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Director-General,

Submission on Vickery Coal Project

We refer to Whitehaven Coal Limited's (**Whitehaven's**) proposed Vickery Coal Project (**Project**), for which planning approval is sought under the *Environmental Planning and Assessment Act 1979* (NSW) (application number SSD-5000), and for which the Environmental Impact Statement (**EIS**) has recently been on exhibition. We thank you for providing an extended timeframe for us to be able to provide our submission.

NTSCORP Limited (**NTSCORP**) is the body funded under the *Native Title Act 1993* (Cth) to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP is responsible for representing the interests of native title holders or persons who may hold native title in any matter relating to native title or the operation of the *Native Title Act 1993* (Cth), including by representing them in consultations relating to future acts which may affect native title. NTSCORP makes the following submission on the EIS which focuses on the Aboriginal Cultural Heritage Assessment (**ACHA**) undertaken for the Project. The ACHA was conducted by Landskape and included as an element of the EIS.

Executive Summary

NTSCORP submits that the ACHA provided as part of the EIS fails to meet the Director-Generals Requirements (**DGRs**), particularly the requirements that the EIS include:

an Aboriginal cultural heritage assessment (including cultural and archaeological significance) which must:

- *demonstrate effective consultation with Aboriginal communities in determining and assessing impacts, and developing and selecting options and mitigation measures;*
- *outline any proposed impact mitigation and management measures (including an evaluation of the effectiveness and reliability of the measures)...*

NTSCORP submits that this failure represents not just a failure to observe the prescribed assessment process, but also means that the content of the EIS is not sufficient to permit a complete and proper evaluation to be undertaken of the impacts of the Project upon the cultural heritage of the Traditional Owners of the Project area.

In summation, NTSCORP's submission is based on the following key flaws, which are discussed in more detail in the main section of this submission:

- Inadequate conduct of the consultation process, such that Registered Aboriginal Parties (**RAPs**) were not sufficiently and adequately apprised of and engaged with the ACHA process;
- Failure to assess, consider and implement feedback from RAPs in the consultation process;
- Adoption of exclusory consultation processes;
- No mechanism to ensure that the persons with the requisite connection to and knowledge of the area, who would be able to ascertain the cultural significance of sites and objects, were included in each stage of the consultation process;
- Lack of detail about the sufficiency of the qualifications of the experts engaged;
- Demonstrable failures in the analysis carried out in the ACHA, as exemplified by:
 - Several insulting, inaccurate, unfounded and contradictory statements in the background analysis;
 - Lack of a methodology to assess the social and spiritual aspects of cultural significance, with associated disregard of the views of RAPs on such significance; and
 - Failure to assess the cultural value of the Project impacts beyond merely the impacts on identified artefacts.
- Insufficiency of the cultural heritage management proposals discussed;
- The cultural heritage management proposals are, in part, presented in a misleading manner and are not demonstrably based on consultation and are in fact contradictory to the proposals put forward in the consultation process;
- Lack of supporting information to prove that the surveys performed for the assessment were sufficient;
- Failure to adhere to, or even define, best practice in relation to ACHA processes; and
- Demonstrable concerns regarding the independence and impartiality of the significance assessment undertaken.

Inadequacy of Consultation Processes

The consultation process followed in the preparation of the ACHA is detailed at table 4.3 in the main volume of the EIS. The consultation process involved several exchanges of correspondence regarding the proposed methodology, the consultation and survey process and the results of the assessment, along with several site inspections and the following meetings:

- A project information session in October 2011 with all RAPs;
- A meeting to discuss the Draft ACHA in September 2012 with all RAPS;
- A meeting to discuss the Draft ACHA and arrange logistics for a site inspection in September 2012 with 'local Elders'; and
- A site inspection in November 2012 with 'local Elders'.

NTSCORP submits that, to be effective (as required by the DGRs), consultation with Aboriginal communities consists of a sufficient and targeted interactive process which ensures that communities are not only aware of but fully comprehend the issues being conveyed to them. It is not a matter of 'ticking a box' that certain issues have been conveyed, but ensuring that those issues are sufficiently understood and appreciated. A consultation that involves only two meetings with all RAPs, neither of which discussed survey and assessment methodologies, is simply not sufficient to be considered effective or even adequate consultation, regardless of the amount of material which is conveyed

via correspondence. Accordingly, we consider that the consultation process undertaken in the ACHA is clearly too insufficient to be considered 'effective'.

NTSCORP is also concerned by Landskape's stated reliance on the *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*. NTSCORP has previously voiced and continues to hold concerns regarding the efficacy of these guidelines in adequately assessing and protecting Aboriginal culture and heritage in NSW. NTSCORP submits that mere adherence to these guidelines is not sufficient to constitute effective and adequate consultation, especially in respect of a project with as significant an impact on land and waters as the Project.

NTSCORP is also concerned that, even in the inadequate consultation process followed for the ACHA, there seems to have been little regard paid to the feedback from RAPs in that process. For example, there is only limited detail in the final ACHA at section 4.4 on how the significant and detailed concerns from RAPs on the Draft ACHA (as detailed at Appendix 4 of Appendix I of the EIS) were considered and taken into account in the settling of the final ACHA. Some of the responses from Landskape in Table 5 mischaracterise and fail to address many of the issues raised in the feedback process.

The failure to adequately acknowledge, consider and implement feedback from RAPs in the consultation process fundamentally undermines the efficacy of that consultation process, and calls into question how that consultation process can contribute to the ACHA produced. This is especially concerning since it is only Traditional Owners, through their involvement as RAPs, whom can speak to the cultural and spiritual import of items and places of significance to them.

Inconsistent and Exclusionary Consultation

There seem to be inconsistencies in Landskape's recommendations for engagement with the persons involved in the ACHA. The relevant guidelines (detailed at section 1.3 of Appendix I) require consultation with all of the Registered Aboriginal Parties for the purposes of the ACHA. However, much of the consultation (including a full half of the meetings held – see Table 4.3 of the main volume of the EIS) occurred through a group of 'recognised senior Elders of the local Aboriginal community' (section 4.3 of Appendix I). It is asserted at section 4.3 of Appendix I that consultation with only this subset of the RAP group was undertaken at the request of the RAPs, however NTSCORP has failed to locate in the ACHA any documentation of such a consultation process being requested. In the absence of such a clear request, NTSCORP is concerned that such a consultation practice has served to exclude a majority of the RAPs from the consultation process.

It is further proposed that a process of consultation with a RAP sub-group would be adopted in respect of consultation for management processes to be adopted for the project (section 12.3.3), which raises similar concerns for NTSCORP in respect of the ongoing management of cultural heritage in the construction and operation of the Project, if approved.

Failure to Identify Appropriate Persons to Speak for Country

The consultation process adopted for the ACHA, as outlined in Appendix I of the EIS, fails to identify the appropriate people to speak for the country the Project is located in and to ensure these people are involved in surveying and assessing cultural heritage in all the areas of the Project boundary. Rather, as outlined in section 7.2.1 of Appendix I, survey teams were selected, presumably by random, from the RAPs. Such a failure to

identify the appropriate people to speak for country fundamentally undermines the efficacy of the assessments conducted leading into the ACHA, as there is no assurance that there were present at all surveys and consultation processes persons with the requisite connection to and knowledge of the area to be able to ascertain the cultural significance of sites and objects.

In this regard, we also note the failure of Landskape to consult the Gomeroi People native title claim group (**Claim Group**), who have a registered native title determination application (Federal Court Proceedings NSD2308/11) over an area which includes the Project area. Although the claim was filed in December 2011, after Whitehaven had made its notifications in September 2011 (as detailed at section 4.2.1 of Appendix I), Whitehaven, through their engagements with the Claim Group regarding other projects in the vicinity of the Project, were well aware of the existence of the claim by the date planning approval was applied for (December 2012). Accordingly, Whitehaven should have ensured that the Claim Group were consulted and included in the assessment process, in order that the value of the cultural heritage in the Project area, in the context of the Gomeroi nation, could be properly assessed.

Failures and Deficiencies in Assessment

NTSCORP submits that it is reasonable to expect that a summary of the qualifications of the experts involved in preparing the ACHA would be included in the ACHA, to provide assurance that they were suitably qualified to conduct an ACHA of the type required by the DGRs. All that is stated at section 2 of Appendix I is that the project archaeologist is *'a qualified archaeologist and geoscientist with 13 years' experience as a cultural heritage advisor'*. There are no details of the specific qualifications of that project archaeologist, nor of any of the other experts involved in preparing the ACHA. This is particularly pertinent given the complaints voiced regarding the qualifications of one of the experts involved in preparing the ACHA (see Table 5 of Appendix I).

The practical effect of this is that there is significant doubt over the ability of the experts engaged to carry out the ACHA as required. Such doubt appears well-founded, given the presence of insulting, inaccurate, unfounded and contradictory statements within the ACHA, such as:

- At section 6.1 of Appendix I, it is stated, without a basis of opinion, that *'[t]raditional social networks [of the Kamilaroi people] collapsed...Other social structures, such as marriage laws, were also abandoned'*;
- At section 6.3.9 it is stated, as part of a discussion of modified trees, that *'if the scar is Aboriginal the tree must now be more than 200 years old'*. This suggests, without any basis for the opinion, that traditional practices including the use of natural resources (including tree modification) have not been carried out since the early 1800s; and
- There is also a contradiction in the discussion in the ACHA of modified trees at a more general level. At section 6.2 of Appendix I it is stated that *'[s]carred trees show where bark may have been removed by Aboriginal people to manufacture canoes, shelters and dishes'*, however later at section 6.3.9 it is stated that *'[e]thnohistoric records indicate that some carved trees were associated with burials whilst others may have been sacred or totemic sites'*.

There are also some systematic failures in how the supra-scientific value of cultural heritage has been assessed. Indeed this appears to be recognised by Landskape when they state at section 10.6 of Appendix I that *'[t]he following significant assessment is based on the scientific or research value and is not based on the insight of Aboriginal*

people for their cultural significant assessment of these sites'. This is despite the DGRs expressly requiring that cultural significance be assessed and the ACHA expressly listing at section 10.1 of Appendix I that the Burra Charter requires the assessment of aesthetic, historic, scientific, social and spiritual values of objects and places, and that *[s]piritual value is predominately used to assess places of cultural significant to Aboriginal Australians*'.

It is hard to see how and where the ACHA quantified the social and spiritual value of the objects and places identified in the report. This is particularly highlighted by the significance ratings at Table 15 of Appendix I, which state that all the sites recorded are of either 'low' or 'low-moderate' significance, despite that fact that *'the Aboriginal representatives viewed all the archaeological sites as significant because they preserve a record of how and where people lived in the past. Such cultural heritage sites also stand as testimony to the continuation of Aboriginal culture and association with the land* (section 10.2 of Appendix I).

Additionally, the ACHA also does not include at its cumulative impacts analysis (at section 11.5 of Appendix I) any analysis of the potential interconnectedness of sites of cultural heritage significance, which is critical to any such impact assessment.

The ACHA process undertaken is also directed solely at identifying and assessing artefacts. At no stage does the ACHA attempt to consider the cultural significance of particular areas within the Project boundary, nor broader cultural heritage values such as the association of dreaming stories with certain areas, or the totemic significance of species found within the Project area.

Lack of Detail and Consultation Regarding Management Proposals

The ACHA demonstrates a lack of detail in regard to management proposals. Although it is general practice that an Aboriginal Heritage Management Plan (**AHMP**) be developed and approved after planning approval has been granted, NTSCORP notes that the DGRs in this instance require Whitehaven to *'outline any proposed impact mitigation and management measures (including an evaluation of the effectiveness and reliability of the measures)*'. NTSCORP submits that the brief discussion on potential management measures included as section 12 of Appendix I is not sufficient to fully detail the mitigation and management measures adopted for the Project, and includes no trace at all of any evaluation of the measures thus proposed.

As well as being insufficient for purpose, section 12 is also misleading. Section 12.3.4 is titled *'Site Management and Cultural Awareness Training'*, however includes no detail as to cultural awareness training to be adopted, merely a blithe and self-evident note that *'[i]t is proposed to provide training to all on-site personnel regarding the Aboriginal Cultural Heritage Management Plan strategies relevant to their employment tasks'*.

NTSCORP also submits that it is unclear what consultation the specific management proposals developed underwent, and in fact they appear to contradict the proposals raised by RAPs. For example, at section 4.2.2 of Appendix I it is noted, during the consultation process, it was suggested that *'a specific storage area [for salvaged objects] should be built so that everyone could access the artefacts'*. However at 12.4 it is recommended that the artefacts be stored at the Red Chief Local Aboriginal Land Council Office. It is not explained how that site was chosen, and it seems to contradict the proposal made by the RAPs, with no reasons for that departure from that proposal given.

Coverage of Survey Undertaken

NTSCORP submits that there is not enough detail of the coverage of the cultural heritage surveys undertaken to provide assurance that the coverage of the surveys is sufficient for the purposes of the ACHA. It is noted at Table 9 of Appendix I that visibility on the surveys was less than 20% for all but one of the survey units, which makes the statement that *'[i]t is possible some archaeology was obscured by grass or soil'* (section 11.4 of Appendix I) seem like a significant understatement. There is no detail in section 7 of Appendix I of the width of survey transects, nor do the diagrams in Appendix 7 of Appendix I identify the transects walked. This means that there is no confirmation in the ACHA that the surveys undertaken for the assessment were sufficient to identify, to a reasonable level of satisfaction, all the sites and items of cultural heritage significance in the Project area.

Failures to Identify Best Practice

Given the lack of detail in the DGRs regarding the methodology and the analysis required in the ACHA, it is critical that best practice be identified and adhered to. In relation to the management measures adopted, it is stated at section 4.13.3 of the main section of the EIS that *'[t]he [cultural heritage management] measures above are considered by Landskape (2012) to be best practice in the mining industry'*. However, there is no attempt in the ACHA to describe how such a conclusion was reached. In relation to the cultural heritage identification and assessment processes, there is no attempt in the ACHA to locate or even define best practice. NTSCORP submits that this failure to adhere to, or define, best practice in relation to cultural heritage assessment identification and analysis means the ACHA is not sufficient for the purposes of the DGRs.

Concerns Regarding Independence and Impartiality of Assessment

NTSCORP also has serious concerns about the independence and impartiality of the ACHA, which make it unfit to be relied upon as a true assessment of the cultural heritage values affected by the Project as required by the DGRs.

The outcomes of the significance assessment in the ACHA, as outlined above, are concerning for NTSCORP, since they ascribe low or low-moderate significance to items of cultural heritage despite the submission of RAPs to the contrary. Landskape fail to adequately address the reasons for their departure from the views of RAPs in coming to their conclusions on significance, which suggests to NTSCORP that the ACHA may have been conducted with a pre-ordained intention to place a minimum value on the cultural heritage within the Project area.

The following statement in section 12.2 of Appendix I particularly concerns NTSCORP:

The location of the proposed mine components, which would disturb the Aboriginal cultural heritage sites, are relatively inflexible, as they have already been optimised based on environmental constraints/considerations. Engineering and resource constraints mean that these mine components cannot be relocated away from the cultural heritage sites to avoid disturbance.

Such a statement seems to suggest that the result of the ACHA is a moot point – the same impact will happen regardless of what cultural heritage values are identified in the ACHA, because the location of the Project components cannot be moved. To be effective, an Aboriginal cultural heritage assessment must be a genuine, independent and analytically-based assessment of the cultural heritage values of an area, how they

will be impacted by a proposed development and what mitigation and protection measures can be adopted in respect of these impacts. NTSCORP submits that the above statement, combined with the significance assessment outcomes, calls into serious doubt whether the ACHA achieves this.

If you require any clarification on these matters, please do not hesitate to contact Hema Hariharan of NTSCORP on (02) 9310 3188 or at hhariharan@ntscorp.com.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "N. Rotumah". The signature is fluid and cursive, written over a light blue circular watermark.

Natalie Rotumah
Chief Executive Officer
NTSCORP Limited