

**Bylong Coal Project - Aboriginal Cultural Heritage Assessment
Expert Review
Peter Kuskie, South East Archaeology**

14 November 2018

1. The following review of issues relating to Aboriginal cultural heritage associated with the proposed Bylong Coal Project ('the Project') is provided at the request of EDO NSW acting on behalf of the Bylong Valley Protection Alliance.
2. I confirm that I have read Division 2 of Part 31 of the *Uniform Civil Procedure Rules 2005* (UCPR) and the Expert Witness Code of Conduct in Schedule 7 of the UCPR and I agree to be bound by it. I wish to reiterate that I do not act as an advocate for either party and that any opinion expressed is based on my professional training, knowledge and experience.
3. I declare that I have made all the inquiries which I believe are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which I regard as relevant have, to my knowledge, been withheld.
4. I confirm that the advice I am providing in relation to Aboriginal cultural heritage associated with the proposed Bylong Coal Project is as an independent expert and I am not aware of any potential or real conflict of interest that may exist or affect my ability to provide independent advice.
5. In relation to my qualifications and experience, I confirm that I hold a Bachelor of Arts (BA) Honours degree in archaeology (Australian National University, 1989) with majors in Aboriginal archaeology/prehistory and anthropology, and that I am a Member of the Australian Association of Consulting Archaeologists Inc. (AACAI). As principal and Director of South East Archaeology I have had extensive experience over a period of 28 years conducting Aboriginal heritage assessments, primarily in south-eastern Australia and particularly in New South Wales, for a wide range of projects related to the mining, infrastructure, residential and tourism industries, including similar projects to that presently under review. A copy of my cv is attached as Annexure A of this report.
6. My advice is based upon a review of the key documents pertaining to the Project application as lodged by KEPCO (the Proponent) and others with the NSW Department of Planning and Environment (DP&E) under Division 4.1 of Part 4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), including:
 - a) Appendix S of the Environmental Impact Statement, Aboriginal Archaeology and Cultural Heritage Impact Assessment (AACHIA), prepared by RPS Australia East Pty Ltd (RPS);
 - b) Bylong Coal EIS Response to Submissions (Hansen Bailey 2016);
 - c) Bylong Coal Response to Submissions OEH Comments (OEH 3 May 2016);
 - d) Bylong Coal Project PAC Review Report (July 2017);
 - e) Bylong Coal Project PAC Public Hearing Response (Hansen Bailey 2017);
 - f) Bylong Coal Project Response to PAC Review Report (Hansen Bailey 2018);
 - g) Bylong Coal Project SSD Final Assessment Report (DP&E 2018);
 - h) OEH advice on response to PAC review (OEH 31 October 2017);
 - i) Recommended Conditions to IPAC (DP&E 2018).

7. My advice is also based upon my extensive experience with Aboriginal heritage assessments in NSW over the past 28 years, including substantial experience with coal mining projects in the Central Tablelands and Hunter Valley regions (including for Ulan, Wilpinjong, Moolarben and Spur Hill) and my undertaking of projects of comparable scope and familiarity with the investigation area.
8. Numerous significant inadequacies are noted with the AACHIA (refer to comments below). The deficient quality of the AACHIA and non-compliances with the SEARS, particularly the *Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales* (DECCW 2010a) and *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010* (DECCW 2010b), provide no justification for acceptance of a heritage report in which these basic requirements have not been met. Recommended improvements to the Development Consent approval conditions are presented here in Table 1.
9. The qualifications and experience of the RPS heritage personnel (Tessa Boer-Mah, Gillian Goode and Kerrie Grant) are not specified. It is noted that this information has now been removed from the RPS website (it was previously available). It is not clear from the AACHIA or information available elsewhere that these persons had the appropriate skills and experience to prepare the AACHIA, required in Section 1.6 of the *Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales* (DECCW 2010a) as:
 - a) A minimum of a Bachelor's degree with honours in archaeology or relevant experience in the field of Aboriginal cultural heritage management, and
 - b) The equivalent of two years full-time experience in Aboriginal archaeological investigation, including involvement in a project of similar scope, and
 - c) A demonstrated ability to conduct a project of the scope required through inclusion as an attributed author on a report of similar scope.
10. A significant flaw of the AACHIA relates to how Registered Aboriginal Party (RAP) comments on the methodology or draft report were addressed. Documentation in the AACHIA is very inadequate, with barely any detail provided as to the specifics of the RAP comment or how the comment was addressed. There is no justification for exclusion from public review of the Aboriginal consultation details and documentation (Appendix 1 of the AACHIA) other than where requested by a RAP (and in my experience it is highly unlikely that every RAP requested every comment be kept 'confidential'). The lack of transparency shown by not providing key information is concerning.
11. Section 5.4.3 of the AACHIA (archaeology background) is very inadequate and fails to review the substantial investigations of similar contexts nearby for the Wilpinjong, Moolarben and Ulan coal mines, which would have informed development of occupation and predictive models, and survey and assessment methodologies.
12. A significant flaw of the AACHIA relates to the lack of development of a model of Aboriginal occupation for the locality (how Aboriginal people used the landscape, including in relation to different environmental and cultural variables) and very limited definition of the expected nature and distribution of Aboriginal heritage evidence (a "predictive model of site location", for example, statements about where a specific site type may be located, such as grinding grooves may occur where sandstone bedrock is exposed, which occurs in ... locations within the Project area).
13. **The most significant flaw of the AACHIA relates to the lack of archaeological survey coverage across the geographic extent of the project impact area.** Only two weeks were initially allowed by RPS for the survey, which ultimately extended to five weeks in response to issues raised by the Aboriginal representatives. Nevertheless, for a Project area of this size (reported in the EIS as a surface impact area of 1,160 hectares or 11.6 square kilometres, and a subsidence impact area of 1,714 hectares or 17.14 square kilometres) such a limited survey time is in my opinion inadequate.

No information is presented in the AACHIA on even such basic issues as the size of the surface impact area, size of the underground impact area or location and extent of heritage survey coverage of these areas, other than minor unsubstantiated details hidden in one summary table in Appendix 2.

No figure is presented showing the GPS recorded transects of the survey teams, another non-compliance with the SEARS (*Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales* {DECCW 2010a}).

Significantly, the absence of descriptions and figures showing the heritage survey coverage area also means that the **impact areas that were not subject to heritage survey coverage** (and therefore for which the identification of Aboriginal sites/cultural values and assessment of project impacts on those sites/values has not occurred) has not even been considered in the AACHIA. These deficiencies and non-compliances with the SEARS alone should have resulted in rejection of the AACHIA.

14. The justification for the assessment of site significance, and relationship between the potential impacts and the proposed management strategies, are not explained in sufficient detail. Overall, this AACHIA is extremely weak in relation to the level of detail required for compliance with the SEARS, particularly the *Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales* (DECCW 2010a) and *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010* (DECCW 2010b). The significance assessment is not supportable (as required under the *Code of Practice*) as it does not identify the individual criteria or threshold levels for which each site met the assessed level of significance, and the process of using a combined numerical ranking has long been discredited and is not consistent with *The Burra Charter* assessment processes. In terms of impact assessment, a fundamental non-compliance of the AACHIA is that no tabulation specifying the type of harm, degree of harm, and consequence of harm for each site, as required by the *Code of Practice*, is presented. There is virtually no evaluation of alternative management strategies for each site, or justification for the selected management strategy, or assessment of how the recommended strategy would contribute to minimising or mitigating the impacts of the project, all fundamental non-compliances of the AACHIA with the *Code of Practice*.
15. OEH concerns about the AACHIA status of recorded sites (such as the 'ochre site'), absence of interpretative lithic analysis, flaws of the cumulative impact assessment model, failure to review and incorporate the wealth of heritage information available from the nearby Ulan, Wilpinjong and Moolarben mines and other issues raised in the numerous submissions are supported in my view but have been identified by the OEH and/or others and are not addressed further here. Notwithstanding, it is noted that the proponent's responses in the Response to Submissions (Hansen Bailey 2016) are very brief and in most cases have not addressed the initial concerns raised.
16. It appears that much of the EIS process has involved confidential negotiations between the proponent and the OEH with respect to the Aboriginal heritage assessment and a draft (not publically available) Aboriginal Heritage Management Plan (AHMP). It is regrettable that there is limited information available about these negotiations, which detracts from the transparency of the EIS process. It does not appear that these 'negotiations' have addressed the issues we have identified above (refer also to Table 1). That such a focus of the OEH effort seems to have been involved in addressing one 'site' (an 'ochre site') that is not a verified Aboriginal site, to the detriment of the numerous non-compliant and inadequate aspects of the AACHIA, is regrettable.
17. Draft Development Consent conditions have been released. In relation to Aboriginal heritage, recommendations are presented in Table 1 below to strengthen these conditions and address the substantial deficiencies identified above with the AACHIA.

Prepared by:



Peter J. Kuskie,
Director,
South East Archaeology Pty Limited.

References:

DECCW 2010a *Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales*. DECCW: Sydney.

DECCW 2010b *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*. DECCW: Sydney.

Table 1: Summary of key inadequacies of AACHIA and proposed recommendations to improve the Development Consent Conditions.

Aboriginal Heritage Issue	Details of Issue	Recommended Improvement to Consent Condition or Alternative Action
<p>Qualifications and experience of heritage practitioners (#8 above).</p>	<p>The qualifications and experience of the RPS heritage personnel (Tessa Boer-Mah, Gillian Goode and Kerrie Grant) are not specified. It is not clear from the AACHIA or information available elsewhere that these persons had the appropriate skills and experience to prepare the AACHIA, required in Section 1.6 of the <i>Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales</i> (DECCW 2010a). The substantial deficiencies identified with the AACHIA can be attributed in the first instance to this issue.</p>	<p>For the present Project, the Independent Planning Commission (IPC) should make their own enquiries as to the suitability of the qualifications and experience of the personnel that prepared the heritage assessment, and if deemed inadequate and non-compliant with the SEARS, reject the AACHIA.</p> <p>For future EIS, DP&E should require lodgement with the Aboriginal Cultural Heritage Assessment of the Curriculum Vitae of each “archaeologist” (as is often and justifiably requested by Aboriginal representatives).</p> <p>For the Project, if approved, the following requirement should be added to Consent Condition 42(c):</p> <ul style="list-style-type: none"> • all additional heritage investigations will be conducted by suitably qualified and experienced professionals whose appointment has been endorsed by the DP&E, and for any Aboriginal archaeological works (eg. survey or salvage), those professionals will meet the minimum requirements specified in Section 1.6 of the <i>Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales</i>.
<p>Aboriginal community consultation (#9 above).</p>	<p>Documentation in the AACHIA is very inadequate, with barely any detail provided as to the specifics of RAP comments about the heritage methodology or draft report or how those comments were addressed. There is no justification for exclusion from public review of the Aboriginal consultation details and documentation (Appendix 1) other than where requested by a RAP.</p>	<p>For the present Project, the Independent Planning Commission should require that Appendix 1 of the AACHIA is made publically available (apart from where specifically requested by a RAP that their comments are not made public). The IPC should require that the Proponent lodge a complete table showing all RAP comments and how they were addressed in the final methodology and/or final AACHIA.</p>

Aboriginal Heritage Issue	Details of Issue	Recommended Improvement to Consent Condition or Alternative Action
		<p>For future EIS, DP&E should ensure that all correspondence from RAPs is lodged in the EIS and made publically available (other than where specifically requested by a RAP that their comments are not made public) and that the Proponent clearly demonstrates how each comment from a RAP has been addressed.</p> <p>For the Project, if approved, the following requirement should be added to Consent Condition 42(b):</p> <ul style="list-style-type: none"> • be prepared in consultation with OEH and the RAPs and include evidence of how any issues raised by the RAPs have been addressed.
Archaeological background (#10 above).	Section 5.4.3 of the AACHIA (archaeology background) is very inadequate and fails to review the substantial investigations of similar contexts nearby for the Wilpinjong, Moolarben and Ulan coal mines, which would have informed development of occupation and predictive models, and survey and assessment methodologies.	<p>For the Project, if approved, the following requirement should be added to Consent Condition 42(c):</p> <ul style="list-style-type: none"> • prior to the conduct of any heritage salvage activities, detailed review will be undertaken of previous heritage investigations at Ulan, Moolarben and Wilpinjong mines, and a model of Aboriginal occupation and a detailed predictive model will be developed, with information included in the first heritage report prepared under the AHMP.
Occupation and predictive modelling (#11 above).	A significant flaw of the AACHIA relates to the lack of development of a model of Aboriginal occupation for the locality (how Aboriginal people used the landscape, including in relation to different environmental and cultural variables) and very limited definition of the expected nature and distribution of Aboriginal heritage evidence (a "predictive model of site location", for example, statements about where a specific site type may be located, such as grinding grooves may occur where sandstone bedrock is exposed, which occurs in ... locations within the Project area)	Refer to recommendation above in relation to Consent Condition 42(c).
Archaeological survey coverage (#12 above).	The most significant flaw of the AACHIA relates to the lack of archaeological survey coverage across the geographic extent of the project impact area. Only two weeks was initially allowed by RPS for the survey, which ultimately extended to five weeks in response to issues raised by the Aboriginal representatives. Nevertheless, for a Project area of this size (reported in the EIS as a surface impact area of 1,160 hectares and a subsidence impact area of 1,714 hectares) such a limited survey time appears inadequate.	For the present Project, the Independent Planning Commission should require that the proponent lodge figures/mapping showing the GPS recorded transects of the survey teams, along with the archaeological survey areas that were effectively sampled on site for Aboriginal heritage (and this should be made publically available).

Aboriginal Heritage Issue	Details of Issue	Recommended Improvement to Consent Condition or Alternative Action
	<p>No information is presented in the AACHIA on even such basic issues as the size of the surface impact area, size of the underground impact area or extent of heritage survey coverage of these areas, other than minor unsubstantiated details hidden in one summary table in Appendix 2. No figure is presented showing the GPS recorded transects of the survey teams, another non-compliance with the SEARS (<i>Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales</i> {DECCW 2010a}).</p> <p>Significantly, the absence of descriptions and figures showing the heritage survey coverage area also means that the impact areas not subject to heritage survey coverage and therefore identification of Aboriginal sites/cultural values and assessment of project impacts on those sites/values is not presented (or even considered in the AACHIA). These deficiencies and non-compliances with the SEARS alone should have resulted in rejection of the AACHIA</p>	<p>The IPC should assess (perhaps with independent expert Aboriginal archaeological advice) whether this level of survey sampling was sufficient for the fundamental purposes of the EIS (ie. to identify what Aboriginal heritage is present, its significance, the impacts on it, and how it should be managed) and to identify what gaps there were in the coverage and therefore what gaps there were in the identification of and management of Aboriginal sites (or potential evidence).</p> <p>In relation to areas that were not surveyed/assessed, the IPC should either require that these are rectified prior to approval through survey, assessment and reporting, or the recommended conditions below are incorporated into the Consent Conditions.</p> <p>For future EIS, DP&E should ensure that the requirements of the <i>Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales</i> (DECCW 2010a), particularly Requirements 5, 8 and 9, are actually adhered to. There is no justification for DP&E acceptance of a heritage report in which these basic requirements have not been met.</p> <p>For the Project, if approved, the following requirements should be added to Consent Condition 42(c):</p> <ul style="list-style-type: none"> • that prior to impacts occurring, the areas not subject to heritage survey should be identified and subject to systematic heritage survey in consultation with the RAPs and consistent with the requirements of the <i>Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales</i>. • include detailed management measures for previously unrecorded Aboriginal sites that may be identified during the course of the project, based on the type of site, its level of significance, and the nature of potential impacts.

ANNEXURE A: CURRICULUM VITAE

NAME: (Mr) KUSKIE, PETER JAMES

Position: Director, South East Archaeology Pty Limited

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Relevant Employment Experience:

Consultant Archaeologist, South East Archaeology, 1989 - present.

Key projects as principal consultant include:

- ❑ Part 3A assessment of Ulan Coal Mine's Continued Operations Project near Mudgee, involving extensive survey of a 50 square kilometre area over 21 weeks, with in excess of 900 Aboriginal sites recorded, including open artefact sites, rock shelters, grinding grooves, scarred trees, stone arrangements and art sites (UCML/Glencore);
- ❑ Survey over a five week period, with over 1,000 Aboriginal sites recorded, and salvage excavations over a 27 week period at the 37 square kilometre Mount Arthur North Coal Mine (URS Australia, BHP Billiton);
- ❑ Part 3A and Part 4.1 State Significant Development assessments of major coal mining Projects, Extensions and Modifications including at Spur Hill (Spur Hill Management / Resource Strategies), Tasman (Donaldson Coal), Abel Mine (Ellembey Resources / Donaldson Coal), Bloomfield (Bloomfield Colliery), Wilpinjong (Peabody) and Moolarben (Yancoal);
- ❑ Part 3A assessment of the Australian Rail Track Corporation's 32 kilometre Maitland to Minimbah and 11 kilometre Minimbah to Wittingham rail upgrades in the Hunter Valley, involving surveys and mitigation measures (Hunter 8 Alliance);
- ❑ Pacific Highway Upgrades, including extensive survey and test excavations of the 37 kilometre Oxley Highway to Kempsey route near Port Macquarie and survey of the 27 kilometre Woolgoolga to Wells Crossing route near Coffs Harbour (GHD/RTA);
- ❑ Surveys, test excavations and salvage excavations for large residential developments at Thornton North in the Hunter Valley (Investa Property Group, County Property Group and Defence Housing Australia);
- ❑ Surveys and mitigation projects for numerous water and sewerage pipeline routes in the Hunter Valley and Central Coast (GHD, Hunter Water Corporation, Department of Commerce, Wyong Shire Council);
- ❑ Surveys and mitigation projects for The Vintage residential golf course (Stevens Group);
- ❑ Salvage and test excavations over an 18 week period for 'The Dairy' ('The Lakes') residential development near Ulladulla (Elderslie Property Investments) and over a 10 week period for Australian Property Growth Fund;

- ❑ Salvage excavations over a 12 week period at Lemington Mine, near Singleton (Lemington Coal Mines);
- ❑ Salvage excavations over a 14 week period of two Aboriginal sites along the F3 Freeway (M1) at Black Hill, near Maitland (RTA);
- ❑ Survey of BHP Petroleum and Westcoast Energy Australia's 740 kilometre long Eastern Gas Pipeline, from Longford, Victoria, to Wilton, NSW;
- ❑ Surveys of Optus Communications' mobile telecommunications network throughout NSW and Queensland and fibre optic cable network from Sydney to Brisbane and Cootamundra to Canberra (Optus Communications, Landscan);
- ❑ Survey for Dorrigo Three Year Environmental Impact Study (State Forests of NSW);
- ❑ Heritage studies at Coffs Harbour (Coffs Harbour and District Local Aboriginal Land Council), Bingie Bingie Point (Cobowra LALC) and the Hunter Valley (Mindaribba LALC);
- ❑ Excavations in Guam, Micronesia, USA (Dames and Moore, National Heritage Studies);
- ❑ Acting Senior Conservation Officer, Australian Heritage Commission (1993);
- ❑ Additional sub-surface investigations and salvage projects in NSW at numerous locations, including Rothbury (RTA), Thornton (GHD, Beechwood Homes, CPG, UrbisJHD), St. Georges Basin (Shoalhaven City Council), Cudmirrah National Park (DECCW), Bewong (Cowman Stoddart), Wollongong (Wollongong City Council), Merimbula (Ridge Consolidated, Bega Valley Shire Council, RTA and Bega Traditional Aboriginal Elders Council), Old Erawal Bay (Matrix Planning), Fishermans Paradise (Matrix Planning) and various locations (Optus Communications).
- ❑ Additional surveys throughout NSW, including:
 - Hunter Valley - numerous locations, such as Anna Bay, Bayswater, Beresfield, Cessnock, Fishermans Bay, Jerrys Plains, Lemington, Maitland, Rothbury, Singleton, Thornton, Tomago, Wambo and Wyong - for clients including Egis, Devine Erby Mazlin, GHD, HWC, Lemington Mine, MPE, Newcastle City Council, Rail Access Corporation and Umwelt;
 - Central Coast - numerous locations, including Wyong, Warnervale, Mardi, Wamberal, Ourimbah, Dora Creek, Toronto, Fennell Bay, Boolaroo, West Wallsend and Woy Woy - for clients including GHD, Department of Commerce, Wyong Shire Council and Connell Wagner;
 - South Coast - numerous locations, including Batemans Bay, Bendalong, Berry, Bewong, Broulee, Callala Beach, Cobargo, Congo, Conjola, Cudmirrah, Dapto, East Nowra, Eurobodalla NP, Fishermans Paradise, Jervis Bay NP, Kangaroo Valley, Lake Conjola, Milton, Moruya, Nowra, Potato Point, St. Georges Basin, West Dapto, Wollongong - for clients including Bullock Walters & Associates, Cowman Stoddart, Crescent Home Plan & Design Service, Eurobodalla Shire Council, Forbes Rigby, Glenshaw Holdings, Grenon-Walker, Horseshoe Pastoral Company, Matrix Planning, Maunsell, Miltonbrook, Niche Environmental Information, DECCW, P.W. Rygate & West, Shoalhaven City Council, State Forests of NSW, Town & Country Real Estate and Travers Morgan;
 - Far South Coast - numerous locations, including Bournda NP, Dalmeny, Bega, Merimbula, Tuross Falls - for clients including Bega Valley Shire Council, Great Southern Energy, GHD, Caddey Searl and Jarman, DECCW and RTA;
 - Southern and Central Tablelands - numerous locations, including Goulburn, Marulan, Yass, Snowy Mountains, Tallaganda, Gundagai, Cowra and Ulan - for clients including Ulan Coal Mine, Cowra Shire Council, Matrix Planning, Cowman Stoddart, SMEC, State Forests of NSW, DECCW and Gundagai Shire Council;
- ❑ Surveys in the ACT at Mitchell, Hume, Conder, Banks, Gungahlin and West Belconnen (ACT Government) and ACT site mapping project (Canberra Archaeological Society).

Professional Skills:

- ❑ Managing and conducting large-scale and small-scale Aboriginal heritage projects;
- ❑ Planning and conducting archaeological surveys of Aboriginal and non-indigenous heritage sites;
- ❑ Planning and conducting archaeological excavations of Aboriginal sites, including artefact scatters, shell middens and rock shelters;
- ❑ Preparation of OEH Section 90 applications and the conduct of sub-surface investigations and mitigation measures;
- ❑ Preparing Aboriginal heritage management plans and Aboriginal heritage impact assessment reports compliant with the OEH, Department of Planning and Environment and other Government requirements;
- ❑ Liaising with Aboriginal communities, clients and government agencies;
- ❑ Assessing heritage site significance;
- ❑ Analysing shell midden deposits and stone artefacts; and
- ❑ Statistical analysis of archaeological data.

Academic Qualifications:

Tertiary degree: Bachelor of Arts (Honours) Australian National University
Result, 1989 Prehistory IV Honours: H2A