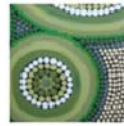


31 August 2016



Local Aboriginal Land Council
DARKINJUNG

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The Director
Mining Projects
Department of Planning & Infrastructure
GPO Box 39
Sydney NSW 2001

Dear Sir/Madam

Wallarrah 2 Coal Mine – Amendment to Development Application SSD-4974 (the amended DA) lodged for the Wyong Areas Coal Joint Venture (WACJV) on 7 July 2016

Please find attached Darkinjung LALC's comments and objections to the above amended Development Application.

As agreed during our meeting of 30 August 2016 with Carolyn McNally, Secretary of the Department of Planning and Infrastructure, due to the inadequacies in the level of information provided by the Applicant and our unresolved GIPA Application(s), this submission is an interim report and we reserve the right to provide a further submission before the end of September. We shall forward our final submission in due course.

If further clarification is required on any matter please do not hesitate to contact us.

Yours sincerely

Sean Gordon
Chief Executive Officer

INTRODUCTION

1. Darkinjung Local Aboriginal Land Council (**Darkinjung**) is a Local Aboriginal Land Council established under the *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**).
2. This submission is Darkinjung's response to the Wallarah 2 Coal Project - Amendment to Development Application SSD-4974 (**the Amended DA**) lodged for the Wyong Areas Coal Joint Venture (**WACJV**) on 7 July 2016.
3. In summary, Darkinjung has substantive interests in the area the subject of the proposed development set out in the Amended DA. Darkinjung is directly and adversely affected by the proposed development. Darkinjung submits that the Amended DA should be refused for the following reasons:
 - (a) The Amended DA is not an amendment. The alteration is substantial and is in effect a new proposal which should be dealt with as a new development proposal.
 - (b) The Environmental Impact Assessment (**EIS**) that purports to support the Amended DA, does not satisfy the Director-Generals Requirements or the Supplementary Director-General's Requirements.
 - (c) The documents comprising the Amended DA are inadequate to allow a proper assessment, and more fundamentally, are inadequate to allow the public to properly comment on the proposal in a fair and open manner.
 - (d) Darkinjung has been denied procedural fairness by having basic information withheld from it during the course of the notification period, including information directly relevant to the manner in which its interests are affected.
 - (e) The proposed development is premised on an inappropriate interference with public access to land which is contrary to public policy and is racially discriminatory in the manner in which it targets Darkinjung's land. It requires instead that the public to share a proposed 3m strip of land with an operating coal loading and rail facility.
 - (f) The proposed development in the Amended DA is a flawed design that is inappropriate for land that is bushfire prone land adjacent to a residential area. The narrow corridor of Nikko Rd is manifestly inadequate for major infrastructure associated with a coal mine. There is no room for the construction of an adequate road, let alone one which has to be shared by the public. There is insufficient room for the safe construction and operation of coal loading facilities as well as providing for security, employee parking, and employee facilities. There is inadequate room for appropriate buffers or set-backs to protect the amenity of adjoining land, or to protect adjoining E2 - Environmental Protection land. It would be inappropriate for a

development application to proceed on the basis that other people's lands provide a buffer.

- (g) It inappropriately, and irresponsibly, involves constructing coal loading and rail infrastructure in a bushfire buffer zone immediately adjacent to Category 1 - Vegetation which the former Wyong Shire Council (**WSC**) identified as the most hazardous vegetation category for bushfires. There is no provision for an asset protection zone (**APZ**), buffer zones or any consideration of bushfire risks either for the project, for neighbouring properties, or the members of the public who will be traversing the site.
- (h) There is no description, let alone assessment, of how the site will be accessed during either the construction or the operational phases.
- (i) The assessment of the impact of noise and dust in the Amended DA is inadequate.
- (j) The risks associated with the Amended DA have not been properly assessed.
- (k) There is no assessment of management of water or drainage on site.
- (l) There is no rehabilitation plan.
- (m) There are adverse economic impacts of the Amended DA which have not been properly identified or assessed. The proposal is inappropriate given that the area has been identified as a growing residential area.
- (n) The Amended DA pays insufficient regard to the objects and purposes of the ALRA and the impact on Aboriginal people.
- (o) There has been no effective consultation with affected land owners.

INTERESTS OF DARKINJUNG

- 4. Darkinjung is the registered proprietor of Lot 195 DP1032847 and Lot 1 DP 1192889, Bushells Ridge which were previously the subject of SSD-4974 (Refer Fig 1.1).
- 5. Darkinjung is also the registered proprietor of Lot 60 DP 755245, Doyalson (**Lot 60**), Lot 204 DP 1117900, Doyalson (**Lot 204**), Lot 197 DP 1964536, Charmhaven (**Lot 197**), Lot 196 DP1064536, Charmhaven (**Lot 196**) (Refer Fig 1.1) .
- 6. Darkinjung also has an undetermined claim (**ALC 37185**) over Lot 201 DP1064536 at Charmhaven (**Lot 201**) lodged pursuant to s 36(1) of the ALRA being ALC 37185. ALC 37185 was lodged on 31 October 2014. The only access to this land is Nikko Rd(Refer Fig 1.1) .
- 7. Darkinjung also has an undetermined land claim (**ALC 16443 & 17930**) over Lot 194/DP1032847 (Refer Fig 1.1).

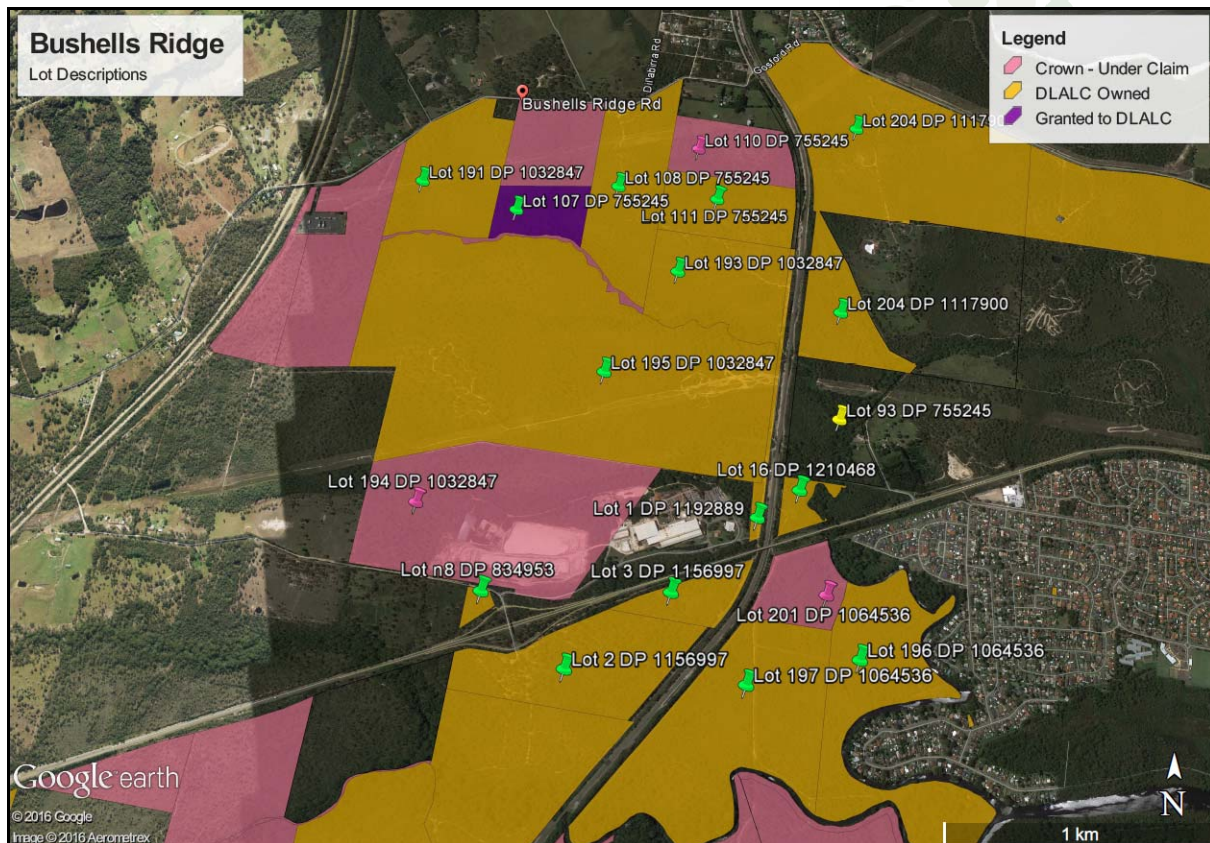


Fig 1.1 – DLALC Landholdings Bushells Ridge

8. The extent of Darkinjung's land holdings in relation to the Amended DA is shown on Fig.11 (p.41) of the Amended DA.
9. Darkinjung is an Aboriginal land council established under the ALRA. The ALRA was enacted to provide some remedy for the injustice of the dispossession of Aboriginal people from their lands. In introducing the *Aboriginal Land Rights Bill* in 1983, the then Minister for Aboriginal Affairs and Minister for Housing, Mr Frank Walker explained the dual purpose of land rights in addressing both the cultural importance of land to Aboriginal people, as well as the use of land as a remedy for Aboriginal economic deprivation:

*"The Government has made a clear, unequivocal decision that land rights for Aborigines are the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time laying a basis for a self-reliant and more secure economic future for our continent's Aboriginal custodians."*¹

10. The ALRA is also an important measure consistent with Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples, which Australia ratified in April 2009.² In the Second Reading Speech for the Aboriginal

¹ Hansard 24 March 1983, Legislative Assembly, p 5088. See also at p 5089: "Some lands, with traditional significance to Aborigines, will retain a cultural and a spiritual significance. Other lands will be developed as commercial ventures designed to improve living standards." See also *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (1992) 76 LGRA 192 (**Education Building**) at 194 per Stein J.

² See for example Articles 26(2) and 28 of the United Nations Declaration on the Rights of Indigenous Peoples.

Land Rights Amendment Bill 2014, the Minister for Aboriginal Affairs, Victor Dominello explained:

"... the Aboriginal Land Rights Act is not simply a tokenistic gesture acknowledging past wrongs; it is an important vehicle for Aboriginal people to shape their own social and economic futures. The importance of the Aboriginal Land Rights Act in Aboriginal social and economic development is recognised internationally. When James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, visited Australia in 2011, in addition to hailing our land rights model as "remarkable", he noted that the work of Aboriginal land councils in New South Wales in securing and developing Aboriginal lands to provide greater opportunities to Aboriginal peoples is:

*... essential to operationalizing the standards set forth in the United Nations Declaration and to move forward in a future in which indigenous peoples are in control of their development, participating as equal partners in the development process."*³

11. Section 3 of the ALRA provides that the purposes of the Act are to:
 - (a) to provide land rights for Aboriginal persons in New South Wales,
 - (b) to provide for representative Aboriginal Land Councils in New South Wales,
 - (c) to vest land in those Councils,
 - (d) to provide for the acquisition of land, and the management of land and other assets and investments, by or for those Councils and the allocation of funds to and by those Councils,
 - (e) to provide for the provision of community benefit schemes by or on behalf of those Councils.
12. The objects of Darkinjung are *"to improve, protect and foster the best interests of all Aboriginal persons within the Council's area and other persons who are members of the Council."*⁴ Darkinjung has a number of statutory functions which enable it to pursue that object and the social and economic objectives of the Act.⁵ Those functions include making claims to Crown land.⁶ Darkinjung can also hold and develop land in the same manner as any other land owner, subject to the provision of the ALRA.⁷ The ability of Aboriginal land councils to hold land and develop it is recognition by Parliament of the need for Aboriginal people to be compensated for their past dispossession. It is also a recognition that Parliament has determined that it is in the public interest that Aboriginal people should be able to use such land to pursue the remedial and beneficial objects of the ALRA, including pursuing the economic advancement of Aboriginal people.
13. Despite this intention, it is also the case that only limited lands are claimable under the ALRA.⁸ The total amount of land that has been transferred under the ALRA has been estimated that less than 0.4% of the Crown estate has been

³ Hansard, Assembly, 21 October 2014, p 1491

⁴ Section 51, ALRA

⁵ See generally section 52, ALRA.

⁶ Section 52(2), ALRA.

⁷ Section 52AA, ALRA.

⁸ See limitations in s 36(1), ALRA.

transferred to Aboriginal land councils.⁹ That means that the total amount of land available for Aboriginal people to pursue economic objectives is limited. This puts particular pressure on land councils to achieve outcomes on the limited land that has been transferred.

14. Darkinjung has been actively pursuing the development of some of its land as intended by the ALRA and in particular Darkinjung's land in the North Wyong Region. Darkinjung LALC has been part of a NSW Government inter-agency taskforce since 2012 regarding its landholding across the North Wyong Region including the Bushells Ridge area, which culminated in the lodging of a multi-site rezoning application in June 2014. The multi-site rezoning proposal has been reported to the former Wyong Shire Council's Ordinary meeting on various occasions over the past 18 months, with a resolution of support for the Wyee Road site (Site 3) in December 2014 (**the Wyee Road Residential Site**).
15. The proposal to rezone Darkinjung Land fronting Bushells Ridge Rd (site 4) (**the Bushells Ridge Residential Site**) was deferred by the former WSC, but later supported by the Joint Regional Planning Panel (JRPP), as part of a Pre-Gateway review submission.
16. A Gateway Determination was subsequently issued for both the Wyee Road Residential Site and the Bushells Ridge Residential Site in May 2016 – representing approximately 900 residential lots.
17. A plan of this and other proposed planned land uses on land in the vicinity of the Amended Development application is shown on Fig. 1.6.

DIRECT IMPACT ON DARKINJUNG'S INTERESTS

18. The Amended DA is premised on the closure of Nikko Rd and the construction of a coal conveyor, coal loading facility and rail siding on that land.
19. Fig 5 (p.12) of the Amended DA shows an "indicative" locations of where infrastructure will be located. The shows that there will be a "New Train Load Out Facility", a "New Drive" a "New Bin Feed Conveyor" and a Rail Spur and New Transfer facility, Noise Barrier on various parts of Nikko Rd. No diagrams of the Transfer or the Noise Barrier are provided.
20. The Rail Loading system is not described in detail other than that the bin is nominally 12m in diameter, 29m in height and has a maximum nominal capacity of approximately 1,000tonne. The conveyor system is not described in detail. The only mitigation identified is there will be shielding for the "roof and one side wall" (p.40)
21. Darkinjung is directly impacted by the Amended DA, including by the following:

⁹ Legislative Council, Standing Committee on State Development, *Economic Development in Aboriginal Communities: Discussion Paper*, July 2016, para [6.14], p 67 quoting the New South Wales Aboriginal Land Council.

- (a) The proposal to put mine infrastructure on Nikko Rd, and the proposal to close Nikko Rd will deprive Darkinjung of the only existing practical legal access to its land. The proposed removal of the existing road reserve will limit Darkinjung's use of its land into perpetuity.
- (b) The 3m access easement put forward as an alternative is ill-conceived, insufficient, dangerous and impractical.
- (c) The Amended DA proposes to place mine infrastructure immediately adjacent to Darkinjung's land with no buffer or set back.
- (d) The Amended DA places the mine infrastructure in close vicinity to other land which is the subject of a Gateway Determination was subsequently issued for Darkinjung Sites 3 & 4 – approximately 900 residential lots. The proposal will impact on that development.

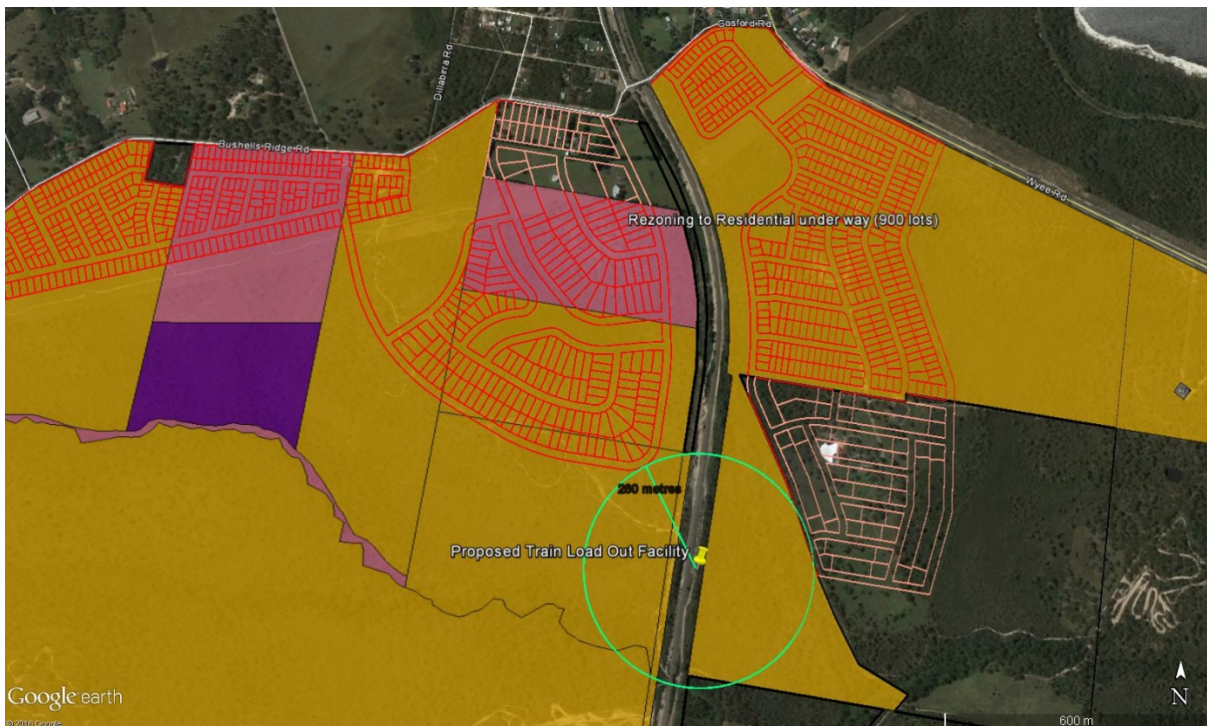
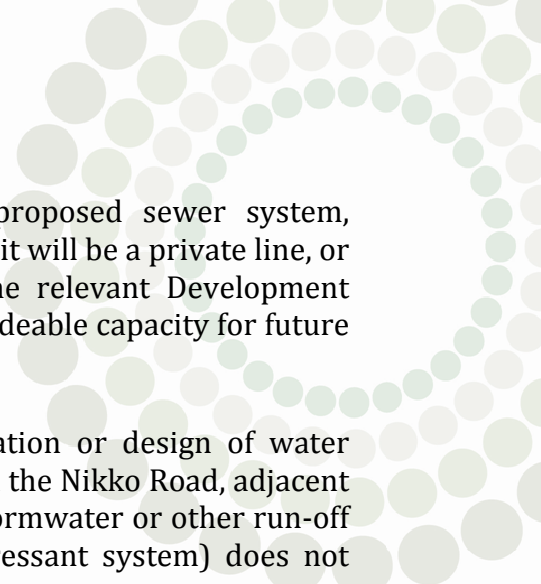


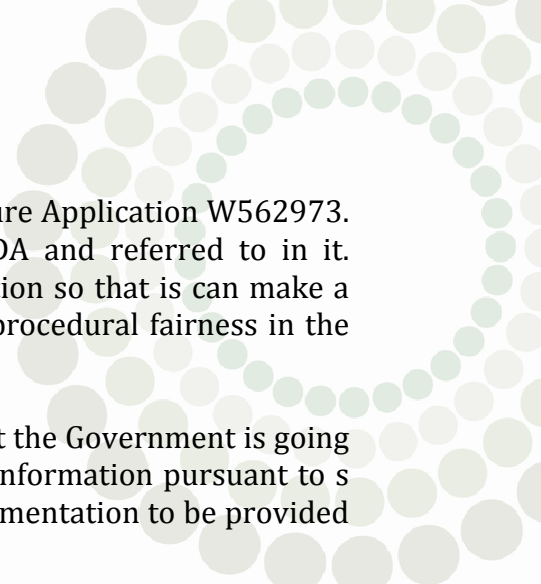
Fig 1.2 Distance between Coal Loader and Darkinjung's Residential Development

22. Each of these matters is a significant impact on Darkinjung's land. It is manifestly apparent, that Darkinjung is substantially, directly affected and more so than any other land holder.

INADEQUACY OF AMENDED DA AND PROCEDURAL FAIRNESS

23. Darkinjung submits that the Amended DA is inadequate. It does not comply with the Director General's Requirements. It also does not provide sufficient information to allow for meaningful public comment. In particular:
- (a) The Amended DA does not include an EIS that contains "*all relevant plans, architectural drawings, diagrams and relevant documentation required under Schedule 1 of the Environmental Planning and Assessment Regulation 2000*" as required by the Director General's Requirements. The Director-General's Requirements required that these documents "*be included as part of the EIS rather than as separate documents*".
 - (b) The Amended DA contains no detailed plan views of how the proposed rail siding, transfer station and coal loading facility will be contained within the 20m wide Nikko Road corridor.
 - (c) The Amended DA contains no reference points to access cross sections provided in Appendix B - Designed Drawings.
 - (d) The Amended DA provides no detail on proposed retaining works along the common boundary of the Nikko Rd reserve and western boundaries of Lot 204 and Portion 60;
 - (e) In relation to the Nikko Rd area, there is no site plan that indicates the existing levels of the land in relation to buildings and roads. Nor is there any plan that shows the proposed finished levels of the land in relation to existing and proposed buildings and roads.
 - (f) In relation to Nikko Rd there is no plan showing:
 - (i) proposed parking arrangements, entry and exit points for vehicles, and provision for movement of vehicles within the site (including dimensions where appropriate), or
 - (ii) proposed landscaping and treatment of the land (indicating plant types and their height and maturity), or
 - (iii) proposed methods of draining the land.
 - (g) The Amended DA contains no detail on height of conveyor over Tooheys Road.
 - (h) The Amended DA has no preliminary concept construction management plan.
 - (i) The Amended DA contains no detail on how extensive cut/fill will be managed within a 20m wide corridor.

- 
- (j) The Amended DA provides no detail on the proposed sewer system, including an absence of any description of whether it will be a private line, or built to Council specifications consistent with the relevant Development Services Plan (DSP), and intended to provide upgradeable capacity for future planned development in the locality.
 - (k) The Amended DA contains no detail on the location or design of water quality control devices presumably required within the Nikko Road, adjacent to the coal loading infrastructure, to ensure any stormwater or other run-off generated with the development (e.g. dust suppressant system) does not impact on nearby waterways.
24. Furthermore, in relation to the visual impact, the Amended DA fails to accurately represent the significant industrial shed (transfer station) adjacent to the Motorway Link Road or the 27m high (8-9 storeys) coal loading facility which is approximately 262m from Darkinjung's proposed developments.
 25. In relation to the proposed easement, the Amended DA fails to properly identify where the easement will be located, how it will link to existing access points, and how existing access will be maintained when the existing access traverses the proposed route of the conveyor belt and the rail spur.
 26. No description is provided as to how the facility will be constructed within the road corridor, and how that land will be accessed for the purposes of construction.
 27. The Amended DA is also deficient for the failure to properly consider the matters set out as paras [56] - [109] below.
 28. The deficiencies in plans and lack of information in the Amended DA means that Planning NSW (**the Department**) does not have the benefit of appropriate studies to assess the project and the public do not have the benefit of accurate information in relation to comment.
 29. These deficiencies are exacerbated for Darkinjung by the fact that a critical part of the Amended DA is the road closing application for Nikko Road (**Closure Application W562973**) which is referred to a para [3.2.2] of the Amended DA. Closure Application W562973 was lodged on behalf of WACJV. It is apparent the matters set out at para's [39]-[54] below that proposal will have a significant impact on Darkinjung. On 16 May 2016 Darkinjung made a request that this information be provided pursuant to s 36(14), ALRA. By letter dated 24 June 2016 the Department of Primary Industries - Lands (**DPI**) advised that it required an application under the Government Information (Public Access) Act 2009 (**GIPA Application**). A GIPA Application was made on 1 July 2016. On 14 July 2016 the DPI advised that Closure Application W562973 was to be provided, but that its production was objected to by WACJV. As at the date of this submission Closure Application W562973 has not been provided. On 1 2016 a separate request was made to Wyong Coal for a copy of Closure Application W562973. On 14 August 2016 Wyong Coal advised that they will not be providing the application.

- 
30. Darkinjung is directly and substantially affected by Closure Application W562973. It is a critical part of the proposal in the Amended DA and referred to in it. Darkinjung is entitled to know the basis of that application so that it can make a response to the proposal. Darkinjung has been denied procedural fairness in the exhibition process through a failure to provide it.
 31. The notification period is unreasonable to the extent that the Government is going to insist on GIPA Applications instead of providing the information pursuant to s 36(14), ALRA and the time does not allow for basic documentation to be provided and commented upon.

PROPOSED AMENDMENT IS A NEW DEVELOPMENT

32. Darkinjung maintains that the Amended DA cannot properly be considered an amendment of SSD-4974, and is instead a new development which requires the lodgement of a new development application.
33. The proposal the subject of SSD-4974 involved a project on specific identified land. The Amended DA proposes a development whereby a coal conveyor, rail, and coal loading infrastructure on different land and is such a substantive variation to the project, the subject of SSD-4974.
34. Placing mine infrastructure on Nikko Rd is a project on different land which is substantially outside of the footprint of the project described in SSD-4974. It involves locating that infrastructure over 2kms from where it was originally proposed and well outside the project boundary, and project infrastructure boundary identified in the development application. It now directly affects two other major projects being the Wyee Road Residential Site and the Bushells Ridge Residential Site.
35. None of the stages of the planning approval process that has occurred to date have anticipated, or required consideration of, mine infrastructure being located in a different location, let alone on Nikko Rd. The Director General's Requirements were not issued on this basis. A long coal conveyor was not part of the original development proposal. The Director-Generals requirements that were issued for SSD-4974 do not properly set a framework for the consideration of the issues that arise from such a proposal. In particular, it did not consider what issues were relevant to the consideration of a proposal to construct a coal conveyor and loading facility on a 20m corridor on bushfire prone land. Nor do they consider the full range of issues associated with constructing a lengthy coal conveyor in close proximity to major roads and crossing the main Sydney to Newcastle rail line. They do not address the range of issues that arise for the road network around Nikko Rd. Furthermore, it does not set a proper framework to consider the impacts on the Wyee Road Residential Site or the Bushells Ridge Residential site which are in close proximity to the area the subject of the Amended DA.
36. There are a large number of people in the residential area of Blue Haven including Darkinjung's 11 existing residential properties and 11 proposed residential properties which are now affected in ways not previously identified. Despite what is said in the Amended DA, the environmental and planning issues that would be

raised by the construction of a coal conveyor, and rail and coal loading infrastructure along the narrow road corridor of Nikko Rd are substantial.

37. The extent of the variations needs to be understood in the context that the project is not occurring in a remote location. It is occurring in close proximity to residential area that are part of a rapidly growing population centre, and where changes to the location of the project impact of a large number of people.
38. The extent of these issues highlight that Amended DA is outside the scope of what can properly be regarded as an amendment and is in fact a new development that requires a new development application.

INTERFERENCE WITH PUBLIC ACCESS - PROPOSED ROAD CLOSURE

Nikko Rd

39. Of particular concern to Darkinjung is that the Amended DA is premised on the closure of Nikko Rd. Nikko Rd is a formed dirt road that fronts Lots 60, 196, 197 and 204. It is the only road access to those parcels.
40. Nikko Rd is a Crown Road and the public currently have a right to access it.¹⁰ Darkinjung is currently able to access Nikko Rd through Lot 1 DP 1192889, Bushells Ridge. Darkinjung accesses Lots 196 and 197 as part of its use and enjoyment of the land as well as to comply with environmental monitoring requirements imposed by the WSC as a condition of separate development consent. See Fig. 1.3 below.

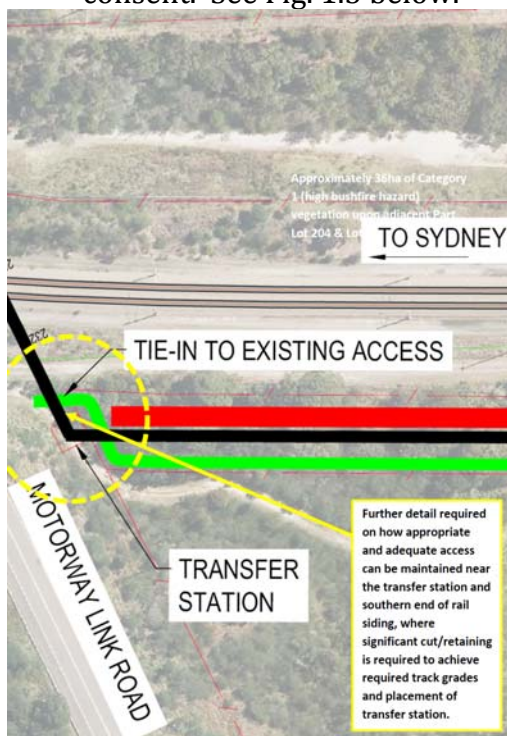


Fig. 1.3 Detail required for continued access under Link Road overpass – provided by Wallarah 2 Coal Project on 29 August 2016 (not included in amended Development Application)

¹⁰ Sections 5- 6, *Roads Act 1993* (NSW).

41. Nikko Rd also forms an important access point for the maintenance of transmission lines located in an easement over Lot 196. The transmission lines are accessed and maintained by Ausgrid. The vegetation clearing around these transmission lines is apparent from aerial imagery. The need to maintain vegetation clearing around these areas is not insignificant given the vegetated nature of the land and its proximity to the Blue Haven residential area.
42. There is also a separate transmission line that runs down Nikko Rd from near the Motorway Link Rd towards Warnervale.
43. Nikko Rd is also required for access to a rising sewer main which is located on Lot 196 which Darkinjung understands is Central Coast Council infrastructure maintained by the Council.
44. Access to Nikko Rd by these government agencies is by the same route that Darkinjung takes. This is the only access to Nikko Rd because, as is apparent from aerial imagery, the other potential approaches from the southern section of Nikko Rd and Spring Creek Road, while in road reserves, are not functional because of Spring Creek in the east and Wallarah Creek in the south. These are wide, deep and permanent creeks that prevent road access. Lots 60, 196, 197 and 201 will become effectively land locked if the access by Nikko Rd becomes unavailable.
45. Refer to Fig 1.4 and Fig 1.5 below which are photographs of the road reserve for Spring Creek Road showing two creeks which prevent the use of Spring Creek Road.



Fig 1.4 Eastern Creek Spring Creek Road



Fig 1.5 Western Creek Spring Creek Road

Long Term Importance of Nikko Rd

46. Nikko Rd is also a strategically important part of the road network in the Wyee / Warner Vale area. As noted above, Wyee and Warnervale have been identified as residential growth areas. Darkinjung's involvement with the NSW Government inter-agency taskforce has led to the potential development of the Wyee Road Residential Site and the Bushells Ridge Residential Site through the Gateway Process. Fig. 1.6 shows the proposed growth of both centres and the clear linkage known as Nikko Road.
47. When those areas are developed, Nikko Rd would have the potential to provide an important road corridor which would allow movement of traffic between Wyee and Warnervale without the need for residents to enter on to the express way. If this proposal proceeds the linkage of Nikko Road will be lost.

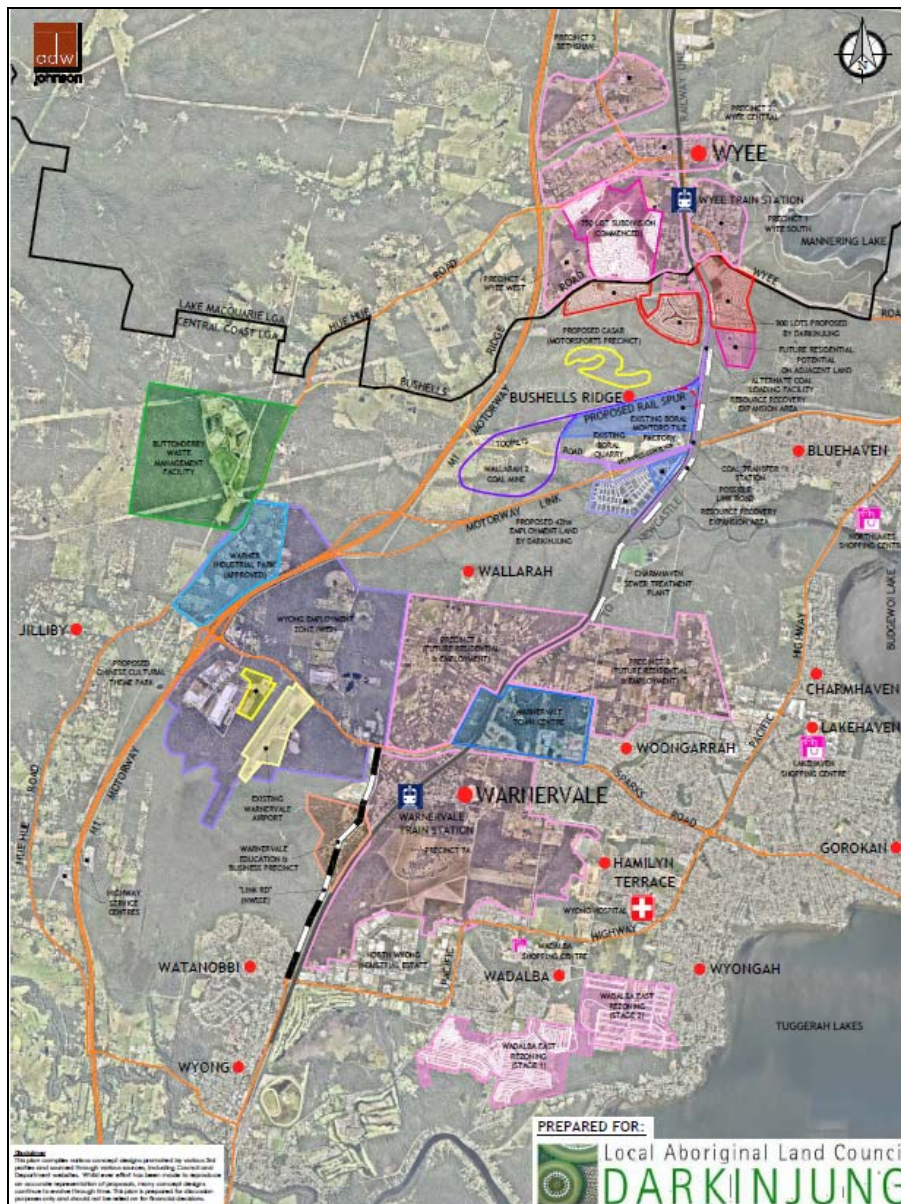


Fig. 1.6 Wyong to Wyee Development Corridor – showing Nikko Road link

Interference with Public Access

48. The Amended DA is premised on the closure of Nikko Rd and the placement of private coal loading and rail infrastructure on that land. It is said that there will be a single 3m access track which will also operate as a maintenance road and the sole road for the daily operation of the facility. The Amended DA also appears to assert that authority will also be sought pursuant to s 138 of the Roads Act.¹¹

49. There is no layout plan for the infrastructure. Fig 5 (p.12) of the Amended DA shows an "indicative" locations of where infrastructure will be located. The shows that there will be a "New Train Load Out Facility", a "New Drive" a "New Bin Feed Conveyor", rail spur, transfer facility, noise barrier on various parts of Nikko Rd. The Amended DA states:

*"There are privately owned lots with frontage along Nikko Road, including lots owned by DLALC. The proposed infrastructure on Nikko Road has been designed so that physical access to these lots is maintained. Furthermore, the lots to the north of the Motorway Link Road are legally accessible via Thompson Vale Road, Spring Creek Road and Wyee Road (in the case of Lot 204 DP 1117900). Thompson Vale Road is a formed road and is considered to be the primary access road to these lots, as opposed to the largely unformed Nikko Road and Spring Creek Road."*¹²

50. In relation to the sewerage pipeline the Amended DA states that the "pipeline will be installed so as to ensure that they will not present any impediment to the use of Nikko Rd". At para 2.4.2 the Amended DA states that the rail spur will require earthworks and the construction of a retaining wall. It notes that 60,000m³ of additional fill material will be required for the rail spur.

51. As noted above, Darkinjung has not been provided with a copy of Closure Application W56973. The precise area that it relates to has not been disclosed.

52. What is apparent from the description in the Amended DA is that there is no intention to allow Darkinjung, Ausgrid or any other person to continue to access Nikko Rd in the manner in which it has done to date. The proposal to remove the existing Crown Road is inappropriate and discriminatory for a number of reasons.

(a) For the reasons explained above, Darkinjung cannot access its land via Thompson Vale Rd or Spring Creek Rd.

(b) Nikko Rd has already been identified by WSC as bushfire prone land (vegetation buffer). It is adjacent to Category 1 vegetation. In the context of urban development in rural areas it has been noted that:

"The purpose of the public road system is to:

- provide firefighters with easier access to structures, allowing more efficient use of firefighting resources;*

¹¹ Amended DA, para. [3.2.2].

¹² Amended DA p.8.

- *provide a safe retreat for firefighters; and*
- *provide a clear control line from which to conduct hazard reduction or back burning operations.*

Roads should provide sufficient width to allow firefighting vehicle crews to work with firefighting equipment about the vehicle."¹³

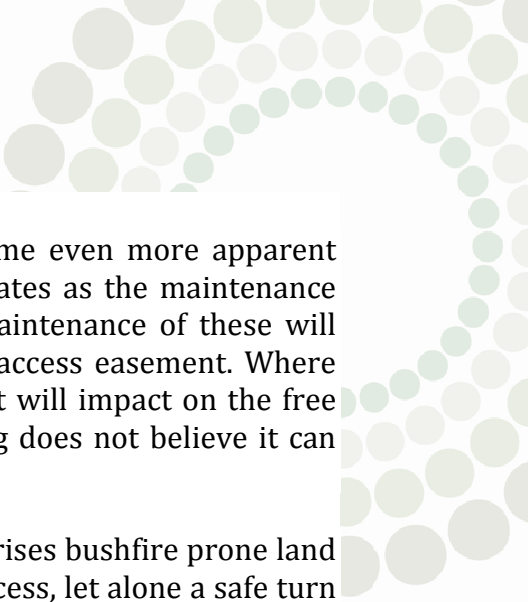
It would be irresponsible to remove that function. It would also be irresponsible to do by allowing the construction of a coal conveyor and loading facility which creates its own fire risks.

- (c) Nikko Rd has been land set aside for road purposes as part of the long-term strategic planning of the area. As is apparent from its on-going use, it remains an important part of the road network.
- (d) It is likely to be needed for road purposes in the future. As noted above, Wyee and Warnervale and the central coast generally are rapidly expanding residential areas. Maintain the existing road network is important to accommodate that expansion. If the Wyee Residential Development Area proceeds, then as shown on Figure 1.6, Nikko Rd, will have the potential for development as an important link road between Wyee and Warnervale which will provide an alternative to residents having to travel in a circular route on the expressway to commute between those areas.
- (e) The removal of Nikko Rd will leave Darkinjung's land landlocked. It is contrary to good public policy to deprive a land owner of existing lawful legal access, so as to provide another person with indulgence of being able to develop on the land.
- (f) Darkinjung is entitled to have benefit of the legal access that was available when the land was transferred to it under the ALRA. The members of Darkinjung are entitled to be able to access the land freely, and safely, without having the risk or inconvenience of having to traverse an operating coal transporting facility.
- (g) Removing legal access will have a clear immediate financial impact on the value of the land to Darkinjung. The absence of appropriate access, will also limit the ability of Darkinjung to utilise the land in future.
- (h) Darkinjung maintains that proposed interference with Nikko Rd is inequitable and inconsistent with the remedial and beneficial objects of the ALRA. Under the ALRA, land is transferred to Aboriginal land councils as a means of compensation for the past dispossession of Aboriginal people of their traditional lands and is intended to be an economic resource to assist Aboriginal communities to achieve economic self-sufficiency. It is inconsistent with that scheme for land to be transferred to Aboriginal land councils and then for the Government to remove legal access to the land by conferring interests on third parties.

¹³ Rural Fire Service, *Planning for Bushfire Protection: A Guide for Councils, Planners Fire Authorities and Developers*, December 2006,; p.20.

- (i) Furthermore, it is clear that the removal of access to Nikko Rd has primary impact on Darkinjung's land only. No other land owners will become land locked by the proposal. It treats Darkinjung's interests as expendable while carefully avoiding the interests of all other land owners, and in this regard it is inequitable and discriminatory.
53. The Amended DA proposes to provide access through the creation of a 3m wide easement. The Drawing 22-17704-C206 in Appendix B shows the assumption of a 3 m wide easement. The proposed easement is ill-conceived and manifestly inadequate for a number of reasons:
- (a) The land is not Wyong Coal's land. It cannot provide an easement unless the road is closed and it purchases the land. Darkinjung does not believe that the road should be closed.
 - (b) The provision of a 3m wide easement is not a reasonable or adequate substitution for the existing access that Darkinjung enjoys. The proposed easement will be a shared area as part of an operating coal loading facility.
 - (c) Contrary to what is said in the Amended DA, the proposed easement does not allow for the existing access to continue. The existing access from the western side of the Sydney / Newcastle Rail line will be blocked by the rail siding. The Amended DA assumes that access will be available through Spring Creek Road and Thompson Vale Rd. As noted above, Thompson Vale Rd is not formed all the way to Nikko Rd. It also crosses a creek. Spring Creek Rd is also not formed and cannot be used because Spring Creek crosses it twice. No part of Amended DA relates to any works on Thompson Vale Rd or Spring Creek Rd. They are not part of the Project Area identified in the DA. They are not part of an Amended DA.
 - (d) A 3m wide easement is inadequate. The reason why road reserves are 20m wide is that it allows space for appropriate road construction when required. A 3m easement is not wide enough for that purpose. The absence of adequate access will constrain the use of Darkinjung's land into the future.
 - (e) The 3m wide easement is impractical as an alternative access for private land owners or members of DLALC who want to access the land. It is not wide enough to allow safe use by a range of vehicles that may need to access land. Even a standard single lane road would not fit within that corridor, let alone allowing for space for vehicles to pass, or stop and allow safe exit where required.
 - (f) The easement is unsafe, in that in large sections of it will be a narrow channel wedge between a retaining wall and a fence. The excavation is said in one location to be "*at least 2 metres and up to 3.4 metres deep.*"¹⁴ This provides no room for vehicles to pass. At best it will provide 50cm on either side of the car if there is a need to exit the car in an emergency. If there is an accident, it will leave insufficient room to access the car. These problems are even more acute for larger vehicles.

¹⁴ See Amended DA, Appendix I, Visual Impact Assessment, p.12.

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- (g) The deficiency in the width of the easement become even more apparent when it is considered that the easement also operates as the maintenance track for both the rail and coal loading facility. Maintenance of these will conceivably require large machinery to be on the access easement. Where parking of staff and visitors is proposed and how it will impact on the free access of the easement is not explained. Darkinjung does not believe it can safely occur in such a confined space.
 - (h) The easement is inadequate for a road which comprises bushfire prone land (vegetation buffer). It does not provide adequate access, let alone a safe turn around area. For example a standard Isuzu FTS750 Crew Cab Tanker Class 1 4 x 4 which is used by Fire and Rescue NSW has a 2.5m width which leaves just 25cm on either side to stay within the easement let alone room to access and use equipment stored on the sides. It has a width of 2.5m and a turning circle of 17m. The Isuzu FTR 800 4 x 2 has a turning circle of 16m. A 3m wide access road with a retaining wall on one side and a fence or coal load facility on the other side is not a defensible space for emergency services. It does not provide sufficient width to allow firefighting vehicle crews to work with firefighting equipment about the vehicle.
 - (i) It should be noted that the project the subject of the original SSD-4974 anticipated a private maintenance road on either side of the entire length of the rail corridor.¹⁵ There is now no private access road on any side of the rail line. There is now only a 3m wide road (which presumably has to be fenced off from the rail line and which has to be shared with the public.

54. To the extent that the DA refers to s 138, *Roads Act*, Darkinjung maintains that provision does not entitle the development of permanent coal and rail infrastructure that removes the rights of the public and adjoining land owners to access the land.

INAPPROPRIATE AND FLAWED DESIGN PROPOSAL

55. Darkinjung submits that the proposal in the Amended DA to construct the facility in a 20m wide road corridor is an inappropriate and flawed design proposal. In particular:
- (a) Nikko Rd itself is variously zoned SP2 - Infrastructure (Road and Traffic Facility), RU6 - Transition and E2 - Environmental Conservation under the *Wyong Local Environmental Plan 2013*. A rail and coal loading facility is a prohibited development under each of those zonings. It is also inconsistent with its zoned purpose.
 - (b) The Amended DA provides for no buffer or setbacks to the land adjoining Nikko Rd. Coal loading and rail facilities should be designed with appropriate buffers and setbacks from adjoining land. Indeed having regard to Drawing 22-17704-C205 in Appendix B of the Amended DA, there will be a 27m high

¹⁵ See for example Figure 19, *Wallarah 2 Coal Project: Environmental Impact Assessment*, April 2013, Vol.1, p.39.

construction placed within 4metres of the boundary of the land, and immediately adjacent to bushfire prone land with an environmental protection zoning.

- (c) Nikko Rd is bushfire prone land (vegetation buffer) and is adjacent to Category 1 - Vegetation which WSC has identified as the most hazardous vegetation category for bushfires. It is inappropriate, and irresponsible to construct coal loading infrastructure in such an area. See fig. 1.7 below.



Fig 1.7 – Adjacent Bushfire Hazard

- (d) As discussed in more detail below, there is no provision for an asset protection zone. An APZ should be provided on the proponent's land, not neighbouring land. Nor is it in any event appropriate to place such infrastructure in such a narrow corridor and assume that a neighbour has to remove vegetation on E2 – Environment Conservation land to provide an APZ.
- (e) The Amended DA proposes to place a coal conveyor, and rail and coal loading infrastructure within 400m of the residential suburb of Blue Haven, and

would be immediately adjacent to E2 Environment Conservation land and coastal protection land for the purposes of SEPP 71.

- (f) Parts of the Amended DA appear to assume that WACJV will be able to access the site by Thompson Vale Road or Spring Creek Road.¹⁶ As noted above, neither of these roads is formed. Both are impassable due to being traversed by Spring Creek which is a deep permanent watercourse. There is no proposed development of these roads. They are in any event outside the project boundary described in the Amended DA.
- (g) There is no description of the nature of the fencing for the project area to protect the site from trespass or set-backs from the fencing. Given the proximity to the facility to a residential area, it is not unforeseeable that there will be children in the vicinity from time to time. Nor is there an explanation with how the need to enclose the area will be achieved if public access is provided by way of an easement.
- (h) It is said that the facility will be controlled locally and remotely (p.15) Drawing 22-17704-C205 shows the existence of a "*control room*". However how individuals could be stationed there is unclear. There is no indication of worker's facilities, toilets or other basic amenities. If such are to be provided there is no indication as to how they will be constructed within the corridor or how they will impact on the proposed easement. More fundamentally:
 - (i) there is no provision for parking;
 - (ii) no provision for appropriate access for emergency vehicles;
 - (iii) it is not even clear how the employees will access the site, given the lack of current access on Spring Creek Road and Thompson Vale Rd, is inadequate, no other road works are proposed or described in the development application.
- (i) Drawing 22-17704-C206 in Appendix B shows 1 in 30 gradients from rail level across the proposed 3m wide access road and into a substantive cut away which will significantly alter the existing levels of the land.¹⁷ This shows that there will be a substantial drainage issue which will need to be addressed. No drainage is planned, or referred to. The alteration of the land contours in turn create unassessed issues as to the impacts on the water quality in Spring Creek from runoff from around the loading facility where coal dust and other pollutants such as oil and grease will no doubt accumulate.
- (j) The 3m wide access road is manifestly inadequate and dangerous. In particular:
 - (i) There is no explanation as to how existing access will be maintain on a single 3m wide easement that has to be shared with coal loading and rail operations.

¹⁶ See for example Amended DA at p.48.

¹⁷ See Drawing 22-17704-C206 - "Typical Cut Section CH112.685 to 11.785".

- (ii) A single 3m wide easement will not allow for vehicles to pass. It is insufficient to safely allow for emergency vehicles, noting that the length of the rail siding containing the conveyor and other infrastructure will exceed 1.1km.
- (iii) There is no information as to how the access road will be constructed or to what standards, or how those standards can be achieved in a 3m wide easement.
- (k) It is unreasonable to remove existing public access and then require land owners to traverse an operating coal facility in order to enjoy their land. It unnecessarily and unfairly exposes them to risks which they should not have in order to access their property.
- (l) The Amended DA identifies no contingency for spillage or the need for an emergency stockpile area in the event that there is a mechanical failure. Nor does it identify how such an area would be managed.

LACK OF CONSTRUCTION PLAN

- 56. The Amended DA does not contain any clear construction plan.
- 57. At para 2.4.2 the Amended DA states that the rail spur will require earthworks and the construction of a retaining wall. It notes that 60,000m³ of additional fill material will be required for the rail spur. It does not provide any further information in relation to how construction will occur.
- 58. Amended DA, p.48 states:

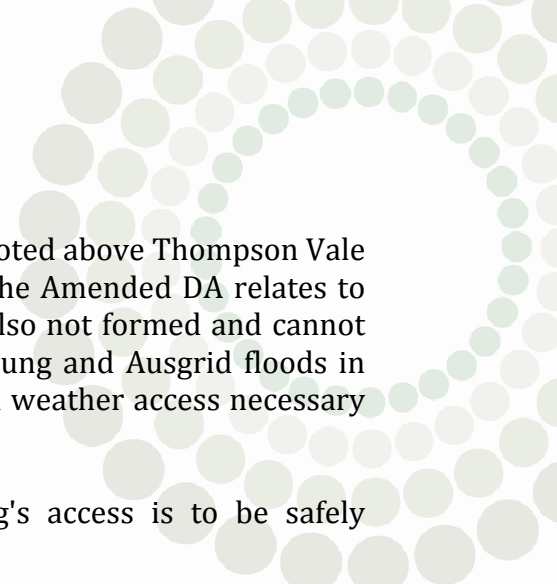
"Construction Noise

The residences on Thompson Vale Road (P14 and P15) and Bushells Ridge Road (P16) are predicted to experience exceedances of the NMLs for standard work hours and work outside standard hours. The Amended Project is predicted to comply with the NMLs for standard work hours in the Blue Haven area. However, residences in Blue Haven may experience exceedances of the NMLs for work outside standard hours. Exceedances of NMLs are generally short term in nature and will be managed to acceptable levels.

To reduce potential road traffic noise during the construction phase, personnel will be transported to the site of the rail spur via bus, rather than commuting to the site individually.

This will substantially reduce vehicular movements in the vicinity of Blue Haven and the two residences on Thompson Vale Road. Road traffic noise associated with the Amended Project is predicted to be within the 60 dBA target for collector roads."(p.48)

- 59. As the construction works are not identified, there is no basis to identify how the 60 dBA figure is derived. To the extent that heavy machinery is to be used on the site, it is unclear how that machinery is going get to the 20m corridor, how they can be safely used in a 20m corridor. Nor is it clear how the construction materials will be transported to the site.

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60. Access to the site for construction is not explained. As noted above Thompson Vale Rd is not formed all the way to Nikko Rd. No part of the Amended DA relates to any works on Thompson Vale Rd. Spring Creek Rd is also not formed and cannot be used. The rail underpass currently used by Darkinjung and Ausgrid floods in heavy rain and therefore does not provide adequate all weather access necessary for an operating coal facility.
 61. The Amended DA does not identify how Darkinjung's access is to be safely maintained while the construction is being undertaken.

RISK ASSESSMENT

62. The Section 5 of the DA headed "Risk Assessment" (p.30) is unintelligible. It does not identify any of the matters that were taken into account. It refers to re-evaluation in relation to 'controls'. The controls are not identified. Nor is it clear why any of the controls in the original assessment are relevant to the matters raised by the Amended DA.
63. The Risk Assessment does not refer to (or assess) bushfire risks, which are obviously relevant given that the Amended DA proposes the development of a coal loading facility in bushfire prone land (vegetation buffer) and immediately adjacent to Category 1 Vegetation. Nor does it identify the risks that arise from there being no buffer to the infrastructure and no APZ.
64. There is no identification of the risks arising from the coal conveyor. The Risk Assessment does not address the risks associated with moving coal by a conveyor system over the Sydney to Newcastle rail line.
65. Nor is there any assessment of the risks associated with the concurrent use of a 3m access road, by coal staff and members of the public. That includes both in terms of risks of harm to the public, as well risks to machinery by accidents involving the public, or risks associated with difficulties in responding emergencies or through only having a single 3m access.
66. Given the deficiencies in information in the Amended DA, it is unclear how the risks can be properly assessed.
67. The Risk Assessment is deficient, and does not comply with the Director-General's requirements which required the EIS to pay "*particular attention to public safety, and including bushfires*".

BUSHFIRE HAZARD

68. Despite being a proposal to undertake a development on bushfire prone land (vegetation buffer), the Amended DA is silent on the issue. There is no assessment of bushfire risks.
69. It does not provide any APZs. It is premised on the removal of a public road which assists in the management of bushfire risks. It proposes to replace that public access with a 3m wide easement which is not connected to any traversable road. The 3m wide easement is not adequate for emergency vehicles. In fact, it creates a fire trap, particularly as the length of the rail siding containing the conveyor and other infrastructure will exceed 1.1km. I refer you to the Department's own publication "Planning For Bush Fire Protection December 2006" Which clearly states the minimum requirements for access roads including Fig 1.8 Property access road requirements (rural areas). Darkinjung repeats the matters set out at paragraph [55] above.

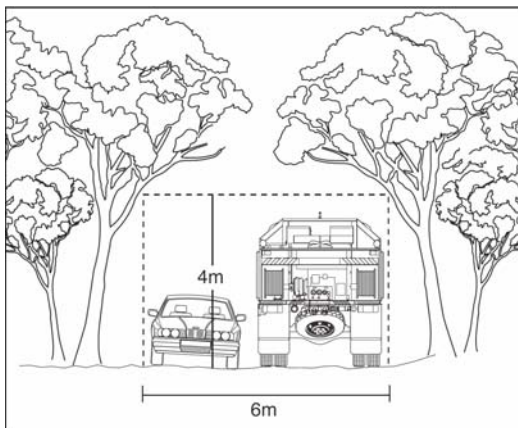


Fig 1.8 – Property access road requirements (rural areas)

70. Bushfires are not a remote possibility in the area. There are significant residential areas in the vicinity. WSC took the responsible planning measure of identifying bushfire prone vegetation areas. The construction of a coal loading and coal conveyor in such an area without any buffer to the adjoining E2 Environmental Conservation land and without an APZ is irresponsible and cannot be justified from a planning perspective.
71. The Amended DA is deficient, and does not comply with the Director-General's requirements which, among other things, required "*consideration of all relevant environmental planning instruments, including identification and justification of any inconsistencies*" with those instruments and also required "*particular attention to public safety, and including bushfires*".

NOISE AND DUST

72. The assessments of noise and dust in the Amended DA are inadequate. There is no assessment of the impact of dust and noise for the people who have to use the

access track and who are required to pass within 3 metres of the rail spur, the coal loader and the conveyor in order to access their land.

73. Paragraph [7.4] (p.43) of Appendix D to the Amended DA discusses the potential air quality impacts on proposed Jilliby Subdivision Stage 2 Land Owners Action Group. While this site has been identified in the WSC Settlement *Strategy*, this is a long term strategic document. The locality has not proceeded into the formal rezoning process. However, and by contrast, Darkinjung has been part of a NSW Government inter-agency taskforce since 2012 regarding it's landholding across the Bushells Ridge area, which has culminated in the lodging of a multi-site rezoning application in June 2014 for the Wyee Road Residential Site and the Bushells Ridge Residential Site. Those developments have since received a Gateway Determination. Despite this, the Amended DA does not assess or discuss impacts in relation to either the Wyee Road Residential Site or the Bushells Ridge Residential Site.
74. Fig.13 and Fig 14 (pp.50-51) of the Amended DA shows the day time noise levels for Darkinjung's land, including the Bushells Ridge Residential Site and the Wyee Road Residential Site as ranging between 40-50dBA for both daytime and night time noise levels. The Amended DA and pp.47-48 discusses impacts on land neighbouring Darkinjung's. Appendix E to the Amended DA (p.49) states that at a Bushells Ridge Road residence (receptor P16 – adjoining Darkinjung's land to the north), has predicted levels that exceed the PSNC by up to 4dBA. The impacts on the Wyee Road Residential area or the Bushells Ridge Residential area are not discussed.
75. Page vi of the Amended DA recognises that mitigation is required for the single residence (receptor P16), and that the proponent "*will consult with these landowners and offer to apply appropriate acoustic treatments in accordance with the Voluntary Land Acquisition and Mitigation Policy for State Significant Mining, Petroleum and Extractive Industry Developments (NSW Government, 2014).*" No similar consideration is made in relation to the impacts on Darkinjung's land that comprises the Bushells Ridge Residential Site and the Wyee Road Residential Site and, as noted below, no consultation has occurred in relation to those effects.
76. The nature of the recommendations set out in Appendix E (p.47) highlight the extent of the impacts on residences in the vicinity and highlights the level of noise that will be generated. People in rural / residential areas do not live their lives as prisoners in their homes. They are entitled to enjoy their land without noise pollution of the kind generated by this project. The Amended DA offers no solution for the unsatisfactory noise levels that will be generated for people on adjoining land outside their homes or to the amenity of their land generally.
77. In addition, because the Amended DA does not explain what vehicles will need to access the Nikko Rd site once it becomes operational, or how they will get to the site during construction, and when it becomes operational, off-site road impacts have not been assessed. Nor is there any assessment of the "*construction, operational, and transport noise impacts*", for the area around Nikko Rd as required by the Director-General's requirements.

VISUAL IMPACTS

78. The assessment visual impacts of the Development Application are inadequate. the Amended DA fails to accurately represent the significant industrial shed (transfer station) adjacent to the Motorway Link Road or the 27m high (8-9 storey) coal loading facility, or elevated conveyor required to reach the top of the loading facility.
79. The coal conveyor will be in an elevated position where it traverses the Sydney-Newcastle rail line and will be an eyesore for traffic on the Motorway Link Road. 27m high coal loading facility exceeds height limits for buildings which would otherwise be permitted in the area and will sit well above the tree line and will be able to be seen from a considerable distance.
80. The visual impact assessment does not describe how the project will look from Darkinjung's land, and in particular Lot 16 DP120468 and Lot 204 DP117900. The people identified as the only "*people who will be potentially exposed to the proposed structure*"¹⁸ do not include the people who currently use Nikko Rd or the owners of the adjoining land who will have to look at the structures while on their land. Indeed, in relation to "*Viewshed 3b*" which is next to Darkinjung's land, the Amended DA states:

*"This Train Load Out Bin structure will be visible from Viewshed 3b within the Immediate Vicinity Viewing Zone. **This view will be from a passenger train travelling north and south** along the Main Northern Rail Line. **This view will be limited as the passenger train will be moving at high speeds** as it passes the Train Load Out Bin structure. Although the structure will be of a large scale, it will have similar character to other rail infrastructure found along rail lines."*¹⁹

81. The land ownership of Darkinjung is completely ignored. The visual impact on the Wyee Residential Land Site and the Bushells Ridge site is also ignored.
82. The visual impact analysis is deficient, and does not comply with the Director-General's requirements which, among other things, required "*potential visual impacts of the project **on private landowners in the surrounding area** as well as key vantage points in the public domain*".
83. The visual assessment is also deficient in that it is premised on the visual impacts being ameliorated through vegetation on adjoining land, not considering how the development impacts on the amenity of the property when the owners are enjoying it. The visual assessment does however consider the need for a visual barrier on the railway side, but then says: "*There is no screening landscape between the structure and rail line. However, the structure is consistent with the character of its immediate location (i.e. other industrial structures.*"²⁰

¹⁸ Amended DA, Appendix I, Visual Impact Assessment, p.10.

¹⁹ Amended DA, Appendix I, Visual Impact Assessment, p.12.

²⁰ Amended DA, Appendix I, Visual Impact Assessment, p.18.

84. This ignores the fact that in this location the immediate location would otherwise be E2-Nature Conservation land. It also ignores the fact that if land owners have E2 Nature Conservation land, which they have to manage, they are entitled to be able to enjoy that land, and the amenity of it, without large coal mining infrastructure, being built right up to the boundary, without any set-back or visual buffer being required for the development.

TRANSPORT AND TRAFFIC

85. The Director-General's Requirements required "*a detailed assessment of the project on the capacity, efficiency and safety*" on the "*....local road network*". The Amended DA does not address the issues which arise for the loss of Nikko Rd. Nor does it address impacts for Spring Creek Rd or Thompson Vale Rd, if that is how the coal loading facility is to be accessed.
86. The project does not identify how vehicles will access the site during construction and what the issues are for traffic movements. It also does not identify how vehicles will access the site when it is operational and how they will access the site.
87. The only existing access is through the rail underpass next to Spring Creek. The road becomes impassable in heavy rain when Spring Creek floods. On its face the Amended DA does not even identify how all weather road access will be maintained to the site. Refer Fig. 1.9 below



Fig. 1.9 Rail underpass at Spring Creek

SOCIO - ECONOMIC IMPACTS

88. "As explained at paras [9]-[12] above, Darkinjung is an Aboriginal land council established under the ALRA which was enacted to provide some remedy for the injustice of the dispossession of Aboriginal people from their lands. Under the ALRA, land is returned to Aboriginal land councils to enable them to pursue the cultural, social and economic object of the Act."
89. The Amended DA does not adequately assess socio-economic impacts on the Aboriginal community.

90. The Wyee and Warnervale area is a growing residential area. There will be increasing demands for residential land on the Central Coast into the future. In fact, the Draft Central Coast Regional Plan, released by the Department of Planning and Environment in November 2015 (p.19), states;

"To meet the projected housing demand over the next 20 years, an average of 1,980 new homes will need to be constructed each year. This is 590 more homes than the average annual housing production of 1,390 dwellings over the 19 years to 2014-15."

91. The economic assessment needs to consider impacts on adjoining land uses and opportunities lost on land moving into the future. Fig. 1.10 identifies Darkinjung's identified opportunities in the immediate area.
92. As noted above, Darkinjung has two residential projects which have received Gateway approval. In contrast to the project in the Amended DA, the development of the Wyee Road Residential Site and the Bushells Ridge Residential Site are consistent with existing residential developments in the area such as other residential developments at Wyee. There is significant economic injection associated with the residential development – exceeding \$300M in 1st round direct expenditure excluding any multiplier effects. There are also significant outcomes for the Aboriginal community from those potential land uses.
93. The impacts of the Amended DA on these developments, or the capacity to use the land for those developments, have been completely ignored. It fails to address the social and economic impact on the Aboriginal community as the proposal limits Darkinjung's potential on its proposed residential developments.
94. Where land is immediately adjacent to, or affects, land held by Aboriginal land councils, the assessment of the impacts should include an assessment on the impacts on the ability of the land council to achieve the social and economic objectives of the ALRA.
95. The economic analysis does not comply with the Supplementary Director-General's Directions which required *"A description of the short-term and long-term social and economic implications and/or impacts of the project"*.
96. Darkinjung has sought opinion on the potential financial impact of the amended proposal upon future residential estates being located so close to significant coal loading infrastructure. It is estimated that retail lot values would be adversely affect by approximately \$10,000/lot - equals an \$8,700,000 loss over the life of the project. A copy of the advice received from MDA Property Consultants dated 23 August 2016 is attached.
97. The amended proposal may also sterilise any additional rail siding opportunities adjacent to the Darkinjung land zoned industrial, located to the west of the amended Proposal. This land is one of the few large (greater than 100ha) industrial zoned parcels located adjacent to a main rail line, and particularly between the Ports of Sydney & Newcastle.

98. Darkinjung has been working in partnership with a local company, Waste Enterprises over the past 18 months to prepare a Business Plan for a resource recovery facility to be located on the southern portion of lot 195 DP 1032847. The facility will (potentially) take waste from areas within a radius of 150 kilometres, sort it and sell it to waste recycling enterprises. An essential part of the plan is rail access to the development. The amended development application will remove future rail access to all Darkinjung land within Bushells Ridge.
99. Darkinjung LALC has entered into an Agreement to Lease with Casar Supporters Inc., a consortium of local business persons who intend to develop a motorsports precinct and social enterprise over a large part of lot 195 DP 1032847. The long term plan is for Casar to have permanent access to the development over lot 1 DP 1192889. There are insufficient details of the proposed conveyor system (incl. details about height) within the development application to determine how this access will be restricted.

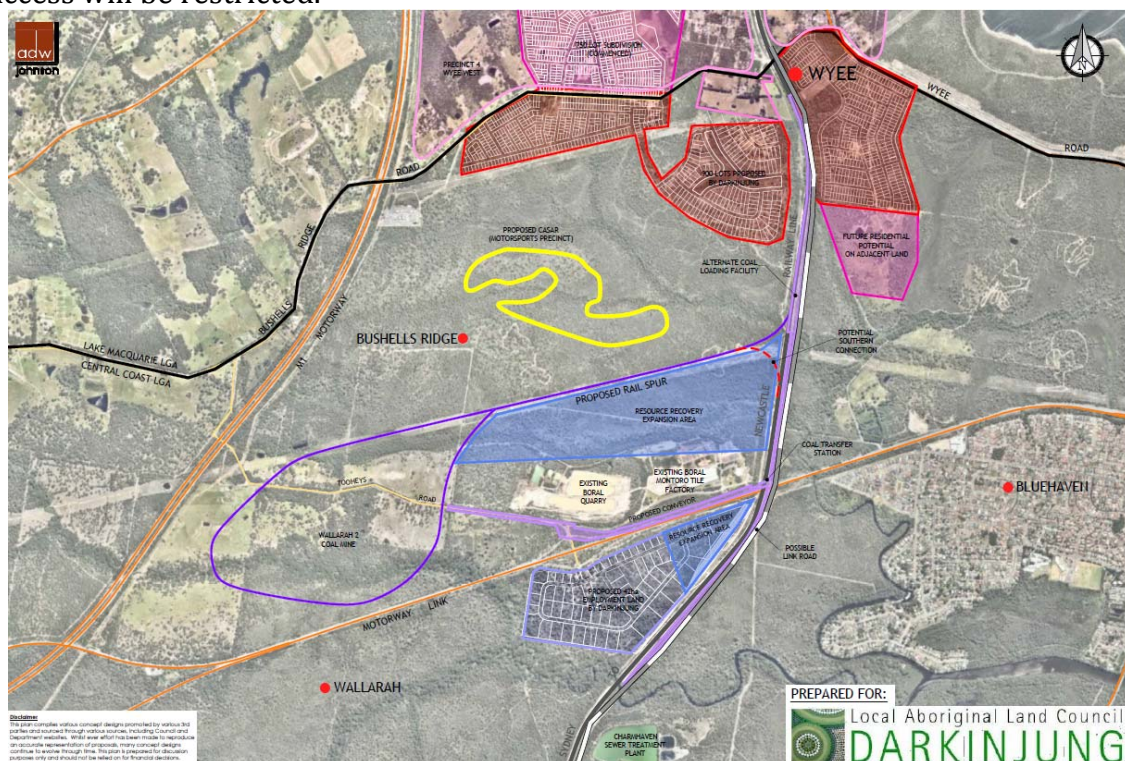


Fig. 1.10 Darkinjung projects , Bushells Ridge

REHABILITATION

100. The Amended DA does not provide any rehabilitation strategy for the Nikko Rd site as required by the Director-General's requirements.

ABSENCE OF WATER CONTROL MEASURES

101. The infrastructure to be place on Nikko Rd is adjacent to Spring Creek. The Amended DA does not address the risk of pollution to Spring Creek arising from the washing of coal, grease or oil into Spring Creek.

102. The Amended DA contains no detail on the location or design of water quality control devices presumably required within the Nikko Road, adjacent to the coal loading infrastructure, to ensure any stormwater or other run-off generated with the development (e.g. dust suppressant system) does not impact on nearby waterways.

ABSENCE OF CONSULTATION

103. The Amended DA states that "*WACJV has undertaken direct consultation with adjoining landowners and businesses*"(p.28) . It also states that "*DLALC was consulted regarding the proposed concept for the Amendment in February 2016*"(p29).
104. Whilst Darkinjung's cultural heritage officers were contacted in relation to potential impacts on cultural matters (a requirement under OEH guidelines), Darkinjung as a landowner, was not consulted.
105. Darkinjung's submission to the Planning Assessment Commission in relation to SSD-4974 included concerns about the lack of consultation by Wyong Coal and a complaint that while Darkinjung was consulted in relation to heritage issues, it was not consulted as a landowner in relation to the project itself. Furthermore, the lodging of SSD-4974 without the consent of Darkinjung when it was required is the reason for the Court Orders in *Wallarah No 2*.
106. Darkinjung did participate and was consulted in relation cultural heritage in relation to a survey undertaken in 2015. It was not however, consulted in relation to any other aspect of the project or the Amended DA. In February 2016 representative of the WACJV met with the CEO and Planning and Development Manager of Darkinjung. At the meeting Darkinjung was told generally of what was being considered and was provided with a single plan drawing. The details were not disclosed. The fact that a road closing application had been lodged had not been disclosed. There was no consultation.
107. The absence of consultation is compounded by the continued resistance to provide Darkinjung with basic information about the project, despite the Amended DA affected Darkinjung's interests in a substantial manner as outlined in this submission. The Director Generals requirements required consultation with public authorities and "*affected landowners*". It also mandated that:

"The EIS must:

- describe the consultation process used and demonstrate effective consultation has occurred;*
 - describe the issues raised by public authorities, service providers, community groups and landowners;*
-"*

108. The Amended DA does not comply with this requirement. It does not identify any of the issues raised by the public authorities it says it consulted in relation to the Amended DA. The requirement to consult with adjoining land owners did not occur in a way that allows compliance with this requirement. That is presumably

why the Amended DA does not address the issue in the way required by the Director-Generals requirements.

109. For completeness, it can be noted that the Supplementary Director-Generals' Requirements also required an explanation of:

*"14. Any consultation about the action, including:
(a) Any consultation that has already taken place;
(b) Proposes consultation about relevant impacts of the action;
(c) If there has been consultation about the proposed action – any documented response to, or result of, the consultation".*

And

"15. Identification of affected parties, including a statement mentioning any communities that may be affected and describing their views."

The details of consultation with Darkinjung identifying how it is affected and describing their views, is not included, because it did not occur.

DISCRIMINATORY DISREGARD FOR THE INTERESTS OF DARKINJUNG

110. In enacting the ALRA, Parliament was informed by the Report of the Parliamentary Joint Committee on Aboriginal Land Rights (**the Keane Report**) which looked at the circumstances of Aboriginal people across the State and the disadvantage that they suffered. In relation to how planning schemes operated, the Keane Report noted the difficulties they had in *"opposing land use schemes that detrimentally affect their own area of residency"*. It also notes that as towns were spreading out to reserves the Aboriginal *"communities were being ignored by local and State Government planners on questions of land usage and development"*. It explained that:

"Aborigines of New South Wales by virtue of their general position of socio-economic disadvantage stand in a position of relative inequality to non-Aborigines, in regard to access to local and State government land planning authorities.

Additionally to this position of inequality, Aboriginal communities are forced to accept and abide by the decisions of the non-Aboriginal Government agencies regardless of whether they adequately accommodate the views, proposals, or expectations of the Aboriginal people.

*As a result, the Aboriginal people of New South Wales suffer discrimination from various Government decision makers in relation to land development and planning. Thereby the ability of Aboriginal group to progress as self-determining communities can be stifled."*²¹

111. Thirty five years after the enactment of the ALRA, it is unsatisfactory that the same problems remain. Both the WACJV and the Department of Planning are fully aware of the extent of Darkinjung's land holdings in the area. The strategic importance of Nikko Rd to Darkinjung is also apparent. Darkinjung's reliance on Nikko Rd is clear

²¹ First Report from the Select Committee of the Legislative Assembly, 1980, at paras [9.11]-[9.15].

the importance of the Wyee Residential Development and the Bushells Ridge Residential development is also manifestly apparent. The potential impact of the Amended DA on Darkinjung's interests is self-evident.

112. The Amended DA states the Amended DA *"will avoid development on land owned by Darkinjung Local Aboriginal Land Council"*.²² Although it is not on land owned by Darkinjung, it is premised on the removal of the existing road access to Darkinjung's land, and places coal loading and rail infrastructure immediately adjacent to the land. Despite the extent of Darkinjung's land interests, the impacts of the proposal on those interests are ignored by the Amended DA. The interests of Darkinjung are reduced to only an interest in cultural heritage. The interests of Darkinjung as an adjoining land owner, with an interest in developing its land, are ignored.
113. The disregard for Darkinjung's interests as an adjoining land owner is discriminatory and contrary to the Director-General's requirements.

CONSIDERATION OF ALTERNATIVES

114. The Amended DA, at point 2.5 provides limited consideration of alternatives, however grossly inadequate for a project of this scale. Darkinjung responds to each of the alternate in the following table;

ALTERNATIVES CONSIDERED	Response
2.5.1 Alternative 1 – Original Project	<p>The original proposal was put forward on the presumption that significant burdens in the form of rail infrastructure and easements/ Mining Lease could be placed upon land not owned by the WACJV without the need to compensate the landowner (in this case Darkinjung).</p> <p>In this case, the proposed mining lease covers over 40 ha of Darkinjung's land. It is approximately 224m wide and bisects the core of Lot 195 across the entire parcel and through the adjoining Darkinjung Lot 193 for a distance of approximately 1950 metres in total. This land is zoned for industrial purposes and has been the subject of extensive studies and planning by Darkinjung in relation to its potential uses.</p> <p>Darkinjung sought fair and reasonable compensation for the proposed burden,</p>

²² Amended DA, p.X.

	as it is entitled to under the scheme of the ALRA.
2.5.2 Alternative 2 – Alternative Location of Train Load Out Facility	<p>This option considers the location of the coal loading facility closer to the Link Rd and residential area of Blue haven, but was considered unsuitable due to the relative proximity of the train load out facility to the Blue Haven residential area.</p> <p>Without the benefit of detailed information which considers Darkinjung's proposed residential developments (Gateway approved) immediately north of the proposed load out facility, it is presumed that impacts will be significant and adverse upon Darkinjung proposals, in the same manner as they would have impacted on residents of Blue Haven and therefore discontinued for this reason.</p>
2.5.3 Alternative 3 – Alternative Location of Rail Spur	<p>This option considers the location of the coal loading facility on the western side of the train lines but was considered unsuitable due to potential rail safety concerns and potential interactions with an existing access track used by the DLALC for accessing its lands to the north.</p> <p>Darkinjung was not consulted on this matter.</p> <p>In fact, the location of a rail siding on the western side of the rail line may have been beneficial to both parties, as this may have (subject to further design) opened up a rail siding adjacent to a significant parcel (greater than 100ha) of Industrial IN1 zoned land.</p>
2.5.4 Alternative 4 –Vales Point Power Station	No comment.
2.5.5 Alternative 5 – Amended Project <i>...The Amended Project removes direct land use conflict with neighbouring land owners in that it avoids development on both DLALC land and privately owned land, whilst ensuring legal access to adjacent private properties....</i>	<p>This option forms the Amended Project and grossly fails to adequately address impacts on adjacent Darkinjung land, as outlined elsewhere in this submission.</p> <p>The Amended Development application states on numerous occasions of the need to avoid having to gain consent from the NSW Aboriginal Land Council (pages i, iii,</p>

<p><i>...By avoiding development on Lot 195 DP 1032847 and other Aboriginal land, the requirement to obtain the consent of the NSW Aboriginal Land Council no longer applies. Therefore, the Amendment allows SSD-4974 to be determined in accordance with the EP&A Act.</i></p>	<p>x, 2, 16, 17, 98, 100) but fails to recognise the introduction of significant adverse impacts to other Darkinjung land in the immediate vicinity of the proposed rail siding , transfer station and loading facility.</p> <p>Darkinjung was not consulted in relation to this proposal.</p>
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NON-COMPLIANCE WITH DIRECTOR-GENERAL'S REQUIREMENTS

115. As noted above, there are numerous matters that have not been addressed, in the Amended DA, which the Director-General's Requirements issued for the original project required to be addressed in an EIS. The EIS is meant to be publicly exhibited so that the public can comment on them. The failure to address those matters in the EIS and allow public comment on them has undermined the public consultation process. It means that neither the public, or relevant Departments and agencies can properly consider, and respond to the project.

CONCLUSION

The ALRA is also an important measure consistent with Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples, which Australia ratified in April 2009.²³ In the Second Reading Speech for the Aboriginal Land Rights Amendment Bill 2014, the Minister for Aboriginal Affairs, Victor Dominello explained:

"... the Aboriginal Land Rights Act is not simply a tokenistic gesture acknowledging past wrongs; it is an important vehicle for Aboriginal people to shape their own social and economic futures. The importance of the Aboriginal Land Rights Act in Aboriginal social and economic development is recognised internationally. When James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, visited Australia in 2011, in addition to hailing our land rights model as "remarkable", he noted that the work of Aboriginal land councils in New South Wales in securing and developing Aboriginal lands to provide greater opportunities to Aboriginal peoples is:

... essential to operationalizing the standards set forth in the United Nations Declaration and to move forward in a future in which indigenous

²³ See for example Articles 26(2) and 28 of the United Nations Declaration on the Rights of Indigenous Peoples.

*peoples are in control of their development, participating as equal partners in the development process."*²⁴

For all the foregoing reasons, the Amended DA should be refused.

²⁴ Hansard, Assembly, 21 October 2014, p 1491



23 August 2016

Our Ref: 16-0836

Lynne Hamilton
Planning & Development Manager
Darkinjung Local Aboriginal Land Council
PO Box 401
WYONG NSW 2259

Dear Lynne

RE: REVISED WALLARAH 2 PROPOSAL AND ASSOCIATED LOSS OF ECONOMIC OPPORTUNITIES/BENEFITS TO DLALC

I refer to your recent instructions wherein you have requested overview advice as to the likely adverse impact on the economic opportunities and associated benefits that apply to the DLALC landholdings within the immediate area and which will be adversely impacted by the revised Wallarah 2 proposal, if it is approved.

As you are aware DLALC are proposing a major residential subdivision just to the north of the new/revised coal loading facility on land off Bushells Ridge Road and having a total yield of approximately 870 lots.

I am of the opinion that the close proximity of the proposed rail loading facility and associated infrastructure will have an adverse impact on the saleability of the 870 lots due to potential noise impact which could require acoustic treatment for dwellings.

In addition there is potential for adverse market reaction to potential impact due to coal dust.

As you will appreciate the market only needs to perceive a problem for saleability/marketability of land to be adversely affected.

Having regard to the above comments it is acknowledged that it is currently difficult to definitively assess the likely loss of economic opportunities/benefits, however as a minimum a reduction in gross realisable allotment value of \$10,000 would result in a significant loss to DLALC, i.e. 870 lots x \$10,000 per lot equals an \$8,700,000 loss over the life of the project.

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In addition to impacting on DLALC's residential development sites in this area the revised Wallarah 2 proposal will remove the potential for rail access to be provided to the industrial land owned by DLALC which is currently situated on the western side of the Main Northern Rail Line at Bushells Ridge.

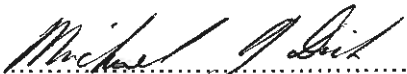
This industrial land is currently very well located, not only in relation to the Central Coast and Hunter industrial land markets but also to the Greater Sydney metropolitan area, noting the close proximity of the M1 Motorway whilst the NorthConnex which is currently under construction, will, when complete, further improve accessibility to Central Coast industrial property.

In relation to the industrial land at Bushells Ridge currently owned by DLALC, the potential availability of rail access makes this a unique industrial landholding. The removal of this potential rail access will have a significant adverse impact on potential economic opportunity and associated benefit to DLALC.

I understand the above advice is all that is required at this stage.

Please do not hesitate to contact me if you require any additional information.

Yours faithfully
MDA PROPERTY

A handwritten signature in black ink, appearing to read 'Michael J. Dick', is written over a dotted line.

MICHAEL J DICK
FAPI
CERTIFIED PRACTISING VALUER