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Dear Tegan

### **Mount Pleasant Continued Operations, Muswellbrook LGA (SSD 10418). Review of Response to Submission Report.**

Heritage NSW (HNSW) has considered the Response to Submissions (RTS) report that was lodged with the Department of Planning Infrastructure and Environment (DPIE) regarding the 26 February 2021 HNSW submission (DOC21/ 59870-16) on Aboriginal cultural heritage (ACH). Apart from agreement by the proponent (MACH) on actions for the Aboriginal cultural heritage management plan (ACHMP), the content of the RTS is substantially in opposition to the HNSW submission.

A principle point of disagreement is the timing of additional assessment work proposed by HNSW. The RTS maintain that the HNSW recommendations can be accommodated post project approval. The HNSW submission requested these actions prior to project approval to ensure that ACH assessment is robust for adequately informing the DPIE determination process. HNSW had also met with DPIE and with the proponent to discuss these matters.

While it remains HNSW view that assessment prior to project approval is best practice and should be undertaken wherever possible, we have modified our previous response on the recommended additional surveys and test excavations and accept, in part, several of the responses on other matters raised in the RTS. The issues raised by HNSW regarding the re-assessment of scarred trees remain valid.

### **Ensuring a robust assessment and planning pathway**

The HNSW submission noted that the proponent is endeavouring to combine and amalgamate previous ACH assessment and approvals (*under the National Parks and Wildlife Act 1974*) with additional areas to be placed under a single planning approval (SSD). It is therefore relevant that the current application is supported by complete documentation as best as can be achieved under the current circumstances. The regulatory and planning processes overseeing future mine operations will need clear guidance from a robust assessment, overall.

### **HNSW response and recommendations**

Modified HNSW recommendations are described in **Attachment A** and HNSW comments regarding the modifications and the RTS are in **Attachment B**, overleaf. HNSW propose one recommendation to be acted on, pre-project approval (**Recommendation 1**). Further recommendations can be accommodated through the Aboriginal cultural heritage management plan, post project approval (**Recommendations 2-3**).

I encourage DPIE to consider the HNSW response to the RTS which have carefully considered and balanced to ensure that the Secretary's Environmental Assessment Requirements (SEAR) will be adequately addressed, given the current circumstances.

If you have any questions regarding the above advice, please contact Phil Purcell, Archaeologist at Heritage NSW on (02) 68835341 or phil.purcell@environment.nsw.gov.au.

Yours sincerely



**Dr Samantha Higgs**

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**ATTACHMENT A HNSW RECOMMENDATIONS**  
**ATTACHMENT B HNSW COMMENTS**

## **ATTACHMENT A      RECOMMENDATIONS**

**Recommendation 1:** Undertake a desktop analysis report of Aboriginal site and landforms associated with the un-surveyed lands.

Develop methods to test the findings of the analysis (post project approval if necessary) and if necessary, recommend measures to manage risks to ACH through, the ACHMP process.

**Recommendation 2:** A test excavation program for the 10 areas identified in the EIS as Zone A2R-C must be undertaken to inform the project design on the significance of the sites and, if determined high significance, modify the project design accordingly. The test program must be undertaken in partnership with the Registered Aboriginal Parties.

**Recommendation 3:** Determine if scarred trees described in Figure 10 of the RTS are Aboriginal culturally modified trees with reference to the *Field Guide for Identifying and Recording Aboriginal Scarred trees in NSW (DEC 2005)*.

## **ATTACHMENT B COMMENTS TO RTS**

### **DESKTOP ASSESSMENT**

HNSW acknowledge the access circumstances that have prevented the proponent to complete the ACH investigations and agrees that the broader project area and surrounding precinct has been extensively surveyed. It is noted that the RTS states land use disturbance history and low potential for some site types of significance as mitigating factors for excluding surveys at this juncture of the assessment.

The RTS has not considered the entirety of Aboriginal land use patterns and that other Aboriginal site types that may be present despite previous disturbances. It is noted however that the RTS is prepared to undertake surveys post approval. In the interim, HNSW recommend a desktop analysis report of Aboriginal site and landform relationship to calculate the probable distribution pattern of Aboriginal objects of the un-surveyed parcels of land where access issues persist. The report must provide guidance on the scale of field investigations required and which are proportionate to the findings of the analysis.

HNSW would be satisfied that the SEAR would be adequately addressed if an interim desktop assessment was completed pre-project approval. Post approval field investigations must follow and be executed in consultation with the Registered Aboriginal Parties (RAP), under the guidance of the Aboriginal Heritage Management Plan (AHMP).

HNSW accept the response from the proponent regarding survey coverage of Zone C lands. Should there be further development interest in the area, adequate ACH surveys will be conducted, as stated in the proponent's response.

### **TEST EXCAVATIONS (10 sites located in SSD Zone A2R-C)**

The RTS maintains that test excavations at 10 locations within the approved mine operation are unwarranted at this juncture of the project determination. The RTS reasons that the test excavations will be undertaken if future activities (subject to final design) potentially threaten the 10 locations. The RTS has also highlighted that earlier archaeological investigations of these areas report "uncertain" significance (McCardle 2007 in RTS:84) but that test excavations would be necessary if the areas are subject to project disturbance (South East Archaeology 2020a in RTS:84-85).

In weighing the RTS response HNSW refer to the code of archaeological practice which describes that, an archaeological test excavation is necessary when (regardless of whether or not there are objects present on the ground surface) it can be demonstrated that sub-surface Aboriginal objects with potential conservation value have a high probability of being present in an area, and the area cannot be substantially avoided by the proposed activity (DECCW 2010:24).

The previous archaeological investigations do not provide definitive statements regarding the potential of significant subsurface objects and the EIS assessment overall does not draw from the voluminous data sets from previous and current investigations to identify landform cultural

sensitivity (beyond general statements). HNSW accept that some of the RTS carry weight on this issue for example and as cited in the RTS,

*“...the appropriate management strategy for these sites is firstly to ‘reassess impacts with detailed design’, with test excavation if impacts are to occur, then further management as per the SSD AHMP for the site type, level of impacts and significance”.* (South East Archaeology 2020a in RTS:85)

### **Conditional acceptance of RTS**

HNSW conditionally accept the RTS on this matter because neither archaeological investigation sufficiently stated the potential conservation value of the 10 areas (significance) and the RTS has indicated that disturbance activities are not proposed at this juncture until final engineering plans are determined. HNSW accept the RTS that these areas will be subject to test excavations at a later stage of project development.

However, if the results of the test excavation program indicates Aboriginal objects of high significance, and in keeping with the principles of the code of practice (which is a component of the SEARs), HNSW expect that avoidance strategies and protection measures be put in place and by default, the proposed ancillary proposal and project water dam activities modified accordingly.

### **REASSESSMENT OF SCARRED TREES (CULTURALLY MODIFIED TREES)**

The RTS state that several of the trees, that the HNSW submission requests re-assessment, are outside of the MPO project boundary (and responsibility) and yet, the HNSW submission is based on the information provided by the MPO ACH assessment (the EIS). Figure 10 of the RTS place several of the trees within the adjoining Bengalla Mining Lease whilst some are located within an approved water pipeline corridor which, HNSW understand, carries dual interest for the Mt Pleasant project and Bengalla Mine project.

### **Advice on due diligence responsibility – Culturally modified trees**

HNSW is responsible for the management of registered Aboriginal objects and uses the Aboriginal Heritage Information Management System (AHIMS) for that purpose. Under the *National Parks and Wildlife Act 1974* a person with knowledge of an Aboriginal object (for example, Aboriginal culturally modified trees) must submit that information to AHIMS using the proscribed method stated in the Act.

There are potential land use planning and regulation uncertainties if the status of the trees is not determined. If confirmed as Aboriginal culturally modified trees, protective management of the trees must be actioned as part the ACHMP or, notification made to the responsible party or landholder.

HNSW take this opportunity to inform the proponent that unauthorized harm to Aboriginal culturally modified trees carries a strict liability offence. It is therefore important that the proponent ensure that their responsibility in this matter is clear and not assume that strict liability is extinguished under the EPA Act, in this instance.

To conclude this matter HNSW request that the proponent carry out or, facilitate, a determination of the trees as previously requested based on, prior knowledge of their

existence. Assessment of the trees must refer to the, *Field Guide for Identifying and Recording Aboriginal Scarred trees in NSW (DEC 2005)*.

### **SIGNIFICANCE ASSESSMENT**

HNSW acknowledge and accept the RTS regarding the issues raised in our previous submission.

### **CONSERVATION AREAS**

HNSW acknowledge and accept the RTS and look forward to continued dialogue regarding the final establishment of a conservation outcome, proportionate to the incremental and projected harm to ACH.

### **ABORIGINAL CONSULTATION – ACHA ADDENDUM REPORT**

HNSW acknowledge and accept the RTS.

### **ABORIGINAL CONSULTATION – FURTHER INVESTIGATIONS AND ASSESSMENTS**

HNSW accept the response from the proponent and acknowledge that continued engagement with the Registered Aboriginal Parties is continuing as part of the conservation areas and development of the ACHMP and activities authorized by the plan.

### **References**

Code of archaeological practice for the protection of Aboriginal objects in NSW provides further guidance on this matter (DECCW 2010:24).

Field Guide for Identifying and Recording Aboriginal Scarred trees in NSW (DEC 2005).

National Parks and Wildlife Act 1974 and Regulations 2009