

MOUNT PLEASANT COAL MINE – MODIFICATION 1

[Application pursuant to s75W of the
Environmental Planning and Assessment Act 1979]

COUNCIL SUBMISSION



**muswellbrook
shire council**

25 October 2010

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The Application

1. By Application lodged 19 May 2010 (the **Application**), Coal & Allied Operations Pty Limited (the **Proponent**) seeks, pursuant to s75W of the *Environmental Planning and Assessment Act 1979* (the **Act**) and Regulation 8J(8)(c) of the *Environmental Planning and Assessment Regulation 2000*, to modify a development consent granted to it pursuant to Part 4 of the Act on 22 December 1999.
2. It is not clear from the Application (or the supporting material) which conditions the Proponent applies to have revoked or varied or whether the Applicant seeks a further condition.
3. The Proponent sets out its modification in Part 7 of its Application as follows:

The design will be generally in accordance with the existing development consent with the exception of the following changes:

- [(a)] provision of an infrastructure envelope for siting the mine infrastructure to provide flexibility during the detailed design and construction in place of specific locations detailed in the EIS;
- [(b)] provision of an optional conveyor/service corridor envelope between the Mount Pleasant Project site and the adjoining Bengalla Mine to the south as an alternative to the approved rail line and rail loop and loader facilities, including loadout conveyor and bin (collectively referred to herein as the rail facilities); and
- [(c)] extension of the remaining consent life by approximately two years until 31 December 2022.

[lettering added for ease of reference]

4. It is possible that the Proponent seeks a variation to condition 1.1 (and its reliance on the EIS) insofar as the subject matter of 3(a) and 3(b) is concerned and condition 1.2(1) insofar as the subject matter of 3(c) is concerned.
5. Unhelpfully, the EIS is not one of the documents being exhibited despite the reliance on it to understand the apparent nature of the Application.

Submissions in summary form

6. Council makes the following submissions in summary:
 - (a) The consent authority is without jurisdiction to assess the matter in the absence of the Proponent's specification of the relief sought by its s75W Application;
 - (b) It is not reasonably open to the consent authority to determine that the Application falls within the jurisdictional power of section 75W;

- (c) Council does not support the Application insofar as the variation sought in 3(a) hereof is concerned but notes that it would support the Application in respect of that variation if, as a condition of the variation, the further conditions set out in Schedule 1 were added to the consolidated approval.
- (d) Council does not support the Application insofar as the variation sought in 3(b) hereof is concerned but notes that it would support the Application in respect of that variation if, as a condition of the variation, the further conditions set out in Schedule 1 were added to the consolidated approval.
- (e) Council does not support the Application insofar as the variation sought in 3(c) is concerned. Council notes that:
 - (i) it would be unable to adequately maintain the road network impacted upon by the modified project at a safe and appropriate standard and has no reasonable prospect of ever being able to do so.
 - (ii) it considers the sterilisation of land development resulting from a combination of the operation of clause 87 of the SEPP (Infrastructure) 2007 and cumulative rail movements associated with the project (and others) to be unreasonable insofar as the future growth of the town is concerned.
 - (iii) it considers that the extension of the project without conditions requiring the monitoring and regulation of PM_{2.5} particulate matter at locations reasonably assessed by Council to be suitable to be unreasonable and notes that the project is up-wind of the prevailing wind corridor affecting the township of Muswellbrook.
 - (iv) it considers that the extension of the project would result in a further deterioration of the underlying sustainability and diversity of the community and would further 'overheat' local markets to the substantial detriment of the community – such markets including the market for labour, health services, community services, water, land, and accommodation.
 - (v) it considers that, for the reasons set out in (i) to (iv) herein, any extension of the project should be applied for under section 75J of the Act.
 - (vi) it notes that there is no evidence, by way of environmental impact, concerning the approximate further two year period sought in the variation. Council submits that it would be fictitious to find that the matters set out in the 1999 EIS provided a sufficient and appropriate basis for the variation assessment. Council submits that while a limited environmental statement dealing with incremental impact may be appropriate in respect of the variations sought in 3(a) and 3(b) herein, it is inappropriate to adopt that approach for a period not contemplated by the original evidence. Council submits that almost all of the assumptions and findings in the original EIS are now manifestly invalid.

- (f) Council submits that *ad hoc* extensions by s75W variation, in circumstances of such rapid local industry growth, would effect a complete disengagement of the community from important considerations about the extent and cumulative impact of mining and is therefore contrary to the public interest.
- (g) Council submits that, in circumstances of such rapid and intensive local mining industry growth the public interest is best served by extensions supported by full environmental impact statements of the type contemplated by s75J of the Act.
- (h) If, notwithstanding the submissions made by Council, the Department is nonetheless minded to grant the approval, Council submits that, as a condition of the variation, the Department impose conditions in the form set out in Schedule 1.

The terms of the Application and the exhibition of documents

7. As noted, above it is not clear from the Application which conditions the Proponent applies to have revoked or varied or whether the Proponent seeks a further condition. Neither the document referred to as a 'Government Briefing Report' nor the original EIS formed part of the public exhibition of documents. Nonetheless the Proponent was kind enough to provide a copy of those documents to Council.
8. The following is noted:
 - (a) The 'Government Briefing Paper' does not further clarify the Application insofar as the precise revocation, variation or addition of conditions is concerned;
 - (b) The EIS sets out a program of works over a 21 year period with some particularity which will, as a consequence of the time remaining in the consent, require a wholesale variation to almost every aspect of the project.
 - (c) If the project is approved in the manner sought by the Applicant (and set out in 3(a) to 3(c) hereof) the consolidated consent would be internally inconsistent because of the tension between condition 1.1 (and the associated EIS), and the vastly shorter time frame and works schedule of the varied project.
9. It is noted that the *pro forma* application document directs an applicant to: "state ... the specific conditions of consent to be modified, deleted or additional conditions requested, and any other changes being sought". The necessity to actually set out the specific revocations, variations or new conditions sought derives from the wording of s75W¹. The failure to specifically identify those matters may render the consent authority without jurisdiction to determine the matter. The NSW Court of Appeal has held that a request for modification of an approval under Part 3A of the Act within the terms of s75W is a precondition to the exercise of the power under s75W².

1 *Barrick Australia Limited v Williams* [2009] NSWCA 275 per Basten JA (McColl JA agreeing) at paras. 13 and 14.

2 *Supra* 1, per Basten JA (McColl JA agreeing) at paras 13 and following.

The proposed consolidated development within the local context

10. There are two reasons why the Council makes a submission in respect of the proposed consolidated development within the local context despite the assessment focus being on the incremental or marginal nature of the modification:
 - (a) It is desirable for Council to make some comment on the merit of the proposed consolidated project as well as the modification so as to assist the community in distinguishing between Council's differing positions in respect of those matters;
 - (b) To illustrate that the degree of change proposed by a modification needs to be assessed not only against the degree of the proposed change to the prevailing consent but also by reference to change in the various matters which underpinned the original consent including the cumulative change to the local mining footprint, changes to Council's capacity to fund the cumulative road network, and changes to the ecological and built environment.

Background

11. An illustration depicting National Parks and Reserves, Mining and Exploration Licence (EL) grants, EL Applications and Mine owned land in the Muswellbrook Local Government Area (the **Illustration**) is annexed.
12. Since the Illustration was compiled, the EL Applications depicted have been granted by the Minister administering the *Mining Act* 1992 and are, accordingly, now EL grants³. The historical translation of EL grants into mining approvals pursuant to section 75J of the planning legislation is running at 100% in the Shire. It is submitted, therefore, that the Illustration provides an accurate depiction of the present and future mining footprint in the Shire. The Illustration does not depict expired leases or mine workings much of which is underground to the north and south east of the township. The actual exposed earth within any approved mining lease is, at any one point in time, only a proportion (albeit a substantial proportion) of the actual lease area. All the operating mines in Muswellbrook and all those on the planning horizon are either open cut or undeclared as to extraction method. There are no operational underground mines.
13. Depicted on the Illustration in the deep maroon line is the boundary of the Shire. Depicted in green is National Park (principally Wollemi and Goulburn River national parks) and Manobolai State Reserve (top centre). There is a large area of Crown land to the south of Monobolai State Reserve which has been the subject of an unresolved historical application for gazettal as State Reserve. The two yellow urban centres are the townships of Muswellbrook (the larger) and Denman (the smaller). Depicted in various colours are State Significant developments.
14. Much of the mining footprint in the Singleton local government area (not depicted) is directly adjacent to the southern boundary of Muswellbrook Shire and is closer to the Muswellbrook urban centre than to Singleton.

3 <http://www.dpi.nsw.gov.au/minerals/titles/status-reports/CoalMonthly-TitlesCurrentTitles.pdf>

15. The Minister administering the planning legislation approved, in concept, a third coal/gas fired power station in the sub region on 12 January 2010⁴. Coal extracted from Muswellbrook Shire is projected to double over the next 2 ½ years⁵. Further developments are in various stages of exploration (Drayton South, Rose Hill, Ridgeland, Ferndale, Spur Hill, Muswellbrook Coal's south eastern expansion, Dartbrook and Dartbrook Open Cut).
16. Muswellbrook is the only town of its size in Australia to be completely encircled by coal mines except for the road, rail and river corridors.

Issues

17. This section addresses the following issues:
 - (a) Local roads
 - (b) Rail
 - (c) The labour market
 - (d) Social infrastructure
 - (e) Land use, the market for land, economic diversity
 - (f) Water and the market for water
 - (g) Health and health services
 - (h) Planning and regulatory capacity

Local roads

18. Each of the coal mining developments in the Shire are accessed by local roads. Those roads include: Thomas Mitchell Drive, Bengalla Link Road, Wybong Road, Coal Road, and Muscle Creek Road. Some of those roads were purpose built⁶ and others evolved from former rural roads⁷.
19. In addition, there is increasing coal related traffic on local roads not used for primary access to coal mines. Edderton Road, which links coal mining developments in the Shire with the Golden Highway and the Mount Thorley Industrial Estate, is one such road. The Bell and Market street over-dimensioned vehicle bypass of the National highway is another.
20. Despite the proposed doubling of coal excavation over the next few years⁸, Council's revenue being applied to roads will be static – 'pegged' by operation of s509 of the *Local Government Act* 1993 to an approximation of its real value.
21. Some contribution to local roads by the proponents of mining developments has been required as a condition of development consent but the incremental nature of the consent process has effected a shortfall in local road funding over time.
22. Capacity and 'step' issues also prevent contributions being matched by Council.

4 <http://majorprojects.planning.nsw.gov.au>

5 Mount Arthur from 13MtPA to 28MtPA – with potential for 36MtPA, Bengalla from 8MtPA to 10.7MtPA, and Mount Pleasant and Mangoola to commence operations – collectively generating an additional 21MtPA.

6 Bengalla Link Road and parts of Thomas Mitchell Drive, Coal Road (and Muswellbrook Coal Road).

7 Wybong Road, Thomas Mitchell Drive, Muscle Creek Road.

8 See above at 5.

Council's road budget for renewals and replacements for the last five financial years has been static at approximately \$1.5M each year. Often the projected quantum of traffic generated by a mining development creates a requirement to increase the standard of a road. Council's budget has not been able to bankroll the difference between the total cost of the necessary upgrade and the contribution made by the coal mine proponent as a proportion of its projected traffic generation. To make the situation worse, traffic generation projections have often differed markedly from actual generation⁹.

Rail

23. Muswellbrook is the junction of the Ulan, Great Northern, and Hunter rail lines – the three lines servicing the Gunnedah, Ulan, and Hunter coal basins.
24. By 2015 it is estimated, on the back of present 'take or pay' coal agreements, that there will be 100 million tonnes of coal per annum (**MtPA**) transported into Muswellbrook along the Ulan line and 20 MtPA transported into Muswellbrook along the Great Northern line¹⁰. Those two lines intersect in the urban centre of the township at the southern end of the central business district. The bridge on which the lines intersect sits proximate to a second bridge which forms part of the National Highway. The town's main street also forms part of that same section of the National Highway. The rail and road bridges both sit above Muscle Creek.
25. None of the rail corridors are attenuated for noise. They are single tracked corridors with little potential for duplication or triplication without compromising development in the main street of Muswellbrook or residential areas of the township.
26. There is no requirement under present law for developers of coal mines to undertake noise attenuation on those rail corridors except in some marginal or incremental way. Any assessed incremental impact is too small to capture for the purpose of a condition of consent. Consequently noise attenuation has never occurred.
27. To complicate matters further, clause 87 of the *State Environmental Planning Policy (Infrastructure)* 2007 (the **SEPP**) prohibits the granting of consent to residential (and other) developments near rail lines unless the consent authority is satisfied that LAeq levels proposed for such developments will not exceed:
 - (a) 35dB(A) in any bedroom at any time between 10:00pm and 7:00am; and
 - (b) 40dB(A) anywhere else in the building at any time¹¹.
28. The effect of the SEPP is to place the onus of attenuating rail noise on residential developers but not on the owner of the rail infrastructure or its users. That is a significant problem in Muswellbrook where residential development is already constrained by the availability of land for urban release noting that:

9 The actual traffic volumes for the Bengalla Link Road, for example, are twice that of those projected in the Bengalla Environmental Impact Statement and the heavy vehicle movements for Wybong Road are more than 50% higher than that projected in the Xstrata Mangoola Environmental Impact Assessment.

10 On both points see Chapter 5: 2009 – 2018 Hunter Valley Corridor Capacity Strategy Consultation document.

11 87(3) of the *State Environmental Planning Policy (Infrastructure)* 2007.

- (a) the town is encircled by coal mines or past workings;
 - (b) mining buffers and land offsets occupy a significant proportion of the urban hinterland (including, recently, all the land surrounding Muswellbrook's industrial estate); and
 - (c) three rail corridors – carrying a significant proportion of the State's coal, all penetrate to the heart of the urban centre (passing through residential zones en route).
29. It is also a problem in Denman where the Western/Ulan line – projected by 2015 to carry 100MtPA of coal each year – traverses the urban centre from east to west¹².
30. The rail lines also present safety and traffic convenience issues. In most instances, the local road network traverses the rail lines by level crossings. The intensification of coal movements therefore has the potential to effect the division of Denman in two and Muswellbrook, in three.

The labour market

31. Although no cumulative assessment of the impact of mining on the labour force has been undertaken, there is anecdotal evidence that the endogenous labour pool has not been able to satisfactorily meet the needs of intensive mining in the sub region¹³. Limited labour supply and high demand for labour has increased the price of labour which, in turn, appears to have flowed into prices more generally.
32. The unpopular reality is that the labour market is probably over heated in the sub region – something which is every bit as burdensome as a labour market which suffers a lack of demand. Labour is an important input in production. A high labour price contributes to higher prices more generally. This is problematic in a community with a 50% higher proportion of people on fixed incomes – many of whom rent from the Department of Housing. The unemployment rate in the Upper Hunter (which for statistical reasons includes Gloucester, Dungog, and Upper Hunter LGAs – all of which have comparatively little mining) is 2.5 percentage points lower than the State unemployment average. The real figure for Muswellbrook and Singleton is probably much lower – and lower again when the skew for the disproportionate number of persons presenting with barriers to entry (largely from areas of social disadvantage) is removed.
33. The price of labour has been constrained in real terms – unable to outstrip the local cost index. That may be one contributing factor in why Muswellbrook's position on the relative wealth index has dropped relative to local government areas without significant mining over the last fifteen years¹⁴.
34. There are other consequences that flow in an economy denuded of sufficient labour.

¹² See above at 8.

¹³ 2008 ACARP Report: *Assessing the Cumulative Impacts of Mining on Regional Communities: An Exploratory Study of Coal Mining in the Muswellbrook Area of NSW* (the Centre for Social Responsibility in Mining, the Centre for Water in the Minerals Industry and the University of Queensland) February 2008 noted, for example, that (one explanation for a reduction in the number of locals employed in mining) was that "there has been a trend towards an increasing number of the jobs available at local mines being filled by people living out of the Shire".

¹⁴ See Table 9 of the 2008 ACARP Report at p. 72.

The depletion of trade qualified persons providing domestic trade services is one such consequence.

Social infrastructure

35. What is often referred to as the 'social licence' to mine is important is dealing with less quantifiable impacts such as loss of visual amenity and character, social impacts – particularly arising from shift work arrangements, noise, dust, road and rail traffic associated with extraction and inputs, residual final landform and landscape, and a raft of other less quantifiable short and long term impacts. Those matters should not be ignored if the localised impact of mining is to be mitigated.
36. There are, however, many readily quantifiable impacts. Council is the provider of significant social infrastructure: libraries, childcare services, aquatic and recreation facilities, art galleries, and much more. The demand pattern for those facilities is heavily altered in a rural community dominated by shift work (in addition to coal mines, the LGA is also home to Macquarie Generation's two coal fired power stations which employ approximately 600 people). The facilities are required to be open for longer periods to equitably service the shift worker community. This is a significant and quantifiable impost on the community's Council attributable to cumulative coal mining.

Land use, the market for land, economic diversity

37. Perhaps the most important issue for resolution relates to land use, the market for land, and short and long term economic diversity and sustainability.
38. Coal is, after all, a short term resource. The 'lumpiness' of intensive coal mining as it moves north west into smaller and smaller communities requires considerable planning and management. If each enlivened exploration licence in the Shire develops into a coal mine (in line with historical experience), half the rateable area of the Shire will be subject to coal mining in the next 2 – ½ to 3 years.
39. Various local markets have suffered demand spikes against supply constraint. The water market, for example, is fully regulated and fully allocated and therefore supply inelastic. That is also true of the market for land. The labour market is already severely constrained by a national shortage of skilled labour, a relatively small local labour pool and by a market for dwellings struggling to accommodate new residents.
40. The price shocks created by those demand spikes have been pronounced and have given rise to sharp increases in the cost of living. The ability of the sub-region's economy to absorb the developments at equilibrium insofar as individual markets are concerned is very limited indeed.
41. Those price shocks have impacted upon other industries which compete for land, water and labour. Quite apart from the uncertainty created by buffer, offset, and attenuation acquisition attaching to mining consents, price shocks have undermined the certainty necessary for capital investment in industries which compete in affected markets.
42. Muswellbrook Shire, and not Upper Hunter Shire, is home to the largest market for

the sale of thoroughbred horses internationally in Australia. The two largest horse studs in the southern hemisphere, Coolmore and Darley Woodlands, are squeezed between six enlivened coal exploration or mining leases: Doyle's Creek, Wambo, Drayton South, Mount Arthur, Spur Hill, and – more distantly – Ferndale. Muswellbrook is also home to another 14 horse studs including the 4th largest horse stud in the Southern Hemisphere, Widden.

43. In what might be described as the closest thing to judicial comment on the looming conflict between the thoroughbred and mining land uses, the commissioners in the Bickham decision found that “the available evidence supports the view that open-cut coal mining and a viable international-scale thoroughbred breeding enterprise are incompatible land uses”¹⁵.
44. The thoroughbred industry has also experienced rapid expansion in the Upper Hunter over the last decade. It is a sustainable industry which has thrived on regulated water, alluvial flats, gently undulating pasture, and critical mass insofar as specialist veterinary skills, training, and markets are concerned.
45. The viticulture industry is also under substantial pressure (principally from oversupply). The viticulture industry has ‘sandbagged’ its decline by pegging itself to the tourism market. That tourism market relies on critical mass. The expansion of the mining industry has claimed a number of wineries which have significantly reduced that critical mass. That is an issue that warrants further examination.
46. The urban land use conflict with coal mining also needs further examination. As noted earlier, Muswellbrook’s residential growth is substantially constrained by coal mining development and associated rail infrastructure. Acquisition has also constrained the prospect for the further release of industrially zoned land.
47. There is little land left in the Shire for offset and mining applicants have sought to acquire land in neighbouring LGAs to satisfy offset requirements. Against that background, there is the very real potential for the extinction of local ecological species. This is particularly true of Muswellbrook’s local orchids which are apparent for only short periods each year. In August 2009, for example, the Federal Environment Minister gazetted the *Prasophylum Wybong* (a local orchid) as critically endangered. The only population of the orchid is on the Mangoola lease area but was detected only after consent was granted for that operation. The management of offset plans to preserve habitats and species is increasingly problematic when half the rateable area of the Shire is subject to potential disturbance.
48. The Great Eastern Ranges Project sponsored by the Department of Environment, Climate Change and Water is a visionary project connecting preserved and remnant woodland across New South Wales. The Hunter Valley is a recognised ‘gap’ in the project’s corridor. A cumulative assessment of the land use conflict between open cut coal mining and power generation (and attendant buffers and offsets) on the one hand, with preserved and remnant woodland on the other should be undertaken and a strategy developed in conjunction with Council.

15 Planning Assessment Commission (3 May 2010) “The Bickham Project Report” at p. vi.

Water and the market for water

49. The Upper Hunter sub region is blessed with a plentiful supply of regulated and good quality water. The Hunter, Goulburn and Pages rivers all have large catchments in the Eastern Ranges. Much was made in the Bickham decision about the potential affect of that open cut mine on the quality of the Pages River. Water quality (both surface and groundwater) is an important issue. Equally as important, but often overlooked, is the market for water. In Muswellbrook LGA, for example, the vast majority of high security water licences are held by businesses in the power and mining industries. Muswellbrook and Upper Hunter shire councils account for less than 1% of the water take for reticulated water supply.
50. The sure and certain availability of water is what has made the sub region so valuable for electricity supply and for thoroughbred rearing.

Health and health services

51. The asserted negative health impact of mining, particularly open cut coal mining, has received much public attention in the recent years. Health services impacts have received somewhat less attention. Both should be treated as matters of zero tolerance insofar as an impact on a population is concerned.
52. The Planning Assessment Report for the Mount Arthur Consolidation Project noted that¹⁶:

The EA includes an assessment of the impact of the project on public services and facilities in the Muswellbrook local government area, which indicates that:

[(a)] health services are already strained, and the project would strain these services further;

...

[(c)] child care services are already strained, and the project would strain these services further; and

[lettering added for ease of reference]

53. The same findings are open in the present Application and, indeed, exacerbated by the Mount Arthur approval.
54. Council submits that a finding that the Hunter New England Area Health Service has capacity and intention to improve facilities in Muswellbrook is not reasonably open on the evidence. The available evidence, insofar as it is understood by Council, is that the Area Health Service has no plan to increase health infrastructure capacity or health service provision in the Muswellbrook area.

Planning and regulatory capacity

55. Notwithstanding the changes to planning legislation which resulted in the Minister for Planning becoming the consent authority for significant development, Council

16 At p. 42.

makes, on behalf of its community, comprehensive submissions as part of the approval process for all major developments – including recommending specific conditions of consent. Council's submission is invited by reason of statute and as consent authority for various attendant matters relating to the development.

56. The process is exhaustive of staff time. Council is not appropriately resourced to conduct the important task of evaluating complex and lengthy applications – particularly in the absence of cumulative data. Council receives no application fee to offset the cost of the assessment of mining applications and the direct cost of that process is therefore directly borne by the community.

Conclusions

57. By reason of the foregoing, Council submits that the proposed consolidated project will be of substantial detriment to the local community and to its Council.

The section 75W issue

58. The Court of Appeal in *Barrick Australia Limited v Williams* made some comment on the scope of section 75W but noted, ultimately, that any assessment of the nature of the modifications which may be sought under s 75W was ultimately for the Minister to make and not the Land and Environment Court¹⁷. The Minister's decision, however, is still subject to judicial review¹⁸. The nature of the relief sought in *Barrick* was not, however, certiorari. The Court noted difficulties with the wording of section 75W and with the notion of 'radical transformation' and the Minister's submission concerning the phrase "new and different". The Court did, however, note that:

If the 40 day period is to be taken as an indicator of the nature of the modifications which may be sought under s 75W, it suggests a constrained view of the scope of the provision. The power of the Director-General to require a level of environmental assessment, which must be complied with "before" the request is considered by the Minister, is liable to render all but the most minor amendments and cursory environmental assessment impossible in practical terms, within the period specified.

59. In the present matter, Council submits that a determination that the Application (at least insofar as the extension is concerned) is a modification which may be sought under s 75W, is not reasonably open in the circumstances and would invite an application in the nature of certiorari. For reasons set out above, the variation would require a wholesale rethink of the project timetable and consequential localised impact.
60. The original application (and EIS) contained no evidence concerning the impact of the project in the two further years of mining now sought in the present Application. Quite apart from anything else, the reality is that virtually all the assumptions that underpinned the original consent have now changed and not just significantly but substantially (including the nature of the timing of the project itself). It would be a triumph of fiction over fact to assert that the additional two years of the project will have similar impacts to those espoused in the original EIS.

¹⁷ *Supra* 1, at para. 53.

¹⁸ *Supra* 1, at para 21. Also see *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 at paras. 99 and 100.

The contemplation of road closures

61. Alarmed by the closure of vast segments of Council's capillary local road network for mining purposes in the last 5 years and the consequential long term sterilisation of land denuded of road infrastructure, Council introduced a Closure of Public Roads Policy in 2009.
62. The present Application seeks the closure of Castlerock Road and the possible closure of part of Wybong Road. A number of smaller capillary local roads are required to be closed if the project is to progress. Two segments of new roads (rural collector roads) are to be constructed. Applications to close roads have not been made and, as a consequence, it is not yet known if the closure of those roads will be conditional on the longer term creation of new roads to serve the lots the subject of the mining consent.
63. While a consent under section 138 of the *Roads Act* 1993 (the **Roads Act**) must be applied consistently with any s75J and s75W approval, an Application under Part 4 of the Roads Act (a road closure) does not. It is the subject of a separate consultative process.
64. While it might be supposed that the then Council was nonetheless minded to close the roads the subject of the Application in line with its Western Roads Strategy (although it is not clear whether that Strategy was ever actually adopted), it is noted vast changes to the mining landscape in the intervening period and Council's present capacity to maintain its road network may bring the present Council to a different view. It is probable that more than 15 years will have passed between the creation of the Western Roads Strategy and the Proponent's application to close roads. In all events, it would be premature to arrive at a view without undertaking the consultation required by the statute. In those circumstances it should not be assumed that the Western Roads Strategy will guide Council's discretion concerning an application to it under Part 4 of the Roads Act. Council submits that the Proponent, if it wishes to close roads, should deal with the matters concurrently with this Application.
65. Council invited the Proponent to deal with the issue of local roads when it consulted with the Council during its single informal meeting with the Council earlier this year. It is unfortunate that the Proponent has not sought to resolve the issue. The Department saw fit not to take submissions from Council concerning the adequacy of the Proponent's response to the Director's requirements which might otherwise have brought the issue to resolution.

The modification

66. Council does not support the Application insofar as the variation sought in 3(a) hereof is concerned but notes that it would support the Application in respect of that variation if, as a condition of the variation, the further conditions set out in Schedule 1 were added to the consolidated approval.
67. Council submits that the conditions provide a proper and sufficient control of the development insofar as visual and noise amenity and road and traffic related

matters are concerned.

68. Council does not support the Application insofar as the variation sought in 3(b) hereof is concerned but notes that it would support the Application in respect of that variation if, as a condition of the variation, the further conditions set out in Schedule 1 were added to the consolidated approval.
69. Council does not support the Application insofar as the variation sought in 3(c) is concerned. Council notes that:
- (a) it would be unable to adequately maintain the road network impacted upon by the modified project at a safe and appropriate standard and has no reasonable prospect of ever being able to do so.
 - (b) Council considers the sterilisation of land development resulting from a combination of the operation of the clause 87 of the SEPP (Infrastructure) 2007 and cumulative rail movements associated with the project (and others) to be unreasonable insofar as the future growth of the town is concerned.
 - (c) it considers that the extension of the project without conditions requiring the monitoring and regulation of PM_{2.5} particulate matter at locations reasonably assessed by Council to be suitable to be unreasonable and notes that the project is up-wind of the prevailing wind corridor affecting the township of Muswellbrook.
 - (d) Council considers that the extension of the project would result in a further deterioration of the underlying sustainability and diversity of the community and would further 'overheat' local markets to the substantial detriment of the community – such markets including the market for labour, health services, community services, water, land, and accommodation.
 - (e) Council considers that, for the reasons set out in (a) to (d) herein, any extension of the project should be applied for under section 75J of the Act.
 - (f) Council notes that there is no evidence, by way of environmental impact, concerning the approximate further two year period sought in the variation. Council submits that it would be fictitious to find that the matters set out in the 1999 EIS provided a sufficient and appropriate basis for the variation assessment. Council submits that while a limited environmental statement dealing with incremental impact may be appropriate with respect to the variations sought in 3(a) and 3(b) herein, it is inappropriate to adopt that approach for a period not contemplated by the original evidence.
 - (g) Council submits that *ad hoc* extensions by s75W variation, in circumstances of such rapid local industry growth, would effect a complete disengagement of the community from important considerations about the extent and cumulative impact of mining and is therefore contrary to the public interest.
 - (h) Council submits that, in circumstances of such rapid and intensive local mining industry growth the public interest is best served by extensions supported by full environmental impact statements of the type contemplated by s75J.

70. If, notwithstanding the submissions made by Council the Department nonetheless is minded to grant the approval, Council submits that, as a condition of the variation, the Department impose the conditions set out in Schedule 1. It is submitted that industry best practice has improved insofar as the contributions being made to local communities is concerned and it would be contrary to the public interest to permit the Proponent to avoid committing to best practice by obtaining successive approvals under s75W to extend the life of a project – particularly where the project had not actually commenced in any substantial way.



OUT10/19896

Mr Howard Reed
Manager Mining
Department of Planning
GPO Box 39
SYDNEY NSW 2001

Attention Ms Belinda Parker

Dear Mr Reed

**Mt Pleasant Project Proposed Modification
(DA 92/97 Mod 1)
Environmental Assessment**

I refer to your letter dated 6 October 2010 regarding Coal & Allied's Mt Pleasant Project Proposed Modification.

Industry & Investment NSW (I&I NSW) technical officers have reviewed the Environmental Assessment (EA) for the project and provide the following comments.

MINERAL RESOURCES

The Mt Pleasant Project Modification is largely within existing mining lease application 100 (MLA 100) held by the proponent. However, as shown on figure 3.2 of the EA, the proposed "conveyor/service corridor envelope" is largely outside MLA 100 and currently held under title by Bengalla Mining Company (Assessment Lease 13) and I&I NSW on behalf of the Crown (Authorisation 102).


While the EA does not state that the proponent will require a mining lease for the "conveyor/service corridor envelope" the proponent should note that I&I NSW cannot grant a mining lease over any area that is held under title by another party without the written consent of the title holder.

Should it be the proponent's intention to apply for a mining lease over the "conveyor/service corridor envelope" the proponent must obtain consent from the Minister for Mineral Resources to apply for a mining lease prior to any modification approval which may be granted by the Minister for Planning.

I&I NSW has no objections to the proposed modification on the basis that the above comments are taken into consideration and actioned if required.

Should you have any enquires regarding this matter please contact Julie Moloney, Principal Adviser, Development Coordination on (02) 4931 6549.

Yours sincerely


William Hughes
Director
Industry Coordination 9/12/10



Office of Water

**Major Development Assessments
Department of Planning
GPO Box 39
SYDNEY NSW 2001**

c: Fergus Hancock
t: 02 4904 2532
f: 02 4904 2501
e: Fergus.Hancock@water.nsw.gov.au

Our ref : ER 21235
Your ref: 10/07746

Date 15 November 2010

Attention: Naomi Nelson

Dear Naomi

Mt Pleasant Coal Project (DA 92/97 MOD 1) Proposed Modification of Consent

The NSW Office of Water (NOW) provides its assessment comments in relation to the application from Coal and Allied Operations Pty Ltd to modify its development consent for the Mount Pleasant Coal Project. Thank you for the opportunity to provide comment and apologies for the delay in responding.

NOW (previously the Department of Land and Water Conservation) provided advice in 1999 as to licensing requirements under Section 10 (Part 2) of the *Water Act 1912* (WA). This advice was in respect to the interception of stream flows and site storage and the proposed diversion of five third order watercourses. In addition, an amendment to a Section 22BA embargo was devised to enable Mt Pleasant Operations to;

"the use of unregulated flows for industrial (mining purposes) in substitution for at times and in conjunction with at times regulated flows pursuant to an existing licence."

The embargo amendment was designed to substitute the interception and use of unregulated stream flows from third order watercourses by use of regulated river extraction licence(s).

Since the *Water Management Act 2000* (WMA) came into force, two water sharing plans have been enacted; the *Water Sharing Plan for the Hunter Regulated River Water Source 2003* (WSPHRRWS) and the *Water Sharing Plan for the Hunter Unregulated and Alluvial Water Sources 2009* (WSPHUAWS). As a consequence of the commencement of these two water sharing plans, the transfer of entitlement between regulated and unregulated river systems is impermissible. This has implications to the existing development consent.

As a consequence, the existing development consent condition 4.3(1) is made irrelevant to the purposes of extraction and/or interception of unregulated stream flows. NOW requests this condition be removed, as it currently is not authorised under the WSPHRRWS. NOW requests that this condition be replaced by a standard condition which has previously been incorporated into the Minister for Planning project approvals for mining operations in New South Wales:

"The applicant shall ensure it has sufficient water supply for all stages of the development, and, if necessary, adjust the scale of the operation to match its water supply."

NOW recommends the carry-over of the existing condition 4.3(2) and that its commencement should be provisional upon the Minister for Planning's determination of the proposed modification to existing development consent. As set out in Condition 8.2, this water take should be reported to NOW on an annual basis, with an annual report in compliance with conditions on surface water access licences based on the water year.

Should you require any clarification of the above please contact Fergus Hancock on (02) 4904 2532.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'm. mignanelli', with a stylized flourish at the end.

Mark Mignanelli
Manager Major Projects and Assessment



**Environment,
Climate Change
& Water**

Our reference:
Contact:

DOC10/45681 LIC10/799
Rebecca Scrivener,
4908 6830

Mr Howard Reed - Manager
Mining and Industry Projects
Department of Planning
GPO Box 39
SYDNEY NSW 2001

Dear Mr Reed

RE: ENVIRONMENTAL ASSESSMENT - MOUNT PLEASANT COAL PROJECT – MODIFICATION TO DEVELOPMENT CONSENT (DA 92/97 MOD1)

I refer to your letter dated 6 October 2010 seeking comment and any recommended conditions of approval from the Department of Environment, Climate Change and Water (DECCW) regarding the publicly exhibited document "*Mount Pleasant Project Modification Environmental Assessment Report October 2010*" prepared by EMGA Mitchell McLennan ("the EA").

DECCW notes that approval for the modification is sought under Section 75W of the *Environmental Planning and Assessment Act 1979*.

DECCW understands that proposed modification to the existing approval includes:

- Relocating approved mine infrastructure areas within a larger footprint, with the specific location of the infrastructure area to be determined following detailed design;
- Installing a new conveyor/service corridor between the Mt Pleasant Project area and the adjoining Bengalla Mine to the south, to enable access to Bengalla's rail facilities as an alternative to building and using the approved rail line, loop and loader facilities;
- Extending the life of the development consent by two years until 31 December 2022; and
- Modifying the existing development consent boundary to accommodate these changes.

DECCW has reviewed the information provided and determined it is unable to recommend conditions of approval until the issues raised in Attachment A have been adequately addressed.

DECCW is of the opinion the Biodiversity and Aboriginal Cultural Heritage Assessments provided in the Environmental Assessment document are inadequate for the proposal. Accordingly, DECCW is unable support the modification proposal in its current form. DECCW would reconsider the modification proposal in the light of the issues raised below being addressed in accordance with DECCW guidelines as part of the proponent's Response to Submissions.

This submission does not include comments of the NSW Office of Water.

If you require any further information on this matter please contact myself on (02) 4908 6830.

Yours sincerely

Rebecca Scrivener 10/11/10.

REBECCA SCRIVENER

A/Head Regional Operations Unit

North East Branch

Environment Protection and Regulation

Encl: Attachment A – DECCW Comments – Mount Pleasant Project Modification (DA 92/97 MOD 1)

ATTACHMENT A**DECCW COMMENTS – MOUNT PLEASANT PROJECT MODIFICATION (DA 92/97 MOD 1)****1. BIODIVERSITY**

DECCW has reviewed the Ecological Assessment, prepared by Cumberland Ecology, provided at Appendix C of the Environmental Assessment document in accordance with relevant DECCW biodiversity guidelines. The following key issues have been identified that need to be addressed before DECCW can consider proposing recommended conditions of approval for the proposed modification.

DECCW previously provided detailed comments on the adequacy of the draft Environmental Assessment on 27 June 2010. DECCW is disappointed that most of the issues raised appear to have not been addressed in this final Environmental Assessment. As such, the Department reiterates them again for your consideration and is currently unable to support the proposal for the reasons detailed below.

DECCW understands that the exact locations and hence impact areas of the proposed rail line and rail loop are yet to be finalised. However, there appear to be a number of varying locations for the proposed rail line and loop depicted on various figures throughout the Environmental Assessment and supporting documentation (for example Figure 3.2 compared to Figure 6.6 of the Environmental Assessment – Volume 1). These proposals appear to require different levels of native vegetation clearing and associated threatened species impacts.

As DECCW is unable to undertake a detailed assessment of the proposal in terms of impact upon threatened species and biodiversity until a final design and the associated vegetation clearing required is determined, the assumed worst case scenarios provided within the Ecological Assessment have been adopted for this assessment. For the purposes of this assessment the Infrastructure Envelope and Conveyor/Services Corridor Envelope are referred to as the Modification Area.

1.1 Flora and Fauna Surveys

1.1.1 Adequacy of flora and fauna surveys - the flora and fauna survey locations are provided on Figures 2.1 and 2.2 of the Ecological Assessment (Cumberland Ecology, September 2010). These figures suggest that whilst both flora and fauna survey has been undertaken to the north of the Modification Area, there has been no fauna survey undertaken within the area predicted to be impacted by this modification. Only limited flora survey has been undertaken within the Modification Area.

DECCW's general standards for 'adequate' flora and fauna surveys is that surveys must be recent and not greater than five years old. Surveys greater than this period are potentially not utilising the currently accepted methodologies, such as those outlined in the DEC 2004 and DECC (2009a) documents, and they may not specifically target recent listings of threatened species, populations and/or ecological communities (under the *Threatened Species Conservation [TSC] Act 1995*).

Table 2.2 Flora Survey Effort and Table 2.3 Fauna Survey Effort provide a summary of surveys undertaken by ERM Mitchell McCotter between November 1994 and November 1995. These surveys are greater than 5 years old and are therefore not accepted by DECCW. The lack of detail in relation to survey effort throughout the ERM surveys is also not acceptable.

1.1.2 Flora survey – Table 2.2 Flora Survey effort states that targeted flora surveys were undertaken during each of the survey occasions. None of these targeted surveys were undertaken during the flowering time of the *Diuris tricolor* (Pine Donkey Orchid). Within the Muswellbrook LGA the main flowering period for this species is during the last two weeks of September and first two weeks of October. Given that the species is unidentifiable whilst not flowering, it is highly unlikely that the presence of this species would have been detected if present.

1.1.3 Fauna survey - Appendix C of the Ecological Assessment provides a summary of the fauna survey undertaken across the entire Mount Pleasant site between against the DECC 2004 survey

guidelines. Whilst fauna survey has been undertaken across lands to the north of the Modification Area there is a distinct lack of survey effort within the Modification Area which clearly does not meet the DECC 2004 survey requirements.

DECCW has previously requested that the exhibited EA demonstrate that adequate survey within the Modification Area has been undertaken in accordance with DECCW's survey guidelines. If this could not be done, DECCW advised that further survey and/or assessment of the likely impacts of the proposed modification should be undertaken prior to the documentation being placed on exhibition.

As this further survey has not been undertaken and the Environmental Assessment does not demonstrate that survey was completed in accordance with DECCW guidelines, DECCW has applied the precautionary principle whilst assessing the exhibited EA and assumed that those species with potential habitat on the site are in fact utilising the site.

If it cannot be demonstrated in the Response to Submissions that adequate survey, particularly targeted threatened species survey, has been undertaken within the Modification Area, DECCW will apply the same approach to this assessment. This will also be taken into consideration during the consideration of appropriate offsets for the Project.

1.2 Threatened Species Records

1.2.1 *Cymbidium canaliculatum* - Section 3.4.3 and Photograph 3.9 of the Ecological Assessment indicates the presence of the Tiger Orchid, *Cymbidium canaliculatum*, within the Mount Pleasant Project Area. Despite being previously requested, the locations of this species have not been provided within the exhibited Environmental Assessment documents. They are also not present on the Atlas of NSW Wildlife Database (DECC, 2010).

Cymbidium canaliculatum occurs as an Endangered Population in the Hunter Catchment. The Scientific Committees Final Determination states that the population of *C. canaliculatum* in the Hunter Catchment is at the south-eastern limit of the geographic range for this species. This population is of significant conservation value because it is one of the few epiphytic orchids occurring at temperate latitudes (DECC, 2008a). Importantly, the number of plants of *C. canaliculatum* in the Hunter Catchment is currently estimated to be very low, as few as 90. It is also estimated that about 90% of the population occurs on land not managed for conservation (DECC, 2008a). Within the Hunter Catchment, *C. canaliculatum* is most commonly found in *Eucalyptus albens* (white box)-dominated woodlands, usually occurring singly or as a single clump, typically between two and six metres above the ground (DECC, 2008a).

The Ecological Assessment states that '*at least four specimens have been recorded within the Mount Pleasant Project Area. Whilst there are no known occurrences within the modification areas, suitable habitat exists in this area*'. Given that the population is currently estimated to be as low as 90 individual plants, the presence of four specimens within the site to the north indicates that the Modification Area potentially contains a number of plants which may be important to the persistence of the population in the Hunter Catchment.

Given the large area of Grey Box/White Box Intergrade vegetation proposed to be impacted by the proposal (9.1 ha), DECCW requires that targeted surveys be undertaken to detect the potential presence of this species within the Modification Area, particularly within the Conveyor / Services Corridor, and that this information be provided to DECCW for consideration.

1.2.2 *Eucalyptus camaldulensis* – This species forms an Endangered Population in the Hunter Catchment (DECC, 2008b). It is also a characteristic species of the Hunter Floodplain Red Gum Woodland Endangered Ecological Community (EEC) (DECC, 2005). Table 3.2 of the Ecological Assessment states that the likelihood of occurrence of this species within the Modification Area is possible but unlikely due to specific habitat requirements. DECCW does not agree with this conclusion for the following reasons:

- i) The Scientific Determination for the Endangered Population of this species states that *Eucalyptus camaldulensis* may occur with *Eucalyptus tereticornis*, *Eucalyptus melliodora*, *Casuarina cunninghamiana* subsp. *cunninghamiana* and *Angophora floribunda* (DECC, 2008b) all of which

occur within the Hunter Floodplain Red Gum Woodland community described in section 3.3.3 of the Ecological Assessment; and

- ii) DECCW has undertaken a review of the Atlas of NSW Wildlife Database (DECC, 2010) which contains 33 records of this species within a 10km radius of the Modification Area.

It is therefore considered that the Modification Area does contain potential habitat for this species and that adequate targeted survey is required to be undertaken to detect the potential presence of this species within the Modification Area.

1.2.3 *Diuris tricolor* (Pine Donkey Orchid) – Table 3.2 of the Ecological Assessment correctly states the TSC Act status of this species as vulnerable. More importantly however it also more forms an Endangered Population in the Muswellbrook Local Government Area (LGA) (DECC, 2008c).

Table 3.2 of the Ecological Assessment states that the likelihood of occurrence of this species within the site is “possible”. The definition provided within the report for ‘possible’ is “*suitable habitat; not recorded within the locality/region*”. DECCW has undertaken a review of the Atlas of NSW Wildlife Database (DECC, 2010) which contains 6 records of this population within a 10km radius of the Modification Area. DECCW suggests the occurrence of species should be keyed as ‘*Likely-suitable habitat; found within locality*’.

Broad-scale clearing associated with open cut coal mining is a key threat to the persistence of this population in the Muswellbrook LGA (DECC, 2008c).

Targeted surveys are required for all threatened flora species which are noted within Table 3.2 of the Ecological Assessment as having potential habitat within the Modification Area. Table 2.2 Flora Survey Effort indicates that targeted surveys may have been undertaken by Cumberland Ecology in 2010, however the locations of the targeted threatened flora searches and detail of the species targeted have not been provided. DECCW strongly recommends that this information be provided to DECCW for consideration.

1.2.4 Threatened Fauna - DECCW has undertaken a review of the Atlas of NSW Wildlife Database (DECC, 2010) in order to ascertain what threatened fauna have been previously recorded within and surrounding the Modification Area. DECCW agrees with the species listed in section 3.5.2 as being known to occur or considered highly likely to utilise the habitat within the modification areas. However, the Powerful Owl (*Ninox strenua*) and Little Eagle (*Hieraaetus morphnoides*) have not been included in this list despite being previously recorded (on the Atlas database) within the Mount Pleasant Project Area / Modification Area.

The Barking Owl (*Ninox connivens*), Masked Owl (*Tyto novaehollandiae*) and Spotted Harrier (*Circus assimilis*) have also not been included in the list of species despite potential habitat being present on the site and Atlas of NSW Wildlife Database (DECC, 2010) records within 10km of the site.

These species will be considered by DECCW as having potential habitat on the site during the consideration of appropriate offsetting requirements.

1.3 Assessment of Ecological Impacts

1.3.1 Vegetation Clearing - DECCW acknowledges the project modifications may potentially (depending on final design) decrease the overall area of vegetation clearing. However, DECCW again notes that the proposal will result in direct impacts (such as clearing and fragmentation) upon a number of EEC's that were not previously considered in the assessment for DA 92/97.

DECCW acknowledges the decrease in the area of Derived Native Grassland to be removed and accepts that this vegetation community is a low quality representative of the Ecologically Endangered Community (EEC), *White Box, Yellow Box Blakely's Red Gum Woodland* EEC listed in the TSC Act. Whilst this may lead to an overall reduction in EEC removal, it does not compensate for the proposed increase in the removal of higher quality representative areas of this EEC and others within the Modification Area.

Table 6.5 of the Environmental Assessment (Volume 1) quantifies the area of vegetation removal approved under DA 92/97 compared to the area of vegetation to be removed under the proposed modification. This table indicates an increase in the area of Box Gum Grassy Woodland EEC to be cleared for the proposal. The area of a number of other woodland EEC's is also proposed and is summarised in Table 1 below:

Table 1: Removal of woodland EEC's for approved and proposed development

Vegetation Community	Corresponding EEC	Approved Disturbance (ha)	Proposed Disturbance (ha)
Upper Hunter White Box – Ironbark Grassy Woodland	White Box, Yellow Box Blakely's Red Gum Woodland	0	1.3
Grey Box/White box Intergrade – Grassy Woodland	White Box, Yellow Box Blakely's Red Gum Woodland	2.0	9.1
Central Hunter Ironbark – Spotted Gum Forest	Central Hunter Ironbark – Spotted Gum – Grey Box Forest	0	0.9
Hunter Floodplain Red Gum Woodland Complex	Hunter Floodplain Red Gum Woodland	0.2	0.2
	TOTAL	2.2	11.5

Whilst DECCW acknowledges the value of the Derived Native Grassland community, the threatened species habitat associated with the woodland EEC's is considered to be of higher quality and more diverse than that of the Derived Native Grassland community. The Proponents suggestion that the proposal will reduce the ecological impacts due to the increased retention of vegetation (i.e. Derived Native Grassland) is therefore not considered justified.

As stated above, DECCW has not been able to undertake a detailed assessment of this impact due to the lack of detail regarding final design. However DECCW advises that appropriate offsetting of the clearing of EEC's and associated threatened species habitat will be required. Adequate survey of the Modification Area, particularly the Conveyor/Services Corridor Envelope, is also required so that the placement of infrastructure within these two envelopes can be undertaken in an informed manner.

It is strongly recommended that this issue be addressed in the Response to Submissions and resolved prior to the issuing of approval rather than deferring it to post-approval conditions should Planning determine the Project by way of an approval.

1.3.2 Provision of Offsets - Section 5.4 of the Ecological Assessment states that it is not considered necessary to provide Biodiversity Management Areas as a compensatory measure to offset any impacts. However, DECCW notes that Condition 3.3(3) and Condition 3.4(3) of DA 92/97 requires that, *'prior to the commencement of any construction works within the DA area, the proponent shall enter into negotiations with NPWS (now DECCW) to identify and reach agreement on off-site conservation options of comparable biodiversity and archaeological values'*. This condition relates to the entire project area and it is recommended that, due to the proposed increased removal of woodland EEC and the associated threatened species habitat discussed above, the Modification Area is included within this consent requirement.

Offsets will require the proponent to consider adequate conservation in perpetuity, appropriate management regimes, and financial security with respect to ongoing management. DECCW would typically consider suitable measures to ensure conservation in perpetuity, such as (but not limited to) a Conservation Agreement under the *National Parks and Wildlife (NP&W) Act 1974*, or a bio-banking agreement under the *Threatened Species Conservation Act 1995*. DECCW recommends that the proponent indicate how the offset lands will be conserved in perpetuity.

To adequately determine an offsetting ratio and habitat composition that would be acceptable to DECCW, the proponent may consider conducting a biodiversity assessment using BioBanking Assessment Methodology, as outlined in the *'BioBanking Assessment Methodology and Credit Calculator Operational Manual'* (DECC 2008b). Under this scenario all vegetation types in the study area should be identified and matched to a DECCW BioMetric vegetation type.

Please note there is no formal requirement to use BioBanking under Part 3A of the *EP&A Act 1979*, but the process can, if the proponent wishes, provide guidance in determining the level and

adequacy of an offset required to compensate the loss of vegetation / habitat. For details on the use of Biometric, see <http://www.environment.nsw.gov.au/biobanking/>.

1.3.3 Bushfire and other Fire Controls - Condition 3.8 of DA 92/97 requires the proponent to provide adequate fire protection works on site, including annual hazard reduction works.

DECCW seeks clarification as to whether or not the vegetation clearing/disturbance associated with adequate hazard reduction is included within the proposed 30m wide disturbance corridor and, if not, whether it has been considered and assessed in the clearing estimates provided within the Ecological Assessment.

1.3.4 Relocation of Electrical Transmission Line - Condition 3.9 of DA 92/97 requires the proponent to undertake the relocation and/or construction of any electrical transmission lines including the 66kv power line prior to any existing line being affected by mining activity.

DECCW seeks clarification as to whether or not this activity has been considered. If this activity is to be undertaken and will result in vegetation clearing and/or disturbance of threatened species habitat, then an adequate assessment of impact is to be included in the Ecological Assessment.

REFERENCES

(DEC 2004) Threatened Biodiversity Survey and Assessment: Guidelines for Developments and Activities

DECC (2005) *Eucalyptus camaldulensis* (online) <http://www.environment.nsw.gov.au/determinations/>.

DECC (2008a) *Cymbidium canaliculatum* endangered population listing Final Determination (online) <http://www.environment.nsw.gov.au/determinations/>.

DECC (2008b) *Eucalyptus camaldulensis* (a tree) in the Hunter Catchment - endangered population listing Final Determination (online) <http://www.environment.nsw.gov.au/determinations/>.

DECC (2008c) *Diuris tricolour*, the Pine Donkey Orchid population in the Muswellbrook local government area - endangered population listing Final Determination (online) <http://www.environment.nsw.gov.au/determinations/>.

DECC 2009 Threatened Species Survey and Assessment Guidelines: Field Survey Methods for Fauna – Amphibians (online) <http://www.environment.nsw.gov.au/threatenedspecies/surveyassessmentqdlns.htm>

2. ABORIGINAL CULTURAL HERITAGE

DECCW has reviewed the Aboriginal Cultural Heritage Assessment Report, prepared by Central Queensland Cultural Heritage Management, provided at Appendix E of the Environmental Assessment document in accordance with relevant DECCW guidelines. The following key issues have been identified that need to be addressed before DECCW can consider proposing recommended conditions of approval for the proposed modification.

2.1 Aboriginal Cultural Heritage Assessment

DECCW notes that field assessments conducted between the 22-31 March 2010 located a number of Aboriginal sites within the modification area. DECCW notes that the proposed development will likely impact all sites within the infrastructure envelope. Accordingly, prior to impacting any sites, the applicant will be required to manage the sites in accordance with Part 6 of the *National Parks and Wildlife* (NPW) Act. In addition to the investigations in accordance with the NPW Act, the proponent will also be required to continually consult with all the local Aboriginal communities in accordance with DECCW's 'Aboriginal cultural heritage requirements for proponents 2010'

The high density of recorded sites presented in the environmental assessment in the proposed conveyor corridor, in a relatively small area, demonstrates either intensive occupation over a short period of time by a large number of people, or low level occupation over a continuous period of time. Areas where sites have not been located are likely to be due to low visibility rather than no objects detected at those locations. Without a final location for the conveyor, it is not possible assess the nature and scale of impact or the significance of impact.

2.2 Aboriginal Consultation

As per the intent of DECCW's *Aboriginal Cultural Heritage Requirements for Proponents* (2010) guideline, DECCW requires written evidence documenting the opinions of the Aboriginal registered stakeholders as identified in the assessment involved in the consultation process, and their thoughts regarding the significance of the area and this report. This evidence may include, but not be limited to:

- copies of letters to from the local Aboriginal community;
- phone log;
- anecdotal records of conversations held with the local Aboriginal community; and
- not relying on minutes from meetings as the only form of evidence of consultation.

2.3 Reporting of Aboriginal Sites

DECCW notes the proponent uses a site classification definition that is inconsistent with that used in NSW. The proponent appears to have artificially reduced the significance of the sites by changing the site definition required by DECCW for isolated finds (being '*a single object identified within a 100m radius*'). Most of the 'isolated finds sites' recorded in the environmental assessment should be classified as 'artefact scatters'. Artefact scatters have a higher value to the local Aboriginal community and archaeologists, than isolated finds. It is unclear as to the extent to which the assessment of significance and potential impact has been reliably documented, and whether the local Aboriginal community has been provided with accurate information.

Accordingly, DECCW has insufficient information to determine conditions that address conservation, avoidance, mitigation or other management strategies for the sites associated with the modification proposal.

DECCW reminds the proponent that under Section 89A of the NPW Act (as amended), they have an obligation to formally notify DECCW regarding the discovery of any new, previously unrecorded or updated site(s) information. The proponent is therefore recommended to review and correct their site cards to reflect the site definition in accordance with DECCW standards to the Aboriginal Heritage Information Management System (AHIMS) to be registered (or updated) promptly. AHIMS contact details: Phone: (02) 9585 6470, address: Level 6, 43 Bridge Street, Hurstville, NSW, 2220, e-mail: ahims@environment.nsw.gov.au.

2.4 Voluntary Conservation Area

DECCW notes there is to be a commitment to create a voluntary conservation area by the proponent, however, there are insufficient details within the Environmental Assessment to determine if the proposed voluntary conservation area contains similar or like Aboriginal cultural heritage values to those being proposed as an offset. DECCW would require additional details such as a physical address of the proposed voluntary conservation area, detailed aerial maps of the location, a management plan for the voluntary conservation area and the views of the voluntary conservation area and its significance as viewed by the local Aboriginal community.

2.5 Care and Control permit:

DECCW recommends that custodial arrangements for any Aboriginal material salvaged as part of this project should be determined with the local Aboriginal community prior to the project's commencement. The care and control of objects is still a regulatory role of DECCW for Part 3A approvals, therefore, the proponent will need to demonstrate meaningful consultation has occurred to a standards acceptable by DECCW.

End
DECCW 10 November 2010