

Chapter 4: Managing the Resource in the Approvals Process

4.1 Introduction

Approval from the Heritage Council is required for the disturbance of archaeological sites in NSW under Section 139 of the *NSW Heritage Act, 1977*. This is the primary approval mechanism for the investigation of the archaeological resource in NSW. Most of these approvals are issued by the Director of the NSW Heritage Office as delegate of the Heritage Council. For sites of exceptional significance permits are sent to the Heritage Council for approval.

A number of approval processes apart from the excavation permit requirements of the Heritage Act have a direct or indirect impact on the protection of archaeological sites. Development approvals, Heritage Council approvals for work to items listed on the State Heritage Register (under Section 60 of the *NSW Heritage Act*) and State agency approvals such as mining leases, environmental permits, internal works permits and remediation requirements can all impact on archaeological sites.

This chapter will consider the current approvals mechanisms that affect archaeological sites in NSW. It should be noted that the effectiveness of the systems here is largely dependent on the effectiveness of early identification of sites and issues as already discussed in Chapter 2. A great deal of work has already been undertaken in the last 12 months to streamline excavation permit approvals and to educate Local Council staff about archaeology in Local Council approvals processes. This has resulted in an improvement in awareness already discussed in Chapter 2. This increasing awareness has also resulted in increasing numbers of applications. The resourcing implications for the Heritage Office are also discussed in this chapter.

4.2 Local Council Approvals

Archaeological considerations are currently required in local council development and demolition approvals. The way archaeological issues are integrated into this process and when, can either assist the early identification and thus effective management of the archaeological resource or it can impede this process.

The basic local council approval that requires consideration of archaeological issues is the Development Application process. For items listed on the State Heritage Register this is known as an Integrated Development Application however the archaeological issues to be considered are the same for all development applications and will be dealt with together here.

Additional matters for consideration issued under Section 79(c) of the Environmental Planning and Assessment Act require Councils to consider heritage issues when considering development applications. This principle is also embodied in the model heritage LEP and REP provisions prepared by the

Heritage Office and already adopted by a number of councils in New South Wales. Ideally this would involve the Applicant submitting a Heritage Impact Statement, including an Archaeological Assessment where appropriate, for consideration by the planning staff when making a recommendation about the determination of the application. This would ensure that any archaeological issues or requirements are raised early in decision making process and that any consent conditions are in keeping with archaeological best practice management. Appropriate conditions relating to archaeology on the DA consent are important in addition to the protection provided by the *NSW Heritage Act*. This ensures that archaeological issues are clarified during DA approval stages, that adequate resources are made available in construction programs and that construction budgets and if necessary construction certificates are only issued once archaeological work has been completed. The latter strategy has recently been employed by Parramatta Council on particularly significant sites to ensure that necessary archaeological work and site protection are completed to the satisfaction of all stakeholders prior to the construction phase.

While these systems are beginning to work effectively in some Councils with the benefit of in-house expertise, up to date LEP provisions and archaeological management plans, other councils are either not recognising archaeological issues at all or are placing out of date consent conditions on DAs. The latter can cause problems where councils are requiring assessments after the DA has been approved (limiting the options for managing archaeological remains and often causing difficulties during construction stages) or requiring the applicant to obtain an excavation permit when there isn't reasonable cause to suspect there are relics or an archaeological assessment has not been prepared to support this course of action. This can not only compromise best practice archaeological management it also consumes additional Local Council and Heritage Office staff time post DA to clarify permit requirements and change DA conditions where necessary.

For Councils without in-house archaeological expertise it is often difficult for planning staff to know when there is potential for archaeological remains to be present in a particular area and hence whether an archaeological assessment should be requested prior to consideration of a DA. This issue could be addressed by the preparation of Archaeological Management Plans for all Local Government Areas. However this will not happen in many LGAs for some time. The Heritage Office needs to prepare brief guidelines for inclusion in general Local Council heritage guidelines so that local council staff with no archaeological training can decide if an archaeological assessment should be requested. Sydney City Council has prepared a similar guideline for its staff, which will be discussed below, and which may be a useful model for other Councils.

Early identification of the nature of the resource and any constraints and requirements according to its significance is vital to ensure adequate protection

of the archaeological resource and to streamline any necessary disturbance of this resource within the development process.

The basic elements of good local council archaeological management are in place. The actions suggested in Chapter 2 relating to LEP provisions and Local Council management guidelines would continue to improve this process. However, even for councils with a good basic knowledge of archaeological issues in their area these elements are not well identified or integrated and the level of understanding at local council level varies.

Sydney City Council is developing a short guide for non-heritage trained planning staff to ensure consideration of archaeological issues at all stages of the DA process. It also contains standard consent conditions that can be applied in different instances depending on the nature of the archaeological resource and the recommendations of the archaeological assessment. A draft of this guideline is attached in Appendix C. A similar generic guideline should be prepared by the Heritage Office and circulated to all Councils in NSW (possibly as part of the Local Council Heritage Guidelines currently in planning stages).

If the assessment predicts a State significant resource may be present on the site, then the Council should refer it to the Heritage Office for advice and any consent conditions necessary to protect the resource. It is in these cases that there is the greatest potential for in situ retention as the best means of conserving the heritage significance of the resource.

Suggested Actions:

- **prepare guidelines for local council staff regarding best practice archaeological process and standard consent conditions for inclusion the Local Council Heritage Guidelines document;**
- **develop a component of existing local council accreditation courses to provide training on archaeological requirements and issues.**

4.3 State Agency Approvals

State agencies can be roughly split into two groups in relation to their responsibilities for the protection of archaeological resources. The first group are asset-owning agencies, which have direct responsibility for heritage sites that may have archaeological values. These agencies include, for example, Sydney Water, the National Parks and Wildlife Service and the Department of Health. The second group is agencies that have an approval role for particular activities, which may impact on the archaeological resource. These agencies include departments such as the Department of Mineral Resources, the Department of Urban Affairs and Planning and the Environment Protection Authority. Some agencies perform both functions and thus fit into both groups, for example the Sydney Harbour Foreshores Authority.

The nature of each agency's involvement with and impact upon archaeological sites varies enough that it is not possible to deal with each one individually in this report. There is however a number of common issues that apply and approaches which should be taken to ensure consistent management of archaeological sites as already indicated in Chapter 2.

Suggested Actions:

- **target agencies that issue approvals affecting archaeological sites and assist them to prepare protocols and checklists for agency staff and industry stakeholders.**

4.4 NSW Heritage Council Approvals

Archaeological approvals can be sought under two sections of the Heritage Act: s57 (for items on the SHR) and s139 for all other sites.

4.4.1 Approvals under Section 60

All activities, which may affect the significance of an item on the State Heritage Register, require Heritage Council (or delegated) approval under the terms of s57 of the *Heritage Act*, unless those activities are covered by the gazetted 'standard exemptions'. Activities that affect relics are specified as activities requiring approval under this section of the Act.

Many, perhaps most, of the items on the State Heritage Register will include some level of archaeological potential. In only limited cases has this potential contributed to the listing of the item on the State Heritage Register.

Heritage Council approvals under Section 60 of the *Heritage Act* (this includes the IDA process) should be processed in the same way that local council approvals should be processed. This has already been described above in section 4.3.

Past practice in the Heritage Office has been to separate archaeological and building approvals under Section 60. The Section 60 for built issues was usually issued first with the archaeological application being made separately and at a later date. Consent conditions on s60 approvals, or terms of approval on IDAs which required an archaeological assessment to be done post-approval, presented the same problems discussed in section 4.3 by looking at archaeological issues effectively after the development approval has been given. While there was no legislative imperative to do so, this separated process was compounded by separate application forms for archaeological and other works under the same section of the Act. These problems led in some cases to conflicting approvals being issued by the Heritage Council for the same site, or conditions of consent on the building S60 which resulted in the destruction of significant archaeological remains that should have been retained. Good architectural outcomes for heritage buildings may also conflict with the best

archaeological outcome and these issues should be resolved in an informed way prior to consent.

Recent changes in this process within the Office have included:

- requesting archaeological assessments during IDA timeframes where they are not provided with the original application so that all works affecting buildings, archaeological sites, vegetation etc. are dealt with in the same application;
- ensuring that terms of approval on IDAs cover all relevant heritage values including archaeology;
- improving internal communication to ensure that all staff are aware of the need to consider these issues for each application;
- preparation of IDA guidelines which clearly explain archaeological requirements
- preparing a new integrated form for works under S60 of the Act that includes archaeological works (Appendix D).

The process that is currently followed in most cases is:

- if any sub-surface disturbance is proposed on a State significant site all IDAs and Section 60 applications are accompanied by an archaeological assessment unless it is demonstrated that there is not reasonable cause to suspect relics are present on the site (for example the site was completely excavated in the 1960s);
- if this assessment is not with the application documentation, the Heritage Office requests this information prior to determining the application;
- in some cases for particularly significant sites with major archaeological issues a program of testing may be undertaken to confirm the nature of the archaeological resource prior to general consent being given by council or the Heritage Council.

The adoption of this process has increased awareness of archaeological issues among Heritage Office staff and has produced more consistent Heritage Council approvals for items on the State Heritage Register.

4.4.2 Approvals under Section 140

Most approvals for archaeological excavation are applied for under Section 140 of the *Heritage Act*.

Section 139 (1) of the *Heritage Act* (as amended in April 1999) specifies that:

a person must not disturb or excavate any land knowing or having reasonable cause to suspect that the disturbance or excavation will or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed unless the disturbance or excavation is carried out in accordance with an excavation permit.

This section of the Act applies to all land not subject to an interim heritage order or listed on the State Heritage Register (application for archaeological works to these items are made under Section 60).

While the *Heritage Act* allows for the removal or destruction of below ground archaeological resources in controlled circumstances it does not require that this happen. The provisions are there to ensure that the resource is adequately dealt with in cases where disturbance of archaeological sites is unavoidable.

The definition of a relic is very broad and relates only to the age of the item not its significance. This has required that applications are made for all relics, which are to be disturbed even if it is evident that they are of no heritage significance, and that their investigation will not contribute to our understanding of our past. This problem was addressed in the recent amendments to the *Heritage Act* where the Heritage Council was given the power to gazette exemptions to the requirements of Section 139. A set of Exemptions has been gazetted and is in Appendix E.

The quality of the archaeological assessments and other documents received with Excavation Permit applications also varies greatly. The Heritage Office has addressed this in the last 12 months by issuing a checklist for documentation accompanying permit applications. The format and contents of archaeological assessments however, still varies and will be discussed in the next chapter. The Heritage Council Archaeology Advisory Panel has also reviewed the Section 140 application form with a new form being included in the Heritage Act Regulation 1999. This new form was accompanied by a new set of permit conditions that are now placed on every excavation permit issued, replacing the old set of standard conditions. The checklist, new form and conditions are in Appendix F.

The standards conditions have always required the submission of a final excavation report within 12 months of archaeological work being completed. The Heritage Office began tracking final reports at the beginning of 1998. Prior to this there is no record of which reports were received and which are still outstanding although the size of the collection at the Department of Urban Affairs and Planning Library indicates that many have not been submitted. These reports are an important product of archaeological work and should be available for public and professional use. The Heritage Council should adopt a formal tracking system for reports and attempt to locate outstanding reports.

The timeframe for processing Excavation Permit applications was not reviewed during the recent *Heritage Act* amendments and remains 21 days. With the increasing number of permits received by the Heritage Council the timeframe should be amended in the next minor Heritage Act amendments to 40 days. This is the timeframe for Section 60 approvals.

The standards for qualifications required to be an excavation director has also been a subject of discussion in the Heritage Council Archaeology Advisory Panel over the last 12 months. Currently Heritage Office staff decide whether an archaeologist is qualified to act as Excavation Director based on details of qualifications and experience submitted to the Office and referring to referees if necessary. This may however expose the Heritage Office to legal action on refusal of an excavation director as there are no formally adopted and published criteria against which these qualifications are measured. The AAP has begun to develop these guidelines and it is recommended that they be completed and adopted formally by the Heritage Council.

Suggested Actions:

- **adopt a stricter policy regarding compliance of Archaeological Assessments to the published guidelines;**
- **amend the S140 permit timeframe to 40 days;**
- **hold an information session on changes to the Heritage Act and current archaeological policy for consultants and other interested parties;**
- **determine which final excavation reports are outstanding and write to applicants requesting that these be submitted to the Office;**
- **explore options for ensuring that final excavation reports are submitted in accordance with consent conditions and that work on site is carried out in compliance with consent conditions;**
- **update the Heritage Council publication *Procedures for the Evaluation of Excavation Permit Applications Under the Heritage Act 1977*;**
- **finalise, adopt and publish guidelines outlining qualifications needed to become an excavation director.**

4.5 In Situ Conservation

As discussed in Chapter 3 the historical archaeological resource of NSW is rapidly diminishing. While in many cases the removal of sites is appropriate it is important to recognise that some sites are of such significance that they should be retained in situ.

Decisions regarding in situ conservation are problematic when there is no frame of reference for comparative significance. Current decisions regarding in situ retention are usually made once the items are under threat rather than in a proactive set of management decisions about the archaeological resource of an area as a whole.

In order to achieve priority for conservation of significant archaeological sites rather than destruction, it is necessary to improve the basis of our knowledge about the totality of the archaeological resource so that the elements we want to keep are clearly identified. This has already been discussed in Chapter 2.

Publishing a set of guiding principles in NSW may also assist to reinforce current best practice standards and to encourage a proactive mindset which aims to

preserve the archaeological resource. They could then be adopted not only by heritage professionals but also by heritage managers in State agencies, local councils and the commercial community. Key principles may include:

- that archaeological remains should be seen as a finite, and non-renewable resource, in many cases highly fragile and vulnerable to damage and destruction;
- that detailed development plans should include policies for the protection enhancement and preservation of sites of archaeological interest and of their settings;
- that where State significant remains and their settings are affected by proposed development there should be a presumption in favour of their preservation - and that in such cases preservation by recording remains after excavation should be regarded as the second best option after physical preservation in situ;
- that the needs of archaeology can be reconciled, and potential conflict very much reduced, if developers identify archaeological issues and discuss their preliminary plans for development with planning authorities at an early stage;
- that decisions by planning authorities on whether to preserve archaeological remains in situ in the face of proposed development have to be taken on merit, taking account of development plan policies and all other material considerations - including the importance of the remains - and weighing these against the need for development;
- that planning authorities and the archaeological profession have the responsibility when development will damage archaeological remains to ensure that

These principles could also be expanded to include suggested principles arising from other chapters of this review eg: principles that aim to ensure public benefit from archaeological sites.

Suggested Actions:

- **create and publish a set of principles in association with the AAP to guide the protection and use of the archaeological resource;**
- **prepare guidelines on in situ retention.**

4.6 Archaeological sites with Aboriginal and Historical Archaeological Values

There is a dual approval role for the Heritage Council under Section 139 of the *Heritage Act* and the National Parks and Wildlife Service (NPWS) under Section 86 of the *NSW National Parks and Wildlife Service, 1974*, for sites that contain Aboriginal and historic relics. For sites that contain prehistoric Aboriginal relics and non-Aboriginal historic relics the process is fairly clear-cut. Excavation permit conditions issued by the Heritage Council for historic sites always note the need to stop work and contact NPWS should any Aboriginal relics be located. The NPWS does not however do this for Consents to Destroy issued for

Aboriginal sites. Most archaeologists working on Aboriginal sites are aware of *Heritage Act* requirements however, historic sites are occasionally destroyed without permission from the Heritage Council during the excavation of Aboriginal sites. The Heritage Council should request the NPWS to place a condition on all consents to destroy noting the need to contact the Heritage Office if historic relics are located during work.

There have however, been problems in the past with sites where assessments for Aboriginal and historic archaeological values were not linked causing delays on site while waiting for permits to be issued. This problem could be addressed through the integration of the Aboriginal and archaeological management plans into GIS and planning frameworks at both a local government and state level. This would alert site managers that more than one set of values is present on the site and that if development were proposed, more than one Act applies.

The class of sites that is more problematic are “contact” sites or nineteenth and twentieth sites where Aboriginal people and non-Aboriginal people lived and interacted (rural sites, missions, cemeteries and inner city housing areas are some examples of these types of sites). Most of these sites fall under both Acts but there are some areas, particularly in relation to cemeteries, that are not clearly defined.¹ Discussions between the Heritage Council and the National Parks and Wildlife Service are needed to clarify roles in relation to these issues.

Suggested Actions:

- **initiate discussions with NPWS regarding procedures for dealing with sites that have Aboriginal and historical archaeological values;**
- **request NPWS to place a standard condition relating to historic relics on all Consents to Destroy issues under Section 86 of the *National Parks and Wildlife Act, 1974*.**

4.7 Resourcing

The Heritage Office employs two full time historical archaeologists.² The Sydney Harbour Foreshores Authority and the National Parks and Wildlife Service employ one full time historical archaeologist each. These agencies share the responsibility for providing advice and approvals for historical archaeological sites in NSW although staff of the Sydney Harbour Foreshores Authority and the National Parks and Wildlife Service are largely occupied with hands on site management rather than approvals and Statewide policy. The Heritage Office undertakes 95% of this work.

¹ Work at Ben Chifflly Dam in 1999 affected both Aboriginal and historic sites from the prehistoric period to the present. A separate Consent to Destroy (NPWS) and Excavation Permit (Heritage Council) were applied for. Staff of the Heritage Office and NPWS Aboriginal Heritage Division successfully handled the complex issues involved in this project by discussing the site in both pre-application and application phases and by writing the conditions of consent for each approval together to ensure that the consents were consistent and dealt effectively with all issues and concerns. This level of liaison is not common however.

² Prior to August 1999 the Heritage Office employed one part-time and one full time historical archaeologists.

In comparison there are approximately 12 archaeologists dealing with Aboriginal sites and issues in NSW State agencies.

With increasing awareness of historical archaeology in the community the number of inquiries and approvals coming into the Heritage Office are increasing. The current development boom is also affecting the number of applications to excavate lodged each year. The rapidly increasing number of s140 excavation permits processed by the Heritage Office over the last 5 years is demonstrated against staff numbers in the table below. This table does not include s60 applications (State Heritage Register Items).

Year	Number of Permits	Number of Staff
Note: 1977-1992	Between 2-20 permit per year	1 - 2
1993	40	1 - 2
1994	42	1 - 2
1995	41	1 - 2
1996	45	1
1997	66	1.6
1998	83	1.6
1999	149 (projected)	2

Table 4.1: Number of Excavation permits issued under Section 140 of the NSW Heritage Act, 1977-1999.

In addition to statutory approvals the current workload of the Heritage Office archaeologists also includes:

- general inquiries on heritage matters including industrial, natural and landscape issues
- general inquiries on the legislation, archaeological assessment procedures and policies
- preparing ministerial advice and answering ministerial correspondence
- commenting on archaeological, and some industrial, natural and landscape issues in EISs, DAs, IDAs, statutory planning instruments, CMPs and SHR nominations
- reviewing archaeological assessments and final excavation reports
- development of archaeological guidelines, policy and strategy

NB: The last two are of great importance and are not being done effectively due to time constraints.

The staff levels relating to historical archaeology have increased in 1999 however the workload is increasing faster than the resourcing levels. Increasing staff levels is not feasible within the Office. The remaining option is to reduce the existing workload. This option is a complex one as to merely refuse particular

issues or types of work without ensuring they are being handled elsewhere would have a detrimental effect on the archaeological resource of NSW. The current workload of the Heritage Office is at best the bare minimum required to ensure archaeological sites are adequately dealt with. It is also not possible for the Heritage Office archaeologists to delegate specific archaeological issues within the Heritage Office as there are no other staff with qualifications or experience in historical archaeology.

One option to address this issue is to delegate certain Heritage Council archaeological approval functions to other agencies or local councils with appropriate specialist expertise. This would potentially reduce the statutory workload within the Heritage Office and allow staff to focus on policy, planning, education and promotion. Delegation has already been given successfully to the National Parks and Wildlife Service for minor archaeological approvals under s140 and s60 of the *Heritage Act*. Consideration is being given to offering the Sydney Harbour Foreshores Authority a similar delegation. (Conditions of delegation are in Appendix H)

Delegations to local councils pose a different set of issues as only two councils have staff with historical archaeological expertise in NSW and have different political and operational requirements. In order to test the impact and effectiveness of delegations to local councils the Heritage Council Archaeology Advisory proposed a trial delegation to Sydney City Council and Ku-ring-gai Council for a period of twelve months. This delegation has been approved by the Heritage Council and will be offered to these Councils by the end of 1999 (Conditions of delegation are in Appendix I). It is anticipated that this trial will indicate what types of conditions are necessary to ensure the delegation works effectively and also to test if delegation of minor functions impacts on the workload of the Heritage Office archaeologists.

Other preliminary suggestions for addressing this problem are as follows:

- gazetting exemptions for certain classes of sites and for non-significant sites is in process. This will limit the number of applications being processed by the Heritage Office (note this is already in progress).
- assist other organisations and groups to increase their understanding archaeological principles and requirements thus reducing the number of general inquiries directed to the Heritage Office (the Heritage Office held two workshops for Sydney City Council staff this year – City Development and City Projects – to raise awareness of best practice archaeological processes and legal responsibilities).
- reducing the number of non-archaeological issues given to the Heritage Office archaeologists.

If these actions are successful, the Heritage Office will then be able to concentrate resources on the management of archaeological sites with high

heritage significance and to promote archaeological sites and their conservation to the wider public. This will ensure better protection and appreciation of the most important archaeological sites.

Suggested Actions:

- **investigate the establishment of a network of regional archaeological advisers to supplement the existing heritage advisers network;**
- **continue holding targeted workshop sessions with local council staff to increase general awareness of basic archaeological requirements and best practice management policies;**
- **develop a strategy for increasing archaeological expertise at local council level, particularly in areas with significant archaeological resources.**

4.8 The cost of archaeology

The cost of archaeology in the process of development has been raised by a number of government and commercial bodies as a cause for concern and many options have been canvassed to address this issue. The following suggestions are provided to address these concerns (note many of these issues have already been addressed in other sections of this report):

- the development of regional research frameworks and State wide thematic research frameworks to provide better broad level contexts for directing resources to sites of high significance and reducing the number of sites excavated that do not have high research potential;
- the preparation of local heritage studies (inclusive of all heritage values) that incorporate archaeological zonings and local planning and management frameworks to assist local council staff and the local community to identify and effectively manage its archaeological sites. These studies would also identify the sites that may be of State significance and worthy of in situ retention;
- test excavating potentially significant sites where there is a high degree of uncertainty about the nature and condition of the archaeological resource prior to development design to provide more certainty about the resource the implications for site management;
- the preparation of short guidelines and flow-charts to explain the development and archaeological management processes;
- ensuring that all on site contractors are inducted regarding archaeological responsibilities and statutory requirements;
- ensuring that contract clauses adequately cover archaeological compliance;
- a local planning system where archaeological assessments are prepared prior to the approval of development applications in order to allow archaeological constraints to be clearly understood by all parties. This would allow developers to adequately plan archaeological requirements into risk management strategies and would provide an option not to proceed with the development at a point at which this choice is still economically viable or to proceed prepared for any necessary archaeological works;

- encourage designs which prevent disturbance to the resource in the first place;
- improving the output of archaeological investigations to produce a clear public benefit for the money invested;
- waiving permit fees for economically disadvantaged site owners;
- the provision of State funds towards significant archaeological projects;
- encouraging professional associations to more carefully regulate consultant pricing policies;
- community education programs aimed at explaining why archaeological sites and their investigation are important and why sites should be kept and responsibly managed.

Suggested Actions:

- **establish a permanent contact in development and sub-contracting firms that the Heritage Office deals with regularly eg: Lend Lease, Meriton, Concrete Construction to ensure consistent archaeological management practices.**