
Commentary

DETERMINING THE ADEQUACY OF ABORIGINAL CULTURAL HERITAGE ASSESSMENTS: AMBER LIGHTS AND RED LIGHTS

In upholding an appeal by objectors to the proposed expansion of a sand quarry at Calga, the New South Wales Land and Environment Court has endorsed the application of the Burra Charter Process to the assessment and determination of management decisions for Aboriginal cultural heritage. It has also reinforced the importance of considering the cultural heritage landscape context when assessing impacts on Aboriginal cultural heritage. By bringing this Process to its assessment of the impacts of the proposed mine, the Court also demonstrated how the precautionary principle should be applied to matters of Aboriginal cultural heritage. The case provides useful guidance to practitioners about the nature and extent of the assessment which is required where irreversible impacts to areas of significant cultural heritage are likely to be caused through proposed developments.

OVERVIEW OF FINDINGS

In November 2015, the New South Wales Land and Environment Court upheld the merit appeal of two objectors against the approval by the Planning and Assessment Commission (PAC) of a proposed sand quarry in Calga, north of Sydney.¹

The appeal was brought by the Australian Walkabout Wildlife Park (AWWP),² the operator of a wildlife park adjoining the proposed quarry, and Darkinjung Local Aboriginal Land Council (DLALC), the local Aboriginal land council in whose statutory area the proposed quarry was located. Rocla Materials Pty Ltd (Rocla), the project proponent, owned the land on which the quarry expansion was proposed.

The Minister for Planning (Minister) was also joined to the appeal as a respondent.

The project had been granted approval by the PAC under the now repealed provisions of Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW).

The hearing was largely confined to matters relating to the project's impact on Aboriginal cultural heritage. The matter was heard over 17 days before two Commissioners of the Land and Environment Court.

The Court held that:

Having regard to all of the weighted considerations, including the impact on Aboriginal cultural heritage and the public interest, it is our considered opinion that the Project application must be refused at this time.³

The Court found that, having regard to the significance of the Aboriginal cultural heritage identified by the expert witnesses:

- there was insufficient credible information upon which to assess the impacts of the Project and make a decision;⁴
- measures were available to obtain the necessary further information without causing excessive delay or disproportionate expense;

¹ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure; Australian Walkabout Wildlife Park Pty Ltd (ACN 115 219791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure* [2015] NSWLEC 1465 (hereafter cited as *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465).

² The authors acted for AWWP.

³ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [485].

⁴ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [449]-[450].

- in the absence of sufficient information, the Court must assume the worst and find that there is a threat of serious and irreversible environmental harm;⁵ and
- the risk of finding further sites was not significantly addressed by the proposed mitigation and management measures outlined in the proposed conditions of consent.

IMPLICATIONS

The case has important implications for the assessment of Aboriginal cultural heritage in the context of development proposals. It emphasises the need for heritage values to be assessed comprehensively early on in the project design stage.

The assessment of Aboriginal heritage values needs to encompass all aspects of values in the Burra Charter – it cannot be confined to an assessment of archaeological significance. In many circumstances it will be necessary to have regard to a broader landscape context when assessing values. In areas where the physical terrain makes detailed surveying difficult, greater emphasis needs to be paid to appropriate predictive modeling to define the survey scope.

Regard must be had to both contemporary and historic values. Social and cultural values are dynamic and may change over time.

While there must be a reasonable limit to investigations, a greater level of knowledge is required when decisions are made that may irreversibly impact on the values of areas of high cultural value.

In the absence of sufficient information a precautionary approach must be taken.

FACTS

Rocla obtained approval for the construction and operation of an extension to an existing sand quarry at Calga in December 2013. The new quarry would involve the excavation of a surface area of approximately 500 square metres at a depth of up to 30 metres. The sandstone obtained would be crushed into sand, primarily for the Sydney construction market. The land adjoined the Popran National Park, Peats Ridge Road and some private properties, including the site owned by AWWP.

Initially, Rocla sought approval for a much larger project area. However, the approval granted by the PAC significantly reduced the project footprint primarily due to environmental considerations (relating to threatened species and offsets, impacts on the neighbouring wildlife park and impacts on known items of Aboriginal cultural heritage). The project application was further amended in the course of the hearing.

At issue before the Court was the impact of the amended project on Aboriginal cultural heritage.

The Court found that the site was located within a broader area “rich in Aboriginal sites”.⁶ A number of investigations of Aboriginal cultural heritage values at the site, dating back to 2005, had been prepared by the proponent for the purposes of the project. The most significant of the sites identified within the project area is an area with rock engravings (the Women’s Site) and an associated stone arrangement.

These sites were acknowledged by all parties to have high cultural significance. Several more sites (both on and adjoining the project site) were identified in the course of, and following the initial project application, and as a result of investigations undertaken for the purposes of the hearing.

In 2013, DLALC lodged an application with the Office of Environment and Heritage (OEH) for the area to be declared to be an “Aboriginal Place” under the *National Parks and Wildlife Act 1974* (NSW).

The project area was challenging to investigate due to the bush terrain and dense vegetation. The location of the Women’s Site was “re-found” as a result of surveys undertaken for the purposes of the project application. This re-finding of the Women’s Site and stone arrangement fostered a heightened

⁵ *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [459].

⁶ *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [140].

interest by Aboriginal women in their culture and stimulated discussion and research into it. The Women's Site rapidly acquired a high level of significance, as reflecting and demonstrating known Aboriginal traditions.⁷

Both applicants to the proceedings asserted that the Women's Site formed part of a broader cultural landscape with values at local, regional and State levels. In contrast, Rocla asserted that the project area contained "hotspots" with "free land" in between them.⁸ Rocla sought to mitigate the impact of the proposed quarry on the Women's Site by proposing a 60 metre "buffer" (measured from the location of one of the engravings). The applicants contended that the effect of such a buffer would be to isolate or "island" the site and destroy the landscape in which the numerous sites exist and which form part of their cultural significance.

The Court found that:

The evidence of experts and Aboriginal witnesses demonstrates that there is a good chance of gaining more information from a more detailed targeted examination of known sites, and of finding currently unknown significant sites or (sites which will augment our information relating to key questions about the significance of sites already known), and of the cultural landscape.⁹

Rocla proposed that such further investigations could be undertaken in the course of quarrying as part of a conservation management plan (CMP), the "survey and salvage" approach. However, in the Court's view:

Rocla's proposal to investigate, assess and conserve or salvage these places in the course of quarrying as part of a CMP presents a very real risk that new significant sites and/or information which might enhance the significance of known sites will be discovered too late to influence land use decisions, or to conserve other discovered significant sites in the cultural landscape.¹⁰

THE NATURE AND EXTENT OF ABORIGINAL CULTURAL HERITAGE

The Court reinforced the values of the Burra Charter (and other OEH policies) in highlighting the importance of the following principles when considering the nature and extent of cultural heritage:

- Aboriginal cultural heritage encompasses both tangible and intangible elements, and the principles of ecologically sustainable development (ESD), including the precautionary principle, apply to both of these values.¹¹
- In accordance with OEH guidelines, Aboriginal witnesses are the determinants of Aboriginal culture.¹²
- Cultural values are dynamic, not static, and may not be captured at any one time.¹³
- "[F]or Aboriginal people the significance of individual features is derived from their interrelatedness within the cultural landscape. This means that features cannot be assessed in isolation and that assessments need to consider the feature and its associations in a holistic manner."¹⁴

Having regard to these principles and the available evidence, the Court found that:

⁷ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [157].

⁸ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [208].

⁹ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [298].

¹⁰ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [336].

¹¹ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [465].

¹² *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [199].

¹³ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [329].

¹⁴ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [220] citing OEH guidelines: Department of Environment, Climate Change and Water (NSW), "What is an Aboriginal Cultural Landscape?" (April 2010).

there is convincing evidence of the existence of a cultural landscape surrounding the “Women’s Site”, connecting to other nearby sites and encompassing tangible and intangible elements as described in the relevant OEH policy documents, significant elements of which may extend outside the proposed buffer zone.¹⁵

Process for assessment of Aboriginal cultural heritage

In considering the adequacy of the assessment undertaken and Rocla’s proposal to continue the assessment process as part of a CMP, the Court had regard to a number of factors:

- “[T]he accepted methodology – mandated by the relevant guidelines and the Burra Charter – requires an assessment of the archaeological, historically/social and ethnological values of discovered items and sites to inform the Statement of Significance *before* land management decisions are taken [emphasis added]”.¹⁶ In this instance, “the Respondents advance the opposite course; the issue of development approval before the completion of the investigations – before a complete understanding of the significance of the development area”.¹⁷
- “[A] requirement for full knowledge about a site is unrealistic and impractical, particularly where the gaps in knowledge arise for a variety of reasons that are not limited to the actions of the proponent and arise in part from the Aboriginal stakeholders re-engaging with a particular site.”¹⁸
- The level of information required before decisions are made is proportionate to the significance of the issue. In this instance, the Court considered that the investigations proposed by the applicant’s experts “are not prohibitive in terms of time or financial expense given the potential threat to the destruction of the Aboriginal cultural heritage and in our assessment are proportionate and practical”.¹⁹

The Court held:

In the circumstances, the development of a Statement of Significance and a CMP after consent has been granted creates unacceptable uncertainty. There remains the obvious problem that such a Statement of Significance, developed as a result of a conservation management planning process which took place after consent was granted, could not effectively influence major changes in the management regime which might be necessary in light of post consent investigations. There appears to be a real risk that new significant sites and/or information which might enhance the significance of known sites, and hence change or augment the overall cultural significance of the site, will be discovered too late to influence land-use decisions or to conserve other discovered significant sites in the cultural landscape.²⁰

PRECAUTIONARY PRINCIPLE, PUBLIC INTEREST

Consideration of the principles of ESD, including the precautionary principle, forms part of the “public interest” to be considered by the determining authority. Application of the precautionary principle requires the satisfaction of two threshold tests: first, a threat of serious or irreversible environmental damage; and, second, scientific uncertainty as to the nature and scope of the environmental damage.²¹

¹⁵ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [217].

¹⁶ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [471]. Article 6.1 of the Burra Charter provides: “The cultural significance of a place and other issues affecting its future are best understood by a sequence of collecting and analysing information before making decisions. Understanding cultural significance comes first, then development of policy and finally management of the place in accordance with the policy.”

¹⁷ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [472].

¹⁸ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [329].

¹⁹ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [461].

²⁰ *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [310].

²¹ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10; [2006] NSWLEC 133, 273 (NSWLR).

Satisfaction of both these conditions means that the decision maker must assume (subject to proof otherwise by the contradictor) that the threat of serious and irreversible environmental damage is no longer uncertain but a reality.²²

Both Rocla and the Minister contended that the precautionary principle, if triggered,²³ could be complied with by the adoption of an adaptive management approach of the kind contemplated by Preston CJ in *Telstra Corporation Ltd v Hornsby Shire Council*.²⁴ That is to say, they asserted that through the conditions of approval and the statement of commitments, an acceptable adaptive management approach could be put in place.

The Court, however, took a different view:

The available scientific, historical, anthropological and ethnographical evidence in these proceedings supports a conclusion that the threat of environmental damage to the Aboriginal cultural heritage and its extent has not been fully investigated. At the completion of those investigations the extent of any threat will be better understood. In those circumstances we must assume the worst and find that there is a threat of serious and irreversible environmental harm. Rocla has not demonstrated that the threat of serious and irreversible damage does not exist or is negligible if the proposed mitigation measures are followed.²⁵

“AMBER LIGHT” APPROACH

To address the deficiencies in the available information, Rocla asked the Court to adopt an “amber light” approach, and issue an in-principle approval of the development subject to the completion of the further investigations and the CMP.²⁶

Such an approach would be dependent upon the Court forming the view that, on its merits, the development was capable of being approved but with amendment or changes. The Court, however, considered that:

[It had] not formed a concluded view that the development is capable of being approved with amendments. A number of investigations need to be completed before an answer to that question can be given. The Court is not a forum for discussing applications or alternatives. While some amendments are acceptable, in this case we are not satisfied that sufficient information has been provided to allow us to properly assess the application.²⁷

In the Court’s view:

This is not a case for “step wise” or an adaptive management approach whereby uncertainties are acknowledged and the area affected by the Project is expanded as the extent of the uncertainty is reduced: *Telstra* at [163]. As the site will be stripped incrementally in segments under the approval, if it emerges that the Aboriginal landscape extends into that area it will be too late.²⁸

The Court decided:

An “amber light” approach in this case is not feasible. Approving the Project without having first obtained a full understanding of the heritage values of the Project site would be contrary to the precautionary principle: *Warkworth* per Preston CJ at [59] and common sense on the evidence as we see it.²⁹

²² *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [456].

²³ Rocla submitted that the application of the precautionary principle failed at the first step because, if carried out in accordance with the agreed draft conditions, there will not be a threat of serious or irreversible environmental damage: *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [38] (8).

²⁴ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 276-277; 146 LGERA 10; [2006] NSWLEC 133.

²⁵ *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [484].

²⁶ *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [477]. An “amber light” approach is discussed by the Court in *Champions Quarry Pty Ltd v Lismore City Council* [2011] NSWLEC 1124, [147] (per Moore SC and Sullivan AC).

²⁷ *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [478].

²⁸ *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [461].

²⁹ *Darlington Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [481].

CONCLUSION

This case demonstrates that the New South Wales Land and Environment Court is moving with contemporary practice in cultural heritage assessment and management. A failure to adequately assess all Aboriginal cultural heritage values in accordance with the Burra Charter early in the project development stage, and to properly take account of emerging cultural values, may prove fatal to the prospects of a project approval.

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