

Appendix L

Aboriginal Heritage Preliminary Investigation (ACHM 2009)



ACHM
AUSTRALIAN CULTURAL
HERITAGE MANAGEMENT

**Preliminary Investigation of Aboriginal
Heritage – City of Gosnells Maddington
Kenwick Strategic Employment Area
(MKSEA)**

May 2009

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Abbreviations

ACHM	Australian Cultural Heritage Management
AHA	<i>Aboriginal Heritage Act 1972</i>
DIA	Department of Indigenous Affairs
MKSEA	Maddington Kenwick Strategic Employment Area
MOU	Memorandum of Understanding
SWALSC	South West Aboriginal Land and Sea Council
WALGA	Western Australian Local Government Association

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Executive Summary

This preliminary investigation report reviews readily available Aboriginal heritage information to provide a risk assessment for the likelihood of Aboriginal sites being located in the City of Gosnells Maddington Kenwick Strategic Employment Area (MKSEA). This report then documents recommended procedures for Aboriginal group engagement and heritage management. This study has determined the following.

Aboriginal Site Registers

Eight Aboriginal heritage sites are entered onto the Department of Indigenous Affairs (DIA) Site Register as located in the MKSEA. Because Aboriginal sites were identified in the MKSEA during the heritage register search, the City of Gosnells has a legal obligation to ensure compliance with the *Aboriginal Heritage Act 1972* in relation to these eight Aboriginal sites.

Based on previous Aboriginal heritage surveys, there is a medium potential for the MKSEA project area to contain an unrecorded Aboriginal archaeological site, and medium potential for the area to contain an unrecorded Aboriginal ethnographic site.

Statutory Requirements in relation to Aboriginal Sites

The heritage protection legislation with most relevance for works at the MKSEA is the Western Australian *Aboriginal Heritage Act 1972*. If the City of Gosnells adheres to the requirements of the *Aboriginal Heritage Act 1972*, no other heritage protection legislation should have operational relevance to works at the MKSEA.

Consultation with Aboriginal Groups

The MKSEA is in the claimed traditional land of the Nyungar Aboriginal people. The South West Aboriginal Land and Sea Council (SWALSC) is the body corporate who administers heritage and native title interests of the Nyungar Aboriginal people through the Region 6 (Metro) Native Title Working Party. The Region 6 (Metro) Native Title Working Party should be consulted if engagement with the Nyungar Aboriginal people is required. Also, the Aboriginal Cultural Materials Committee (ACMC) policy is for consultation to include Native Title Representative Body nominees, informants of known sites, and others with cultural knowledge of the area.

Recommended Processes

This report identifies that, because Aboriginal sites were identified in this preliminary investigation, additional Aboriginal heritage survey work is required prior to any development of the MKSEA because these sites are protected under legislation and the exact location of these Aboriginal sites is unreliable. It is possible some sites were collected in the 1970s, but until these Aboriginal sites are verified through ground survey the components and spatial extent of these sites is unquantifiable.

General Discussion

There is high potential for the project area to contain Aboriginal heritage issues. There is potential that earthworks may encounter previously recorded Aboriginal sites, or encounter previously unrecorded Aboriginal sites, if an Aboriginal heritage management regime is not implemented. Because of these factors, it is the opinion of ACHM that undertaking an Aboriginal heritage survey would provide the best strategy for Aboriginal heritage management of the MKSEA.

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1.0 Introduction

Australian Cultural Heritage Management Pty Ltd (ACHM) has been engaged by the City of Gosnells to undertake an Aboriginal heritage preliminary investigation study of the Maddington Kenwick Strategic Employment Area (MKSEA), Perth, Western Australia (Figure 1).

This report reviews readily available Aboriginal heritage information to provide a risk assessment for the likelihood of Aboriginal heritage sites being located in the MKSEA, and then documents a series of procedures for Aboriginal group engagement and heritage management.

2.0 Preliminary Investigation Research Methodology

This report used the following research methodology:

- Search the Department of Indigenous Affairs (DIA) Sites Register, the Australian Heritage Database, the Western Australia Heritage Council Places Database and other sources for previously recorded Aboriginal sites and reports of Aboriginal heritage surveys in the study area and within 200m of the MKSEA.
- Synthesise and evaluate Aboriginal heritage information relevant to the MKSEA, including information held on DIA site files and in Aboriginal heritage reports.
- Examine previous research regarding Aboriginal heritage in the study area to provide an indication of the types of Aboriginal heritage issues that may be present for the MKSEA.
- Summarise State and Commonwealth legislative requirements relating to Aboriginal heritage and Native Title.
- Identify and liaise with the Aboriginal organisations, groups and individuals with traditional interests in the locality, and their representation and interests with respect to Aboriginal heritage and Native Title issues.
- Identify and liaise with key relevant stakeholder groups (including Aboriginal group representatives, Government departments and community groups), and their representation and interests with respect to the MKSEA as these interests relate to Aboriginal heritage and Native Title issues.
- Outline a methodology for consultation with the relevant Aboriginal group and managing Aboriginal heritage issues that may arise for the MKSEA.

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Figure 1 Locality map of the City of Gosnells MKSEA, Perth, WA

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3.0 Results of Heritage Register Searches

The preliminary investigation research involved searches of the DIA Site Register, the Australian Heritage Database, the Western Australia Heritage Council Places Database and other sources for previously recorded Aboriginal sites and reports of Aboriginal heritage surveys in and within 200 metres of the MKSEA (to contextualise any Aboriginal site data for the area). The desktop research has ascertained the following information.

3.1 DIA Site Register

The DIA Site Register has eight entries of Aboriginal heritage sites within the MKSEA boundary (Table 1 & Figure 2).

DIA Site ID	DIA Site Name	Site Type	Easting	Northing	Zone	Data	DIA Site Status
122	Yule Brook Farm	Artefacts / Scatter	403053	6457085	50	Unreliable	Not a Site
3312	Wattle Grove, Perth	Artefacts / Scatter	403639	6456649	50	Unreliable	Insufficient Information
3624	Boundary Road, Wattle Grove	Artefacts / Scatter	403739	6456299	50	Reliable	Permanent
4340	Edward/Grove Streets	Artefacts / Scatter	403339	6457599	50	Unreliable	Insufficient Information
4341	Brentwood Road NW	Artefacts / Scatter	405189	6457599	50	Unreliable	Insufficient Information
4342	Brentwood Road Quarry	Quarry / Artefacts / Scatter	405489	6457199	50	Unreliable	Permanent
4343	Brentwood Road Swamp	Artefacts / Scatter	405489	6457199	50	Unreliable	Permanent
24785	Yule Brook Farm 02	Artefacts / Scatter	403088	6456869	50	Reliable	Lodged

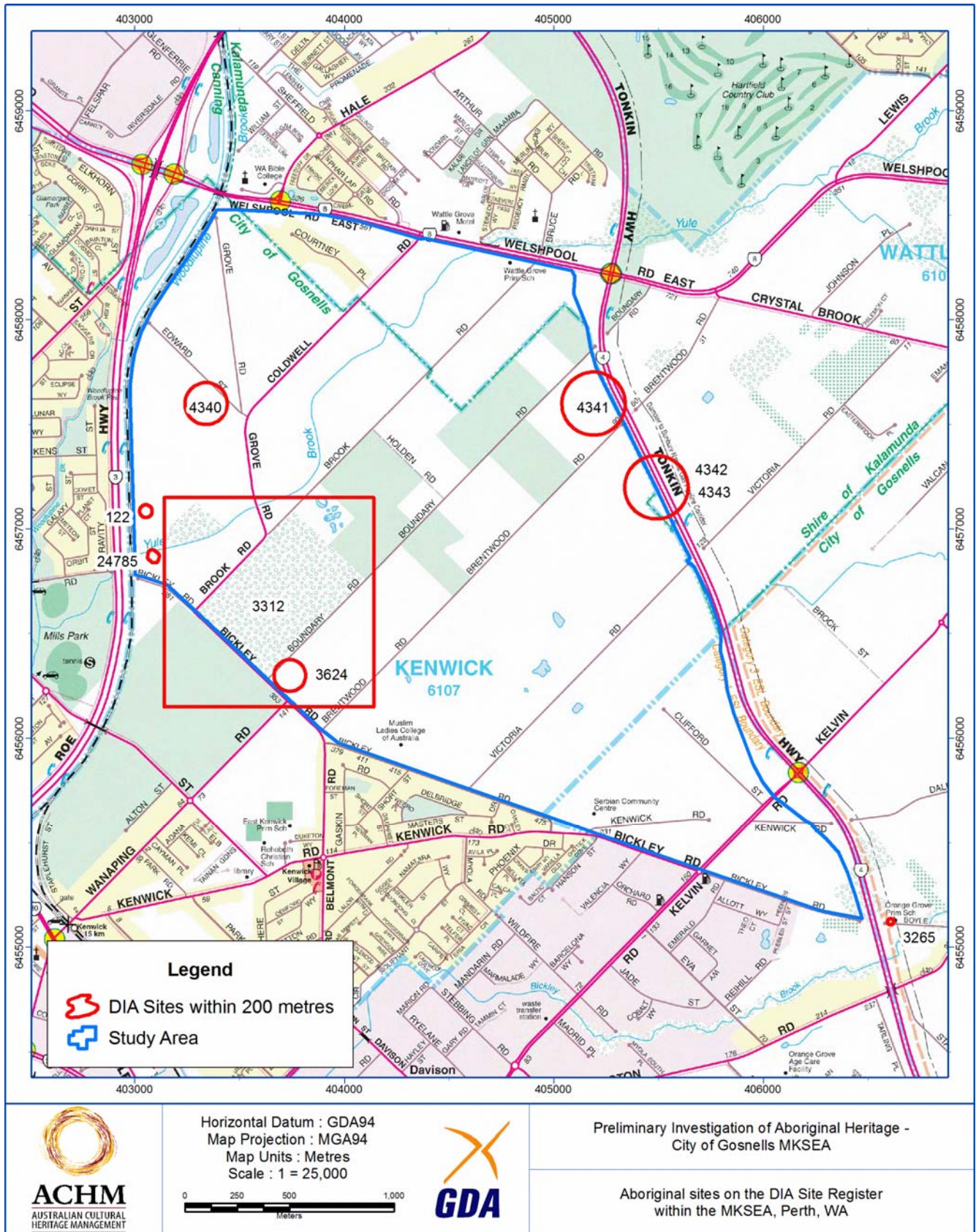
Table 1 Aboriginal sites on the DIA Site Register recorded within the MKSEA

One additional Aboriginal site is located within 200 metres of the MKSEA boundary (Table 2). All DIA Site files are 'OPEN' sites, and there are no 'CLOSED' DIA Site Files in the MKSEA area.

DIA Site ID	DIA Site Name	Site Type	Easting	Northing	Zone	Data	DIA Site Status
3265	Orange Grove School	Artefacts / Scatter	406607	6455122	50	Unreliable	Not a Site

Table 2 Aboriginal sites on the DIA Site Register within 200 metres of the MKSEA

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Below is a list of reports with relevance to the eight Aboriginal sites recorded as within the MKSEA. These reports have been accessed for this preliminary investigation (Table 3).

DIA Report ID	Author	Report Name	Year	DIA Site/s Referenced in Report
22304	Australian Interaction Consultants (AIC)	Working Document to Identify Aboriginal Heritage Issues to Facilitate Risk Management Strategies for Stage 5 of the Dampier to Bunbury Natural Gas Pipeline Duplication Project.	2006	Unknown – Report Missing at DIA
22521	Quartermaine, G.	Report on a Preliminary Archaeological Investigation for Aboriginal Sites Proposed High Wide Load Corridors 1 and 2 Southern Metropolitan Area of Perth.	2007	3312
22955	Gifford, P.	Results of an Aboriginal Cultural Heritage Survey of the Yule Brook Flow Reduction Dam Site, Kenwick.	2007	24785
22955	Hook, F.	The Report of an Indigenous Archaeological Assessment of the Proposed Yule Brook Flow Reduction Dam, Kenwick.	2007	24785
102173	O'Connor, R.	Report on a Survey for Aboriginal Sites at the Proposed Homestead Road Sewerage Pipeline, Gosnells.	1989	3312 3624
104379	Hallam, S.	Australian Research Grants Scheme: Final Report on the Project the Swan Coastal Plain, Western Australia.	1986	3312
104505	Strawbridge, L.	Aboriginal Sites in the Perth Metropolitan Area: A Management Scheme. June 1987 - Revised 1988.	1988	4340
105660	O'Connor, R.	Report on a Survey for Aboriginal Sites on the Roe Highway Welshpool Road to South Street Section.	1989	4340
105699	Machin, B.	Aboriginal Heritage Issues and Cable Crossings: Upper Canning River Downstream from Nicholson Road Traffic Bridge Adjacent Downstream from Canning Bridge and Narrows Bridge Utilizing Internal Bridge structure Swan River Adjacent Upstream to Causeway.	2001	3624 4340 4341 4342 4343

Table 3 Aboriginal heritage survey reports relevant to Aboriginal sites in the MKSEA

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Due to the early time period most of these sites were recorded in, many do not have Aboriginal informants listed on the DIA Site Files (Table 4).

DIA Site ID	DIA Site Name	Site Type	Aboriginal Informant/s
122	Yule Brook Farm	Artefacts / Scatter	-
3312	Wattle Grove, Perth	Artefacts / Scatter	-
3624	Boundary Road, Wattle Grove	Artefacts / Scatter	-
4340	Edward/Grove Streets	Artefacts / Scatter	-
4341	Brentwood Road NW	Artefacts / Scatter	-
4342	Brentwood Road Quarry	Quarry / Artefacts / Scatter	-
4343	Brentwood Road Swamp	Artefacts / Scatter	-
24785	Yule Brook Farm 02	Artefacts / Scatter	Marion Collard (SWALSC) Glen Gillespie (SWALSC) Nat Gillespie (SWALSC) Stanley Headland (SWALSC) Leonie Humphries (SWALSC) Barry McGuire (SWALSC)

Table 4 Aboriginal site informants for Aboriginal sites in the MKSEA

Of the eight Aboriginal sites recorded on the DIA Site Register as being within the MKSEA boundary, it is worth noting that six of these Aboriginal sites have been determined by DIA to be spatially unreliable – meaning the physical location of these sites cannot be conclusively confirmed or relied upon as being accurately mapped.

3.1.1 Implications of the DIA Site Register - MKSEA

The DIA Site Register has relevance to this project as it means there is a legal responsibility for the landowner to comply with the provisions of the *Aboriginal Heritage Act 1972* (AHA). Based on discussion with Peter Randolph at DIA on 18 May 2009, compliance with the AHA for the sites within the MKSEA boundary would be as described in the following table (Table 5).

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DIA Site ID	DIA Site Name	DIA Site Status	Comment
122	Yule Farm Brook	Not a Site	Because this site has been determined by the ACMC to not be an 'Aboriginal site' under the terms of the AHA, activities at this location would not breach the AHA. Activities at this location can proceed with caution, since new information could arise and reinstate it as an 'Aboriginal site'. Because it is 'Not a Site' under the AHA, it is not possible for any prosecution for activities at this location.
3312	Wattle Grove, Perth	Insufficient Information	Currently there is insufficient information for the ACMC to determine if it is an 'Aboriginal site', but there is potential for this to be determined to be an Aboriginal site. More information is required for the ACMC to determine its site status. All obligations under the AHA apply until further information is provided to the ACMC.
3624	Boundary Road, Wattle Grove	Permanent	This site has been assessed as an 'Aboriginal site' by the ACMC. All obligations under the AHA apply.
4340	Edward/Grove Streets	Insufficient Information	Currently there is insufficient information for the ACMC to determine if it is an 'Aboriginal site', but there is potential for this to be determined to be an Aboriginal site. More information is required for the ACMC to determine its site status. All obligations under the AHA apply until further information is provided to the ACMC.
4341	Brentwood Road NW	Insufficient Information	Currently there is insufficient information for the ACMC to determine if it is an 'Aboriginal site', but there is potential for this to be determined to be an Aboriginal site. More information is required for the ACMC to determine its site status. All obligations under the AHA apply until further information is provided to the ACMC.
4342	Brentwood Road Quarry	Permanent	This site has been assessed as an 'Aboriginal site' by the ACMC. All obligations under the AHA apply.
4343	Brentwood Road Swamp	Permanent	This site has been assessed as an 'Aboriginal site' by the ACMC. All obligations under the AHA apply.
24785	Yule Farm 02 Brook	Lodged	This site is yet to be assessed as an 'Aboriginal site' by the ACMC. All obligations under the AHA apply in the event the ACMC determine it is an 'Aboriginal site'.

Table 5 Aboriginal sites in the MKSEA boundary and comment on DIA site status

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3.2 Australian Heritage Database

The Australian Heritage Database, including the National and Commonwealth Heritage Lists and the Register of the National Estate, does not contain any entries for Aboriginal heritage sites in the MKSEA.

3.2.1 Implications of the Australian Heritage Database - MKSEA

Because there are no entries for Aboriginal sites within the project area, the Australian Heritage Database has no relevance to this project.

3.3 Western Australia Heritage Council Places Database

The Western Australia Heritage Council Places Database does not contain any entries for Aboriginal heritage sites at the MKSEA.

3.3.1 Implications of the Australian Heritage Database - MKSEA

Because there are no entries for Aboriginal sites within the project area, the Western Australia Heritage Council Places Database has no relevance to this project.

3.4 Discussion

The Register searches have identified that eight previously recorded Aboriginal sites on the DIA Site Register are recorded as within the MKSEA boundary. One of these sites has been determined as 'NOT A SITE' under the *Aboriginal Heritage Act 1972*, while the conditions of the *Aboriginal Heritage Act 1972* apply to the remaining seven sites. Until further information regarding the Aboriginal sites with the status of 'INSUFFICIENT INFORMATION' is provided to the ACMC, these sites should be treated as 'Aboriginal sites'. This further information can only be collected through survey and ground-truthing of these locations. One site has been lodged with DIA and is yet to be determined or not determined to be an 'Aboriginal site'.

It is the opinion of ACHM that there is a medium risk of an unrecorded Aboriginal site being within the MKSEA because of erosion uncovering and / or covering archaeological material (and thus exposing / hiding archaeological materials), and the long time lag since previous studies.

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4.0 Previous Surveys and Aboriginal Sites

Because there are previously recorded Aboriginal sites in the MKSEA, there is a need to evaluate the surveys to understand the character of these sites in order to infer what potentially unrecorded Aboriginal sites may still be within the MKSEA.

4.1 Evaluation of Previous Surveys

Most Aboriginal sites in the MKSEA were recorded in the 1970s during surveys for academic studies, with six of the eight Aboriginal sites recorded through this purpose (Table 6). Aboriginal heritage consultancy surveys focused on smaller tracts of land in and adjacent to the MKSEA, and resulted in another two sites being recorded.

DIA Site ID	Site Type	Recorder	Year	Site Size	No. Of Artefacts	Comment
122	Artefacts / Scatter	Quartermaine	1996	3m x 2m	4 (All Quartz)	"If the Water Corporation intend to conduct excavation works in this area that shovel test pitting occurs across 122" (Hook 2007: 33)
3312	Artefacts / Scatter	Hallam	1974	-	3 (All Quartz)	All artefacts at this site collected
3624	Artefacts / Scatter	Hallam	1970	5m x 5m	3 (1 x Flaked Glass / 1 x Quartz / 1 x Dolerite)	"Clearly a Contact assemblage"
4340	Artefacts / Scatter	Stranger	1973	40m x 20m	52 (All Quartz)	"Require clarification of...current condition before their research potential can be assessed" (Strawbridge 1988: 66)
4341	Artefacts / Scatter	Stranger	1973	40m x 8m	50 (49 x Quartz / 1 x Chert)	"There are also a large number of sites that have been disturbed by development...These sites cannot be or do not require further assessment" (Strawbridge 1988: 56)
4342	Quarry / Artefacts / Scatter	Stranger	1973	40m x 25m	48 (40 x Quartz / 7 x Fossil Chert / 1 x Chert)	"There are also a large number of sites that have been disturbed by development...These sites cannot be or do not require further assessment" (Strawbridge 1988: 56)
4343	Artefacts / Scatter	Stranger	1973	115m x 20m	42 (32 x Quartz / 10 x Fossil Chert)	"Indications of early occupation. This site requires further examination prior to disturbance by development" (Strawbridge 1988: 68)
24785	Artefacts / Scatter	Hook	2007	24m x 17m	24 (Minimum – All Quartz)	"If the Water Corporation intend to conduct excavation works in this area that shovel test pitting occurs across...YB07-01" (Hook 2007: 33)

Table 6 Characteristics of Aboriginal sites in the MKSEA on the DIA Site Register

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Through analysis of the DIA Site Files and reports, and communication with DIA staff, it is believed the entirety of the MKSEA has probably been surveyed by Hallam in the 1970s. Selected areas of the metropolitan area were surveyed by students of Sylvia Hallam, Lecturer in Archaeology at UWA in the 1970s as part of the Swan Coastal Plains Survey. The recording of six of the sites in the MKSEA indicates this area was included in the Swan Coastal Plains Survey in which the archaeology students walked transects to locate surface scatters of artefacts (pers. comm. Peter Randolph 17/3/2009). These sites included some of those recorded as in the MKSEA.

4.1.1 Relevant Reports and Aboriginal Site Implications

Of the reports, the most current and relevant to the MKSEA are by Gifford (2007) and Hook (2007). These archaeological and ethnographic surveys, for a portion of the land in the MKSEA, identified Aboriginal heritage issues associated with Yule Brook. In regard to archaeological sites, the following recommendations were made (see also Hook 2007: 33).

The unanimous conclusion of the Indigenous informants was that no work should be done by WaterCorp or its contractors which would disturb either of these sites [DIA 122 & 24785], either directly or by causing the site areas ultimately to be flooded by the construction of an artificial wetland.

The informants resolved therefore that since such damage was probably unavoidable if the plans proceeded, WaterCorp should look elsewhere to place its proposed Yule Brook Flow Reduction Dam than the Kenwick survey area...

As far as the current survey area at Kenwick was concerned, the informants noted that high level vegetation cover across the survey area had prevented full identification of DIA Site 122, and they recommended that additional survey work there be conducted in summer.

If Watercorp intended to conduct excavation works in the current Kenwick survey area, then shovel test pitting should occur across DIA Site 122 and YB07-01 [DIA Site 24785]. This test pitting programme should follow a suitable sampling methodology as outlined by Ms Hook in her report (Gifford 2007: 26-27).

Aboriginal informants were not supportive of any impacts to these relatively small archaeological sites. Given there are eight previously recorded archaeological sites in the MKSEA, if these sites cannot be managed *in situ* (i.e. not developed) it is likely there would be limited or no support from Aboriginal people for a Section 18 application under the *Aboriginal Heritage Act 1972* for these sites to be disturbed.

In regard to ethnographic sites, the following recommendations were made.

Concern was expressed by the informants during the surveys about the future of Yule Brook, and in particular that part of it which bisects the survey area from east to west.

The informants felt that although the survey area in general had long since been cleared for grazing and other purposes, there was no justification for widening Yule Brook, which inevitably would result in the destruction of the remnant native vegetation on its banks and in its bed.

For this reason, and because of the brook's mythological significance in terms of the Waugal, the informants requested that the entire length of Yule Brook be declared a site under the *Aboriginal Heritage Act (1972)*, on a similar basis to the

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Swan and Canning Rivers (mythological sites Nos. 3636 and 3538) of which it is a tributary.

The informants pointed out that although much of the lower section of the brook had been massively disturbed, the same also applied to the Swan and Canning Rivers and had not prevented their being declared sites.

The informants said that if WaterCorp sought to carry out its flood mitigation work on part of Yule Brook which was already massively disturbed, this would almost certainly be acceptable even if the entire brook was declared a site.

In other words they would probably not oppose an application under Section 18 of the Aboriginal Heritage Act, if this applied to an area of Yule Brook downstream from the Kenwick area surveyed on the 15th September, in particular the Yule Brook Main Drain area or the section of Yule Brook which had been re-routed as part of the construction of Roe Highway (Gifford 2007: 26-27).

There is potential for the length of Yule Brook to be viewed by Aboriginal people as constituting an Aboriginal ethnographic site. This stated, it is undeterminable with the current level of information whether DIA would view this as an 'Aboriginal Site' under Section 5 of the *Aboriginal Heritage Act 1972*, or would view this as generalised significance for a watercourse. Based on Gifford's 2007 report results, it is important to note that if Yule Brook is registered as an Aboriginal site, there may be support from Aboriginal people for a Section 18 application under the *Aboriginal Heritage Act 1972* Yule Brook to be disturbed.

4.2 Character of Aboriginal Sites in the MKSEA

The types of archaeological sites likely to be in the MKSEA can now be inferred. The majority of Aboriginal sites are small in size and low in artefact density. The most common stone artefact material is quartz, with fossiliferous chert, chert and dolerite being the remaining stone types. The most common artefact type is the debitage or 'waste' from stone tool making (i.e. cores, flaked pieces and small flakes). Used tools are not common and are 'scrapers' and 'adzes' (wood working tools – DIA Sites 4340 / 4341 & 4343) and used flakes (DIA Sites 4340 / 4341 / 4342 & 4343). At one site, a tool known as a 'backed blade' made from chert was recorded (DIA Sites 4341), and at two sites dolerite artefacts are recorded (DIA Sites 3624 & 24785). Flaked glass is recorded at one site (DIA Site 3624); meaning it was occupied in Colonial times.

4.2.1 Aboriginal Site Types in the MKSEA - Archaeology

The most common Aboriginal site type in the MKSEA is artefact scatters (the most common archaeological site type in the Perth metropolitan region). These artefact scatters consist mainly of quartz artefacts. Other materials such as chert, fossiliferous chert, dolerite and glass are not common. Common artefact types are the by-product of making stone tools such as cores and flakes. Used artefacts are not common.

4.2.2 Aboriginal Site Types in the MKSEA – Ethnography

Extrapolating the results of a previous ethnographic survey over a portion of Yule Brook to the length of Yule Brook, it is identified there is potential for the length of Yule Brook, as a tributary of the Canning and Swan Rivers, to be identified as an Aboriginal ethnographic site. Yule Brook runs through the MKSEA, making its management a key aspect of developing the MKSEA.

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5.0 Aboriginal Heritage Protection Legislation

This section of the report provides an overview of relevant Aboriginal heritage protection legislation.

5.1 Aboriginal Heritage Act 1972

The Western Australian *Aboriginal Heritage Act 1972* is concerned with Aboriginal sites of archaeological or ethnographic (Indigenous cultural and/or anthropological) significance. Section 5 of the *Aboriginal Heritage Act 1972* provides the following definition of an Aboriginal site:

5. Application to places

This Act applies to —

- (a) Any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
- (b) Any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- (c) Any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;
- (d) Any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

Under Section 4, any place to which the *Aboriginal Heritage Act 1972* applies is an “Aboriginal site”.

Section 57 of the *Aboriginal Heritage Act 1972* outlines the penalties for breaches of this Act. In the case of a body corporate, for a first offence the fine is up to \$50,000 and for a second or subsequent offence up to \$100,000.

5.1.1 Relevance of the Aboriginal Heritage Act 1972 - MKSEA

The *Aboriginal Heritage Act 1972* has the main legislative relevance to the MKSEA. This Act ensures the protection of Aboriginal sites by making it an offence to damage an Aboriginal site (Section 17), and also not to report the finding of an Aboriginal site (Section 15).

5.2 Aboriginal & Torres Strait Islander Heritage Protection Act 1984

The Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* provides a mechanism for the Commonwealth Minister for Environment to make declarations regarding the protection of an Aboriginal site when the Minister is satisfied that, under State or Territory law, there is ineffective protection from the threat of injury or desecration. Declarations made under this Act may involve restricting activities and/or access to an Aboriginal site.

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Under Section 21H of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* it is an offence to conduct behaviour or partake in an action that contravenes a declaration made by the Minister. Penalties under this section are \$10,000 or imprisonment for 5 years, or both, for an individual or \$50,000 for a corporate body where an Aboriginal site is concerned, and \$5,000 or imprisonment for 2 years, or both, for an individual or \$25,000 for a corporate body where an Aboriginal object is concerned.

5.2.1 Relevance of the Aboriginal & Torres Strait Islander Heritage Protection Act 1984 - MKSEA

If City of Gosnells adheres to the requirements of the *Aboriginal Heritage Act 1972*, the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* should have little operational relevance to proposed works at the MKSEA.

5.3 Environment Protection & Biodiversity Conservation Act 1999 (2003)

The Commonwealth *EPBC Act 1999 (amended 2003)* protects places of national cultural and environmental significance from damage and interference by establishing a National Heritage List (for places outside of Commonwealth land) and a Commonwealth Heritage List (for places within Commonwealth land). Under the *EPBC Act 1999 (amended 2003)* any action that has, will have or is likely to have a significant impact on a place of national cultural and/or environmental significance must be referred to the Minister for the Environment for approval. The *EPBC Act 1999 (amended 2003)* sets out a procedure for obtaining approval, which may include the need to prepare an environmental impact statement for the proposed action (an action is defined in section 523 to include a project, development, an undertaking or an activity or series of activities).

5.3.1 Relevance of the EPBC Act 1999 (2003) - MKSEA

Because there are no Aboriginal heritage sites that are entered onto the National Heritage List or the Register of the National Estate, there is no current referral process required to the Dept of the Environment, Water, Heritage and the Arts under the *EPBC Act 1999* and this Act has little relevance for any Aboriginal site in the MKSEA.

5.4 Native Title Act 1993

The Commonwealth *Native Title Act 1993* is part of the Commonwealth's response to the High Court's decision in *Mabo v Queensland (No. 2)* and adopts the common law definition of native title defined as the rights and interests that are possessed under the traditional laws and customs of Aboriginal people in land and waters, and that are recognised by the common law. These rights may exist over Crown Land but do not exist over land held as freehold title.

5.4.1 Relevance of the Native Title Act 1993 - MKSEA

The MKSEA is covered by the Single Nyungar Claim (Area 1) native title claim (NNTT File Number WC03/6). Native title had been determined to exist in the Perth metropolitan area in September 2006, but on 23 April 2008 the Australian Full Federal Court handed down their decision in an appeal against this ruling. The Full Court set aside the previous decision that determined native title existed over the Perth metropolitan area, and referred the matter to another judge in the Federal Court at Perth for a new determination (for an overview of this matter see http://www.finlaysons.com.au/news/documents/Alert_May08_Full_Court_decision_on_Perth.pdf).

Due to these proceedings, the Single Nyungar Claim (Area 1) native title claim is currently 'Not Registered' under the *Native Title Act 1993*.

The *Native Title Act 1993* has relevance as it identifies the Nyungar Aboriginal people as having self proclaimed heritage interests within the boundaries of this Aboriginal group's native title area. Under the *Native Title Act 1993*, consultation must occur between the City of Gosnells and the Nyungar native title claim representatives, through SWALSC, if any land subject to Native Title is to be affected.

5.5 Discussion

From this overview of statutory requirements, it has been identified that the heritage protection legislation with most relevance for the MKSEA is the Western Australian *Aboriginal Heritage Act 1972*. If the City of Gosnells adheres to the requirements of the *Aboriginal Heritage Act 1972*, no other heritage protection legislation should have operational relevance to the MKSEA.

The Commonwealth *Native Title Act 1993* also has relevance as it provides the processes of identifying the Native Title claim and any subsequent consultation that may need to occur within the project area.

6.0 Identification of Stakeholder Groups

Based on ACHM's previous experience and research into readily available information from DIA and the National Native Title Tribunal, the key Government and community stakeholder groups for the MKSEA have been identified.

6.1 Nyungar

The key Aboriginal stakeholder group to be consulted on heritage and Native Title issues are the Nyungar Aboriginal group (Figure 3). The Nyungar Aboriginal group (*Nyungar = people*) are the traditional occupants of the southwest Western Australia region, and their country extends from Geraldton on the west coast to Esperance on the south coast, and from Jurien Bay in the north to the southern coast, and east to Ravensthorpe and Southern Cross. Prior to Colonial expansion into the southwest there were thirteen Nyungar dialectic groups / clans who made up the Nyungar collective. It is possible the name Nyungar was recorded by colonists as early as 1833, when R.M. Lyon noted the term "*Nyoonger*" – meaning "a *man*" (Lyon, in Green (ed.) 1979: 155).

Engaging with the Nyungar Aboriginal group involves initial consultation with the South West Aboriginal Land and Sea Council (SWALSC), who are the Native Title representative body for the Single Nyungar Claim (Area 1). Specific to the Perth metropolitan area, consultation should be directed to the Region 6 (Metro) Native Title Working Party through their legal representative at SWALSC, whose contact details are as follows.

Simon Blackshield or Daniel Garlett
South West Aboriginal Land and Sea Council
1490 Albany Highway
Cannington WA 6107
PO Box 585
Cannington WA 6987

Phone: 08 9358 7400
Fax: 08 9358 7499
Email: reception1@Nyungar.org.au

Mr Blackshield or Mr Garlett can act as an interface between the City of Gosnells and the Region 6 (Metro) Native Title Working Party. It is important to note that SWALSC would encourage the City of Gosnells to enter into a heritage protection protocol which sets out how activities / sites are defined and outlines the conduct of surveys.

In any early correspondence, it should be mentioned that the City of Gosnells wishes to raise the matter as an agenda item at the next Region 6 (Metro) Native Title Working Party meeting to brief them on the project. In practice, this consultation might involve providing SWALSC with maps of the area and information on the MKSEA, and a representative from the City of Gosnells who is familiar with the project being scheduled to and attending a meeting of the Region 6 (Metro) Native Title Working Party to provide a presentation on the MKSEA.

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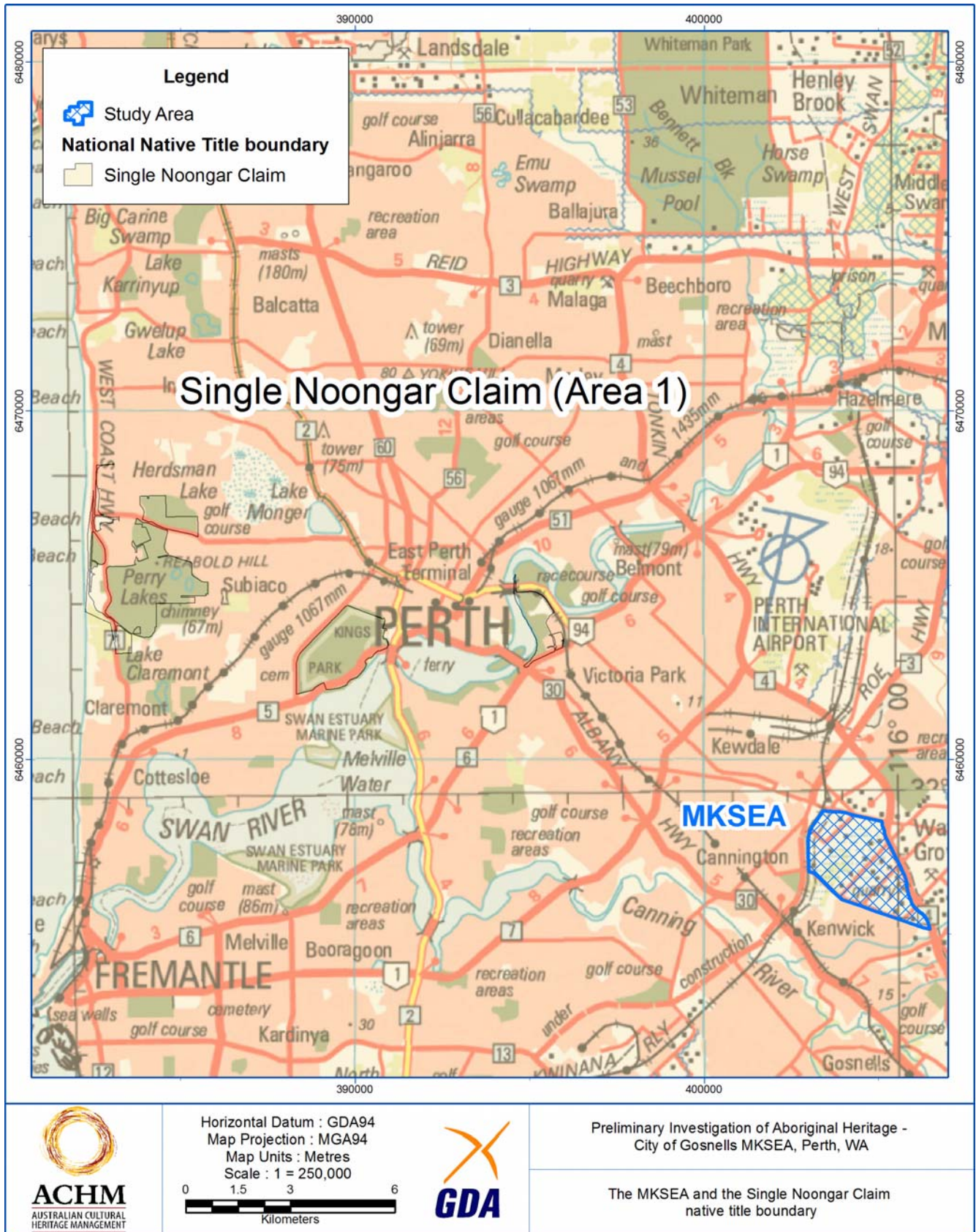


Figure 3 The MKSEA and the Single Nyungar Claim native title boundary

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- **Perth** • PO Box 2031, Warwick, WA, 6024
- **Melbourne** • GPO Box 5112, Melbourne, VIC 3000
- **P** : (08) 8340 9566 • **F** : (08) 8340 9577
- **P** : (08) 9247 1217 • **F** : (08) 9247 1217
- **P** : 1300 724 913 • **F** : (03) 5781 0860
- **W** : www.achm.com.au • **E** : email@achm.com.au
- **W** : www.achm.com.au • **E** : email@achm.com.au
- **W** : www.achm.com.au • **E** : email@achm.com.au

SWALSC also has an anthropologist who works specifically in the Perth metropolitan area, and he can be contacted to discuss issues relevant to the MKSEA. His contact details are as follows.

David Raftery
Anthropologist
South West Aboriginal Land and Sea Council
1490 Albany Highway
Cannington WA 6107
PO Box 585
Cannington WA 6987

Phone: 08 9358 7400
Fax: 08 9358 7499
Email: David.Raftery@Nyungar.org.au

In a recent meeting between SWALSC and heritage consultants (dated 20 February 2009) SWALSC provided the consultants an update on heritage procedures this organisation is attempting to implement. These procedures include the need to use SWALSC as the primary interface between the Nyungar people and land developers.

In 2003, a Memorandum of Understanding (MOU) between the SWALSC and Western Australian Local Government Association (WALGA) was signed on behalf of the Nyungar Aboriginal people and WALGA (WALGA & SWALSC 2003). This MOU sets a basis on how SWALSC and WALGA can work together to develop agreements to enable governments to progress land management and land use objectives. The template agreements will outline various issues that are of mutual concern to Nyungar people and Local Governments, and will be a resource to aid both parties in the resolution of issues. The template agreements may include heritage protection.

6.1.1 Discussions with SWALSC Regarding the MKSEA

A meeting was held with the SWALSC anthropologist David Raftery on 9 April 2009 regarding the MKSEA, to inform SWALSC of this potential project and to understand the consultation regime that may be required for this project. During this meeting the process for consultation outlined in Section 6.1 of this report was clarified, and general discussions regarding any survey participation from SWALSC discussed. While the Perth metropolitan area currently has no registered Native Title claim over this area, SWALSC are in the process of preparing information for this claim and aim to have this completed, and the claim registered, by mid-late 2009.

6.2 Department of Indigenous Affairs (DIA)

DIA are the WA Government department to liaise with on Aboriginal heritage matters, and administer the *Aboriginal Heritage Act 1972* and the Site Register. Consultation should occur with DIA representatives prior to any development of the MKSEA due to the presence of previously recorded Aboriginal sites within the MKSEA. Contact details for the DIA representative who administers the work in the WA south-west, and is in regular discussion with SWALSC, is as follows.

••• Australian Cultural Heritage Management •••

Peter Randolph
Senior Heritage Officer
Dept of Indigenous Affairs
197 (Level 1) St George's Terrace
PERTH 6000

Phone: (08) 9235-8000
Fax: (08) 9235 8088
Email: Peter.Randolph@dia.wa.gov.au

Peter has approximately 35 years experience as a public servant administering Aboriginal heritage legislation and dealing with Aboriginal heritage issues, and is very well versed on current issues relating to the Nyungar Aboriginal people.

DIA have also commissioned an Aboriginal heritage officer to work with SWALSC to improve the administration of Aboriginal heritage procedures in the WA south-west. Her contact details are as follows.

Morgan Morris
DIA/SWALSC Heritage Anthropologist
South West Aboriginal Land and Sea Council
1490 Albany Highway, Cannington, WA 6107

Phone: (08) 9358 7400 (Reception)
Fax: (08) 93587499
Email: Morgan.Morris@Nyungar.org.au

6.2.1 Discussions with DIA Regarding the MKSEA

On 17 March 2009 a meeting was held with DIA representative Peter Randolph to discuss the views of DIA regarding the MKSEA. It was ascertained that DIA may request a wider spread of Aboriginal consultation for Aboriginal heritage issues than can be provided by SWALSC. This has its roots in an internal policy of DIA that Aboriginal people with previously documented specific knowledge for an area are consulted (i.e. informants on a DIA site file). If DIA do not believe survey participants identified by SWALSC have that knowledge, they may request further consultation with a wider representation of Nyungar Aboriginal people prior to accepting any application under Section 18 of the *Aboriginal Heritage Act 1972*.

6.3 Discussion

The relevance of identifying the Aboriginal group with heritage interests in the MKSEA is that the appropriate Aboriginal group and representative body to consult with be clearly identified. For the MKSEA this is the Nyungar Aboriginal group; who are represented on heritage and native title matters by the Region 6 (Metro) Native Title Working Party through SWALSC. Consultation may also be required with informants of known Aboriginal sites (see Table 4), and others with cultural knowledge of the area as per the ACMC policy.

In regard to WA Government departments, DIA are the contact for Aboriginal heritage matters and should be consulted regarding any development of the MKSEA due to the presence of Aboriginal sites on the DIA Register within the MKSEA.

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7.0 Heritage Management Processes

The following section identifies heritage management strategies the City of Gosnells may choose to implement for any unrecorded Aboriginal heritage site that may be located on the MKSEA.

7.1 Heritage Survey Prior to Works

The following actions are recommended for a heritage survey prior to any earthworks.

- Begin consultation with SWALSC as soon as practicable. To ensure fluidity of process this consultation should entail a full briefing of the proposed construction footprint, the potential for undertaking of an Aboriginal heritage survey, the consideration of an acceptable heritage consultant agreeable to all parties, and clarification on whether a template agreement under the SWALSC & WALGA MOU would be required or not.
- Archaeological and ethnographic field survey of the MKSEA to re-record and verify the location of previously recorded Aboriginal sites, and to identify any previously unrecorded Aboriginal sites. When conducting the field surveys it would be beneficial if a representative from the City of Gosnells attends for the first few hours of the survey to answer any questions the Aboriginal representatives may have.
- Reporting of the results of the cultural heritage survey to the City of Gosnells and SWALSC. After the survey has been completed the heritage consultant will produce draft reports that document the survey methodology and results, including electronic maps delineating the extent of any sites recorded during the survey, recommendations for the management of those sites and any other recommendations the Aboriginal representatives may make with regards to the findings of the survey. The draft reports would be circulated to the SWALSC and the City of Gosnells in order to receive feedback and comment. Once feedback has been received from the relevant parties then the final reports will be issued.
- Implementation of any on-ground heritage management practices during earthworks if warranted and recommended in the heritage survey process.

An advantage of conducting an Aboriginal heritage survey adopting the above processes is it allows for the identification of Aboriginal heritage sites within the project area at a planning stage.

The above process documents a due diligence approach to identify and manage Aboriginal heritage sites prior to earthworks and provides the opportunity for a risk assessment in regards to Aboriginal heritage. This is particularly relevant to the *Aboriginal Heritage Act 1972*, where the City of Gosnells have an obligation not to impact an Aboriginal site.

An Aboriginal heritage survey prior to works, including ground truthing and re-mapping of previously recorded sites to determine if the sites are still extant and/or a revision of the plotted extent, could assist in minimising the land to be set aside to preserve the sites or trigger a re-assessment under s5 and 39 of the *Aboriginal Heritage Act 1972*. This may also avoid potential delays during earth works, and provide a process of heritage site identification to ensure compliance with the *Aboriginal Heritage Act 1972*.

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7.2 No Heritage Survey

Given there are previously recorded Aboriginal sites in the MKSEA, and that the spatial information for these sites cannot be relied upon for land use planning of the MKSEA, it is the opinion of ACHM that development of the MKSEA without an Aboriginal survey would leave the City of Gosnells vulnerable to breaching Section 17 of the *Aboriginal Heritage Act 1972* because there is no due diligence strategy in place to manage the previously recorded Aboriginal sites in the MKSEA.

Not undertaking an Aboriginal heritage survey does not afford the City of Gosnells flexibility in planning or the ability to avoid potential delays in construction should an Aboriginal heritage site is encountered. Not undertaking an Aboriginal heritage survey also does not present the opportunity for unintentional and preventable damage avoidance for a discovered Aboriginal site.

7.3 Discussion

These two options are available to the City of Gosnells to use when managing Aboriginal sites within the MKSEA. Based on the preliminary investigation study, it is the opinion of ACHM that an Aboriginal heritage survey will need to be undertaken. This is because of the fact that six of the eight Aboriginal sites on the DIA Site Register cannot be spatially relied upon as being exactly where the grid coordinates for these sites map them, and all Aboriginal sites have legislative protection under the *Aboriginal Heritage Act 1972*.

Additional to this, the MKSEA has not been comprehensively surveyed for Aboriginal sites in the past 30 years. Areas on the fringe of this area have been surveyed, with many of these surveys identifying Aboriginal archaeological sites, which heightens the potential for previously unrecorded Aboriginal sites being located within the MKSEA.

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8.0 Summary and Discussion

This desktop report by ACHM regarding potential Aboriginal heritage issues at the MKSEA has addressed the scope of works as identified in Section 2.0 of this report. From this desktop research the following has been determined:

- There are eight previously recorded Aboriginal heritage sites in the MKSEA.
- There is a medium risk that previously unrecorded Aboriginal sites exist in the MKSEA.
- State and Commonwealth Aboriginal heritage legislation provides protection for all Aboriginal sites in Western Australia.
- There are one Aboriginal group with heritage interests in the MKSEA project area: the Nyungar Aboriginal people. The Nyungar Aboriginal people are represented by the Region 6 (Metro) Native Title Working Party through SWALSC for heritage and native title matters.
- There is two options the City of Gosnells could consider to manage any Aboriginal cultural heritage issues for the development: to conduct an Aboriginal heritage survey and report prior to the works or not to conduct an Aboriginal heritage survey prior to the works.

Of relevance to the management of Aboriginal sites in the MKSEA is that six of the eight Aboriginal sites on the DIA Site Register cannot be spatially relied upon as being exactly where the grid coordinates for these sites map them, and also that one of these Aboriginal sites has been determined by the ACMC as not being an Aboriginal site under the terms of the *Aboriginal Heritage Act 1972*.

This means that any works near the grid coordinates of seven Aboriginal sites, without prior verification of where these sites physically exist, and without written consent from the Minister for Indigenous Affairs to use the land under Section 18 of the *Aboriginal Heritage Act 1972*, run the risk of impacting these Aboriginal sites, which may be a breach of Section 17 of the *Aboriginal Heritage Act 1972*. Activities at the Aboriginal site determined by the ACMC as not being an Aboriginal site under the terms of the *Aboriginal Heritage Act 1972* can occur with caution.

Because of these legislative responsibilities, the City of Gosnells must decide on an Aboriginal heritage management strategy for the MKSEA, with this decision being informed by the results of this desktop report. Given that there are previously recorded Aboriginal sites within the MKSEA boundary, and that the spatial accuracy of these Aboriginal sites is in general unreliable, it is the opinion of ACHM that undertaking an Aboriginal heritage survey would provide the best strategy for any development within the MKSEA to ensure compliance with relevant Aboriginal heritage protection legislation.

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9.0 References

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