



Maules Creek Coal Mine Mod 9

Submission of the Wando Conservation and Cultural Centre Inc, Maules Creek

1 BACKGROUND

The Wando Conservation and Cultural Centre Inc is an environmental association based in the locality of Maules Creek, Narrabri. We hereby submit our objection to the proposed Modification 9 of the Maules Creek mine approval 10_0138, which has the dual objects of enlarging the footprint of the project area for the purpose of electricity transmission and making major changes to the existing biodiversity offset strategy.

We do not propose to comment on the enlargement of the project area. We object to the modification on the grounds that the changes to Maules Creek mine offsets are not minimal, and should not be assessed under the *Environmental Planning and Assessment Act 1979* s 4.55 (1A) as requested by the applicant. Our reasons for objecting are discussed below.

In our opinion, insofar as the changes to the Maules Creek Biodiversity Offsets Strategy are concerned, these are outside the power in s 4.55(1A). Changes of this magnitude which affect a matter of high public interest such as the survival of the Critically Endangered Ecological Community, the White Box Grassy Woodland (CEEC) (also referred to in the documentation as "Box Gum"), and which are protected by the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) should be assessed as a new project. The location of the new offsets, remotely located from the project area as they are, suggest that they are far outside the understanding of connectivity envisaged by the Commonwealth. The matter should be brought before the Commonwealth for a fresh assessment. Our detailed reasons are outlined below.

However, in the alternative scenario that a fresh approval is not deemed legally appropriate, we maintain that there are at least grounds under section 4.15(1) of the EP & A Act for the consent authority to consider our objections, one being the public interest. The objectives of the Act as relevant to the request to modify the Leard Forest offsets include:

1.3 Objects of Act

(cf previous s 5)

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

Wando CCC comment: The social and economic welfare of the community depends on maintaining the rule of law and ensuring that there is adequate monitoring of compliance with environmental law and approval conditions of developments. Therefore it is within object (a) for the history of mismanagement and lack of compliance in relation to the Leard Forest biodiversity offsets to be considered in deciding Mod 9.

- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

Wando CCC comment: Again, we point out that legal compliance is a social "good" that must be considered. When balancing the "good" of employment offered by Maules Creek mine, this should be weighed up against the damage done to the integrity of the NSW planning system when conditions are not observed, and there is no penalty for non-compliance as has been the case in relation to Whitehaven's failure to obtain the obligatory biodiversity offsets even with the benefit of over ten years and three extensions approved and recommended by the Dept of Planning.

- (c) to promote the orderly and economic use and development of land,

Wando CCC comment: Orderly use of land depends on compliance with land use conditions, both within the EP & A Act and under other legislation. The pattern of behaviour of Whitehaven Coal to breach and offend its governing laws and conditions has become such a risk to the "orderly" use and development of land as to make the company's record a matter for consideration.

- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

Wando CCC comment: for this reason, we recommend that the Department disallow any further clearing of the Leard State Forest until biodiversity offsets are approved and confirmed. If the consent authority is minded to approve Mod 9, conditions must be in place to ensure that history is not repeated and further clearing of CEEC does not take place without conservation agreements for the new offsets.

- (j) to provide increased opportunity for community participation in environmental planning and assessment."

Wando CCC comment: Whitehaven has failed to undertake the minimum of expected by the Department of Planning. We know this because we have referred to the department's

Engagement Guideline for State Significant Projects entitled “Undertaking engagement guidelines for State Significant Projects” which can be easily accessed on the Department’s website. We have to assume that the proponent has a thorough knowledge of this guideline, however it is clear that the guideline is being comprehensively ignored. We will discuss this below

Whitehaven’s track record of misrepresenting planning law

There is a precedent for concern that this modification is being brought under a legal error, being a misapprehension that section 4.55 (1) applies in the circumstances we are addressing here.

By way of background, we take this opportunity to recall that in 2019, the Wando Conservation and Cultural Centre undertook strong advocacy to demonstrate that Whitehaven Coal was required to undergo approval modification in the face of denials by the Department itself. We are referring to Modifications 5 and 6 of the Maules Creek mine approval which Whitehaven Coal, in concert with the Department, attempted to argue that the construction of two major water pipelines off the project area did not require a modification. The matter was debated during which the Department’s representative Mr O’Donoghue, assured stakeholders and the media – The Northern Daily Leader – that a modification was not legally required and that the State Environmental Planning Policy for Mining (Mining SEPP) authorised without the need for a modification. After the pipelines were constructed, the Department conceded that reality the advice that Mr O’Donoghue had given both the media and numerous stakeholders was false.

As the record of history tells, we were correct in our estimation that the additional pipelines outside of the existing project footprint required a formal modification. While the Department was insisting that no approval was needed at the time, we found this incredible as the Department was incorrectly interpreting its own creature, the Mining SEPP.

A complaint was lodged to the New South Wales Ombudsman, who apparently found that whatever bureaucratic error or misconduct occurred, the retrospective modification process was sufficient to heal the complaint. When one of our group sought further clarification in the course of an Application under the *Government Information Public Access Act*, the Departmental officer simply shrugged the matter away as “oh well, people make mistakes”.

We think this is a disgraceful act of misconduct and/or incompetence on the part of the Department and this is unfortunately a precedent for the present situation whereby the legality of this modification is not well-founded under the *Environmental Planning and Assessment Act*. Our reasons for disputing the authority to make this modification under section 4.55 (1) are below.

2 Mod 9 is not a minor modification of “minimal” impact

We say that Mod 9 is not a matter with no environmental impact as required under section 4.55(1). It is incontrovertible that the changes to the biodiversity offsets do not “involve

minor error, misdescription or miscalculation". On the contrary, set in the context of the New South Wales Auditor General's report "Effectiveness of the New South Wales Biodiversity Offsets Scheme", matters concerning this scheme are extremely serious. They are made even more serious in view of the fact that the Leard State Forest is listed as critically endangered ecological community under the Commonwealth law, the EPBC Act.

3 Modification power not available to change Commonwealth offset

However, the more serious and we believe fatal argument against approving the new offset strategy is that the changes do not constitute a change to the "development" ie the Maules Creek coal mine. The mine will continue to operate unchanged whether offsets are approved or not.

We rely on a recent NSW Court of Appeal case, **Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA 177**, in support of our contention. Whereas the primary question raised in that case concerned the power to modify a development consent to reduce the amount of contribution paid under voluntary planning requirements, as a condition of a grant of consent, in the present case we are concerned with a condition of development consent places a requirement on the proponent to do certain things outside of the development itself. In the case of *Buyozo*, the condition was to pay money to Council for community benefit (*Ku-ring-gai Contributions Plan 2010*) and in the present case it was to offset damage to the Leard State Forest.

The proponent relies on the argument that the development (as modified) must be "substantially the same development" as that for which consent was originally granted: s 4.56(1)(a). However, we argue that (excluding the electricity transmission line which definitely enlarges the approved project area) the proposed changes do not in any way change the activities at the development, in fact s 4.56(1), "read as a whole, demonstrates that a modification is only available where some change is proposed with respect to the development for which consent was granted" as was the case in *Buyozo* (at par [11], per Basten and Payne JJ).

As the changes to the offsets are merely "ancillary" to the development, they can not be altered under section 4.55(1).

As a result, it is clear from the Court of Appeal's judgement that as in *Buyozo* (at par [14]) that the consent authority has no choice other than to reject the offset-related part of Mod 9. We are of the view that there is no authority to assess the new offsets under section 4.55 and an entirely new State Significant Development application or designated development application need to be sought.

4 Insufficient public consultation

It is clear from the modification report that the proponent has been talking about these alternative offsets with the Department since early 2021, so therefore dumping this

modification onto public exhibition during the Christmas period is clearly an attempt to evade consultation.

Added to this observation is the fact that there was a Maules Creek mine community consultative committee meeting held in early November during which there was no attempt to provide any detail on the proposed modification. This shows dishonesty and bad faith, as superficially the company claims implicitly or explicitly to be observing the required public consultation under the Engagement Guideline for State Significant Projects entitled “Undertaking engagement guidelines for State Significant Projects” including the International Association of Public Participation principles of engagement. As simple reading of the two documents, compared with the blatant refusal to consult with the CCC, ie enough evidence to show that Whitehaven has deliberately attempted to withhold specifics of the proposed new offsets, did not provide details when it had the opportunity, and denied the public of the opportunity to make adequate enquiries that might confirm or deny their ecological features and suitability as offsets for the Leard State Forest.

Given the huge public interest in the Leard State Forest, and the fact that it has already the subject of many challenges of the offsets, and the fact that the offsets already have been modified many times due to their insufficiency, this new development application warranted public exhibition not the concerted attempt to bypass public exposure and comments.

5 Scientific rigour not in evidence in Mod 9

The Modification Report is indicative of a feature of some environmental assessments well-known to rely on volume of information but not necessarily quality of information. Even where the content is of quality, the omissions are significant. This is known as “snowing” the decision-maker and public, with information that may or may not be relevant, in such volume and without care as to the comprehensibility of the information.

The two week period of public exhibition and consultation makes a mockery of the undertaking by the Planning Secretary Mr Mick Cassell, to the NSW Auditor General that he will ensure scientific rigour in all future planning decisions concerning biodiversity offsets. However this so-called scientific rigour spoken of by the Secretary of Planning is not in evidence in this modification report. The Secretary states that Mr Mike Mdrak AO has been appointed to oversee an Integrated Improvement and Assurance Program, but clearly this program has not got Whitehaven Coal in its sights.

The Mod 9 Modification Report does not bear the features of scientific rigour, in part because of the fundamental inadequacy of the maps that have been provided, which do not enable either the community or the government stakeholders properly appraise the proposed new offset properties. This seems to be a continuation of the practice that has been upheld by Whitehaven coal for several years including refusal to provide digital maps to the biodiversity conservation trust over a lengthy period of time, providing an A4 format intended to faithfully portray areas of 50 km or more when the tiny patches of offsets are measured in a scale which is not visible in that format. Without maps that are of a scale and accuracy to enable a viewer to comment on their size or condition class, this is a scientific failing which is inconsistent with the standard that has been portrayed by the Planning Secretary as being the way that things will be done scandalous history of events concerning Maules Creek mine offsets.

Scientific opinion

We wish to draw attention to a couple of other matters that show a lack of scientific rigour in the modification report. The first is the use of the word “possible” when referring to the likelihood that biodiversity corridors eg at page 20:

“The modified biodiversity offset strategy maintains a possible linkage from Nandewar Range to Leard State Forest (through the Boggabri Coal Mine Offset Area and Onavale Offset Area), and from Leard State Forest to the Namoi River (through Teston South, Louenville, Velyama and Kelso Offset Areas). The possible linkage would be maintained through the combined Whitehaven and Idemitsu Boggabri Coal offset areas; in particular retention of the potential “east/west” components of the corridor to the Namoi River that the Maules Creek Offset Areas contribute to (PA 10_0138 Schedule 3 Condition 52e).”

And at page 57:

“The modified biodiversity offset strategy maintains a possible linkage from Nandewar Range to Leard State Forest (through the Boggabri Coal Offset Area and Onavale Offset Area), and from Leard State Forest to the Namoi River (through Teston South, Louenville, Velyama and Kelso Offset Areas) retaining the potential “east/west” components of the corridor to the Namoi River that the Maules Creek Offset Areas contribute to (PA 10_0138 Schedule Condition 52e). The possible linkage would be maintained through the combined Whitehaven and Idemitsu Boggabri Coal Offset Areas.”

These statements evidence a low level of confidence in the likelihood of successful biodiversity corridors to be successful, which should be noted by the decision-makers of Mod 9. Especially as the new offsets are located so much further from the Leard State Forest and exist at different elevations, the prospects of connectivity are dubious for many species.

We go further than the modification authors who attest to so many positive outcomes being “possible’ We say that it is unlikely or even very unlikely that the biodiversity offset scheme has any greater chance of replacing the Leard State Forest.

Department of Planning and Environment



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Your ref: D2213766/PA6691

Mr Ian Goodwin
Deputy-Auditor General for New South Wales
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Subject: Performance Audit- Biodiversity Offset Scheme

Dear Mr Goodwin

Thank you for the opportunity to consider and respond to your Performance Audit - Biodiversity Offsets Scheme.

I welcome the report's findings and recommendations. Please find attached the Department of Planning and Environment's response to each of the report's recommendations. The Department is supportive of the recommendations directed to the Department.

The NSW Biodiversity Offsets Scheme is a world leading approach to ensuring ecologically sustainable development and a key component of the Government's approach to combatting the decline of biodiversity. I appreciate the Audit Office's acknowledgement of the work undertaken to improve the scheme since it commenced in 2017.

The NSW Government is committed to continuously improving the scheme through our Integrated Improvement and Assurance Program (IIAP), independently overseen by Mr Mike Mrdak AO. In his most recent progress report to the Minister for the Environment and Heritage, Mr Mrdak noted 'strong and well-structured progress' is being made to deliver key improvements and 'the scheme is now in the strongest position it has been in since commencement'. A major achievement is the establishment of the Biodiversity Credits Supply Fund, a ground-breaking initiative which will accelerate the establishment of Biodiversity Stewardship Agreements (BSAs) to generate "in demand" biodiversity credits. In addition, we are improving the scheme by:

- making it easier for stakeholders to participate in the scheme (reducing barriers to entry for BSAs)
- further strengthening the biodiversity credit market and improving price information
- maintaining a scientifically rigorous approach to assessing biodiversity values
- ensuring confidence in the scheme through improved auditing and monitoring.

Your audit recommendations will significantly contribute to informing our evolving IIAP.

I thank the audit team for the significant work they have undertaken and their professional and collaborative approach to working with the Department. If you have any further questions, please do not hesitate to contact me.

Yours sincerely

A blue ink signature of Mick Cassel, written in a cursive style.

Mick Cassel
Secretary

Encl: DPE response to recommendations

26 August 2022

References to the koala include at page 8 of the AMBS Ecology and Heritage Report, that the koala “Has been recorded on two occasions since 1980 (Cumberland Ecology, 2011). One record within the MCCM boundary between 2008 and 2010 by Cumberland Ecology (2011), and recorded in the wider locality by Parsons Brinckerhoff (2010).” This is incorrect and based on incomplete information. Koalas are well-known to be in the Leard State Forest at least until 2017, and as evidence by these photos of a live koala and fresh scats.



Furthermore, we think it is reprehensible that Whitehaven Coal, after spending years openly and regularly denying the presence of koalas in the Leard State Forest and at the former offset properties including “Blue Range” are now trumpeting that: “The additional areas of potential habitat for the Koala to be included in the modified biodiversity offset strategy are substantially more extensive than the areas no longer proposed to be included. The Koala is widely distributed throughout the region (Figure A6.23).” This kind of scientific opinion evidence is a form of scientific misconduct similar to that which resulted in the former ecologist of Whitehaven Coal being reprimanded by their own professional body the Ecologists Association of Australia (NSW) and resigning from that body.

The Modification Report claims, “The proposed Modification is considered to be consistent with the aims of the Koala Habitat Protection Chapters 3 and 4 of State Environmental Planning Policy (Biodiversity and Conservation) 2021” however then goes on to state that “the Modification area is not “potential koala habitat”; and the Modification area is not “core koala habitat”, and “The Proposed Modification is not expected to have any impacts on “potential koala habitat” or “core koala

habitat", yet "the proposed Modification is considered to be consistent with the aims of Chapter 3 of the Biodiversity and Conservation SEPP having regard to the fact that the proposed modified offset strategy will result in the long -term conservation and management of approximately 9,315.7 ha of potential habitat for koalas (Appendix A)."

With respect, this appears incomprehensible tortured language attempting to mislead.

Conclusion

Limited by the meagre exhibition period permitted to us, this is our submission. Although we have provided matters for consideration by the consent authority, these are secondary to our primary argument that insofar as the biodiversity changes are concerned, Modification 9 cannot lawfully be considered.

***Wando Conservation and Cultural Centre Inc
Environmental representative, Maules Creek mine Community
Consultative Committee***

Date: 15th December 2022