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AACAI – NSW CHAPTER  
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SYDNEY NSW 2006

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27 July 2010

**Re: Submission on Draft Code of Practice for Archaeological Investigation in NSW and Consultation Draft of the National Parks and Wildlife Amendment (Archaeological Investigations) Regulation 2010**

Dear Mr Gifford,

Thank you for the opportunity to comment on the above documents (hereafter referred to as 'The Draft Code' and 'The Draft Regulation' respectively). We are pleased to offer the informed opinions of our membership on these documents, particularly as they closely affect the Aboriginal archaeological consultancy work of our members. We are, however, disappointed that this expertise and practical experience was not more fully drawn on through consultation that we had been led to believe would be integral to the drafting of the Draft Code.

The submission contains comments on both the Draft Regulation and the Draft Code, the latter part divided into *General Comments* and *Specific Comments* which are tabulated according to the numbered sections of the Draft Code for ease of reference.

***Comments on the Draft Regulation***

Given the statutory requirement that the introduction of a Regulation must be preceded by a consultation process, some members have questioned the appropriateness of this occurring in relation to a Code this is at draft stage. As detailed below, the major failure of the Draft Code is that it does not specify who can carry out the archaeological investigation in terms of required minimum qualifications and experience. Given the gravity of exempting people undertaking archaeological test excavations from the definition of 'harm' under the Act, AACAI cannot support the Draft Regulation unless these issues are addressed in the finalised Code. It presently represents a step towards less protection of Aboriginal heritage, which on principle we cannot support as a professional organisation devoted to the appropriate management and protection of heritage.

***General Comments on the Draft Code***

**Professional Standards**

The archaeological heritage of Australia constitutes part of the living culture of Aboriginal people, past and present. The importance of the physical protection and regulation of this archaeological heritage, along with the professional and academic standards, is set out and guided by the Burra

Charter and archaeological heritage charters prepared by ICOMOS<sup>1</sup> and UNESCO<sup>2</sup>. AACAI incorporates these principles in our Constitution and Code of Ethics and our submission is guided by this.

The AACAI conditionally supports the notion of archaeological test excavations not requiring a Part 6 approval in certain circumstances. However we strongly oppose the current proposal in the Draft Code on the grounds that it does not stipulate that such works be carried out by a qualified professional archaeologist, (despite being labelled an 'archaeological' code), nor what qualifications and experience such people should possess. This contradicts the principles to which our members subscribe, as well as those underpinning heritage management in Australia and internationally.

At a state level, professional standards under heritage legislation are left to departmental policy and differ dramatically between the Aboriginal and non-Aboriginal heritage regulators. In obtaining an archaeological excavation permit under the *Heritage Act 1977* (NSW), the Heritage Branch, Department of Planning, has outlined specific criteria for an archaeological excavation director<sup>3</sup>. This is common best practise nationally and internationally. DECCW, however, does not require any such professional standards to be met prior to issuing an Aboriginal Heritage Impact Permit (AHIP). There is no legal or policy requirement to demonstrate archaeological qualifications, experience or abilities. Anyone can complete Section 2.4 of the AHIP application<sup>4</sup>, and from the list of AHIP supporting documentation<sup>5</sup> there is no requirement to submit or demonstrate archaeological qualifications and/or competencies. In practice, regulators could verbally request proof of archaeological qualifications, but legally an AHIP cannot be refused on these grounds<sup>6</sup>. Further, DECCW's operational policy for protecting Aboriginal cultural heritage does not outline professional requirements for archaeologists responsible for undertaking work permitted under an AHIP<sup>7</sup>. This is unfortunate in light of DECCW's Cultural Heritage Strategic Policy which identifies three key focus areas: fostering connections with heritage, raising standards for heritage conservation and understanding heritage in its context<sup>8</sup>. The only document that hints at professional requirements for archaeologists (such as a degree, experience and knowledge of legislation) is the Aboriginal Cultural Heritage Standards and Guidelines Kit which dates to 1997<sup>9</sup> and is intended to be superseded by the Draft Code.

This policy trend is further compounded by the Draft Code. Archaeological test excavations from 1 October 2010 will not require a s87 AHIP if archaeological works are undertaken in accordance with the Draft Code. Further it is noticed that this archaeological work does not need to be undertaken by a professional archaeologist. AACAI does not want to speculate as to why this is a

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<sup>1</sup> ICOMOS: *Charter for the protection and management of the archaeological heritage* (1990). Prepared by the International Committee for the Management of Archaeological Heritage (ICAHM) an approved by the 9th General Assembly in Lausanne in 1990. ([http://www.international.icomos.org/charters/arch\\_e.htm](http://www.international.icomos.org/charters/arch_e.htm)).

<sup>2</sup> UNESCO, *Recommendations on International Principles Applicable to Archaeological Excavations*. The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting at New Delhi, from 5 November to 5 December 1956, at its ninth session. ([http://portal.unesco.org/en/ev.php-URL\\_ID=13062&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html))(accessed 7/7/2010). The Constitution of UNESCO, signed on 16 November 1945, came into force on 4 November 1946 after ratification by twenty countries including Australia. This is a UNESCO recommendation not subject to ratification, adopted in 1956.

<sup>3</sup> NSW Heritage Branch, Department of Planning, Excavation Directors Assessment Criteria, [http://www.heritage.nsw.gov.au/06\\_subnav\\_02.htm#selecting](http://www.heritage.nsw.gov.au/06_subnav_02.htm#selecting) (accessed 7/7/2010).

<sup>4</sup> See AHIP form <http://www.environment.nsw.gov.au/resources/cultureheritage/09136AHIPApplicationform.pdf> (accessed 12/7/2010)

<sup>5</sup> DECCW NSW Applications for an Aboriginal Heritage Impact Permit (AHIP) under the National Parks and Wildlife Act 1974; DECCW NSW (February 2009) *Supporting information for AHIP applicants*. <http://www.environment.nsw.gov.au/resources/cultureheritage/09137SupportingInfo.pdf> (accessed 12/7/2010)

<sup>6</sup> DECCW (2009), Guide to determining and issuing Aboriginal Heritage Impact Permits pg 21.

<sup>7</sup> <http://www.environment.nsw.gov.au/resources/cultureheritage/09121AHIPGuide.pdf> (accessed 12/7/2010).

<sup>8</sup> DECCW NSW (February 2009) *Operational Policy: Protecting Aboriginal cultural heritage*. <http://www.environment.nsw.gov.au/resources/cultureheritage/09122ACHOpPolicy.pdf>

<sup>9</sup> DECCW NSW Cultural Heritage Research Agenda 2006-2010 at [10].

<sup>9</sup> NSW NPWS (1997) *Aboriginal Cultural Heritage Standards and Guidelines Kit*.

policy trend within DECCW, but wishes to point out the critical failings this draft document has with regard to meeting basic international standards for archaeological practice.

It is strongly felt that DECCW is at serious risk, with this Draft Code, of putting in place a substandard system affecting all heritage practitioners and Aboriginal communities in NSW. Leaving this gap provides the opportunity for any lay person to attempt to follow the code without critical qualifications and archaeological field skills. It is felt that this, almost certainly, would amount to cultural vandalism.

Archaeological excavation of Aboriginal sites requires a sound technical knowledge of landform analysis, archaeological research skills, excavation sampling techniques, stone tool identification skills, and information assimilation and analysis abilities to make interpretation on past human interactions with the environment. This is indeed recognised by the preparation of a specific 'Archaeological' Code by DECCW. Until such a time as the legislation moves away from being based on archaeological 'objects', archaeological professional standards should be upheld and supported by all heritage regulators. We strongly urge DECCW to implement this requirement, as suggested below.

**Suggestion:** This could be addressed, as suggested in our detailed submission table below, by amendments to Section 2.2 Requirement 1 of the Draft Code. The proposed amendments are based on current AACAI guidelines and those required for archaeological excavation under the *Heritage Act 1977*.

*A test excavation must have a **qualified person** in a directorial role taking responsibility for the project at all times. They, or the instigator of the test excavation (e.g. proponent), must ensure that:*

- *The research design (research context, aims and methods) is attributable by authorship or authorising review to a **qualified person**;*
- *A **qualified person** is present and has directorial control over the test excavation at all times, and;*
- *A **qualified person** is a named author endorsing the quality of research and recommendations included in any report.*

*A **qualified person** is defined as:*

*1) A person with an honours degree or postgraduate degree in archaeology or relevant field of scholarship or having such experience in the field of Aboriginal cultural heritage management AND;*

*2) Has the equivalent of two years full time experience in Aboriginal cultural heritage management, including involvement in a project of similar scope, AND;*

*3) Has a demonstrated ability to conduct a project of the scope required through inclusion as an attributed author on a report of similar scope.*

*Full Membership of the Australian Association of Consulting Archaeologists where the conditions for peer-reviewed admission is met through work conducted in Aboriginal cultural heritage management is considered to be validation as a **qualified person**.*

*If a person intending to have directorial control is not a qualified person and still maintains that they have the appropriate skills to conduct a test excavation they must either: a) Engage a qualified person to act in the roles outlined in Additional Requirement 1, or; b) apply for an exemption to the requirements of the Code as outlined below.*

Without the inclusion of such minimum professional standards for archaeologists AACAI cannot support the proposal for archaeological test excavations to be exempted from Part 6 Approvals, and by extension cannot support the Draft Regulation allowing such activities to take place under the Draft Code.

### **Replacement of the 1997 Standards and Guidelines Kit**

The AACAI supports the creation of a document designed to update the Draft 1997 NPWS *Aboriginal Cultural Heritage Standards & Guidelines Kit* ('The Kit'). However, The Kit is much broader in scope and less prescriptive in form, and better recognises the variety of heritage situations where investigation and management of Aboriginal heritage is required. We recognise that the Draft Code was created to perform a specific function under the recently amended Act, however irrespective of its final form, the AACAI would strongly support the creation of an enlarged 'Guideline' document which in form and substance updates The Kit. We do not believe at present that the Draft Code is applicable in many situations.

### **Prescriptive Nature of the Draft Code**

The ACCAI recognises the specific purpose for which the Draft Code was created, however we believe that its overly prescriptive nature does not reflect established best heritage management practice, which must include flexibility to ensure appropriate methods are used in different situations. Put simply, there is no uniform best approach to all Aboriginal heritage investigations. Whilst many of the provisions in the Draft Code are supported and do reflect current industry best practice, they are not necessarily appropriate or applicable in all situations but amending or ignoring them leaves people carrying out these activities liable to prosecution. Our members work on a range of sites ranging from individual house blocks to large rural properties zoned for subdivision and redevelopment; from a small substation measuring a few square metres to a new service (e.g. gas, water, sewer) spanning thousands of kilometres. While the code recognises differences in scale, there needs to be more flexibility to allow archaeologists to exercise their professional judgment. Many examples of this are provided in our detailed comments below.

Many parts of the Draft Code refer to conditions that *must* be met but many circumstances can be envisaged where they may not be relevant or are provisions that only *should* be included. The inclusion of a number of requirements that *must* be done, but which would not be possible or relevant in all cases will:

- Technically create a situation where an archaeologist loses their exclusion from the harm provisions by being in breach of the Code whilst undertaking an activity that would be defined without question as deliberate harm;
- Would require that some investigations will need to be done under an AHIP despite clearly being within the intended remit of the Code.

At some stage during the approval of an AHIP application a regulator will be forced to either: a) determine whether the investigation has been completed in an appropriate manner; or b) stipulate that it ticks every box in the Code. If box-ticking becomes the standard (as it is in Victoria<sup>10</sup>), archaeological standards will fall as the methodology will become geared towards bureaucratic compliance and less focused on the more relevant complexities of the archaeological site and its research potential.

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<sup>10</sup> Indeed the new Victorian heritage legislation has led to a stream of revisions to regulation and policy as it became apparent that they were far too detailed and prescriptive to apply to every situation and context.

The need for the degree of stricture presented in the Draft Code would certainly be obviated to some extent by ensuring that those undertaking archaeological investigation are appropriately qualified and experienced to do so, as suggested above.

**Suggestion:** While some conditions should be preceded by 'must', separate listing of other conditions that 'should' be done should be included as per our submission below.

**Suggestion:** A mechanism should be included in the finalised Code which outlines the process by which an amendment to certain provisions of the Code may be obtained (e.g. in relation to specific excavation methodology as outlined below).

### **Inappropriate Title**

The Draft Code should be renamed to reflect its restriction to archaeological investigation of Aboriginal cultural heritage and refer to the fact that it does not provide exemptions from prosecution relating to harm to other types (historical, maritime) of heritage.

**Suggestion:** "Draft Code of Practice for Aboriginal Archaeological Investigation in NSW"

### **Exclusion of Post Contact Aboriginal Heritage**

The Draft Code does not address specifically or generally the recording or excavation of post-contact Aboriginal heritage sites. Appropriate investigative methods for such places would, in many cases, differ to other 'pre-contact' Aboriginal archaeological objects. Appropriate sections should be inserted into the General Requirements and Excavation Requirements to ensure appropriate management of this site type.

### **Development of a Model Report Template**

Outlined in the specific comments below, there are many aspects of the Draft Code where it is not clear what is required, and what format will be considered adequate for presentation. Given no style documents are referred to in the Draft Code, some members have suggested that a *Model Report Template* be developed by DECCW to provide guidance on the form and format of intended reporting. This would save much time in individual queries between proponents/the consultants and DECCW in clarifying these issues.

### **Workshop**

Given that the activities and documentation under this draft code will be central in demonstrating legal compliance with the exemption of *harm*, we urge DECCW to provide a workshop opportunity for the archaeological industry of NSW. DECCW must provide strong clear guidance (perhaps in the form of a workshop with attendance accreditation) on every aspect of the final Code to give archaeologists, Aboriginal community, proponents and DECCW confidence that compliance will occur. This will then reduce the occurrences of 'harm' and litigation resulting from the new legal regime.

**Specific Comments on the Draft Code**

Section	Sub section	Comments
I. Introduction	-	<p>With respect to the recommended requirement for minimum professional standards and the need for less prescriptive measures described above, the following amendment is suggested for Section 1.6 (amendments in italics).</p> <p><b>1.6 How to comply with this Code</b>            This Code contains the <b>standard requirements</b> (Table 2.1) that must be met by a <b>qualified person</b> carrying out an archaeological investigation in NSW. Depending on the investigation required to adequately characterise the proposed development area or the archaeological site type being investigated, <b>additional requirements</b> may also apply (Tables 2.2 to 2.6).</p> <p>The Code also contains <b>advisory notes</b> about some of the steps that may be taken to comply with the standard requirements. The advisory notes are intended as a guide only and may not be appropriate for every situation. Alternative measures may be taken as long as the standard requirements are complied with <i>unless an application for exemption to specific requirements has been approved by the relevant DECCW EPRG branch</i></p> <p>With respect to the latter proposed amendment, it is suggested that a process for applying and evaluating such exceptions be developed for inclusion in the final Code of Practice. AACAI offer their services and expertise in assisting with the development of this process.</p>
2.1 General Requirements	Requirement 1.1 – Review of previous archaeological work	<p><b>Mapping sites and survey areas</b></p> <p>There are likely to be situations where it is not appropriate to map site location data where it may become publicly accessible (and this may be opposed by Aboriginal communities), nor is this always appropriate except as proof that this distribution has been considered. Similarly, not all previous study areas are available and the requirement to map these should only extend to data available through AHIMS.</p> <p><b>Suggestion</b> (amendments in italics)</p> <p>be used to present a map in the archaeological report, preferably prepared using a geographic information system (GIS), showing the location of previously recorded sites (<i>where appropriate</i>) and, where <i>readily</i> available <i>from an AHIMS database search</i>, areas of previous surveys</p>

Section	Sub section	Comments
2.1 General Requirements	Requirement 1.1 – Review of previous archaeological work	<p><b>Identification of Aboriginal Cultural Heritage Management Plans</b>  The requirement to identify whether or not the subject area is covered by an Aboriginal Cultural Heritage Management Plan (ACHMP) linked to a consent process may be very difficult to ascertain, especially if such an ACHMP is currently being prepared, is in draft, or has not been registered with DECCW for the AHIMS report database (for example if prepared in relation to an EPA Act Part 3A proposal). It is anticipated that DECCW will map finalised ACHMPs on AHIMS, or else it is not clear how their existence can be reliably ascertained. The requirement should therefore be amended to reflect AHIMS as the source of this information.</p> <p><b>Suggestion</b> (amendments in italics)</p> <p>identify, <i>through an AHIMS database search</i>, whether or not the subject area is covered by an Aboriginal Cultural Heritage Management Plan linked to a consent process.</p>
2.1 General Requirements	Requirement 1.1 – Review of previous archaeological work	<p><b>Ethnohistory</b>  It is understood that the <i>Ethnohistory Fact Sheet</i> referred to in the Draft Code will no longer be produced. In the absence of DECCW guidance on this matter, caution is urged on setting requirements for the documentation of ethnohistorical information in archaeological investigation. For example, ethnohistorically and linguistically based cultural boundary mapping by archaeologists is often at odds with the views of cultural geography maintained by some Aboriginal people and opinions on cultural boundaries may vary within Aboriginal communities.</p> <p><b>Suggestion:</b> (amendments in italics):</p> <p><b>Purpose:</b> The purpose of reviewing and analysing previous archaeological work is to synthesise available information from previous archaeological and ethnohistorical studies to provide a context and baseline for what is known about Aboriginal cultural heritage in the subject area. This contributes to the assessment of archaeological significance of the proposed development area. <i>Previous archaeological research must always be referred to whereas ethnohistory should only be referred to insofar as it is required for the assessment of significance.</i></p>

Section	Sub section	Comments
2.1 General Requirements	Requirement 1.2 – AHIMS Searches	<p><b>Data Limitations and Licence Agreements</b></p> <p>No rationale is provided for limiting data to 120 site records without a data license. This number appears arbitrary, particularly given the emphasis in the new Code on situating sites within a broader landscape context. For example, does it apply to a number of sites within a Land Council or Local Government boundary, or just an arbitrary total? For example a pipeline survey may be several hundred kilometres in length and is likely to return in excess of 120 site records if the adjacent landscape is to be meaningfully investigated. However the number of sites in one administrative boundary may be less than this. Obtaining a Data Licence Agreement may be extremely difficult given the large number of Aboriginal organisations potentially involved.</p> <p>Further to this, and if no flexibility on this arbitrary limit is to be included, there is a clear need for information on obtaining Data Licence Agreements to be made public. There is currently nothing in the DECCW website on how to obtain a data licence, only the cost, and AHIMS staff are not well versed on the procedures. It is not clear, for example, who must consent to the agreement. We strongly suggest that this process be clearly outlined as well as requirements for Aboriginal consent (the current assumption is Local Aboriginal Land Councils, Registered Aboriginal Owners and Registered Native Title Claimants).</p>
2.1 General Requirements	Requirement 1.2 – AHIMS Searches	<p><b>Robustness of Search Results</b></p> <p>AACAI strongly supports the idea of considering the robustness of AHIMS search results, as it inherently acknowledges the limitations of the database. It is consistent with our earlier submission (20/5/10) on the Draft Due Diligence Code of Practice which we strongly argued should require such consideration. However there must also be recognition of the incompleteness of data available on the register. Hence we propose the following amendment.</p> <p><b>Suggestion:</b> (amendments in italics):</p> <p>...levels of visibility, exposure and previous impact, <b><i>where these details are readily available in the AHIMS library database.</i></b></p>

Section	Sub section	Comments
2.1 General Requirements	Requirement 1.2 – AHIMS Searches	<p><b>Inclusion of Search Results in Reporting</b></p> <p>We note that although the results of the AHIMS search (i.e. sites identified within search area) are printed out (with the date) and can be scanned and included as an appendix, AHIMS library search results are often not included in reports. Is evidence of every “keyword” search of the AHIMS report catalogue, and searches for reports referred to in site cards or other reports, required to be included in the Appendix to the Archaeological Report? AACAI suggests removal of this provision as follows:</p> <p><b>Suggestion:</b> (text struck out):</p> <p style="padding-left: 40px;"><del>The AHIMS search results and AHIMS library search results, including evidence of the date of the searches, must be presented as an Appendix to the Archaeological Report</del></p> <p>It is also noted that the mapping of AHIMS results may be opposed by Aboriginal communities and indeed that this in some degree is inconsistent with limitations on access to site location data included in the Draft Code. It is suggested that, while they may generally do so, reports not be strictly required to map AHIMS searches or provide geographic coordinates attached to printed AHIMS searches.</p>
2.1 General Requirements	Requirement 1.2 – AHIMS Searches	<p><b>Further Requirements</b></p> <p>AACAI is currently developing a guideline for our members listing the recommended timing and format of data submissions to AHIMS. In addition to the legislated requirement for reporting newly recorded Aboriginal objects, we recommend that our members submit a GIS shapefile or stand-alone map on current 1:25k topo showing the study area for all projects, and inform AHIMS of a site being incorrectly mapped if a consultant becomes aware of this based on data in the review of previous archaeological work. Discussion with AHIMS staff has indicated that this would be favourably received by them.</p> <p>We would support these becoming requirements in the finalised Code of Practice.</p>

Section	Sub section	Comments
2.1 General Requirements	Requirement 2 - Landscape Context	<p><b>Requirement 2.1 – The landscape description</b></p> <p>It is considered overly restrictive to require that the landscape description <i>must</i> do all of the things outlined in all cases. There are circumstances where the scope of an investigation would not justify such detail (for example a single scarred tree, rock art engraving or relatively simple case of determining presence or absence of subsurface artefacts for purposes more fully outlined in other documents). This may also require specialist input which may not be appropriate at this stage unless a reasoned case can be made for its mandatory inclusion. It may, in the absence of available data, only be possible after a site inspection has occurred, or may not be able to be determined with any degree of accuracy at all prior to actual excavation.</p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p>The landscape description <i>should</i> <del>must</del>:</p> <p>describe and map the landscape history, <b>where known from documentation or estimated based on a visual inspection</b> at a scale that allows characterisation of the subject area</p> <p>include a statement outlining the paleoenvironmental history of the subject area, <i>where known</i><sup>11</sup></p>
2.1 General Requirements	Requirement 3 – Regional Discussion	Supported, but an indication of the amount of information required as per the advisory notes should be provided. It should not be compulsory to summarise previous sections of a report if these are clearly and sensibly presented.
2.1 General Requirements	Requirement 4 – Predictive Modelling	<p><b>Predictive Model Requirements</b></p> <p>AACAI supports that a predictive model <i>must</i> be presented, however we propose that the details it should contain (Requirement 4.1) be limited to '<i>should</i>' in recognition of the variable availability of information.</p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p>The predictive model <i>should</i> <del>must</del>:</p>

<sup>11</sup> Alternately, references to documents that provide information of satisfactory detail in this regard could be provided.

Section	Sub section	Comments
2.1 General Requirements	Requirement 4 – Predictive Modelling	<p><b>Mapping Areas of Potential</b></p> <p>The strict requirement for mapping areas of potential should be omitted. Such maps would be included where relevant, but making it a requirement will mean that some assessments are forced to resort to inappropriate guesswork just for the purposes of making a map because it <i>must</i> be there. There will also be cases when it is simply not needed. For example, an entire study area may be found to be completely disturbed and have no Aboriginal archaeological potential – this can be covered by a statement.</p> <p><b>Suggestion:</b> (amendments in italics):</p> <p>The areas of potential must be....mapped <i>if sufficient information is available to do so</i>, and presented in a figure as part of the preliminary assessment</p>
2.1 General Requirements	Requirement 4 – Predictive Modelling	<p><b>Availability of Supporting Documentation</b></p> <p>In reviewing the Draft Code, it has not been possible to access the DECCW “Aboriginal Sites Decision Support Tool”.</p> <p><b>Suggestion:</b> Online access to this should be provided, including downloadable georeferenced GIS files if available for the requirements of the finalised Code to be met.</p>
2.1 General Requirements	Requirement 5.1 – Sampling Strategy	<p>This section is a good example of the overly prescriptive nature of the Draft Code and its inability to capture situations where certain provisions may not be appropriate (i.e. the problem of <i>must</i> versus <i>should</i> as described above). There is no reason that will apply <i>in all cases</i> that sampling strategies cannot be developed during the survey. There will be cases with small study areas where a qualified person is able to commence a survey with no more concrete a sampling strategy than the intention to conduct a complete and thorough survey. It may not always be <i>needed</i> to describe the relationship between sampling strategy and an impact footprint for a number of reasons, including the common occurrence that this footprint is not known at the time of survey. Indeed, as much as possible the location of such proposed impacts should be determined by the results of Aboriginal heritage investigations.</p> <p><b>Suggestion:</b> (amendments in italics):</p> <p>The archaeological survey must not begin until a sampling strategy has been developed, <i>or a reasonable argument provided as to why such a strategy is not applicable</i>.</p>

Section	Sub section	Comments
2.1 General Requirements	Requirement 5.2 – Survey Requirements	<p>There are aspects outlined that the AACAI supports as essential ('must') and others where it should only be recommended that they <i>should</i> be done. These relate to provisions which are not practical or would lead to reporting being unnecessarily large (in length and electronic size).</p> <p><b>Suggestion:</b> Remove the following from <i>must</i> be done and create separate list of what <i>should</i> be done:</p> <ul style="list-style-type: none"> <li>include representative photographs of each survey unit and each landform present</li> <li>record landform and soil information (see Requirement 2) for each survey unit</li> </ul>
2.1 General Requirements	Requirement 5.3 – Survey Units	<p>All requirements should be amended stating that they <i>should</i> (rather than <i>must</i>) be done to allow for circumstances that can be entirely appropriate without complying as it is currently stated (for example, annotation of high quality aerial photographs in place of GPS use or allowing for the fact that Aboriginal stakeholders may survey to their own chosen approach in a way that cannot be mapped but should be recorded as entirely integral to the survey effort). The over-prescriptiveness means that malfunction or loss of a GPS unit, or failure due to forest canopy etc would be treated as non-compliance with the Code. There are also many surveys of small size (a single house block) where no division into more than one survey unit (it is implied that there must be more than one unit) is logical or possible on anything other than arbitrary grounds.</p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p>The archaeological survey, using survey units (<i>where appropriate</i>), <i>should</i> <del>must</del>:</p>
2.1 General Requirements	Requirement 5.3 – Survey Units	<p><b>GPS Requirements</b></p> <p>It is not stated whether the GPS transects are required to be reproduced in a map in the report (which would in many cases be messy and difficult to decipher). If not required to be reproduced, is the intended recording of such information to be able to prove that the survey occurred in the manner described in the report?</p> <p><b>Suggestion:</b> Clarification of the use of this information is required and where it is to be presented (if at all).</p>

Section	Sub section	Comments
2.1 General Requirements	Requirement 6 – Site Definition	<p>Generally supported.</p> <p><b>Suggestion:</b> We note that the advisory notes refer to “artefacts” but should refer to all sites/objects.</p>
2.1 General Requirements	Requirement 7 – Site Recording	<p>Generally supported.</p> <p>The <b>Scales for Photography</b> section requires slight amendment to reflect the reality of the variety of situations in the field. For example, photographing an artefact in the field in a way that captures certain diagnostic features may require holding the artefact in a way that cannot usefully also include a scale other than the fingers themselves. It may also not be practically possible in all contextual photography to include a scale.</p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p>All photographs <del>should</del> <b>must</b>.....</p>
2.1 General Requirements	Requirement 8 - Geographic reporting	<p><b>Requirement 8.1</b></p> <p>In some circumstances GPS may not be the most appropriate tool – for example where high resolution aerial imagery or measurements from cadastral or natural features provided better resolution, particularly in situations where cloud, forest canopy or buildings affect GPS accuracy.</p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p>Geospatial information <del>should</del> <b>must</b> be recorded using GPS receivers, <i>where this provides the most accurate and appropriate means of recording spatial information.</i></p>
2.1 General Requirements	Requirement 8 - Geographic reporting	<p><b>Requirement 8.2 – Datum and grid coordinates</b></p> <p>Fully supported, but it is noted that currently AHIMS data is largely provided in the AMG system.</p> <p><b>Suggestion:</b> Please provide an advisory note in the finalised Code to explain this relationship, and whether all AHIMS data will now be provided in GDA94/MGA94.</p>

Section	Sub section	Comments
2.1 General Requirements	Requirement 9 - Survey Coverage	<p>Many of the requirements in this section are overly prescriptive without explanation. For example in many cases it would be very difficult and onerous, if not physically impossible, to accurately describe and map every area of exposure and its extent (and visibility), nor is this necessarily relevant. In general, all requirements in this section should replace <i>must</i> with <i>should</i> to recognise they will not always be appropriate.</p> <p><b>Suggestion:</b> Replace ‘must’ with ‘should’ in all dot points.</p>
2.1 General Requirements	Requirement 10 - Survey Effectiveness	<p>There are many situations in which survey coverage will be very low (e.g. grassy paddocks) but where other contextual information may allow for an effective evaluation of the archaeological potential of the land in question. These considerations cannot always be reduced to numbers in a table. Therefore the following amendments are suggested.</p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p>The survey results <del><i>must</i></del> <i>should</i>:</p> <ul style="list-style-type: none"> <li>▪ be presented in the format of the example tables below, and</li> <li>▪ include a descriptive summary of the effectiveness of the survey for each survey unit and then for the whole of the subject area, <i>or</i></li> </ul> <p><b><i>Include cogent justification for its omission where the following format is not used.</i></b></p>
2.1 General Requirements	Requirement 11 – Archaeological Report Format	<p>Some amendments and definitions are required to make these requirements clear.</p> <p><b>Suggestion:</b> (amendments in italics):</p> <p><b>Contributors</b> – Include <b><i>the qualifications and experience of the author taking responsibility for the report and provide</i></b> a list of other contributors and their affiliations, specifically: reviewers; advisors; participants in survey activities.</p> <p><b>Recommendations:</b> Please define “strong justification”.</p> <p><b>References</b> – <b><i>Any referencing style consistent with a peer-reviewed scientific/archaeological journal may be used and must be used consistently throughout the report</i></b> Harvard style (author, date) referencing <del>must be used.</del></p>

Section	Sub section	Comments
2.1 General Requirements	Requirement 12 – Records	<p>Generally supported, though the experience of our members suggests that information requests from DECCW officers may not always be reasonable or pertinent to the matter currently being assessed. There must be a reason provided for the request and it must be reasonable.</p> <p><b>Suggestion:</b> (amendments in italics):</p> <ul style="list-style-type: none"> <li>• provided in a legible form to any authorised officer of DECCW on <i>justifiable</i> request.</li> </ul>
2.1 General Requirements	Requirement 13 – Notification of Breaches	Supported
2.1 General Requirements	Requirement 14 – Provision of Information	Supported
2.2 Archaeological Test Excavation	Requirement 1 – Pre-conditions	<p><b>1: Pre-conditions to carrying out test excavation</b></p> <p>For the reasons discussed above, test excavation should not be allowed to be undertaken without the involvement of a qualified person, and a definition of a qualified person provided.</p> <p><b>Suggestion:</b> Insert the following Clause a, amending existing clauses (a), (b) and (c) to (b), (c), and (d) respectively.</p> <p><i>a) <b>Qualified Person</b> – A test excavation must have a qualified person in a directorial role taking responsibility for the project at all times. They, or the instigator of the test excavation (e.g. proponent), must ensure that:</i></p> <ul style="list-style-type: none"> <li>▪ <i>The research design (research context, aims and methods) is attributable by authorship or authorising review to a <b>qualified person</b>;</i></li> <li>▪ <i>A <b>qualified person</b> is present and has directorial control over the test excavation at all times, and;</i></li> <li>▪ <i>A <b>qualified person</b> is a named author endorsing the quality of research and recommendations included in any report.</i></li> </ul> <p><i>A <b>qualified person</b> is defined as:</i></p> <ol style="list-style-type: none"> <li>1) <i>A person with an honours degree or postgraduate degree in archaeology or relevant field of scholarship or having such experience in the field of Aboriginal cultural heritage management AND;</i></li> <li>2) <i>Has the equivalent of two years full time experience in Aboriginal cultural heritage management, including involvement in a project of similar scope, AND;</i></li> <li>3) <i>Has a demonstrated ability to conduct a project of the scope required through inclusion as an attributed author</i></li> </ol>

Section	Sub section	Comments
		<p><i>on a report of similar scope.</i></p> <p><i>Full Membership of the Australian Association of Consulting Archaeologists where the conditions for peer-reviewed admission is met through work conducted in Aboriginal cultural heritage management is considered to be validation as a <b>qualified person</b>.</i></p> <p><i>If a person intending to have directorial control is not a qualified person and still maintains that they have the appropriate skills to conduct a test excavation they must either: a) Engage a qualified person to act in the roles outlined in Additional Requirement 1, or; b) apply for an exemption to the requirements of the Code as outlined below (amended Point 5 of Table 2.2).</i></p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p><b>d) <del>Reporting</del></b></p> <p>The name and contact details of the <i>qualified person</i> who will be <del>carrying out</del> <i>taking responsibility</i> for the sub-surface investigation <del>where this is different to the legal entity</del></p>
2.2 Archaeological Test Excavation	Requirement 1 (b) Pre-conditions to carrying out test excavation	<p>The draft Code refers to Potential Archaeological Deposits (PADs), but does not give meaningful guidance as to what DECCW understands PADs to be, nor does the draft Code provide a definition of a PAD in the definition section. Please note that not all consultants prefer to use this term in developing theories for subsurface archaeological potential. If this term is required to be used by DECCW, we suggest further clarity is provided for this theoretical tool.</p> <p>The code hints that a PAD is something that “<i>is anticipated to be of higher significance than the continuous distribution of archaeological material in which it exists</i>” (pg 28). While this is insufficient as technical guidance for defining a PAD, we do welcome DECCW’s acknowledgement of a ‘<i>background scatter</i>’ occurrence of objects which can exist across landscapes. This acknowledgment raises questions as to legal liability for knowingly harming objects that are considered ‘background scatters’. While following the code exempts archaeologists from harm to investigate the occurrence of objects, it perhaps <i>does not</i> exempt proponents from tier one and two harm offences given they will knowingly impact background scatter objects during their projects. AACAI is assuming that from 1 October 2010, DECCW will be issuing s90 AHIPs that apply to the whole development area (“area-based s90”) to cover all types of object occurrences to remedy this issue.</p>

Section	Sub section	Comments
2.2 Archaeological Test Excavation	Requirement 2.2 Presence of sub- surface deposit	<p>There is no justification, or current literature given to support the basic requirements of this section. For example there are only limited situations where 0.2m<sup>2</sup> test probes would be appropriate (generally to determine the presence of subsurface midden or levels of disturbance) which are not of sufficient size to determine the presence/absence of subsurface deposits of stone artefacts for example. Similarly there is no justification provided as to why linear transects must be used. In most cases a qualified person will take this approach but this will not always be the case. For example in testing along a road verge the transect may be found to be too close to the disturbed edge of the road and be shifted to cover less disturbed areas. The transect would then be either not linear or result in 2 transects separated by less than 50m. Test probes may also most productively be closer than 5m – for example testing immediately above and below a creek terrace. In some cases 5mm mesh would be perfectly adequate (see 2.3 below). It may not be practical or desirable that excavated areas are immediately backfilled – circumstances will arise where it may need to stay open for a short period (e.g. a geomorphologist will be making an additional assessment in a couple of days). The overriding principle here should be OH&amp;S, whereby open excavations can be made secure.</p> <p><b>Suggestion:</b> Rather than attempting to amend all sections to provide greater scope and flexibility, insert Clause 5 in Section 2.2 as outlined below.</p>
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p>As per Section 2.2. above, there are no justifications provided as to why the prescribed methodology would be considered technically possible, justifiable and most appropriate in all cases. In general, it is considered preferable to provide an overarching mechanism for amending specific requirements where justified, as outlined in the proposed additional Clause 5 in Section 2.2. below. However comments and suggestions on specific sections are also provided below.</p> <p><b>Suggestion:</b> Rather than attempting to amend all sections to provide greater scope and flexibility, insert Clause 5 in Section 2.2 as outlined below.</p>
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p><b>Point a)</b></p> <p>No justification is provided for a mandatory systematic regularly spaced grid. This will often be used but not always offer the best approach.</p> <p><b>Suggestion:</b> Offer option for amendment under the proposed additional Clause 5 in Section 2.2 or make provision for flexibility within this point.</p>

Section	Sub section	Comments
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p><b>Point b)</b></p> <p>As the point of the test probe excavations is merely to determine presence/absence of Aboriginal cultural remains, the archaeological test excavations in Requirement 2.3 aim to determine areas of potential conservation value. This will in most cases only be able to be determined as a result of these excavations, in which all areas must be sampled to determine which have the greatest potential. This point is therefore meaningless.</p> <p><b>Suggestion:</b> remove Point b).</p>
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p><b>Point d)</b></p> <p>It appears that this should read <b>maximum</b> not minimum. If this is the case please amend.</p>
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p><b>Point h)</b></p> <p>Circumstances may arise where units are best spaced closer than 10m. For example when attempting to test the bank of a buried palaeo-channel and it is found that is has been missed be several metres within the excavated square. It is also not clear if, given Point i), test excavations should not exceed 0.3% of the area being investigated, how this should be implemented or calculated? It is definitely open to misinterpretation by non-qualified persons (especially with regard to background scatters) as can undertake such excavations under the Draft Code.</p> <p><b>Suggestion:</b> Offer option for amendment under the proposed additional Clause 5 in Section 2.2 or make provision for flexibility within this point.</p>

Section	Sub section	Comments
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p><b>Point i)</b></p> <p>Problems will arise applying 0.3% to small areas. For example if you are testing a 5m x 5m area for a telecommunications tower you can only excavate a 27cm x 27cm test pit.</p> <p><b>Suggestion:</b> Offer option for amendment under the proposed additional Clause 5 in Section 2.2 or make provision for flexibility within this point.</p>
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p><b>Point j)</b></p> <p>5cm spits may not always be practical, appropriate or best practice.</p> <p><b>Suggestion:</b> (amendments in italics):</p> <p>Test excavations must be excavated and documented in 5 cm spits <b><i>OR by clearly detectable stratigraphic units in spits up to 10cm where appropriate. Excavation of bulk samples may be justified in some circumstances and this approach may be used only after initial controlled stratigraphic excavation presents a cogent justification.</i></b></p>

Section	Sub section	Comments
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p><b>Point k)</b></p> <p>3mm sieves may not always be practical, for example where wet sieving cannot be used and deposits are too wet or clayey to dry sieve through 3mm. Wet sieving may be prevented by not being able to get water to remote places or where environmental concerns over muddy run-off exist and reticulated water systems are not possible. It is notable that that the largest analyses of artefacts done in Sydney, while based on excavation that included use of 2mm or 3mm sieves, only uses data from a &gt;5mm fraction<sup>12</sup>. Referring back to the actual aims of test excavation in the Code and the limitations on the extent of research that can be done, there is no plausible reason why detection and analysis of artefacts within a 5mm fraction is not sufficient.</p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p>All material excavated must be sieved using <i>wire-mesh of a maximum 5mm aperture. 3mm mesh should be used when possible</i> <del>a 3 mm aperture wire-mesh sieve.</del></p>
2.2 Archaeological Test Excavation	Requirement 2.3. Further test excavation	<p><b>Point p)</b></p> <p>It may not be practical or desirable that excavated areas are immediately backfilled – circumstances will arise where it may need to stay open for a short period (e.g. a geomorphologist will be making an additional assessment in a couple of days, for comparability of deposit between squares). The overriding principle here should be OH&amp;S, whereby open excavations can be made secure.</p> <p><b>Suggestion:</b> (amendments in italics, replaced text struck out):</p> <p>Test excavations must be backfilled immediately, <i>or as soon as practicable afterwards. Backfilling must be undertaken by the end of the test excavation of the subject area, and pits should be temporarily fenced in the time between when the excavation of the pit has been completed, and when the pit is backfilled.</i></p>

<sup>12</sup> See White, B. and J. McDonald. 2010 Lithic artefact distribution in the Rouse Hill Development Area, Cumberland Plain, NSW. *Australian Archaeology* 70:29-38.

Section	Sub section	Comments
2.2 Archaeological Test Excavation	Requirement 3. Test excavation not excluded from definition of harm	<p>It is consistent with the intention of the Code that certain acts should be permitted within 50m of a rockshelter or midden and in some cases in deposits overlying a potential subsurface midden material where the intention is to determine its presence or absence with minimal or no impact.</p> <p>Suggestion: Amend as follows with reference to a new Clause 5 in Section 2.2. (proposed below) as below (amendments in italics):</p> <p>c) in or within 50 m of a <i>known registered</i> rock shelter, shell midden or earth mound <i>unless an exemption to the requirements of the code has been issued by the relevant DECCW EPRG office.</i></p>
2.2 Archaeological Test Excavation	Requirement 5. Application for Exemption to Requirements	<p><b>Application for exemption to requirements</b></p> <p>As noted above, there are many situations relating to archaeological excavation methodology where the prescriptive methods in the Draft Code are technically impractical or methodologically inappropriate in certain circumstances. We therefore feel that to make the finalised Code as workable as possible, a mechanism for amending the prescribed methods needs to be provided. A suggestion is provided below as Clause 5 in Section 2.2.</p> <p><b>Suggestion:</b> Insert the following Clause 5 in Section 2.2.</p> <p><i>In circumstances where the preceding methods are considered by the Qualified Person undertaking the excavation not to be appropriate or practical, an amendment to this methodology may be sought through an appropriately delegated officer of the DECCW. Applications for an exemption to the requirements of the Code may be made in writing to the relevant EPRG office. Exemptions are intended to allow small scale investigations to be carried out within the intention of the Code and not to permit a level of impact through investigation that should be subject to an AHIP. EPRG are required to provide a response within two weeks. Exemptions can only be issued in relation to specific requirements of the Code, leaving all other requirements in place. DECCW EPRG may also attach conditions to the issuing of exemptions. Examples may include:</i></p> <ul style="list-style-type: none"> <li>▪ <i>Using greater than 3mm sieve mesh size in circumstances where heavy clay soils and remoteness or environmental sensitivity preclude the use of wet sieving to get deposits through the smaller mesh size;</i></li> <li>▪ <i>Auguring for the purposes of mapping the subsurface extent of a midden overlain by non-cultural deposits where that auguring ceases as soon as midden material is detected and has minimal or no impact;</i></li> <li>▪ <i>Where a person does not meet the requirements of a <b>qualified person</b> but can argue that they have the</i></li> </ul>

Section	Sub section	Comments
		<p><i>appropriate skills for the scope of the project;</i></p> <ul style="list-style-type: none"> <li>▪ <i>Where uniformity or disturbance of a soil profile justifies excavation of spits greater than 5cm</i></li> <li>▪ <i>Where test excavation within 50m of a rockshelter can be justified; for example where the rockshelter may be too small, wet or have a floor too sloping or bare to be contain or be likely to contain cultural deposits.</i></li> </ul>
2.5 Carved and Scarred Trees	Requirement – Recording carved and scarred trees	<p>Often uncertainties relating to the potential for a scar to be of Aboriginal cultural origin can be resolved through the advice of a suitably qualified arborist. A visual appraisal of the age of a tree is often a key piece of evidence which an arborist may be best able to provide, as well as alternative explanations for scarring such as limb loss, disease, lightning strike or damage by vertebrate or invertebrate animals<sup>13</sup>. This should occur prior to recording a possible scarred tree on AHIMS, as it is then impossible to remove from AHIMS if subsequently found not to have an Aboriginal cultural origin.</p> <p><b>Suggestion:</b> add the following dot point:</p> <p>The advice of an arborist (where it may resolve an issue of potential cultural origin) should be sought prior to a 'possible' scarred tree being recorded and registered on AHIMS.</p>

<sup>13</sup> As discussed in Irish, P. 2004. "When is a scar a scar? Evaluating scarred and marked trees at Sydney Olympic Park", *Australian Archaeology* 59:59-61.

Section	Sub section	Comments
2.8 Artefact disposition and storage	Requirement – artefact disposition and storage	<p>The process for the curation of Aboriginal archaeological materials is currently poorly managed, under-resourced and unclear. For example, under s 88 of the Act the Australian Museum is the legal repository for objects, unless alternative <i>care and control</i> has been asserted. However, the Australian Museum will not accept unworked and unmodified faunal remains (e.g. shell material from excavated middens) even though written EPRG advice obtained by our members recently (11/8/2009, DECCW Ref: DOC09/43265) states that these should be considered objects and are protected under the Act. Also we note that the DECCW's <i>Procedures for the Deposition of Archaeological Materials</i> is not readily available. Obtaining a Care and Control agreement for objects is also a poorly defined and in many cases an impossible prospect (as it requires all Aboriginal stakeholders to agree on a storage location). These scenarios have resulted in a preference by community for artefact reburial at or near their recorded location. There has, however, been insufficient discussion as to whether this constitutes acceptable heritage management.</p> <p>This issue is especially unclear in the current draft code. While the code suggests reburial of recorded objects, it does not give guidance on how this is permitted under s 85A of the Act (<i>Transfer of Aboriginal Objects</i>). Clarity should be outlined that compliance with the code is a defence to harm <i>and</i> these other sections of the Act, if this is the case.</p> <p><b>Suggestion:</b> As soon as practicable, a policy on the long term management of collected/excavated objects should be developed by DECCW, with input from the Australian Museum, AACAI and ACHAC.</p>

The above general and specific comments reflect NSW AACAI membership and have the support of the National Executive Committee (NEC). While AACAI appreciates the opportunity to review these draft documents during this public exhibition period, we are disappointed that specific direct consultation on the draft code was not undertaken with us prior to this time. As a key archaeological industry stakeholder, it is felt this code will have a significant affect on archaeological practice in NSW and our professional opinion should have been sought prior to public release of this draft document. However, it is hoped that our constructive comments and suggestions are useful and are adopted prior to finalising the Code.

We strongly reiterate the requirement for appropriately qualified persons to undertake work allowed under the Code. Without such requirements, the Code as it stands provides insufficient protection for Aboriginal heritage, less than is currently offered to Aboriginal objects under the unamended statute. The AACAI would like to remind the Director-General of DECCW and the Minister that in carrying out their functions under the NPWA they must give effect to the objectives of the Act<sup>14</sup>. This includes “*the conservation of places, objects and features of significance to Aboriginal people*”<sup>15</sup>. Without the inclusion of professional requirements in this Code, DECCW is recklessly providing more opportunity to *harm* objects, contrary to the objectives of the Act. As a result, without this core amendment, AACAI cannot on principle support either the Draft Code or Draft Regulation.

We would be happy to discuss these views further with you and would welcome the opportunity to assist in the re-drafting of these and other revised elements of these documents.

Yours sincerely,



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<sup>14</sup> *National Parks and Wildlife Act 1974* (NSW) s 2(A) (3)(a).

<sup>15</sup> *National Parks and Wildlife Act 1974* (NSW) s 2(A) (1)(b)(i).