter

This Chapter applies to all development in the Kempsey Shire local government area that requires development consent pursuant to Clause 5.10 of KLEP 2013.

1.2 Relationship to Other Chapters of this DCP

The provisions of this Chapter override the provisions of any other Chapter in this DCP to the extent of any inconsistency.

1.3 Definitions use in this Chapter

Definitions of terms used in this chapter are contained in the Glossary of this DCP.

2.0 Chapter Objectives

The objectives of this Chapter are:

- a) To ensure that Aboriginal objects are identified and protected.
- b) To ensure that proposed development does not compromise or deleteriously effect Aboriginal objects or an Aboriginal place of heritage significance.

3.0 Background

3.1 Relationship to other Documents

These provisions should be read in conjunction with:

- a) "Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales", (Department of Environment, Climate Change and Water NSW, 2010).

The Due Diligence Code assists individuals and organisations to exercise due diligence when carrying out activities that may harm Aboriginal objects.

- b) "Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010", (Department of Environment, Climate Change and Water NSW, 2010).

The Heritage Consultation Requirements provides guidelines for consulting with the Aboriginal community.

- c) "Code of practice for archaeological investigation of Aboriginal objects in NSW". (Department of Environment, Climate Change and Water NSW, 2010).

- d) "Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW", (NSW Office of Environment & Heritage, 2011)
- e) "Applying for an Aboriginal heritage impact permit: guide for applicants 2010", (NSW Office of Environment & Heritage, 2011)

The above documents are available on the NSW Office of Environment & Heritage website.

3.2 Legislation

3.2.1 National Parks and Wildlife Act 1974.

The *National Parks and Wildlife Act 1974* (NPW Act) is administered by the Office of Environmental & Heritage (OEH) and is the primary legislation for the protection of Aboriginal cultural heritage in New South Wales. The NPW Act provides statutory protection for all Aboriginal places and objects. The provisions of the NPW Act in relation to Aboriginal cultural heritage will apply even in the event no development consent from Council is required.

3.2.2 Environmental Planning and Assessment Act 1979

Development Applications

All development applications are required to be considered against the provisions of any environmental planning instrument and development control plan, in accordance with section 79C of the *Environmental Planning and Assessment Act 1979* (EPA Act). Both Kempsey LEP2013 and this DCP require consideration of the potential impacts of development on Aboriginal heritage.

Integrated Development under the EPA Act

An Aboriginal Heritage Impact Permit (AHIP), issued by the Office of Environment & Heritage, will be required for development that will have an impact on Aboriginal objects or places. Further information is available on the OEH website at www.environment.nsw.gov.au If an AHIP is required, then the development will constitute Integrated Development in accordance with Section 91 of the EPA Act.

The implications of triggering Integrated Development are that the development application will need to be placed on public exhibition and additional development application fees will need to be paid at the time of lodgement.

3.3 Kempsey Local Environmental Plan 2013

Clause 5.10(2) of Kempsey LEP 2013 requires development consent for any of the following:

- Demolishing, removing or altering the exterior of an Aboriginal object;
- Knowingly, disturbing an archaeological site;
- Erecting a building on land on which an Aboriginal object is located or that is within an Aboriginal place of heritage significance; and
- Subdividing land on which an Aboriginal object is located or within an Aboriginal place of heritage significance.

Clause 5.10(8)(a) requires the consent authority to consider the effect of development on Aboriginal places of heritage significance. To be defined as an Aboriginal place of heritage significance in accordance with KLEP2013, it is necessary for the site to be listed in an Aboriginal heritage study that is publicly exhibited and adopted by Council. At the time of adoption of this DCP, no such study has been adopted by Council.

Clause 5.10(8)(b) requires the consent authority to notify the local Aboriginal community in writing where the development application involves development on or in an Aboriginal place of heritage significance. The notification will have a 28 day response period.

Clause 5.10(10) provides conservation incentives in relation to any Aboriginal place of heritage significance

The above summary is current at the time of adoption of this DCP. Please refer directly to the KLEP2013 for detail of what's contained in the clauses and to ensure the most current version is referred to.

4.0 Guidelines

4.1 Step by Step Process for Determining Impact on Aboriginal Objects and Places

Step 1 - Will the activity disturb the ground surface or any culturally modified trees?

- (i) If no – proceed with caution.
- (ii) If yes – proceed to Step 2.

Step 2 - Are there any:

- a) Relevant confirmed site records or other associated landscape feature information on AHIMS? And/or**
- b) Landscape features that are likely to indicate presence of Aboriginal objects?**

Aboriginal objects are often associated with particular landscape features as a result of Aboriginal people's use of those features in their everyday lives and for traditional cultural activities. Therefore it is essential to determine whether the site contains landscape features that indicate the likely existence of Aboriginal objects.

Landscape features that are likely to indicate the existence of Aboriginal objects or places include:

- Within 20m of or in a cave, rock shelter or cave mouth;
- Within a sand dune area;
- Immediately adjacent to coastal waterways, waterholes and wetlands;
- Located on a prominent ridge top, ridge line or headland;
- Located immediately below or above a cliff face; and
- Within the vicinity of where the coastline used to be in the past.

Examples of Aboriginal objects include:

- Human skeletal remains;
- Aboriginal culturally modified tree (eg scarred trees and canoe trees);
- Middens;
- Rock art (painting and engravings);
- Stone artefacts/tools;
- Raised earth rings;
- Grinding grooves;
- Rock shelters;
- Earth mounds;
- Hearths; and
- Stone arrangements.

Refer to Appendix 1 of the Due Diligence Code for examples of these objects.

- (i) If no – proceed with caution;
- (ii) If yes to any or all – go to Steps 3a and 3b.

Step 3a - Can harm to Aboriginal Objects listed on AHIMS or identified by other sources or information be avoided?

Step 3b – Can the carrying out of the activity at the relevant landscape features be avoided?

Avoiding harm to Aboriginal objects and places basically involves avoiding development on those parts of the site likely to contain objects.

- (i) If no – proceed to Step 4.
- (ii) If yes – proceed with caution.

Step 4 – Does a desktop assessment and visual inspection confirm that there are Aboriginal objects or that they are likely?

Desktop assessment and visual inspection applies to “not disturbed land” and where there are no known Aboriginal objects. The actions required are to:

- Check any previous archaeological/heritage studies; and
- Visual inspection by a person with expertise in identifying Aboriginal objects.

- (i) If no – proceed with caution.
- (ii) If yes – consider modifying the application

Step 5 - Further investigation and impact assessment.

- (i) If harm to Aboriginal Object will occur an AHIP will be required with referral to OEH as Integrated Development.
- (ii) If no harm – no Aboriginal object, or harm can be avoided if present, proceed with caution.

Proceed with caution (during works)

- If you find an Aboriginal object – stop work and notify OEH (may need AHIP).
- If you find human skeletal remains – stop work, secure area, contact police and OEH.

5.0 Development Requirements

5.1 Due Diligence Check

Desired Outcomes

DO1 Reasonable actions are undertaken to identify the potential for Aboriginal objects and Aboriginal places of heritage significance on development sites.

Development Requirements

- a) For developments that are located within landscape features that are likely to indicate presence of Aboriginal objects, a due diligence check in accordance with the Due Diligence Code is required to be submitted in support of the application.

5.2 Where Potential Impact is Discovered During Due Diligence

Desired Outcomes

DO1 An adequate assessment is made to determine the likely impact on any Aboriginal object or place has been made, including measures required to manage any potential impacts.

Development Requirements

- a) The requirements of the Office of Environment & Heritage must be considered and reflected in a development application affecting land being of cultural significance to the local Aboriginal community.
- b) An Aboriginal Heritage Assessment Report is submitted with development applications.
 - (i) All development applications must be accompanied by an assessment of the cultural value of the affected land;
 - (ii) Each assessment must reflect the particular interests of traditional/tribal owners as well as the generic interest of Aboriginal people;
 - (ii) Include appropriate management and security measures for ongoing protection of sites; and
 - (iii) Comply with the methodology and requirements of the "Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW".

Appendix A: Aboriginal objects and potential places of Aboriginal significance identified in other Chapters of this DCP

The following table provides a summary of all references to Aboriginal objects or places contained in this Development Control Plan.

Chapter	Page	Copy
D4	6	3.5.1 (a) – refers to Aboriginal Midden located on north-eastern corner of the site. 3.5.2 (b) – possible Aboriginal scar tree 6.5m to the south of the site. 3.5.3 (b) – indicates that the Old School Building is of significance to the local Aboriginal community.

Appendix B: Indication of coastline within Macleay Valley 5000-6000 years ago.

When reviewing whether any landscape features may indicate the potential for Aboriginal objects on the land, it is useful to consider that the coastline in the Macleay has moved over time. Objects, such as shell middens, may be located a considerable distance from the current coastline.

