

## David Watt's Speech Vickery Extension Public Hearing 4.2.19 Boggabri

We simply cannot rely on the economic argument in assessing this project. It must be assessed in consideration of the triple bottom line. It is clear that this company doesn't have a social licence nor does this project have a net social benefit to this community, and likewise it doesn't have an environmental license.

On 14 April 2016, the then Commonwealth Department of the Environment determined that the Vickery Extension Project was a Controlled Action because it would impact upon threatened species and communities and a water resource.

Therefore the Secretaries Environmental Assessment Requirements or SEARS were amended to include the requirement that the environmental record of the proponent is included in the EIS, so as to satisfy the Environment Protection and Biodiversity Conservation Act 1999.

However on the 17<sup>th</sup> of July last year, after this amendment was included, Whitehaven coal decided to change proponent from Whitehaven coal Pty Ltd to Vickery Coal Pty Ltd. Why would they do this?  
*Please refer to attachment A.*

Because Whitehaven coal has a rap sheet as long as your arm!

In August of 2017, Environmental Justice Australia obtained Whitehaven's annual compliance reports for its Namoi mines covering the previous 6 years, through freedom of information requests. These took nine months to obtain as Whitehaven tried to block them at every turn. The documents revealed more than 50 breaches of environmental licence conditions, including fines at Tarrawonga and Narrabri for polluting waterways with contaminated water, and fines for falsifying a green group on The CCC for Maules Creek mine. Of the 20 annual reports only 2 were found to be compliant.

In July of 2017 Maules Creek Coal Mine was elevated by the EPA to the highest environmental risk category, level 3. This ruling positioned Whitehaven's mine as one of only 3 mines in NSW to carry this highest category rating.

In contrast, Vickery Coal Pty Ltd has had no fines or beaches, as the company was only registered on the 17<sup>th</sup> of May 2018.

Whitehaven have declared in the EIS that  
The applicant for the Project is Vickery Coal Pty Ltd (a subsidiary of Whitehaven).  
No proceedings under a Commonwealth, State or Territory law for the protection of the environment or the conservation and sustainable use of natural resources have been taken against Vickery Coal Pty Ltd.

It is important to note that under  
Section 136, chapter 4 of the EPBC act it clearly states that

-In deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval, having regard to:

(a) the person's history in relation to environmental matters; and

(b) if the person is a body corporate--the history of its executive officers in relation to environmental matters; and

(c) if the person is a body corporate that is a subsidiary of another body or company (the parent body)--the history in relation to environmental matters of the parent body and its executive officers. Attachment B

Therefore Whitehaven coal Pty Ltd's history should have been declared as part of the EPBC referral this is their attempt at creative deception. However legislation requires that since Vickery Coal Pty Ltd is a wholly owned subsidiary of Whitehaven coal Pty Ltd, their environmental history is still captured by the amended application and MUST be detailed and considered.

Delving at a little further into this, the policy statement relevant to this section of the EPBC act states that:

Information relevant to the person's environmental history is that which will indicate whether a person is likely to comply with the conditions of an approval." Attachment C

"Likely to comply with the conditions of approval". As one of the great modern day philosophers, Dr Phil says, " the best predictor of future behaviour is past behaviour".

Given the proponents history of non-compliance, If there is any question about the science behind this mining project, and there obviously is, then to use a cricket analogy, the benefit of the doubt must lie with the environment.

And when I'm talking about the environment, I'm not talking about just in a green context. I mean it the way the word was intentioned. The surrounds, the environs. In this situation I'm talking about the river, the groundwater, the animals, the farmland and the families.

Allowing this company to progress with this development in this area is environmental mismanagement in the most extreme and gross negligence on behalf of the state government. The government must consider the environmental record of Whitehaven coal, including all of its subsidiaries. While many are focused on the potential economic benefits it could provide in the short term we are ignoring the intergenerational debt it will create from this gross environmental mismanagement.

**Notification of****CHANGE OF DESIGNATION OF PROPONENT**

Vickery Extension Project, Gunnedah, NSW, (EPBC 2016/7649)

This decision is made under section 78(5) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)(**EPBC Act**).

**Person designated as the proponent under section 75 of the EPBC Act (First proponent)**

<b>First proponent</b>	Whitehaven Coal Pty Ltd ACN 086 426 253
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<b>Proposed action</b>	The extension of the open cut mining operations at the Vickery Coal Mine and related surface infrastructure and activities, 25 km north of Gunnedah, NSW (see EPBC Act referral 2016/7649 and the variation approved on 17 February 2017)
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**Change of designation of proponent to another person (Later proponent)**

<b>Reconsideration of decision</b>	Pursuant to section 78(5) of the EPBC Act, I, Kim Farrant, Assistant Secretary, Assessments and Waste Branch, Department of the Environment and Energy, a delegate of the Minister for the Environment and Energy for the purposes of the EPBC Act, revoke the designation of Whitehaven Coal Pty Ltd as proponent of the proposed action and designate Vickery Coal Pty Ltd as proponent of the proposed action.
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<b>Later proponent</b>	Vickery Coal Pty Ltd ACN 626 224 495
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<b>Name and position</b>	Kim Farrant Assistant Secretary Assessments and Waste Branch
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<b>Signature</b>	
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<b>Date of decision</b>	17.7.18
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**ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 - SECT 136 General considerations**

**ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 - SECT 136**

**General considerations**

Mandatory considerations

(1) In deciding whether or not to approve the taking of an **action**, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:

- (a) matters relevant to any **matter protected** by a provision of Part 3 that the Minister has decided is a **controlling provision** for the **action**;
- (b) economic and social matters.

Factors to be **taken** into account

(2) In considering those matters, the Minister must **take** into account:

- (a) the **principles of ecologically sustainable development**; and
- (b) the **assessment report** (if any) relating to the **action**; and
  - (ba) if Division 3A of Part 8 (assessment on referral information) applies to the **action**--the finalised recommendation report relating to the **action** given to the Minister under **subsection 93(5)**; and
  - (bc) if Division 4 of Part 8 (assessment on preliminary documentation) applies to the **action**:
    - (i) the documents given to the Minister under **subsection 95B(1)**, or the statement given to the Minister under **subsection 95B(3)**, as the case requires, relating to the **action**; and
    - (ii) the recommendation report relating to the **action** given to the Minister under **section 95C**; and
  - (c) if Division 5 (public **environment** reports) of Part 8 applies to the **action**:
    - (i) the finalised public **environment** report relating to the **action** given to the Minister under **section 99**; and
    - (ii) the recommendation report relating to the **action** given to the Minister under **section 100**; and
  - (ca) if Division 6 (environmental **impact** statements) of Part 8 applies to the **action**:
    - (i) the finalised **environmental impact** statement relating to the **action** given to the Minister under **section 104**; and
    - (ii) the recommendation report relating to the **action** given to the Minister under **section 105**; and
  - (d) if an inquiry was conducted under Division 7 of Part 8 in relation to the **action**--the report of the **commissioners**; and
  - (e) any other information the Minister has on the **relevant impacts** of the **action** (including information in a report on the **impacts of actions taken** under a policy, plan or program under which the **action** is to be **taken** that was given to the Minister under an agreement under Part 10 (about strategic **assessments**)); and
  - (f) any relevant comments given to the Minister in accordance with an invitation under **section 131** or **131A**; and

(fa) any relevant advice obtained by the Minister from the Independent Expert **Scientific Committee** on Coal Seam Gas and **Large Coal Mining Development** in accordance with **section 131AB**; and

(g) if a notice relating to the **action** was given to the Minister under **subsection 132A(3)**--the information in the notice.

Note: The Minister must also **take** into account any relevant comments given to the Minister in response to an invitation under **paragraph 131AA(1)(b)**. See **subsection 131AA(6)**.

#### Person's **environmental** history

(4) In deciding whether or not to approve the taking of an **action** by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval, having regard to:

(a) the person's history in relation to **environmental** matters; and

(b) if the person is a body corporate--the history of its executive officers in relation to **environmental** matters; and

(c) if the person is a body corporate that is a subsidiary of another body or company (the **parent body**)--the history in relation to **environmental** matters of the parent body and its executive officers.

#### Minister not to consider other matters

(5) In deciding whether or not to approve the taking of an **action**, and what conditions to attach to an approval, the Minister must not consider any matters that the Minister is not required or permitted by this Division to consider.



Australian Government

Department of Sustainability, Environment,  
Water, Population and Communities

# ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)

## Policy Statement

### Consideration of a Person's Environmental History when making Decisions under the EPBC Act

#### Overview

This Policy Statement relates assessing a person's 'environmental history' for the purposes of making decisions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations).

In particular, environmental history is a relevant consideration for decisions under subsections 136(4), 143(3), 144(3), and 145(3) of the EPBC Act.

The Policy Statement sets out:

- the decisions under the EPBC Act which require consideration of a person's environmental history;
- the kind of information relevant to a person's environmental history;
- sources of information relating to a person's environmental history; and
- how to ensure that a person has an opportunity to comment on any information relied on in the decision-making process.

#### Decisions involving consideration of a person's environmental history

##### Approval of actions (Chapter 4)

The Minister responsible for administering the EPBC Act or their delegate (**Minister**) may have regard to a person's *history in relation to environmental matters* (their **environmental history**) when making certain decisions under the EPBC Act. (For ease of reference, the Minister and Ministerial delegates are subsequently referred to as the Minister.) This consideration of a person's environmental history applies in particular to decisions concerning:

**Assessment approach: referral documentation**—under subsection 87(4A) of the EPBC Act the Minister may only decide on an assessment on referral information if satisfied that the action meets the prescribed criteria set out in Division 5.1A of the EPBC Regulations, which includes (if the information is available) that the person proposing to take the action has a satisfactory record of responsible environmental management and compliance with environmental laws (regulation 5.03A(1)(e) of the EPBC Regulations);

**Approval of an action**—under subsection 136(4) the Minister may have regard to a person's environmental history when considering whether to grant an approval to that person for the taking of an action and/or attach conditions to that approval;

**Variation, suspension or revocation of approval**—the Minister may take into account an approval holder's environmental history when deciding whether to revoke, vary or add to conditions (subsection 143(3)), or suspend or revoke an approval (subsections 144(3) and 145(3)); and

**Consent to transfer an approval**—under subsection 145B(4) the Minister may consider the transferee's environmental history when deciding whether to consent to the transfer of an approval.

### Permit applications (Parts 13 and 13A)

The Minister may, in deciding whether to grant a permit to a person under Parts 13 or 13A of the EPBC Act, consider whether the person has, in the 10 years before the application, been convicted of an offence mentioned in regulation 17.07(1) of the EPBC Regulations or, is subject to proceedings for such an offence. The Minister could also consider other information about a person's environmental history if relevant to the grant of the permit.

### Bodies corporate, subsidiaries and executive officers

The EPBC Act does not define 'body corporate', but the term ordinarily means any artificial person<sup>1</sup> which has a separate legal identity and is identified by a particular name. These entities have perpetual

succession<sup>2</sup>. They have the power to act, hold property, enter into legal contracts, and can sue and be sued in their own name. Bodies corporate include entities created by statute, by registration under statute, and under common law. Bodies corporate can apply for approvals and permits under the EPBC Act.

Under sections 136 (4), 143(3), 144(3), 145(3) and 145B(4) of the EPBC Act, if the relevant person (i.e. the proponent of an action, approval holder or transferee of an approval) is a body corporate, the Minister may also consider the environmental history of the executive officers of the body corporate.

An executive officer of a body corporate is defined under section 493 of the EPBC Act as "a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body".

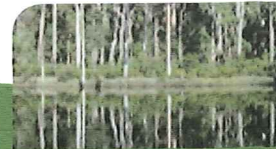
### Information relevant to a person's environmental history

The provisions of Chapter 4 of the EPBC Act that allow a person's environmental history to be taken into account are expressed broadly. The provisions do not limit the information relevant to a person's environmental history to the person's past environmental criminal convictions or civil penalties awarded against them.

Information relevant to the person's environmental history is that which will indicate whether a person is likely to comply with the conditions of an approval.

<sup>1</sup> Butterworths Concise Australian Legal Dictionary, 2nd edition, 1998 defines an 'artificial person' as "an entity recognised by law but which is not a real person, for example a company."

<sup>2</sup> Ibid, 'perpetual succession' is defined as "that characteristic of a company which makes it a continuing entity in law with its own identity regardless of changes in its membership. A registered company is declared to have perpetual succession."



Such information may include, for example:

- records of State, Territory or Commonwealth court or tribunal proceedings against the person involving compliance with environmental laws. The general principles regarding evidence of instances of non-compliance with the EPBC Act would also apply to alleged instances of non-compliance with State or Territory environmental legislation;
- where the person is a body corporate, the person's environmental policies and corporate plans;
- details of previous EPBC Act approvals and permits held and the level of compliance with the approval and permit conditions; and
- details of audits in relation to environmental matters.

Whether information regarding a person's environmental history is relevant will depend on the particular circumstances relating to a decision. Not all information about a person's environmental performance may necessarily be relevant in the context of the decision at hand. For example, evidence of good environmental performance in a particular area will usually provide a broad indication of a person's general approach to environmental management. However, this information is only relevant to a specific decision under the EPBC Act insofar as it can be used to usefully predict their future compliance with the requirements of that decision.

In the case of the grant of a permit under Chapter 13 or 13A of the EPBC Act, the above considerations generally apply in relation to the matters mentioned in subregulation 17.07(1) of the EPBC Regulations, as well as any other aspect of an applicant's environmental history that is relevant to the grant of the permit.

## Non-compliance without a conviction

Evidence of non-compliance, without a conviction, is equally relevant to matters arising under State or Territory environment laws, or other Commonwealth environmental laws.

The Minister may consider information indicating incidents of non-compliance by a proponent or an approval holder with provisions of the EPBC Act (or other Commonwealth, State or Territory environmental legislation) as part of a person's environmental history, including cases where those incidents did not involve the person being convicted of an offence. The absence of sufficient evidence to establish a conviction for an offence does not of itself prevent the Minister from being satisfied that the incident occurred.

However, the evidentiary weight that can be given to information about such non-compliance will depend upon the reason why there was no conviction. In cases where the proponent or approval holder has admitted that the non-compliance occurred, it would generally be reasonable for the Minister to consider that information in relation to the person's environmental history.

In cases where a person was acquitted of a prosecution, or where criminal proceedings were otherwise resolved with no admission of guilt by the person, information relating to the alleged incident should not generally be taken into account as part of a person's environmental history.





## Non-compliance without proceedings being initiated

Evidence of non-compliance, without proceedings being initiated is equally relevant to matters arising under State or Territory environment laws, or other Commonwealth environmental laws.

If evidence of a person's non-compliance is identified (e.g. through monitoring and audit activities) this evidence may be included in relation to the person's environmental history, even if no proceedings<sup>3</sup> were commenced against the person. In these cases the department's recommendations to the Minister should state why the department did not take legal action—this may reflect policy reasons such as the availability of alternative administrative mechanisms. The degree of non-compliance involved in these cases would be made clear in the recommendation provided to the Minister or a delegate.

Where information about a non-compliance incident is taken into account as part of a person's environmental history, no implication or suggestion would be drawn that the person would have been convicted or subject to a civil penalty if proceedings had been initiated against that person.

An incomplete investigation would not be considered as part of a person's environmental history, as no proceedings may result or the person may be found not to have contravened any environmental requirements.

## Remediation determinations, enforceable undertakings etc under the EPBC Act

If the Minister considers that an action taken by a person has contravened a civil penalty provision of Part 3, the Minister may make certain administrative 'penalty' decisions, including remediation determinations (section 480D) and accepting an enforceable undertaking (section 486DA).

A court determination stating a contravention occurred is not necessary for this decision. Nevertheless, the Minister must consider that a contravention has occurred, and would only make such a decision where strong evidence supports that view.

If the Minister makes, for example, a remediation order, and the decision is supported by an admission by the relevant person, the evidence used to support the decision about the contravention would be relevant to the person's environmental history. However, if the person has not admitted to the contravention, then the department would not usually take the information into account as part of a person's environmental history. In such cases, a Ministerial remediation determination or enforceable undertaking would not be considered in isolation, but in relation to the evidence about the circumstances of the alleged contravention which led to the Minister issuing the determination or undertaking.

## Sources of information about a person's environmental history

The EPBC Act does not limit the type of information that could be relevant to a person's environmental history. Information may be obtained from various sources, including by the department from its own records (e.g. audit reports), directly from the proponent (e.g. admissions to failing to comply with approval conditions), or from other external sources (e.g. court reports and Commonwealth/State/Territory agencies).

<sup>3</sup> Ibid, proceedings is defined as "an action commenced in a court".



Section 6 of the Department's 'Referral of proposed action' form requires proponents to set out their environmental history, including whether their record is satisfactory, and whether they have been subject to proceedings under an Australian environmental law. This information is supplemented by the Department's records of proponent compliance.

Other sources of information of a person's environmental history are Public Environment Reports (PER) or Environmental Impact Statements (EIS) pursuant to paragraphs 97(2)(b) and 102(2)(b). These paragraphs require the proponent to comply with any matters specified in the regulations. EPBC Regulation 5.04 requires the person proposing to take the action to address the matters in Schedule 4 of the EPBC Regulations. Among other things, Schedule 4 requires that the person proposing to take the action provide details of any proceedings under a Commonwealth, State or Territory law for the protection of the environment or the conservation and sustainable use of natural resources against the person proposing to take the action. In the case of corporations, corporations are also required to provide details of their environmental policies and planning framework.

The department will check the accuracy of any information provided by individuals or agencies against publicly available sources (e.g. checking whether particular offence proceedings against a person resulted in an acquittal).

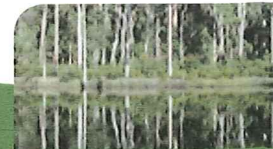
For example, if searching for case law, a useful starting point is the Australasian Legal Information Institute ([www.austlii.edu.au](http://www.austlii.edu.au)). Alternatively, State and Territory law court sites provide copies of recent cases (e.g. NSW: [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)).

## Natural Justice

If information about the person's environmental history is before the Minister the person will be given an opportunity to comment on any adverse findings and its relevance to the decision being made before the decision is finalised (known as the **natural justice hearing rule** or in this note, simply referred to as **natural justice**). Failure to adhere to the requirements of natural justice can result in the decision being challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

- (a) The nature of the Department's natural justice obligations (i.e. the amount and type of information that must be provided to a person and the period they should be given to provide comments) depends on the circumstances of the particular case, including:
- (i) the particular provisions of the EPBC Act;
  - (ii) the nature of the interest affected by the decision, and the consequences of the decision for the person;
  - (iii) the degree of urgency with which the decision must be made;
  - (iv) whether it is an area of high-volume decision-making; and
  - (v) the existence of merits review or of a staged decision-making process.

In the case of information indicating an incident of non-compliance, the person would generally be invited to comment on whether the incident occurred, any mitigating circumstances and any subsequent steps the person has taken to remediate the incident.



However, in certain circumstances, the Minister may not be required to comply with the requirements of natural justice or, may do so by doing less than set out in the previous paragraph. Examples of this include:

- (a) a decision under subsection 87(4A) to assess a proposed action on referral information—in this instance the decision-maker is generally not required to provide procedural fairness as an assessment approach decision does not directly affect the interests of the person; and
- (b) a decision under section 133 or 134—in this instance, section 131AA of the EPBC Act provides an exhaustive statement of the Minister's natural justice obligations in relation to a decision on whether or not to approve an action under section 133 of the Act, and attach any conditions to the approval under section 134, including the Minister's consideration of a person's environmental history as part of this decision.

In these circumstances, the Minister may nevertheless decide to afford natural justice, or do more than lawfully required to afford natural justice to a person. For example, if a particular approval condition is proposed because of the information that the Minister has about a person's environmental history, it may be consistent with the spirit of procedural fairness requirements to give the relevant person a chance to comment on that information even though section 131AA does not expressly require the Minister to do so. Similarly, if unfavorable information about the person's environmental history is taken into account for the purposes of regulation 5.03A(1)(e), then it would usually be appropriate to provide the person an opportunity to comment on the information, as a right to procedural fairness may be considered to arise because the information could be damaging to the person's reputation.

