

## CHAPTER 3 STATUTORY CONSIDERATIONS

### TABLE OF CONTENTS

<b>3</b>	<b>STATUTORY CONSIDERATIONS.....</b>	<b>3-1</b>
3.1	<b>Commonwealth Legislation .....</b>	<b>3-1</b>
3.1.1	Environment Protection and Biodiversity Conservation Act 1999 ...	3-1
3.2	<b>State Legislation.....</b>	<b>3-1</b>
3.2.1	Environmental Planning and Assessment Act 1979 .....	3-1
3.3	<b>State Environmental Planning Policies.....</b>	<b>3-2</b>
3.3.1	State Environmental Planning Policy (Major Projects) 2005.....	3-2
3.3.2	State Environmental Planning Policy (Mining, Petroleum Production And Extractive Industries) 2007 .....	3-3
3.3.3	State Environmental Planning Policy No 33 - Hazardous and Offensive Development.....	3-4
3.4	<b>Other State Legislation.....</b>	<b>3-5</b>
3.4.1	Mining Act 1992 .....	3-5
3.4.2	Protection of the Environment Operations Act 1997 .....	3-5
3.4.3	Threatened Species Conservation Act 1995 .....	3-6
3.5	<b>Local Environmental Planning Instruments .....</b>	<b>3-6</b>
3.5.1	Broken Hill Local Environmental Plan 1996.....	3-6
3.5.2	Broken Hill Development Control Plan No 11 Management Of Lead Contamination.....	3-7
3.6	<b>Summary Of Approvals, Permits And Referrals.....</b>	<b>3-7</b>

*This page has intentionally been left blank.*

### **3 STATUTORY CONSIDERATIONS**

*This chapter details the approvals required and the statutory context in which the Project must be considered.*

#### **3.1 COMMONWEALTH LEGISLATION**

##### **3.1.1 Environment Protection and Biodiversity Conservation Act 1999**

Pursuant to the provisions of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) an action requires approval from the Commonwealth Minister for the Department of the Environment and Water Resources if the action has, will have, or is likely to have a significant impact on any matters of National Environmental Significance (NES).

Matters of NES under the EPBC Act include:

- World Heritage Areas;
- wetlands protected by international treaty (The RAMSAR Convention);
- nationally listed threatened species and communities;
- nationally listed migratory species (i.e. those species listed by International conventions to which Australia is a signatory);
- all nuclear actions; and
- the environment of Commonwealth marine areas.

The Project Area is not a world heritage property, a natural heritage place, a Ramsar wetland or a Commonwealth marine environment, and the Project does not include nuclear actions.

No threatened or migratory species or communities listed under the EPBC Act were recorded within the Project Area. The Project is not likely to have a significant impact on any migratory or marine bird species protected under the EPBC Act. As such, a referral to the Minister for Environment and Conservation is not required.

#### **3.2 STATE LEGISLATION**

##### **3.2.1 Environmental Planning and Assessment Act 1979**

Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act) details the approval process of major infrastructure and other significant 'projects'. *Section 75(b)* identifies where Part 3A applies, it states:

*"... the carrying out of development that is declared under this section to be a project to which this Part applies:*

*(a) by a State environmental planning policy, or*

*(b) by order of the Minister published in the Gazette".*

*State Environmental Planning Policy (Major Projects) 2005* (Major Projects SEPP) defines certain developments that are major projects under Part 3A of the EP&A Act and to be determined by the Minister for Planning. This Project is referred to as a Major Project in the Major Projects SEPP and therefore Part 3A of the EP&A Act applies.

Under *Section 75(R)* of the EP&A Act Environmental Planning Instruments (EPIs) {other than State Environmental Planning Policies (SEPPs)} do not apply to a 'Major Project'. However, *Clause 75J(3)* states:

*"In deciding whether or not to approve the carrying out of a project, the Minister may (but is not required to) take into account the provisions of any environmental planning instrument that would not (because of section 75R) apply to the project if approved. However, the regulations may preclude approval for the carrying out of a class of project (other than a critical infrastructure project) that such an instrument would otherwise prohibit."*

This EAR, which assesses the likely impact of a Project on the environment, has been prepared in accordance with *Section 75(F)* of the EP&A Act and the Department of Planning Director General's Requirement.

Pursuant to *Section 75U* the following authorisations are not required for a project approved under Part 3A:

- a) *"the concurrence under Part 3 of the Coastal Protection Act 1979 of the Minister administering that Part of the Act,*
- b) *a permit under section 201, 205 or 219 of the Fisheries Management Act 1994,*
- c) *an approval under Part 4, or an excavation permit under section 139, of the Heritage Act 1977, a permit under section 87 or a consent under section 90 of the National Parks and Wildlife Act 1974,*
- d) *an authorisation referred to in section 12 of the Native Vegetation Act 2003 (or under any Act to be repealed by that Act) to clear native vegetation,*
- e) *a permit under Part 3A of the Rivers and Foreshores Improvement Act 1948,*
- f) *a bush fire safety authority under section 100B of the Rural Fire Act 1997,*
- g) *a water use approval under section 89, a water management work approval under section 90 or an activity approval under section 91 of the Water Management Act 2000."*

Pursuant to *Section 75V*, authorisation of a Mining Lease under the *Mining Act 1992* or an Environment Protection Licence under *Chapter 3* of the *Protection of the Environment Operations Act 1997* (for any of the purposes referred to in section 43 of that Act) cannot be refused if it is necessary for carrying out a project approved under Part 3A of the EP&A Act and it is substantially consistent with the Project Approval.

### **3.3 STATE ENVIRONMENTAL PLANNING POLICIES**

#### **3.3.1 State Environmental Planning Policy (Major Projects) 2005**

*State Environmental Planning Policy (Major Projects) 2005* (Major Projects SEPP) defines certain developments that are major projects under Part 3A of the EP&A and determined by the Minister for the Department of Planning.

Schedule 1 identifies mining activities that are classified as a Major Project, to which Part 3A of the EP&A Act applies. Clause 5 refers to mining developments and states:

*“(1) Development for the purpose of mining that:*

*(c) has a capital investment value of more than \$30 million or employs 100 or more people.*

As the Project has a capital investment value in excess of \$30 million and, at full capacity, will employ 143 people, Part 3A of the EP&A Act applies. This application has been prepared in response to this approval process.

### **3.3.2 State Environmental Planning Policy (Mining, Petroleum Production And Extractive Industries) 2007**

*State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (SEPP 2007)* consolidates and updates planning provisions related to these industries as well as ensuring that potential environmental and social impacts are adequately addressed during the assessment and determination of project applications. SEPP 2007 repeals *State Environmental Planning Policy No 45 – Permissibility of Mining (SEPP 45)* and *State Environmental Planning Policy No 37—Continued Mines and Extractive Industries (SEPP 37)*.

Clause 5(3) of SEPP 2007 states that SEPP 2007 prevails over any other EPI except for *State Environmental Planning Policy (Major Projects) 2005*, *State Environmental Planning Policy No 14—Coastal Wetlands* and *State Environmental Planning Policy No 26—Littoral Rainforests*.

Under Clause 7, development for the purposes of mining may be carried out only with consent. Clause 7 states:

*“Development for any of the following purposes may be carried out only with development consent:*

*(a) underground mining carried out on any land,*

*(b) mining carried out at surface level:*

*(i) on land where development for the purposes of agriculture or industry may be carried out (with or without development consent), or*

*(ii) on land that is, immediately before the commencement of this clause, the subject of a mining lease under the Mining Act 1992 or a mining licence under the Offshore Minerals Act 1999,*

*(d) facilities for the processing or transportation of minerals or mineral bearing ores on land on which mining may be carried out (with or without development consent), but only if they were mined from that land or adjoining land, ...”*

#### *Implications for the Project*

As SEPP 2007 prevails over other EPI, SEPP 2007 overrides the provisions of Broken Hill Local Environmental Plan (LEP) 1996. Clause 7 of SEPP 2007 identifies permissible development to include surface and underground mining and associated facilities. Consequently, notwithstanding LEP 1996, mining is a permissible use across the Project Area.

Under Clause 12, the consent authority is required to consider the compatibility of the Project with other nearby land uses. Potential land use impacts may result from the proximity of mining to residential uses. Acoustic, air quality and health related impacts are discussed in Chapters 7, 8 and 9 respectively and, where appropriate, management recommendations have been identified.

*Clause 14* of SEPP 2007 requires the consent authority to apply consent conditions that ensure a mining development is undertaken in an environmentally responsible manner, and in particular that impacts to significant surface and groundwater resources, threatened species and biodiversity and greenhouse gas emissions are avoided, or are minimised to the greatest extent practicable. Assessment of the potential impact of the Project on these key natural resources has been carried out as part of the Environmental Assessment Report and includes appropriate management measures where required.

The consent authority, under *Clause 15* of SEPP 2007, must also consider the efficiency or otherwise of the Project in terms of resource recovery and the minimisation of waste through reuse or recycling of material. *Chapters 15* and *9*, respectively, outline BHOP's waste management and energy reduction initiatives. *Chapter 10* provides information on the proposed recycling of underground water to minimise the potential requirement for sourcing this water from off-site sources.

Before granting approval, *Clause 16* of SEPP 2007 requires the consent authority to consider whether a mining application limits the transport of material via the public road system. All material will be exported from the site via rail and therefore impacts on the road system will be minimal.

In accordance with *Clause 17* of SEPP 2007, the consent authority must consider the need for a rehabilitation plan to be prepared for a mining development, which addresses the proposed waste generation and handling of the operation, and potential contamination and public safety issues associated with the proposed end use. The SEPP 2007 Planning Circular states that a rehabilitation strategy is required for all mines as part of the development approval process. A rehabilitation strategy has been prepared for Rasp Mine. This is discussed further in *Chapter 17*.

### **3.3.3 State Environmental Planning Policy No 33 - Hazardous and Offensive Development**

*State Environmental Planning Policy No. 33 – Hazardous and Offensive Development* (SEPP 33) requires development consent for hazardous or offensive development proposed to be carried out and to ensure that in determining whether a development is a hazardous or offensive industry, any measures proposed to be employed to reduce the impact of the development are taken into account.

*Clause 2* of SEPP 33 stipulates the specific aims of the Policy which are:

- a) *'to amend the definitions of hazardous and offensive industries where used in environmental planning instruments, and*
- b) *to render ineffective a provision of any environmental planning instrument that prohibits development for the purpose of a storage facility on the ground that the facility is hazardous or offensive if it is not a hazardous or offensive storage establishment as defined in this Policy, and*
- c) *to require development consent for hazardous or offensive development proposed to be carried out in the Western Division, and*
- d) *to ensure that in determining whether a development is a hazardous or offensive industry, any measures proposed to be employed to reduce the impact of the development are taken into account, and*
- e) *to ensure that in considering any application to carry out potentially hazardous or offensive development, the consent authority has sufficient information to assess whether the development is hazardous or offensive and to impose conditions to reduce or minimise any adverse impact, and*
- f) *to require the advertising of applications to carry out any such development'.*

All hazardous materials will continue to be managed in accordance with existing BHOP Environmental Management System procedures and policies, which are currently implemented at Rasp Mine.

The DoP in their 1994 document, Applying SEPP 33, state that *“Typically, the level of offence would not be considered significant if relevant EPA (or any other relevant pollution control) licences can be obtained; that is, if the EPA (or other licensing authority) is willing to issue a licence under its pollution control legislation”*. The existing Environment Protection Licence (EPL) for the Project Area (EPL No. 12559) will be updated to reflect changes resulting from the Project. The Project is not considered to be an offensive industry.

### **3.4 OTHER STATE LEGISLATION**

#### **3.4.1 Mining Act 1992**

The *Mining Act 1992* refers to the granting of Mining Leases and mining activities generally.

A mine is defined:

- a) *‘when used as a noun—any place, pit, shaft, drive, level or other excavation, drift, gutter, lead, vein, lode, reef or salt-pan (whether occurring naturally or artificially created) in, on or by means of which, any mining operation is carried on, and*

*when used as a verb—to extract material from land for the purpose of recovering minerals from the material so extracted or to rehabilitate land from which material has been so extracted, but does not include any activity declared not to be mining by a regulation under section 11A.’*

Under the *Mining Act 1992*, environmental protection and rehabilitation are regulated by conditions in all Mining Leases, including requirements for the submission and approval from I&I NSW of a MOP prior to the commencement of operations. Environmental protection and rehabilitation have been addressed in Part B of this EAR.

An application for a MOP will be prepared and lodged with I&I NSW for the Project. If the Project is granted Project Approval under the Part 3A planning process, approval must not be refused by I&I NSW and must be substantially consistent with the terms of the Project Approval.

#### **3.4.2 Protection of the Environment Operations Act 1997**

The *Protection of the Environment Operations Act 1997* (POEO Act) provides an integrated system of licensing for polluting industries. *Schedule 1* of the POEO Act identifies types of development that require an EPL. Included in *Schedule 1* are mines that:

*“... mine, process or handle minerals (being minerals within the meaning of the Mining Act 1992 other than coal) and that have disturbed, are disturbing or will disturb a total surface area of more than 4 hectares of land associated with a mining lease or mineral claim or subject to a section 8 notice under the Mining Act 1992 by:*

- (1) clearing or excavating, or*
- (2) constructing dams, ponds, drains, roads, railways or conveyors, or*
- (3) storing or depositing overburden, ore or its products or tailings. “*

Section 48 of the POEO Act requires scheduled activities listed in *Schedule 1* to hold a premises-based EPL. The EPL for the Project Area (EPL No. 12559) will be reviewed and updated as necessary to reflect changes to mine operations resulting from the Project.

### **3.4.3      *Threatened Species Conservation Act 1995***

Projects determined by a statutory authority of the NSW State Government, are required to be assessed in accordance with the EP&A Act, as amended by the *Threatened Species Conservation Act 1995* (TSC Act).

Section 3 lists the objects of the TSC Act, which are:

- “(a) to conserve biological diversity and promote ecologically sustainable development, and*
- (b) to prevent the extinction and promote the recovery of threatened species, populations and ecological communities, and*
- (c) to protect the critical habitat of those threatened species, populations and ecological communities that are endangered, and*
- (d) to eliminate or manage certain processes that threaten the survival or evolutionary development of threatened species, populations and ecological communities, and*
- (e) to ensure that the impact of any action affecting threatened species, populations and ecological communities is properly assessed, and*
- (f) to encourage the conservation of threatened species, populations and ecological communities by the adoption of measures involving co-operative management.”*

The presence of threatened flora and fauna species and endangered ecological communities were investigated as part of this EA and are discussed in *Section 12.3*. No threatened species or populations or endangered ecological communities listed under the TSC Act were recorded at the site during past investigations and their likely occurrence is considered to be low due to a lack of suitable habitat.

## **3.5      *LOCAL ENVIRONMENTAL PLANNING INSTRUMENTS***

### **3.5.1      *Broken Hill Local Environmental Plan 1996***

The Rasp Mine site is zoned partly *1(m) (Mining Zone)* and partly *2(c) (City Zone)* under the *Broken Hill Local Environmental Plan 1996* (Broken Hill LEP).

The aims of the *1(m) (Mining Zone)* are outlined in the development control table in *Clause 9* of the Broken Hill LEP, it states:

- “(a) to promote the efficient extraction of metals and minerals from proven and potential ore bearing ground through predominantly traditional underground mining methods, and*
- (b) to facilitate the efficient extraction of metals and minerals by open cut mining where:*
  - (i) the land has been declared unsafe for underground mining, and*
  - (ii) the reclamation of the land would enhance the potential reuse of the land, and*
- (c) to ensure that works associated with mining do not interfere with the natural environment, particularly surface water run-off systems and windblown dust, and*
- (d) to facilitate conservation, education, heritage or tourist development related to mining activities in a manner compatible with:*
  - (i) the continued extraction of metals and minerals, and*



- (ii) the environmental capabilities of the land, and*
- (iii) the cost of providing public services or amenities.”*

The objective of the 2(c) (City Zone) is to allow development in Broken Hill in a manner that is compatible with its urban function. Mines are prohibited on land zoned 2(c). However, as SEPP 2007 prevails over the Broken Hill LEP, mining is permissible at the site with development consent.

Part 4 of the Broken Hill LEP relates to heritage items and relics. *Clause 19* states:

*“(1) The following development may be carried out only with development consent:*

- (a) demolishing, defacing, damaging or moving a heritage item, or*
- (b) altering a heritage item by making structural changes to its exterior, or*
- (c) altering a heritage item by making non-structural changes to the detail, fabric, finish or appearance of its exterior, except changes resulting from any maintenance necessary for its ongoing protective care which does not adversely affect its heritage significance, or*
- (d) moving a relic, or excavating land for the purpose of discovering, exposing or moving a relic, or*
- (e) erecting a building on, or subdividing, land on which a heritage item is located.*

*(2) Development consent is not required by this clause if the Council is of the opinion that the proposed development would not adversely affect the heritage significance of the heritage item.*

*(3) When determining a development application required by this clause, the Council must take into consideration the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item.”*

Clause 20 states:

*(20) The Council must take into consideration the likely effect of the proposed development on the heritage significance of a heritage item, a heritage conservation area, archaeological site or potential archaeological site and on its setting when determining an application for consent to carry out development on land in its vicinity.*

Schedule 1 identifies heritage items in the Broken Hill local government area. There are a number of heritage items that are situated within the Project Area. Whilst the Minister is not obliged to consider the provisions of the Broken Hill LEP, this EAR has assessed the potential impact of the development on these heritage items (refer to *Chapter 11* and *Annexure L*).

### **3.5.2 Broken Hill Development Control Plan No 11 Management Of Lead Contamination.**

Development Control Plan (DCP) 11 provides guidelines for the management of issues relating to lead contamination. The EAR is supported by a health impact assessment which considers issues relating to lead and recommends appropriate management strategies. The outcomes of this assessment are presented in 9.

## **3.6 SUMMARY OF APPROVALS, PERMITS AND REFERRALS**

The following permits, licences and approvals will be sought for the Project:

- Project Approval under Part 3A of the EP&A Act, sought from the Minister for Planning;
- a variation to EPL No. 12559, sought from the DECCW under the POEO Act;
- licenses for water extraction under the *Water Management Act 1912*, and
- a MOP, sought from the I&I NSW under the *Mining Act 1992*.
- Water extraction licences under the *Water Management Act 1912*.