



Submission to Vickery Extension Project (SSD-7480) July 2020

Wando Conservation and Cultural Centre is an environmental centre which, since its establishment in 2016, conducts tours, educational and citizen science activities, policy development and environmental monitoring in and around the Leard and Pilliga State Forests.

Wando most strenuously objects to this proposal.

Wando Conservation and Cultural Centre acknowledges the Gomeroi, the traditional custodians of the land upon which we live and work and pays our respect to leaders past, present and emerging.

The Vickery Extension project under consideration for approval is another Whitehaven Mine in the Gunnedah Basin. In urging the Independent Planning Commission to reject approval, Wando is drawing on a wealth of experience with the proponent which demonstrates a willingness to flaunt conditions of approval, to egregiously misrepresent its failings and avoid responsibilities until forced to do so by community action. Community groups such as ours have come to understand that the Department of Planning, Industry and Environment (DPIE) acts as facilitator for the proponents in this project and seeks merely to manage and discount the justified concerns of communities. The community has repeatedly seen that the State Government and its agency, the DPIE, is unable or unwilling to ensure Whitehaven's compliance to planning conditions as imposed. We draw the Commissioners attention to our submission to the Hearings held on this matter in Gunnedah in February 2019.¹

In July 2017 the EPA of NSW, which is responsible for issuing the licence EPL 20221 for Whitehaven's Maules Creek mine, escalated the risk level of that mine from level 2 to level 3 (the highest risk level classification). At the company's AGM in 2017 Paul Flynn, CEO of Whitehaven Coal, claimed that the reasons for this were 'administrative,' 'not actually risk in terms of environmental outcomes' and based on complaints from one 'serial complainant'. Mr Flynn's claims were incorrect and have been strongly discounted by the EPA². The fact is that a number of noise and dust impacts, i.e. environmental, factors were responsible for the change in the EPA's Risk rating level. Of 49 coal mines in NSW only 2 others share this serious risk classification. Wando continues to believe that such misrepresentations on the part of the proponent renders it unfit to hold a licence to mine.

It remains our contention that by any reckoning this is not an Extension of the 2014 approved mine, but an entirely new project (from a 4 ½ million tonne per annum approval to a plan to create a "central hub to receive coal from other Whitehaven mines", with a coal handling and processing plant producing 11 ½ million tonnes per annum of coal) and should be treated as such.

Failure of the Department of Planning to adequately monitor or effect compliance.

a) Biodiversity Offsets and Biodiversity.

The list of Whitehaven's non-compliances is certainly extensive³ and the DPIE failure to monitor and effect compliance is clearly demonstrated in the matter of **biodiversity offsets**. Wando, in its submissions to the Environment Protection and Biodiversity Conservation review⁴ and to the NSW Upper House Inquiry into Koala Populations⁵, demonstrated yet again that requirements in Whitehaven's approvals for offsets were never enforced in any meaningful way by the Commonwealth, nor by the NSW Department of Planning to whom responsibility for enforcing Commonwealth conditions has devolved. The six years of mining by the proponent in the heart of the Leard Forest has seen the collapse in endangered species and in the visible ecological community.

¹ See [289692 Wando CCC Vickery Extension Submission V3 201...](#)

² In correspondence Wando would be happy to share with the Independent Panel Commissioners if it is determined it would be useful

³ Attachment 1 Schedule of Whitehaven Coal's Non-Compliance

⁴ Attachment 2 Wando CCC Submission EPBC Act 1999

⁵ Attachment 3 Wando CCC submission NSW Parliamentary Inquiry into Koala Populations and Habitat

At the NSW Legislative Council's Koala Inquiry The Hon. MARK BUTTIGIEG asked: If those State conditions were not met, how did the clearing go ahead?

Wando's representative replied: ***That is a question for the Department of Planning. That is the question we ask year after year and extension after extension. Why are they getting extensions?***

Community groups have been forced into years of writing to the Department and placing Government Information Public Access (GIPA) requests⁶. These applications for disclosure have been opposed by Whitehaven Coal and some have had to go to the Information and Privacy Commission for determination.

Finally, Whitehaven had until midnight on Tuesday 31 March 2020 to secure the required 5,532 hectares of biodiversity offsets to compensate for their clearing of a critically endangered ecological community. The process is deeply flawed when communities are forced into legal action (in this instance brought in the Federal Court by Environmental Defenders office against the operator of Maules Creek mine on behalf of a community group).

A new legal challenge has been launched today against the operator of Whitehaven's Maules Creek mine for failing to secure thousands of hectares of biodiversity offsets for the controversial coal mine near Narrabri in central north NSW. The mine gained federal approval in 2013 on the condition that the company secure 5,532 hectares of biodiversity offsets to compensate for clearing a critically endangered ecological community, known as box gum grassy woodland. Whitehaven had until midnight on Tuesday 31 March 2020 to secure its biodiversity offsets. As predicted by the community at the time the approval was granted, seven years on Whitehaven has been unable to secure those offsets.⁷

b) Winter clearing

In July 2017 the Department of Planning and Environment had to step in to stop Whitehaven's Maules Creek Mine from clearing a section of the TSR adjacent to Leard State Forest in the winter months- the designated clearing window is between 15 February and 30 April to prevent vulnerable fauna being harmed or killed while hibernating, nesting or raising young); however concerted action from groups such as Wando was necessary to prompt the DPIE to intervene.

c) The failure of the Commonwealth Government to protect environment and biodiversity

Since 2016 Wando has been drawing attention to the failure of the bilateral agreements and approval conditions to protect the environment and biodiversity of the area under mining by Whitehaven Coal. On 6 December 2016 Wando communicated our concerns to the then Minister for the Environment, The Hon Josh Frydenberg. Wando identified a number of breaches of Commonwealth approval by Whitehaven's Maules Creek Mine including:

- i) failure to submit a Biodiversity Corridor Plan within 3 months of approval
- i) failure to procure like-for-like offsets
- ii) grave inadequacies in water management plans

⁶ Wando's GIPAs include Re the Public Interest, Department of Planning and Environment GIPA nos. 19-473; 19-678; 20-738; 2019-06

⁷ Refer to EDO's 'Court challenge over coal mines critically endangered woodlands offsets failure' [here](#)

- iii) no arrangements for procuring Commonwealth offsets in perpetuity and
- iv) grave inadequacies in mine site rehabilitation.

Wando asked that the Minister intervene at once to bring Whitehaven Coal to account and put in place an immediate moratorium on any activities to expand the mine's operations, including any further clearing of Leard Forest or any critically endangered ecological community⁸. We ask that the Commissioners understand how the complete dismissal of communications such as this work to cement the understanding that the Commonwealth is unable and unwilling to protect the environment.

Please refer to Wando's submission to the EPBC Inquiry (Attachment 4) for an analysis of this matter. Attention is drawn particularly to the following as it relates to Whitehaven's mining operations in the Gunnedah Basin:

- 'it is clear that bilateral arrangements for the enforcement of Commonwealth conditions of approval by the NSW Department of Planning are in effect mere window-dressing with no substantive effectiveness' (p.4)
failure in requirements of adequate monitoring and auditing of compliance
- the failure of the 'offset' system (the Leard Forest Koala may well be locally extinct)
- the dangers of political pressure and fast-tracking of the approval process
- other issues including greenhouse gas emissions, water issues

The findings against the Commonwealth Government have been widely canvassed⁹.

d) Retrospective Approval

Wando asks that the Commissioners imagine our consternation when it became apparent that Whitehaven Coal was seeking **retrospective approval** for a network of pipelines and ancillary infrastructure intended to facilitate the conveyance of groundwater from farms a distance of up to 12 kms from the Maules Creek Coal Mine

In a report on 17 December 2019 the Northern Daily Leader¹⁰ captured Wando's experience. As the Northern Daily Leader observed:

Whitehaven Coal purchased a number of properties near its Maules Creek mine, and is using those properties to access groundwater it purchased earlier in the year, transporting it via a pipeline.

Construction (of 2 pipelines) started and straight away questions were raised if it was in line with the state's planning laws. However, the NSW Department of Planning, Industry, and Environment (DPIE) was firmly of the belief that no modification application was necessary.

On multiple occasions, the *Leader* asked the DPIE if Whitehaven needed to lodge development modifications, and [every time the department wiped its hands of the situation.](#)

The *Leader* asked DPIE if, given the pipeline was outside the mine's boundary, Whitehaven needed to lodge a modification as per the state's planning laws - at the time DPIE responded there were a "number of approval pathways for development outside of an approved mine boundary".

⁸ Attachment 4 Wando to Minister Frydenberg re breaches Maules Creek Mine 6 December 2016

⁹ e.g. The Guardian, 'Morrison Government has failed in its duty to protect environment, auditor general finds', 25 June 2020 [here](#)

¹⁰ Northern Daily Leader, 17 December 2019 [here](#)

DPIE also said it understood the pipeline had all the necessary approvals it needed from other organisations, such as Narrabri council and [the water watchdog, the Natural Resource Access Regulator \(NRAR\)](#).

The department was so firm in its belief that the pipeline didn't need a planning modification it stated "any further questions about this matter should be directed to the mining company or NRAR".

Now the DPIE has changed its stance, forcing Whitehaven to submit retrospective modification applications for the two pipelines the company has already finished constructing. But it begs the question:

What's the point of a planning department if it doesn't enforce its laws?

If retrospective applications are allowed, then what's to stop them from becoming the norm?

This whole situation reeks of an "easier to seek forgiveness than permission" attitude.

After weeks of denial that Modifications were required, modifications were published with no particulars, no Environmental Assessment, not even a project application. After the briefest period on exhibition, and in spite of many objections being submitted¹¹, the pipelines were **retrospectively approved**. We refer you also to Wando's communication to the Secretary, Department of Planning and Public Spaces, which explains our reasons for condemning the Department's actions in this matter (Attachment 5b).

Wando submitted a **complaint to the Ombudsman**¹² concerning the Department of Planning's actions. The Ombudsman, who is pursuing the complaint, reported on June 10, 2020: *Although the responses were due in May, I am yet to receive a response. I have followed this up with DPIE and I was advised today that they are reviewing why the response is delayed and will answer shortly.*

It is of little consolation that DPIE treats the Ombudsman with the same disrespect Wando and other community groups experience.

e) Fit and Proper Person Application

In March 2020 Wando requested a Ministerial intervention in Whitehaven Coal Limited's application for a new mining lease at Boggabri (Mining Lease Application 578) under **the Fit and Proper Person test**. We communicated with Minister for Energy and Environment Matt Kean our understanding that Mining Lease Application 578 should be refused on the ground of the reputation and character of the applicant who 'has held a mining right, or any other instrument issued or granted under relevant legislation, that has been suspended, cancelled or revoked.'¹³

Exploration Licence EL 6324 was suspended by the Resource Regulator in August 2019 and remains suspended following serious breaches of the company's exploration conditions. Ministerial correspondence policy led Wando to follow up when no reply had been received from Minister for the Environment, Matt Kean after 20 working days. We were informed the matter had been referred

¹¹ Attachment 5 a) Maules Creek Coal Mine Mod 5 and Mod 6 Wando CCC; see also Attachment 5 b) Wando to Planning Secretary Betts

¹² Attachment 6 Wando to Ombudsman 8 Jan 2020

¹³ Attachment 7 Minister Kean fit and proper person (Mining Lease Application 578) 17 March 2020

on to the Deputy Premier, presumably as Minister for Regional New South Wales, Industry and Trade, a reply is now overdue from the Deputy Premier.

Such a lack of transparency and urgency in the Government's responses is not infrequent, is to be deplored and is to the unfair advantage of the proponent.

f) Constant reminder of 'approval creep'.

For many years now Wando has been fighting 'approval creep' which sees empty mine buses and increased road traffic- we can have no confidence that Whitehaven's assurances regarding traffic are well-founded or that compliance will be effected.

g) Within the last 4 months

a. Hazardous Waste

After months of correspondence and research Wando was party to a GIPA 551 which sought information about Whitehaven's dumping of hazardous waste at the Narrabri Landfill. Finally Whitehaven Coal was fined \$120 000.¹⁴

b. Styrofoam pollution

Weeks of agitation, correspondence and media effort were required to have Whitehaven acknowledge responsibility for its pollution of Back Creek which is part of the Namoi River system which eventually flows into the Murray Darling System.¹⁵

c. Water theft

On 2 July 2020 the Natural Resources Access Regulator (NRAR) announced it was prosecuting Whitehaven Coal for stealing water at the Maules Creek Mine¹⁶

Such reports cannot convey the anguish felt, the hours of research, reporting and correspondence undertaken nor the expenses incurred by community members; actions required to have Whitehaven called to account in the face of the failure to do so by the Commonwealth Government, State Government and its instrumentalities.
The (often irreversible damage) damage is done.

The consequences of the failures of the Commonwealth Government, NSW Government and its agencies especially the DPIE, with regard to Whitehaven's acts of noncompliance are profound when considering the DPIE's recommendation for approval of this project with conditions.

1. The IPC is being asked to endorse a flawed project for which so many approvals are outstanding and the community can have no confidence that a transparent and fair process will ensue. One example is the new borefield proposed to supply the mine which apparently

¹⁴The Northern Daily Leader, 28 April 2020 'Whitehaven Coal fined \$120 000 for dumping hazardous waste', [here](#)

¹⁵ See The Land, 'Maules Creek Coal Mine accused of Back Creek pollution', [here](#) also report in 'Fossil Fool Bulletin' [here](#)

¹⁶ See Lock the Gate report, 2 July 2020 'Whitehaven's Maules Creek alleged water theft further proof Vickery must not be approved' [here](#)

will be separately assessed by DPIE Water; then there is the whole nightmare of a train track to transport the coal on a new rail crossing over the Namoi River and its floodplain.

2. The DPIE's own agency objects to Whitehaven's proposal to put a mine spoil pile on top of Zone 4 of the Namoi alluvial aquifer, with concerns it will lead to contamination of the aquifer as water seeps through acidic and saline spoil, carrying metals and contaminants into the aquifer below.
3. An acknowledgement by the Department that there might not be enough water to run the mine in prolonged periods of dry conditions. Whitehaven's nearby Maules Creek coal mine has had difficulty sourcing water, has been found to have taken water unlawfully and has come into conflict with farmers in the region over the mine's water demand.
4. The DPIE, on p. v of its 'Final Assessment Report' (Final Report) notes: *Whitehaven also needs to obtain an approval from the Commonwealth Minister for the Environment under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), due to the potential impacts on threatened species and water resources. The assessment process under the EP&A Act has been accredited under a bilateral agreement with the Commonwealth Government. Under this agreement, the assessment of both State and Commonwealth matters has been integrated into a single assessment process.*

Wando reiterates its experience: **'it is clear that bilateral arrangements for the enforcement of Commonwealth conditions of approval by the NSW Department of Planning are in effect mere window-dressing with no substantive effectiveness'** (p.4 EPBC submission)

5. The Final Report (p.viii) observes: *While submissions raised concerns, given the extended drought period, about availability of water supply during very dry periods, the Department notes that the Approved Project requires Whitehaven to adjust its operations to match its water supply. The Department recommends this condition is retained for the Project. The Department has recommended a range of conditions to manage the water resource impacts, including requiring Whitehaven to:.... prepare and implement a Water Management Plan for the Project incorporating a site water and salt balance, erosion and sediment control plan, surface water management plan and groundwater management plan in consultation with DPIE Water and the EPA*

On p. x Whitehaven is to *prepare and implement Noise, Blast and Air Quality Management Plans for the Project.*

Wando asks that the Independent Planning Commissioners acknowledge we can have no confidence that Whitehaven will abide by conditions as imposed, nor that the DPIE will effectively monitor or insist on compliance. Surely the preparation of a rigorous Water Management Plan and a Noise, Blast and Air Quality Management Plan would be prerequisites of any project approval especially in the light of Whitehaven's appalling record documented in Attachment 1 and discussed above.

6. The Final Report abounds in qualified language which does not instil confidence: concerning amenity impacts (p. x of the Final Report) requires *'reasonable and feasible noise mitigation measures'*, *'all reasonable measures to minimise visual and off-site lighting impacts'*, (p.xi) that the required ecosystem and species credits *could be obtained* *'(italics added)*

Wando has concerns, justified by experience, that Whitehaven will enjoy considerable latitude in interpreting such unquantified measures.

An extraordinary omission from the project process is the Queensland Hunter Valley Pipeline.

Initial inspection of the Queensland Hunter Gas Pipeline maps found in the NSW Planning portal and the Vickery EIS maps show that The Queensland Hunter Gas pipeline route approved by the planning process in February 2009 crosses the property Kurrumbede (acquired by Whitehaven); it appears the route runs along the bottom half of EL7407; it appears from the approved maps that the pipeline route intersects with the proposed rail line. And yet this State Significant Project with its approved corridor through the Vickery Extension is not mentioned in the proposal before the Commissioners.

The social impacts of another open-cut mine in the primarily agricultural district of Boggabri will be detrimental, in recognition of which the Narrabri Council formally objected to the project in February 2020. Already, 76 family farms have been purchased by Whitehaven in close proximity to the town of Boggabri. This has hollowed out the township, affected local businesses and further destroyed the social fabric of the district. This proposal will mean more rural properties bought up because of air and noise pollution, irreversibly changing the community and impacting the township itself.

Climate change, intergenerational equity and the Precautionary Principle

Wando understands that Australia is not on track to meet its Paris commitments and those commitments are, in any case, inadequate and in line with a catastrophic 3 degree warming outcome. Whitehaven is relying on global coal demand projections that assume the world will fail to meet the Paris climate agreement goals and avoid catastrophic climate change,¹⁷ but the Department has relegated its meagre consideration of intergenerational equity to an appendix.

The final Report contains the absurd claim (in bold): The Department acknowledges that coal and other fossil fuel combustion is a contributor to climate change, which has the potential to impact future generations. However, **the Department also recognises that there remains a clear need to develop coal deposits to meet society's basic energy requirements for the foreseeable future** (p.151)

Wando is appalled at this unsubstantiated and clearly unfounded claim; as the world acknowledges the absolute need to move from fossil-fuelled economies and to embrace renewable energies this position by a Department of Planning is reprehensible.

Current market realities contribute to Wando's bewilderment by the State Government's enthusiasm for this project. As a report in 'The Sydney Morning Herald' by Simon Nicholas, energy analyst for the Institute of Energy, Economics and Financial Analysis, observed 'NSW's bullish coal export plan defies the global market realities'¹⁸.

'Renew Economy' on 6 July in 'Australia ranks second worst in world on climate action, outside top 50 on clean energy' reported that:

¹⁷SMH, 29 June 'Australian emissions break Paris targets even after corona quiet'
<https://www.smh.com.au/environment/climate-change/australian-emissions-break-paris-targets-even-after-corona-quiet-20200629-p557co.html> and

¹⁸ SMH, 25 June 2020 [here](#)

In the 2020 edition of the Sustainable Development Report, Australia's score for "climate action" saw it rank second last, sitting 176th of 177 countries assessed, with oil and gas heavy Brunei the only country that received a worse score.

Sitting almost at the bottom of the 'climate action' ranking, Australia scored lower than fossil fuel heavy countries, including Kuwait, the United Arab Emirates, Norway and Qatar.

Australia also ranked amongst the worst countries in terms of progress towards 'Responsible consumption and production', due to the significant volume of pollution attributable to coal-heavy manufacturing industries and a lack of policies to deal with electronic waste.¹⁹

It is no consolation that Whitehaven hides behind the NSW Government's shirking of responsibility for Scope 3 emissions and Wando regards with concern the language used in The Final Report:

The Department has recommended conditions to manage the GHG emissions of the Project, including requiring Whitehaven to: • take all **reasonable** steps to improve energy efficiency and reduce Scope 1 and Scope 2 GHG emissions for the Project; and • **prepare and implement an Air Quality and Greenhouse Gas Management Plan, including proposed measures to ensure best practice management is being employed to minimise the Scope 1 and 2 emissions of the Project** (p.xv) **(bold added)**

Once again Wando is compelled by experience to conclude that 'reasonable steps' is inadequate and that a rigorous Air Quality and Greenhouse Gas Management Plan should be in place **before** the project is approved.

In conclusion Wando observes that Whitehaven already has an approval for a mine at the site; with this project the company proposes to more than double the volume of coal it mines every year. The infrastructure the company is proposing has larger capacity than the proposed mine, and Wando knows from bitter experience that coal mines devour their environments.

Wando CCC Inc. urges the Panel to heed the Precautionary Principle and considerations of intergenerational equity; to acknowledge that this Proposal is so much more than an Extension to the already approved mine and that approval, even with the imposition of monitored and enforced stringent conditions, is unconscionable in the twenty-first century .

We implore the Commissioners to reject the Vickery Extension proposal under consideration.

¹⁹ 'Renew Economy', 6 July in 'Australia ranks second worst in world on climate action, outside top 50 on clean energy' [here](#)

Schedule of Whitehaven Coal's Non-Compliance

<i>Date</i>	<i>Action</i>	<i>Explanation</i>	<i>Mine</i>	<i>Amount</i>
Mar 2012	4 penalty notices ¹	Polluting waters and breaching its environment protection licences on 2 occasions	Narrabri Underground and Tarrawonga	\$6,000
Dec 2014	Penalty notice ²	Disturbing an Aboriginal artefact	Narrabri Underground	\$3,000
Dec 2014	Penalty notice ³	Mining more coal than licence allows	Tarrawonga	\$15,000
Jun 2014	Court undertaking	Enforcement action causing WHC to give an undertaking to the LEC not to clear forest habitat during sensitive seasons. ⁴	Maules Creek	
Jul 2015	Investigation ⁵	Blast fumes	Maules Creek	-
Aug 2015	2 penalty notices ⁶	Failure to implement proper weed and feral animal control as per Biodiversity Management Plan	Maules Creek and Tarrawonga	\$6,000
Mar 2017	Penalty notice ⁷	Failing to provide the government with information and records during the blast investigation	Maules Creek	\$1,500
Mar 2018	Official caution ⁸	From DPIE for "failure to undertake annual road noise monitoring for the 2017 calendar year"	Rocglen	-
Mar 2018	Warning letter ⁹	Failure regarding implementation of the Blast management plan.	Tarrawonga	-
Mar 2018	Official caution	Failure regarding implementation of the Noise Management Plan	Tarrawonga	-
May 2018	Penalty notice ¹⁰	Failing to minimise dust pollution from truck movements on haul roads	Maules Creek	\$15,000
Dec 2018	Warning letter	Sound power levels of equipment exceeded those specified in the Noise management Plan	Narrabri Underground	-
Mar 2019	Court conviction ¹¹	Blast fume left site and drifted over neighbouring properties	Rocglen	\$38,500

¹ EPA media release: <https://www.epa.nsw.gov.au/news/media-releases/2012/decmedia12033003>

² See Independent Environmental Audit 2017. Available here:

<http://www.whitehavencoal.com.au/sustainability/environmental-management/narrabri-mine/>

³ EPA media release: <https://www.epa.nsw.gov.au/news/media-releases/2014/epamedia14120902>

⁴ For details see a summary of this case from the Environmental Defenders Office

https://www.edonsw.org.au/maules_creek_community_council_v_whitehaven_coal

⁵ EPA media release: <https://www.epa.nsw.gov.au/news/media-releases/2015/epamedia15070603>

⁶ Department of Planning media release: <https://www.planning.nsw.gov.au/-/media/Files/DPE/Media-Releases/2015/August/26082015-Miners-fined-for-environmental-breaches.pdf>

⁷ EPA media release: <https://www.epa.nsw.gov.au/nePws/media-releases/2017/epamedia17030801>

⁸ This caution is cited in Rocglen Annual Review 2018.

⁹ Referred to the Tarrawonga Annual Review 2018.

¹⁰ EPA media release: <https://www.epa.nsw.gov.au/news/media-releases/2017/epamedia17052202>

¹¹ EPA media release: [https://www.epa.nsw.gov.au/news/media-releases/2019/epamedia190320-whitehaven-coal-mining-ltd-convicted-and-fined-\\$38500-by-court](https://www.epa.nsw.gov.au/news/media-releases/2019/epamedia190320-whitehaven-coal-mining-ltd-convicted-and-fined-$38500-by-court)

Mar 2019	Penalty notice ¹²	Blast exceeded the airblast overpressure criteria	Werris Creek	\$15,000
Apr 2019	Clean up Notice ¹³	Dumping combustible canisters, resulting in fires breaking out at Narrabri Council's rubbish dump	Narrabri Underground	-
Jun 2019	Fine ¹⁴	Failure to minimise dust, resulting clouds from stock pile	Narrabri Underground	\$15,000
Aug 2019	Suspension ¹⁵	Suspension of exploration licence for unlawful clearing of bushland for access tracks	Narrabri Underground	-
Aug 2019	Statutory Notice	Rehabilitation	Tarrawonga and Rocglen	-
Sept 2019	Illegal water take ¹⁶	NRAR finds WHC has taken over 3 billion litres of surface water illegally over 3 years	Maules Creek	Outcome pending
Sept 2019	Prohibition notice ¹⁷	Issued by Resources Regulator prohibiting the use of vehicles following a dangerous incident	Maules Creek	-
Oct 2019	Investigation	NRAR investigating whether mine is causing groundwater loss to local farmers	Maules Creek	Ongoing
Nov 2019	Investigation	NRAR and Dept Planning investigating construction of a water pipeline not included in approval	Maules Creek	Ongoing
Jan 2020	Prosecution ¹⁸	Resources regulator prosecuting over serious WHS incident	Maules Creek	Ongoing
Feb 2020	Investigation ¹⁹	EPA investigating polystyrene foam balls pollution into Back Creek during flood event	Maules Creek	Pending Outcome
Apr 2020	Legal Action Launched	EDO launch legal action for WHC failing to secure necessary biodiversity offsets when clearing endangered woodlands	Maules Creek	Pending Outcome
May 2020	Fine ²⁰	Sediment dam failure causing discharge into neighbours	Tarrawonga	\$15,000

¹² Department of Planning media release: <https://www.planning.nsw.gov.au/Assess-and-Regulate/About-compliance/Inspections-and-enforcements/March-2019-formal-enforcements/Penalty-Notice-issued-to-Werris-Creek-Coal-Pty-Ltd>

¹³ EPA clean up notice: <https://apps.epa.nsw.gov.au/prpoeoapp/ViewPOEONotice.aspx?DOCID=-1&SYSUID=1&LICID=1578807>

¹⁴ EPA media release: <https://www.epa.nsw.gov.au/news/media-releases/2019/epamedia190625>

¹⁵ Resources Regulator suspension notice: https://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0005/1153634/Suspension-Notice-Decision-document.pdf

¹⁶ NRAR media release: <https://www.industry.nsw.gov.au/natural-resources-access-regulator/nrar-news/nsw-water-regulator-concludes-investigations-into-maules-creek-coal-mine>

¹⁷ Resources Regulator media release: <https://resourcesandgeoscience.nsw.gov.au/about-us/news/2019/prohibition-notice-issued-to-maules-creek-open-cut-coal-mine>

¹⁸ Resources Regulator media release <https://www.resourcesandgeoscience.nsw.gov.au/about-us/news/2019/maules-creek-coal-prosecuted-over-mining-truck-collision>

¹⁹ EPA media release: <https://app.epa.nsw.gov.au/prpoeoapp/ViewPOEONotice.aspx?DOCID=-1&SYSUID=1&LICID=1591771>

²⁰ EPA media Release: <https://www.epa.nsw.gov.au/news/media-releases/2020/epamedia200528-tarrawonga-coal-fined-after-environmental-breach-at-mine>



Submission to Independent Review, EPBC Act 1999



Pic: Whitehaven Coal's Maules Creek Mine (EPBC Approval 2010/5566), 2018 showing the mine's encroachment into Leard State Forest, under a raft of conditions most of which have been ignored and not enforced over the six year period since commencement. (Wando Conservation and Cultural Centre)

INTRODUCTION

This Review of the *Environment Protection and Biodiversity Conservation Act 1999* by a Panel chaired by Professor Graeme Samuel AC is a welcome, if burdensome, opportunity for a small conservation group of volunteers to speak our truth about an environmental travesty which occurred when then Minister for Environment Tony Burke approved two mega coal mines in the Leard State Forest, upon conditions which have never been enforced in any meaningful way by the Commonwealth, nor by the NSW Department of Planning to whom the responsibility for enforcing Commonwealth conditions has devolved.

We strongly object to one of the guiding principles of the review, which is “(b) making decisions simpler, including by reducing unnecessary regulatory burdens”. Making decisions simpler, when they involved complex matters of science, is the wrong direction for our environmental laws.

We also reject the premise of this review, that Commonwealth environmental laws necessarily duplicate state laws. That has been the case when we are concerned, rather that the Commonwealth laws served to patch up and filling gaps where the state planning system provided inadequate protection. Certainly, a unified approach to listing threatened species would be an advantage but this is outside of our limits of knowledge as to how this could be achieved.

We wish to make it clear that we are not commenting on the application of the EPBC Act outside of the direct subject matter familiar to us, that is, the destruction of the Leard Forest by the introduction of coal mining. This is where we can provide the panel with direct knowledge, historical accuracy and lessons from the past that may inform the improvement of the Commonwealth environmental laws as they pertain to species preservation, habitat protection, and the protection of water from damage incurred by unconventional gas extraction and coal mining.

If the opportunity should arise to provide further detailed evidence or to answer questions, members of the Wando Conservation and Cultural Centre are at the ready to assist wherever possible.

The past six years since the commencement of the Maules Creek and Boggabri by coalmines in the heart of the Leard Forest have seen adjustable collapse not only in endangered species, but in the visible ecological community. This ecological tragedy must not be repeated, although we witnessed a similar trajectory being played out in Queensland in respect of the Adani coal mine.

Now similarities are observed at the Adani Carmichael project, where biodiversity offset properties for the Black-Throated Finch are covered by exploration licences for Alpha North coal mine. In Maules Creek, offsets for the Leard Forest critically endangered ecological community are covered by Whitehaven Coal’s exploration licence. These situations make biodiversity offsetting appear farcical. To some, it is tragic.

We hope that the Review Committee will hear our call for more robust assessment, and a dramatic improvement in compliance activities and enforcement of Commonwealth approvals under the EPBC Act.

Wando Conservation and Cultural Centre Inc.
April 2020

SHORT ANSWERS TO QUESTIONS

Question 1.

Some have argued that past changes to the EPBC Act to add new matters of national environmental significance did not go far enough. Others have argued it has extended the regulatory reach of the Commonwealth too far. What do you think?

Wando Conservation and Cultural Centre: Does not go far enough, see Q. 4.

Question 2.

How could the principle of ecologically sustainable development (ESD) be better reflected in the EPBC Act? For example, could the consideration of environmental, social and economic factors, which are core components of ESD, be achieved through greater inclusion of cost benefit analysis in decision making?

Wando Conservation and Cultural Centre: The Precautionary Principle, which is an essential aspect of Ecologically Sustainable Development

Question 3.

Should the objects of the EPBC Act be more specific?

Wando Conservation and Cultural Centre: We are not of the opinion that the Objects of the EPBC Act should be changed.

Question 4.

Should the matters of national environmental significance within the EPBC Act be changed? How?

Wando Conservation and Cultural Centre: Yes, MNES known as the Water trigger, or “protection of water resources from coal seam gas development and large coal mining development”, added in 2013, should be amended. At present, protection of water from gas mining is arbitrarily restricted to coal seam gas mining. This MNES should be broadened to include:

- Modifications seeking expansions of existing coal seam gas (CSG) or coal developments, not only new projects, should be subject to assessment under the EPBC water trigger.
- Other forms of unconventional gas mining such as shale gas and tight sands, also underground coal gasification which might otherwise escape Commonwealth scrutiny and yet pose catastrophic risks to water resources.

Also, **climate change** should be a MNES.

Question 5.

Which elements of the EPBC Act should be priorities for reform? For example, should future reforms focus on assessment and approval processes or on biodiversity conservation? Should the Act have proactive mechanisms to enable landholders to protect matters of national environmental significance and biodiversity, removing the need for regulation in the right circumstances?

Future reforms should emphasise Assessments and Approvals, and Compliance and Enforcement, where major failings exist:

- Evidence-based application of the Precautionary Principle and Intergenerational Equity must be seen to be observed in the assessment process, rather than a flat unsubstantiated assertion.
- No political pressure to speed up the assessment of a project at the expense of environmental outcomes, as occurred in respect of the Maules Creek coal mine and the Boggabri Coal Mine, both of which are mining the Leard State Forest under Commonwealth approval.
- Abolition of the present bilateral arrangements. Certainly as far as the State of NSW is concerned, which is within our realm of direct experience, it is clear that bilateral arrangements for the enforcement of Commonwealth conditions of approval by the NSW Department of Planning are in effect, mere window-dressing with no substantive effectiveness.

In particular, we wish to recommend the introduction of a new element of assessment and of compliance – Good Faith of the Applicant. In other words, any evidence that the Applicant has intentions other than to observe their conditions of consent, by their words, actions, or other circumstantial evidence, should be able to be considered by the Commonwealth Department of the Environment.

The introduction of a Good Faith requirement would be a valuable innovation which will minimise approval creep and provide confidence that an Applicant would be compliant.

While this is novel, we request that the Review Panel please consider the introduction of some kind of mechanism that enables Good Faith of the Applicant to be given regard to.

GENERAL COMMENTS AND RECOMMENDATIONS

It is an accepted statistic that Australia leads the world on mammal extinction. We have experienced three animal extinctions since 2009, including the first made extinct by climate change (the Bramble Cay Melomys). Australia is the only developed nation identified as global deforestation hotspot. The 2016 State of Environment report highlighted that the outlook for Australia's biodiversity is "poor and worsening" Only five critical habitats have been protected in the past 20 years of the EPBC Act. Since the EPBC Act came into operation, 7.7 million hectares of threatened species' habitat has been destroyed.

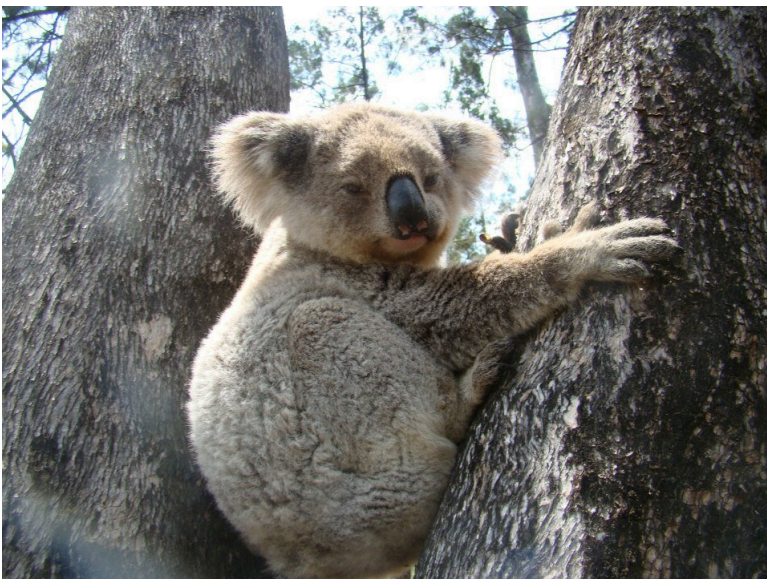
In the North West of NSW, EPBC approvals of open cut coal mining in the Leard Forest has resulted in visible decimation of the ecological community, not only of the critically endangered woodland that was covered by the actual mine footprint, but also areas contiguous to the mine where the blasting explosions and dust plumes, light pollution, low frequency noise, destruction of permanent water source and fragmentation have impacted on the forest.

All of this damage and destruction has continued for 6 years with still NO SECURED OFFSETS, and 3 extensions granted to Whitehaven's Maules Creek mine, which keeps alive the falsehood that the Leard Forest was offsettable.

The digging up of some parts of Leard Forest and sterilisation of the remainder is a violation of the Objects of the EPBC Act, and the lessons from the Maules Creek and Boggabri mines experience should be learned, or the EPBC Review will be meaningless.

If the Review Committee is inviting further testimony, Wando CCC would like to have the opportunity to discuss the Koala situation and how evidence of the Koala population in the Leard was swept aside by decision-makers to downgrade the value of the habitat.

Very few disclosures are made by the mines or the NSW Department of Planning about the impact on the ecosystems post-mining, but the little we know is that bird species are in steep decline. The Leard Forest **Koala** might well now be locally extinct. Here is a Leard Forest Koala pictured at North Loop Rd, Leard Forest, close to the entrance of Maules Creek mine.



As to the protection of offsets for the survival of the Koala and other threatened species, this is non-existent. Whitehaven Coal has done nothing to ensure their protection. The removal of "Blue Range" from the Offset Strategy despite its being prime habitat well connected to a desirable wildlife corridor and permanent water is an example of this, and it occurred without adequate scientific basis or consultation.

The EPBC Act is prone to political interference that erodes the public's trust in the legislation.

The EPBC approval of Maules Creek and Boggabri mines took place following political pressure. The following extracts from the Federal Court case *Northern Inland Council for the Environment v Aston Coal 2* (referred to below) allude to the unexplained circumstances under which Minister Tony Burke rushed the approvals.

21 On 9 February 2013 an article was published in the Sydney Morning Herald newspaper entitled '*Burke intended to approve Maules Creek before hoax*'. The article referred to the fact that the Minister (then Mr Tony Burke) sent to the NSW Government a confidential letter that raised '*further questions about the minister's [sic] sudden announcement this week to delay a decision on the mine for three months*'. The article referred to the fact that the Minister had proposed to approve the '*controversial Maules Creek Coal Mine before Christmas, only weeks before it was the subject of a hoax media release claiming funding for the project from ANZ Bank had been withdrawn*'. The article continued:

Mr Burke was widely anticipated to announce his decision on the \$776 million project on Thursday, but the environment department instead announced it would be deferred until April 30.

The department said the delay was because it was seeking "clarification on potential impacts to matters of national environmental significance."

However, in a letter to the NSW Planning Minister, Brad Hazzard on December 21, Mr Burke said: "I am proposing to approve this proposal. My proposed decision is attached for your information."

23 The Minister also issued a press release on 11 February 2013. Such press release stated that the NSW government had 'leaked' commercially sensitive information concerning the project and that in consequence the Minister had considered it necessary to bring forward the decision even though further work was to be done in relation to the approvals. Relevantly, the Minister said:

"In each of these there additional approvals there is more work to be concluded before the project can actually proceed," Mr Burke said.

"As the conditions make clear where more work, new plans or further modelling needs to take place, then this must be carried out to my satisfaction.

"It has always been my preference to minimise the number of planning and modelling processes which have to continue after a decision has been made because I want companies to be able to determine whether or not a project will go ahead on the basis of the conditions they see in my decision.

"Unfortunately the decision of the New South Wales Government to leak commercially sensitive information has caused me to have to bring these decision forward today with the remaining work to be resolved directly between the company and myself.

"The development of these further conditions will be conducted without reference to the NSW Government, which is unfortunate but a decision that they have effectively made for themselves."

24 On the following day, the Minister was interviewed by Sabra Lane in an ABC AM radio program. An introduction to the transcript to the interview refers to the Minister's decision to approve '*two coal mine projects near Narrabri*' (namely the project and the Maules Creek Colliery Proposal) and a separate coal seam gas development near Gloucester. The transcript relevantly reads:

TONY BURKE: I don't think there's ever been a set of three approvals that I've given with so little knowledge as to whether or not the projects will end up going

ahead.

On this occasion, all three of them, there were significant outstanding issues and in the ordinary course, I would have worked through those before making a decision.

What I've done in this case is, for the areas that are not yet resolved, instead of giving a normal approval and say these are the conditions, I've said these further issues need to be worked through to my satisfaction before we know whether the project can actually go ahead.

So it's quite... even though it's just being reported as approvals, it's actually quite a different set of conditions to what would normally occur.

SABRA LANE: How stringent are these conditions?

TONY BURKE: As I say, some of them are on issues that are not resolved. So with Gloucester, the hydrological modelling still has to be done. And if the impact on ground water comes back as unacceptable then the project won't be able to go ahead.

SABRA LANE: Why give approval then? It sort of sounds like a Claytons approval kind of thing.

TONY BURKE: That's not an unreasonable description of this one.

Quite simply, the New South Wales Government had stated to strategically leak parts of where we were up to with bits of it being reported, not all of it being reported, and effectively had a situation where market-sensitive information was starting to drip feed into the market.

Pretty irresponsible pathway to choose, and something that no other state government's ever done before.

So I took the view that should make the decision on all the conditions that we were certain of and do all of that publicly. And then for the issues that were still yet to be resolved, put rules around them where unless they're resolved to my satisfaction, the project can't go ahead, but to cut New South Wales out of the remainder of the process.

...

TONY BURKE: I can't have a situation where market-sensitive information gets strategically leaked for political purposes. You need to have a situation where anyone who you're bringing into the advanced detail before things are finalised is able to act in a responsible way.

On 20 June 2013, the Minister issued a statement of reasons pursuant to s 13 of the ADJR Act for the decision to approve the project.

The statements above illustrate a chaotic situation whereby the Maules creek approval was rushed with calamitous consequences.

Our emissions continue to rise and we are failing to take sufficient action on climate change to meet our Paris targets.

Greenhouse gas emissions should be considered as a Matter of National Environmental Significance and it beggars belief that currently it is not, when major GHG gas emitting processes are being left exclusively to the States to decide on.

Water trigger

This is an important MNES needs to be augmented so that it applies to variations to existing mines. For example, the Maules Creek mine recently underwent Modifications of its State approval. These entailed expanding the footprint of the mine, extending its furthest reaches by up to 13 km, by acquiring water rights and building infrastructure without satisfactory risk assessment and

threatening the Namoi River catchment by ignoring the Recommendations of the NSW Natural Resource Access Regulator. The Recommendations included measures to ensure that the cumulative impacts of all three mines (and a possible fourth – Vickery which is under assessment by the NSW Independent Planning Commission) in the Namoi region would be correctly understood and modelled. The NSW Department of Planning has refused to accept the recommendations of the very Government agency set up to regulate access to water.

If this had been referred to the Commonwealth, it would have enabled increased scrutiny of this parlous decision which has been made by the Department of Planning in ignoring the need to assess cumulative impacts.

Fit and proper test

We refer to the test for whether an Applicant has a “satisfactory record of responsible environmental management and compliance with environmental laws”, and the discretion of the Minister to consider this information. Recently we witnessed how ineffective this condition is, when a subsidiary company of Whitehaven Coal was formed which takes advantage of the wording of s 5.03A to avoid disclosing and allowing the Minister to exercise the discretion. Whitehaven’s subsidiary company has been able to avoid disclosing prosecutions and fines, investigations, a Prohibition Order, suspension of an Exploration Licence, a Mandatory Pollution Audit, a Pollution Reduction Order, and a Clean-Up Order, in relation to the Vickery mine project. This is obviously counter to the intentions of the EPBC Act.

Will the Review Panel please consider making a recommendation on this matter.

Part 5—Assessing impact of controlled actions

Division 5.1A—Assessment on referral information

5.03A Minister’s decision on an assessment on referral information

(1) For subsection 87(4A) of the Act, the criteria for a decision by the Minister are all of the following:

- (a) the potential scale and nature of the relevant impacts of the action can be predicted with a high level of confidence;
 - (b) the relevant impacts are expected to be short term, easily reversible or small in scale;
 - (c) adequate information is available about relevant impacts on the matters protected;
 - (d) the action is likely to have a significant impact on only a small number of protected matters or elements of each relevant protected matter;
 - (e) if the information is available—the person proposing to take the action has a satisfactory record of responsible environmental management and compliance with environmental laws;
 - (f) the degree of public concern about the action is, or is expected to be, moderately low.
- Is “all” of the following, not discretionary.

“(e) if the information is available—the person proposing to take the action has a satisfactory record of responsible environmental management and compliance with environmental laws;”

Bilateral agreement with State

The experience at Maules Creek mine has been an utter failure of the bilateral arrangements between Commonwealth and State, whereby NSW has allowed all enforcement of Commonwealth conditions to be ignored for six long years. Please see our attached correspondence with the

Commonwealth which were referred to the NSW Department of Planning under bilateral arrangements and instead of taking enforcement action, excuses and extensions were granted.

As a result, without litigation to make the Government enforce the conditions, they are meaningless.

CASE STUDY: MAULES CREEK COAL MINE, NSW

On 11 February 2013, the then Federal Minister for Sustainability, Environment, Water, Population and Communities (Minister), granted approval EPBC 2010/5566 to Whitehaven Coal's subsidiary company Aston Coal 2 Pty Ltd, under sections 130(1) and 133 of the EPBC Act to construct and operate an open cut coal mine 18 km north-east of the township of Boggabri in New South Wales, including associated infrastructure. Approval was to mine 10 million Tonnes Per Annum of coal in the Leard State Forest and the footprint includes surrounding farms where giant overburden dumps and ancillary infrastructure have been built.

Damage and destruction to the Leard Forest was to be offset by the acquisition of a number of properties said collectively to contain an adequate quantity of White Box – Yellow Box – Blakely's Red Gum Grassy Woodland and Derived Native Grassland. Ecologist David Robertson of Cumberland Ecology was the consultant to Whitehaven Coal. His calculations were severely criticised by numerous experts, culminating in censure from his own professional body, the Ecological Consultants Association of Australia.

In question was the professional conduct and ethics of Cumberland Ecology as related to the environmental assessment information supplied by them to Hansen Bailey for inclusion in the Ecological Impact Assessment to gain NSW and Commonwealth approval for the Maules Creek open cut coal mine.

David Robertson subsequently resigned from his own professional body after agreeing to improve future assessments. It is worth noting that David Robertson has since been involved in another controversial assessment, this time in relation to a development at Georges River of the Kogarah Golf Club. There, he threatened to sue for defamation a university that had questioned his professional ethics. And so, it seems, that unethical behaviour by some ecologists is difficult or impossible to police, and the impacts of their conduct devastating and contrary to the objects of the EPBC Act.

Whether deliberate or not the vegetation mapping and description of the habitat in the offsets by Cumberland Ecology has enabled the approval of Maules Creek mine, paving the way for the destruction of 1665 hectares of mature forest containing known habitat for threatened species and 544 hectares of critically endangered ecological community.

Upon review, the calculations were found to be incorrect, and another consultancy Greenloaning Biostudies was engaged to revise the offset strategy and identify new properties that had to be acquired by Whitehaven.

The approval of the Maules Creek mine in February 2013 was mired in high profile controversy and conducted in haste. Documents obtained via Freedom of Information reveal that in December 2012 a new Offset Calculator had been introduced, and the staff at DOE did not yet know how to use it. Desperate emails were flying around the Department calling for help, with department officers saying they were under pressure with a deadline to prepare for an early approval.

The conditions of the February 2013 approval included the following:

- Must submit a Biodiversity Corridor Plan within three months (by 11 May 2013) imposed on WHC by EPBCA 2010/5566, condition 3, has never been completed.
- \$1.5 mil over life of project for **National Recovery Plans** for critically endangered within 2 years of approval, condition 16, nothing is known of such recovery Plans and they have not been communicated to the public

Key observations about the EPBC conditions:

- It is important to note that the Commonwealth conditions were over and above the requirements of the State of NSW. They constitute an extra layer of protections to make up for the inadequacy of the State conditions. In particular, the preservation of a 500m biodiversity corridor, is regarded as one of the essential protections granted by the EPBC conditions to help preserve any remnant of the existing White Box – Yellow Box – Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community which is listed nationally.
- The amount offsets in hecatres is far greater than the actual amount being disturbed in the Leard Forest, but of far inferior quality.
- The high condition Box Gum CEEC woodland and habitat for nationally threatened species found in Leard State Forest are not present in the offsets proposed to replace it.
- The proposed revegetation in the offsets and rehabilitation of the mine site will not produce a functioning endangered ecological community of high condition. The approval conditions specifically states that offsets must be of equivalent or better condition as compared to that community cleared in Leard State Forest.
- The overall impacts of the mine have not been properly assessed because the impacts of noise, light, dust and blasting on surrounding ecosystems has not been quantified.

The 500m corridor is a key requirement of the East-West connection between Nandewar Ranges and the Pilliga. Yet, incredibly Whitehaven Coal has made its intentions known repeatedly that it fully intends to mine this corridor, and to try to substitute this corridor with some other rehabilitated land somewhere else. That was not the intention of the condition, and is impossible to achieve anyway – in 6 years Whitehaven has not even secured its offsets yet, let alone find new ones which in any way compensate for the loss of high quality Box Gum CEEC of the 500m corridor.

The NSW and Federal governments have approved both mines based on false and misleading information provided by Cumberland Ecology. The glaring disparity between the EIA vegetation map and the ensuing BOMP vegetation map should have set alarm bells ringing.

The offsets are not like for like. The same critically endangered ecological community with the same suite of flora and fauna cannot be recreated in grazing and cropping paddocks. The mine approval will ultimately result in further decline of threatened species and the endangered ecological community.

The Northern Inland Council for the Environment Inc brought action against the Minister for Environment, Heritage and Water and Aston Coal 2 Pty Ltd (the latter being a Whitehaven Coal subsidiary) in the Federal Court seeking to injunct Whitehaven from proceeding with clearing Leard Forest by challenging the Minister's approval: *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419. NICE submitted that the offset conditions were not

capable of being fulfilled, and that the approval assumed adequate offset areas were available to offset the removal of the Leard Forest.

The nationally listed endangered plant *Tylophora linearis* was not considered in the environment assessment. That suitable habitat will not be replaced in the revegetated offsets for at least 150 years, if ever.

Extensive surveys were required to determine the extent of the plant in Leard State Forest. Those surveys needed to be done when the plant is growing with leaves visible, which is likely to be November. However, the NICE challenge to the Maules Creek mine approval failed due to administrative law grounds, and construction proceeded.

Condition 32 of the EPBC approval required notification of this additional MNES it had to be reported to the Commonwealth if a significant impact on the MNES was likely. In *NICE v Aston Coal 2*, the Federal Court discussed the topic of *Tylophora Linearis* extensively, how the Minister and the Department had technically “taken into account” the threatened species, which had been acknowledged by the Department to be on the Project site in January 2013. Still, it was not until Greenpeace conducted its own independent site surveys and forced the issue, that condition 32 was taken seriously. For over one long year, the department (and by inference the Minister) knew of the presence of *Tylophora Linearis*, and yet did not trigger action under condition 37.

Cowdroy J found that although no action had been taken, and insufficient attention was given to the presence of the threatened species by the Department, nevertheless it had fulfilled its legal obligation. Departmental advice within the final decision brief categorised the alleged discovery of *Tylophora Linearis* as a “claim” only.

Then in 2014, the Greenpeace Threatened Species Unit conducted site inspections at the Leard Forest and identified the presence of *Tylophora Linearis*, which had been omitted from Whitehaven’s environmental assessment. After the Greenpeace revelations, in accordance with condition 37, the Minister called on the Maules Creek mine Offset Management Plan to be revised to include the details and results of *Tylophora Linearis*, which by then had been surveyed by other consultants to include a whopping 3,484 stems from the Maules Creek project surface area and 15,807 stems from the area immediately adjacent.

New management, monitoring and reporting actions were required under condition 18. The Mine Site Rehabilitation Plan (conditions 25-28) must provide details of proposed rehabilitation and revegetation measures, targets and performance indicators to achieve effective restoration of the species. *Tylophora Linearis* is also present on at least one of the Eastern Offsets, YET Whitehaven is progressing with a mine expansion to the north to the area covered by its Exploration Licence A346, which is located over these very Eastern offsets. It should not be allowed to pass off a future mine site as an offset property for virgin endangered woodland.

Despite years in which Greenloaning Biostudies has been working for Whitehaven Coal to somehow achieve compliance with the EPBC conditions, it remains the case that Greenloaning Biostudies reports contain insufficient data to verify that the vegetation Report to be box gum CEEC is consistent with the listing advice for this ecological community. As such, the Greenloaning

Biostudies reports on the offsets do not satisfy Condition 10 of the EPBC approval in that they are not an “independent review” sufficient to satisfy the conditions.

Whitehaven Coal finalised its Biodiversity Management Plan in 2017, which did not provide a tabulated calculation of the area of the Proposed EPBC offset properties.

Between the date on which the Approval was given and 15 May 2019, approximately 541 hectares of Box Gum CEEC (made up of approximately 455 ha of Woodland Box Gum CEEC and approximately 86 ha of Derived Grassland CEEC) was cleared within the Project Area.

Yet, to date, Whitehaven Coal has failed to register legally binding conservation covenants over offset areas of no less than 5,532 ha of equivalent or better quality of Box Gum CEEC, despite receiving three extensions of the deadline.

Numerous extensions have been given by Whitehaven for its inability to fulfil its deadlines.

The EPBC offsets do not contain sufficient vegetation meeting the definition of Box Gum CEEC set out in the Listing Advice that is of an overall equivalent or better condition class than the areas that have been and/or are permitted to be cleared, based on the proportion of each condition class represented and other relevant ecological attributes. Namely:

- i. The proportion of condition class represented in the area of Box Gum CEEC approved to be cleared is 84% Woodland Box Gum CEEC, and 16% Derived Grassland Box Gum CEEC;
- ii. The proportion of condition class represented in the EPBC offsets is 67.1% Woodland Box Gum CEEC and 32.9% Derived Grassland Box Gum CEEC.

As to the Maules Creek Biodiversity Management Plan (BMP) dated 2017, (Condition 17 of the EPBC approval), there are serious concerns about subsequent modifications which were made to the process and the content of this BMP including the removal of “Blue Range” farm property as a Commonwealth offset, despite it being an important nearby location for the red gum ecological community.

Demonstrating how ill-advised it is for the Commonwealth to delegate its compliance responsibilities to the State, is the fact that Blue Range was later removed without consultation as previously prescribed by the management plan procedures – that is because the NSW Department of Planning removed the requirement to consult with the Maules Creek Community Consultative Committee and thereby extinguished all transparency and trust in the process.

Throughout the many years that have followed the commencement of the Maules Creek mine, challenges has come from numerous quarters as to the non-compliance of Whitehaven with its the EPBC conditions relating to the offsets. Wando CCC itself has written on multiple occasions to the then Minister (Mr Frydenberg) and to the Department calling on the Commonwealth to defend its own conditions of consent to them Maules Creek mine. Departmental officers have flicked the matter back to the State, who responded with a blanket assurance that the mind is compliance and the Commonwealth refused to listen to any alternative view, however well-substantiated.

LESSONS FROM MAULES CREEK MINE

- Fast-tracking environmental approvals to satisfy commercial demands risks breaching the Objects of the EPBC Act by acting without a science basis and without risk-weighted decision-making.
- Bilateral arrangements are not working. The Commonwealth trusts the State to manage compliance and enforcement of Commonwealth conditions. NSW does not have either the intention or interest in honouring this trust, which is clear from our experience.
- Ecological consultants need to be more tightly regulated. The experience with Cumberland Ecology has been outlined above, but more is to come as the performance of Greenloaning Biostudies comes under scrutiny by the Federal Court in *South East Forest Rescue v Whitehaven Coal*. False statements that are acted upon, such as occurred with Maules Creek mine, should not be the subject of mere words but should be subjected to harsh penalties and a suitable evidentiary framework should be developed to accommodate that.
- By now, someone in the Commonwealth should have twigged that the EPBC conditions are being taken for a joke, and the 500m corridor, offsets and other requirements either ignored or delayed.
- Follow up monitoring should be undertaken to assess the state of the Leard Forest outside the mine footprint, and if the impacts of mining are deemed to extend the mine as noted, then this throws the adequacy of offsets further into disrepute.
- The Commonwealth must resolve to audit the compliance of Maules Creek mine without delay and take appropriate action itself, not leaving this for the NSW planners who are bereft of responsibility.



NSW Parliamentary Inquiry into Koala Populations & Habitat in NSW



Pic: Leard Forest koala, by Tania Marshall (2013)

Submission of the

Wando Conservation and Cultural Centre Inc.

1212 Black Mountain Creek Rd, Maules Creek NSW 2382

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Wando Conservation and Cultural Centre koala monitoring

Wando CCC was formed in 2015, and is the only dedicated environmental conservation group in the Narrabri area, based in Maules Creek. The group has since then engaged in many conservation activities including biodiversity monitoring. Field activities to identify high-use koala habitation in Leard Forest has been one such biodiversity study areas.



With the help of experts able to identify and educate community members, locations of high use have been found in Leard Forest repeatedly throughout the past few years, showing that the koala is continuing to survive in the ravaged Forest which is beset with coal mining which results in serious aberration of the natural environment, through regular blasting, 24-hour low frequency noise, vibration, loss of habitat through clearing and fragmentation.

The most recent survey was conducted in September 2018, whereupon koala scats were again found in the Goonbri Creek vicinity, which is covered by a coal Exploration Licence.

The mining company Boggabri Coal, owned by the Japanese conglomerate Idemitsu via its Australian branch Idemitsu Resources Australia, has a licence to explore this very area.

Boggabri Coal has already wiped out a considerable portion of the high-use koala habitat that existed prior to coal mining.

The Department of Planning has been ineffective in overseeing these developments, and gives no weight to the possibility of species extinction.





Submission

Wando CCC wishes to concentrate its comments on the following terms of reference:

- 1. The status of koala populations and koala habitat in New South Wales, including trends, key threats, resource availability, adequacy of protections and areas for further research.**

Members of the Wando Conservation and Cultural Centre response attended the Koala Strategy workshop in Gunnedah organised by Office of Environment and Heritage. We raised the problem of habitat loss due to coal mining. It is deeply troubling that the comments provided by Wando CCC to the OEH workshop did not find their way into the Recommendations. We think it is ludicrous that water fountains for suburban and semi-urban koalas of Gunnedah are considered more important means of preserving the koala species than, for example, preserving the ONLY permanent water source in the Leard Forest, which was Lawler's Well, a billabong which has now been destroyed by Whitehaven Coal, the neighbouring coal mine to Boggabri Coal.

The NSW Government, whilst espousing a wish to protect the koala from extinction, is actually fast-tracking its extinction through slack biodiversity assessments which falsely describe koala habitat and populations.

The adequacy of protections is abysmal, and we refer particularly to the system of biodiversity offsets which claims to offset the Leard, Vickery and Breeza Forests with inferior and not like-for-like habitats sometimes 40 km from the existing koala habitat.

There is no evidence at all that offsets have been beneficial in preserving species whose habitat was destroyed by coal mining in the Namoi Valley.

- 2. The effectiveness of State Environmental Planning Policy 44 - Koala Habitat Protection, the NSW Koala Strategy and the Biodiversity Conservation Act 2016, including the threatened species provisions and associated regulations, in protecting koala habitat and responding to key threats.**

This is ineffective. The current development at Gilead in Camden is an apt example of the failure of SEPP 44.

3. Identification of key areas of koala habitat on private and public land that should be protected, including areas currently at risk of logging or clearing, and the likely impacts of climate change on koalas and koala distribution.

Key areas that should be protected include the areas currently targeted by coal mines including Shenhua Watermark mine, Whitehaven's Vickery mine, also Santos coal seam gas project.

Wando CCC would greatly appreciate an opportunity to meet with the Parliamentary Committee, either at Parliament House, or to invite the Members to visit us in the Namoi Valley to obtain a first-hand account and view the destruction for themselves.

**Wando Conservation and Cultural Centre Inc.
2 August 2019**



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6 December 2016

The Hon. Josh Frydenberg MP
Minister for the Environment and Energy

josh.frydenberg.mp@aph.gov.au

RE: Non-compliance of the Maules Creek Mine Project with Bilateral Agreement arrangements and Commonwealth approval conditions relating to this project.

Dear Minister,

The Maules Creek Mine Project (Aston Coal) was given approval by the Commonwealth to operate in February 2013 (EPBC 2010/5566) until the 31 December 2053, provided that approval conditions are met. Those conditions cover the following areas:

Disturbance Area. Conditions provide for limits to the extent of removal of Commonwealth listed threatened ecological communities, habitat for threatened species and the provision of a 'Biodiversity Corridor' to allow east-west movement of Commonwealth listed fauna (Regent Honeyeater, Corben's Long-eared Bat and Swift Parrot) between the Boggabri and Maules Creek Mine footprints. The Biodiversity Corridor Plan and an analysis of the progressive impact upon the CEEC over the life of the mine must be submitted to the Minister within 3 months of the approval.

Direct Offsets. A legally-binding conservation covenant must be registered over a minimum area of equivalent or better condition habitat for the above-mentioned species and equivalent or better condition class of the Critically Endangered Ecological Community White Box- Yellow Box-Blakely's Red Gum Woodland and Derived Native Grassland (Box Gum CEEC). The extent of this offset must be evaluated by an independent review of the suitability, extent and condition of these offsets by the 30 December 2013. The mechanisms of the legally binding covenants must be registered by the proponent within 5 years of the date of the approval (February 2018).

Indirect Offsets. To compensate for the loss of the CEEC and habitat for threatened species, the proponent must submit a project plan to invest \$1 million to investigate the effective methodologies to restore functioning Box Gum Woodland on mine rehabilitation land ('mining sites') within 2 years of the approval (February 2015) and \$1.5 million over the life of the mine operation to implement recovery actions for the Commonwealth threatened species. A plan to achieve this must be submitted to the Commonwealth also within 2 years of the approval.

Offset Management Plan. The proponent must submit Offset Management Plan within 12 months of the date of the approval that deals with the management of all Commonwealth Biodiversity Offset Areas. This can be included within a Biodiversity Management Plan consistent with state approvals and must include objectives for monitoring, performance criteria, targets and annual baseline surveys.

Surface and groundwater management plans must be submitted to the Minister prior to the commencement of construction that are consistent with the National Water Quality Management Strategy. It must demonstrate how cumulative impacts of groundwater drawdown (taking into account other mine developments within 20km of the project area) will affect the health of remnant vegetation in the project area *and surrounding areas*.

Leard Forest Mining Precinct Regional Biodiversity Strategy. The scoping report was to have been provided to the Minister by the 31 July 2013, but this did not happen until June 2015. In the meantime, apparently confident that the State is monitoring the Commonwealth EPBC conditions of approval and the process of implementation of biodiversity offsets, has absented itself from the Steering group of the Regional Biodiversity Strategy.

Mine site rehabilitation. The proponent must within 12 months from the commencement of construction activities provide to the Minister a Mine Site Rehabilitation Plan outlining the progressive establishment of 1665 ha of native forest within the project area (554 ha of which must be consistent with the definition of Box Gum CEEC) minus the area covered by the 'Biodiversity Corridor'. The Plan must include details of vegetation communities to be created, targets, performance criteria, soil management, risks, and an annual reporting process. The Plan must be subject to an independent review.

There are other matters relating to final landform, provision of survey data, annual reporting to the Minister and the publication of plans but not will be dealt with in any detail here, except to point out that the according to Condition 40, the proponent must publish on their website the relevant Plans that are required under the Commonwealth approval.

Commonwealth NSW Bilateral Agreements

It is noted that, at present, that while there is an Assessment Bilateral Agreement in place between the Commonwealth and NSW, there is no current Approval Bilateral Agreement in place. While a Draft Agreement has been on exhibition this has not been adopted. A draft agreement has no statutory effect.

The Assessment Bilateral Agreement has been in place since the 26 February 2015 and allows the Commonwealth Minister for the Environment to rely on specified environmental impact assessment processes of the State of New South Wales in assessing actions under the EPBC Act. Relevant to the Maules Creek Mine approval, this would include the assessment procedure contained within the NSW BioBanking Assessment Methodology (BBAM) which uses a biodiversity credit system.

If it had been in place, the Approval Bilateral Agreement would provide for the accreditation of New South Wales processes for approval of proposed actions that would otherwise be assessed by the Australian Government for approval under the EPBC Act. Under such an agreement, no Commonwealth government referral, assessment or approval would be required for proposed actions that fall under an accredited process. However, this has not occurred.

In NSW, it is the offset policy, the rules by which credits are 'retired', which is the process which informs an approval. It is our contention that no NSW offset policy, past or present, can be accredited by the Commonwealth which has quite different offset rules and objectives.

As none of the processes by which the approval for the Maules Creek Mine is accredited by the Commonwealth, the Commonwealth's assessment of the performance of the mine should be based solely on whether the proponent is compliant with the approval conditions set out by the Commonwealth.

In their compliance reports to the NSW Department of Planning and Environment, the proponent does not track compliance with the Commonwealth's approval. As well, delays in the implementation of the Leard Forest Mining Precinct Regional Biodiversity Strategy and any offsetting arrangements and actions is a matter for the state and do not negate the Commonwealth's approval conditions. In response, we have outlined below the serious shortcomings of the proponent's development of the mine that constitute breaches of the approval conditions.

Breaches of Commonwealth approval conditions identified

1. Disturbance Area

Condition 3 of the approval states that the proponent must submit a Biodiversity Corridor Plan to the Minister within 3 months of the approval. **Condition 5** states that the plan must demonstrate the extent of Box Gum CEEC and habitat for the Regent Honeyeater, Corben's Long-eared Bat and Swift Parrot within this 500m wide corridor. To our knowledge this has never been fulfilled. No such plan exists on the Whitehaven website.

The proponent provided a two-paragraph letter by Cumberland Ecology pursuant to **Condition 6** but merely states that the mine clearance will be progressive so does not address the requirements of this condition which specify that the proponent has to provide progressive limits to clearing over the life of the mine and an analysis by an ecologist as to the progressive impact on the Box Gum CEEC. 6(c) states that the proponent is required to collaborate with Boggabri Coal to provide progressive limits

to clearing within the Regional Biodiversity Strategy. This document has not been finalised.

2. Direct Impacts

Under the *White Box - Yellow Box - Blakely's Red Gum Grassy Woodlands and Derived Native Grasslands Advice to the Minister* (17 May 2006) three condition classes or 'states' of this CEEC exist:

- An overstorey of eucalypt trees exists, but there is no substantial native understorey.
- A native understorey exists, but the trees have been cleared.
- Both a native understorey and an overstorey of eucalypts exist in conjunction.

The Commonwealth Scientific Committee considers that areas in which an overstorey exists without a substantially native understorey are degraded and are no longer a viable part of the ecological community

While the criteria outlined above are the minimum level at which patches are to be included in the listed ecological community, they represent different condition classes, meaning each is a different, greater or lesser state of condition. The degraded two condition classes *'do not represent the ideal state of the ecological community'*.

The approval conditions relating to direct impacts clearly state that in the offset areas, the CEEC must be in an equivalent or better condition class to that being removed. The approval condition (12b) states, *"the offset areas must meet the definition of the ecological community as described in the listing advice, and must be an overall equivalent or better **condition class**, than the areas being cleared, based on the proportion of each **condition class** represented, and any other ecological attributes."*

The proponent has continually classified a large proportion of the derived native grassland as being 'good condition', however this is not consistent with the definitions in the advice to Minister of the listing of the Box Gum CEEC, and merely sets out having the requirements which meet the definition of the CEEC.

According to the proponent's figures, the mine will clear up to 545 ha of White Box-Yellow Box-Blakely's Red Gum Woodland and Derived Native Grassland CEEC (458 ha, or 84%, of which is high condition woodland and 86 ha of derived native grassland, or 16%). It will also remove another 1,207 ha of native forest and woodland and 328 ha of native grassland including low condition communities. The Commonwealth has specified that the proponent needs to provide 5,532 ha of Box Gum CEEC as an offset. If the proportion of good condition woodland is used as per the approval condition, this would mean the proponent needs to offset 4,647 ha of good condition woodland Box Gum CEEC.

The revised offset strategy claims to protect 5,477 ha of Box CEEC though does not distinguish between good condition woodland and low condition woodland (scattered paddock trees) or derived native grassland in the figures. We do know that

there will be 210.2 ha of Box Gum woodland CEEC protected within the ‘Additional Offsets’. Despite the lack of clarity, based on inspection of aerial photography of the offsets and ground-truthing undertaken by independent scientists, we suggest it is *highly unlikely that the proponent has met their target of 4,647 ha of Box Gum CEEC which matches the highest condition class within their offset strategy.*

Further we have strong evidence that the independent review of the offsets provided to the Commonwealth by Greenloaning Biostudies and revised offset strategy has continued to mis-identify certain vegetation communities, including Box Gum CEEC. The details have previously been submitted to former Minister Greg Hunt from the Northern Inland Environment Council on the 1 June 2014. No response has been received. In addition, field work undertaken on one of the Commonwealth offsets, ‘Blue Range’ has found the proponent has mis-identified the riparian forest community along Maules Creek.

To our knowledge, only one Commonwealth compliance officer has visited the offset sites, Alex Taylor visited ‘Blue Range’ but did not inspect the mapped vegetation communities. Based on the latest communications with the OEH, an officer has reviewed the on-ground offsets in the ‘Additional Offsets’ only, though no report of this inspection is publicly available.

As the majority of the CEEC being removed as a result of the mine is of the highest condition class and that the vast majority of land being assigned as offsets would appear to be derived grassland or low condition woodland, we contend that the offsets provided by the proponent to the Minister following the independent review do not meet the requirements of approval **conditions 10, 11 and 12.**

Similarly, the majority of habitat within the proposed offsets areas are not equivalent or better habitat for the Regent Honeyeater, Swift Parrot and Corben’s Long-eared Bat and also do not meet the requirements of the approval **conditions 10, 11 and 12.**

3. Indirect Offsets.

Project plans to invest \$1 million to investigate the effective methodologies to restore functioning Box Gum Woodland on mine rehabilitation land (‘mining sites’) and \$1.5 million over the life of the mine operation to implement recovery actions for the Commonwealth threatened species. These have been prepared and are available on the Whitehaven website.

4. Offset Management Plan.

The proponent has submitted a Biodiversity Management Plan consistent with state approvals, which should meet the requirements of the Commonwealth approval. However, the Plan is deficient in that it does not identify any actions for Commonwealth offset lands, ‘Blue Range’ and ‘Cattle Plain Creek’. However, to be compliant with **Condition 18** of the approval, actions which include objectives for monitoring, performance criteria, targets and annual baseline surveys should be identified for all offset lands covered by the Commonwealth approval.

5. Surface and groundwater management plans

The proponent has provided a 'Water Management Plan' incorporating both surface and groundwater components, though has mis-characterised the Maules Creek stream, stating that it is a '*Wide gravel bed with shallow pooled water*'.

Only one surface water monitoring point (SW1) has been identified in the Plan, to be measured at times of surface water runoff. This ignores the fact that it is primarily a groundwater-fed system.

The Plan identifies three aquifer systems in the vicinity of the Project area that has an average yearly inflow of 550ML/year over the life of the mine. It then identifies that interception of groundwater by the mine void will be 73ML/year at year 5, 438ML at year 10, 1,058.ML at year 15 and 255.5 ML at year 21. These are significant levels of groundwater interception that are likely to have deleterious effects upon the local aquifers, including the 'North' Maules Creek aquifer.

The Plan states that this system "... *has been identified that the upper region of Maules creek is a gaining system, with groundwater actively discharging into the creeks and tributaries*". However, despite the seepage into the pit identified above, "*the groundwater model for Maules Creek Coal Mine predicted some reductions in discharge to the alluvial aquifers, however it was not predicted to materially change the groundwater levels within the alluvial aquifer and Stygofauna are not expected to be impacted as a result of the Maules Creek Coal Mine.*"

While the presence of Stygofauna is acknowledged, the Plan fails to mention that in fact, the surface environment within the Maules Creek groundwater discharge zone is a regionally and nationally significant groundwater dependent ecosystem, as identified in the Bureau of Meteorology's Australian GDE Atlas. It is a flowing stream 94% of the time upstream of the Back Creek confluence and downstream of the Cattle Plain Creek confluence and has been studied extensively by the Connected Waters Initiative Group based in the University of New South Wales. The Plan has failed to identify the relative contribution of groundwater and surface water to this system or to any of the work carried out by Dr Martin Anderson or his colleagues.

It should be noted that the updated **Guidelines for Groundwater Quality Protection in Australia** focuses on the adoption of risk-based management to protect and enhance groundwater quality for the maintenance of specified Environmental Values.

"An Environmental Value is a particular value or use of the groundwater that is important for the maintenance of a healthy ecosystem or for public benefit, welfare, safety or health, and which requires protection from the effects of contamination, waste discharges and deposits (ANZECC and ARMCANZ 2000a). Different Environmental Values, as defined in the NWQMS (ANZECC and ARMCANZ 2000a), are values or uses of the groundwater that support aquatic ecosystems, primary industries, recreation and aesthetics, drinking water, industrial water, and cultural and spiritual values."

This has not been taken into account in the EIS documentation available with respect to Maules Creek. As a result, it has failed to identify any potential impacts or the need to monitor impacts on this regionally and nationally important GDE.

6. Leard Forest Mining Precinct Regional Biodiversity Strategy.

We understand that the Commonwealth is playing no active role in the ongoing development of this Strategy following the submission of the scoping report. We know this from the explanation at p. 45 of Stage 2 of the RBS as to why the Commonwealth is absent from the RBS Steering Group:

“DoEE advised DPE that they prefer to have an observer role in the ongoing development of Stage 2 of the Strategy. Relevant information has been provided to DoEE in preparing the strategy.”

Two State government representatives have stated to the community that compliance with Commonwealth offsets is not a State responsibility, and the State has no concern with the arrangements for securing Commonwealth offsets in perpetuity.

7. Mine site rehabilitation.

The Mine Site Rehabilitation Plan as required by the Commonwealth seems to have been incorporated within the Mine Operations Plan which is required the NSW consent authority. The proponent in the MOP states that a separate MSRP will be prepared, however, this document is not publicly available and there does not seem to have been any independent review of this Plan as outlined in **Condition 28**.

In summary, the following points can be made:

1. The NSW Government has misinterpreted the scope and intent of the Assessment Bilateral Agreement in that it has been used as a means to inform an approval process that is not accredited by the Commonwealth. The use of the NSW offsetting arrangements which allow the use derived native grassland as a means to retire biodiversity credits goes beyond the scope of the Assessment Bilateral in place and is not consistent with the relevant approval conditions in this case. A similar line of reasoning would mean that conditions relating to key threatened species have also not been met.
2. Serious unresolved questions remain as to the accuracy of the vegetation mapping being used to achieve consent by the Commonwealth.
3. One statutory plan, the Biodiversity Corridor Plan, as required under the Commonwealth approval is not posted on the proponent’s website as required and indeed appears to be missing. The fact that this plan is missing and presumably not finalised would be in breach of a number of Commonwealth approval conditions.
4. Whitehaven have not provided a proper ecological analysis or even an outline of the extent of the progressive impact of the operations on the CEEC. There

are strong concerns that clearing limits has been excessive as it seems the majority of clearing for the project has already occurred prior to year 5.

5. The lack of any management actions on some Commonwealth offset lands mean the proponent is in breach of the relevant condition relating to the Offset Management Plan.
6. The Water Management Plan has failed to take into account the significance or potential impacts upon the Maules Creek groundwater discharge system, and so is not compliant with the *Guidelines for Groundwater Quality Protection in Australia*.
7. The Mine Site Rehabilitation Plan does not exist as a stand alone document raising questions of compliance with a number of Commonwealth requirements, there does not appear to have been an independent review of the MRSP or MOP.

In view of the above, we ask that you ask that you as the Minister **intervene at once to bring Whitehaven Coal to account**. Much high biodiversity value land has already been removed and ground and surface water systems degraded as a result of the mines activities, without the necessary approval conditions being met.

We ask you put in place **an immediate moratorium on any activities to expand the mines operations, including any further clearing of the Leard Forest or any other critically endangered ecological community** until the matters outlined above have been satisfied.

We further ask that Commonwealth compliance officers visit the mine offsets to verify the extent and condition of the CEEC.

We await your immediate response on this issue.

Sincerely



Ms Patricia Schultz
Chairperson
Wando Conservation and Cultural Centre (Inc.)

cc: Ms Monica Collins, Assistant Secretary, Compliance and Enforcement Branch, Department of Environment and Energy

**cc. The Hon. Robert Stokes MP, Minister for Planning
pittwater@parliament.nsw.gov.au**

**cc. The Hon. Mark Speakman SC MP Minister for the Environment
cronulla@parliament.nsw.gov.au**



Maules Creek Coal Mine Mod 5 and Mod 6

Submission of the Wando Conservation and Cultural Centre Inc, Maules Creek

1. INTRODUCTION

Whitehaven Coal seeks retrospective approval for a network of pipelines and ancillary infrastructure intended to facilitate the conveyance of groundwater from farms a distance of up to 12 km from the Maules Creek Coal Mine (MCCM). It is also worth noting that a water carting operation has been underway for the duration of the pipeline construction.

We wish to make a formal submission opposing MP10_0138-Mod-5 (Olivedene Water Pipeline Modification) and MP10_0138-Mod-6 (Roma and Brighton Water Pipeline Modification).

Whitehaven argues that the developments seeking retrospective approval are a “continued use”, however, this is a mischievous argument which seeks to ignore the fact that the supposed “continued” usage until now has been unapproved under planning law.

Whitehaven also makes much of the assertion that during the time of pipeline construction, it has been in “continual contact” with the NSW DPIE. How the current procedural chaos has occurred, if the proponent was in “continual contact” with the regulator is yet to be understood. By procedural chaos, we refer to the sudden publication of Modifications 5 and 6 after weeks of denial by the company and the DPIE that a Modification was required, but with no particulars, no Environmental Assessment, not even a project application.

The conduct of Mods 5 and 6 so far has severely damaged any confidence the public might have in the resources assessment processes.

We believe Mod 5 and Mod 6 should be referred to the Independent Planning Commission. By all appearances, the Resource Assessments branch of planning does not have appropriate skills in-house to possibly evaluate these Modifications. Furthermore, referral to the IPC would restore some confidence that the modification of mine consents in this region is being conducted in an evidence-based manner, with due regard to the legal framework governing the mines. Referral to the Independent Planning Commission for expert evaluation would enable careful and detailed questioning by the Commissioners.

2. MODIFICATION REPORTS FOR Mod 5 and Mod 6

Section 1.3 of the Modification Reports states that approval is sought under section 4.55(1A) of the *Environmental Planning and Assessment Act 1979*, which states:

4.55 Modification of consents—generally
(cf previous s 96)

...

(1A) **Modifications involving minimal environmental impact** A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

- (a) it is satisfied that the proposed modification is of minimal environmental impact, and
- (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and

...

- (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

...

Whitehaven Coal goes to lengths to demonstrate that the pipeline is of “minimal environmental impact” and that it is “substantially the same development” and as a result concludes that (at p.8):

“The assessments herein conclude that the Modification is of ‘minimal environmental impact’. In particular, the continued use of the pipeline and associated infrastructure to convey groundwater to MCCM would not result in any additional land disturbance, and amenity impacts at nearby privately-owned dwellings are not expected to be significant.”

In this statement, Whitehaven suggests that the only environmental concerns associated with the pipeline are from the infrastructure, and not the extraction of groundwater.

Of course it is known that aspects of the MCCM PA 10_0138 are subject to the *Water Management Act 2000*. However, the insinuation that obligations under the WM Act completely override all obligations under PA 10_0138 and the *Environmental Planning and Assessment Act* is erroneous.

We contend that the considerations of the WM Act are to be taken into account AFTER all requirements of the EP & A Act are satisfied, and are consequent upon satisfactory compliance with BOTH the EP & A Act and the approval conditions of MCCM PA 10_0138.

Furthermore, conformance with the Regional Water Strategy, whilst not having the force of law, is nevertheless a condition of approval of MCCM and must be respected as it relates to the

cumulative impacts of the Leard Forest coal mine complex and thus has severe ramifications for water security in the region (see letter from Natural Resource Access Regulator to DPE, November 2018, referred to below).

Therefore, a summary consideration of Mods 5 and 6 without a full environmental assessment is unacceptable. Furthermore, a full exhibition period to allow substantial feedback is called for due to the very high level of public interest in the security of groundwater in the Namoi Valley.

With respect to public exhibition, the DPIE has indicated to the public that it will accept public submissions but there is no public exhibition as such, pursuant to s. 4.55(1A)(d). We reject this decision as entirely out of proportion with the seriousness of the Modifications.

Accordingly, we submit this submission opposing Modifications 5 and 6 of the MCCM Project Approval PA 10_0138.

3. RELEVANT CONDITIONS OF CONSENT

The Modification Reports incorporate two legal arguments which Wando Conservation and Cultural Centre unequivocally reject. They are:

1. That the *Water Management Act 2000* overrides all relevant conditions of consent PA 10_0138

The Modification Reports imply that the conditions of consent for the MCCM are either irrelevant to the Mods 5 and 6, or at best subservient. However, this is incorrect. PA 10_0138 governs the sourcing of water for the MCCM and operational relations between the three mines in the Leard Forest Mine Precinct which includes water sharing.

The Terms of Approval and Conditions are the primary sources of consent for MCCM, not the WM Act. Therefore, we say these matters must be considered by the consent authority when assessing Mod 5 and Mod 6.

The MCCM EA Main Report Part I, p.41 (Section 3.8 Water Management System) lists three sources of water for mining operations, ie processing ROM coal and dust suppression:

1. runoff from overburden emplacements and rehabilitation areas
2. water recovered from mining operations (this would include passive and active pumping from the pit)
3. High Security Water Allocation for up to 3,000 units from the Namoi River.

Nowhere in the EA is bore water or groundwater listed as a source of water, and the very first item in the Terms of Approval states that the Proponent shall carry out the Project “generally in accordance with the EA”. The taking of water from bores was explicitly excluded in the EA, therefore it cannot be asserted that bore water is “generally in accordance with the EA”.

The MCCM Conditions of Approval clearly state:

“Water Supply

36. The Proponent shall ensure that it has sufficient water for all stages of the project, and if necessary, adjust the scale of mining operations on site, to match its available water supply to the satisfaction of the Secretary.”

In fact far from adjusting the scale of its operations to match its available water supply, Maules Creek mine is seeking to expand its water take.

Furthermore, there has been no assessment of the impacts that diverting water from farms might have on farming, and the community.

2. That the “Substantially the Same” Test negates the need for a full environmental assessment

Whitehaven Coal, having conducted pipeline construction and a 6-day a week, 11-hour a day water carting operation which are not approved and were never conceived of as part of the MCCM operations, is now using the 6-week unlawful activities for a “continuing use” argument to add weight to their argument that the conveyance of water from farms to the MCCM is part of “substantially the same” activities as permitted under PA 10_0138 (at p.9).

“The consent authority is, therefore, required to satisfy itself that any consent as modified would result in the approved MCCM remaining substantially the same development as was last modified under section 75W (i.e. including Modification 3), inclusive of consideration of the changes arising from the previously approved modifications.”

Table 3 of the Modification Reports (at p.10) outlines the “Key Comparatives” in order to demonstrate that the modified project is “substantially the same” as approved, inclusive of MCCM Modifications 1-3. Under the Key Comparative of “Primary, secondary and ancillary use” seeks to extrapolate from PA 10_0138 that in regard to water acquisition there is no appreciable difference between what was approved and what is proposed. For reasons we outlined above, this is not correct.

The precedent of Boggabri Coal’s Mod 5 for a new bore field in 2015 is an apt one in the present circumstances. This has been put to the DPIE, but the Department has sought to distinguish Boggabri Coal Mod 5 from the present Modifications, because “Boggabri Coal sought approval for a borefield”. This is an unsubstantiated distinction, because Maules Creek mine has too developed a new borefield, amalgamating existing farm bores, upgrading some, and adding new infrastructure.

In other words, the new groundwater use regime underway by Whitehaven Coal could hardly be more different to what was in place before, neither in water pumping capacity, infrastructure, purpose, environmental impact or social impact.

Therefore, the “Substantially the Same” Test fails.

4. UNDERMINING THE LEARD FOREST MINE PRECINCT REGIONAL WATER STRATEGY

The Leard Forest Mine Precinct Regional Water Strategy (RWS) is also known alternatively as the BTM Complex Water Management Strategy and is a requirement under the conditions of approval of the Maules Creek, Boggabri and Tarrawonga Coal mines. The RWS was finalised in July 2019 after years of delays, caused largely by the failure of Whitehaven Coal to finalise the Water Management Plan for the MCCM. The RWS is supposed to provide risk management tools for protecting the aquifers in the Region, being in Zones 4, 5 and 11. It is a requirement of Condition 40(d) of PA10_0138. NRAR was called upon to provide comment on the Strategy (under the term BTM Water Strategy), which was based on a hydrogeological modelling report by AGE Consultants. The peer reviewed report describes the cumulative impact of the three mines on the groundwater systems, and provides estimates of water licensing attributable to each mine individually. It was jointly commissioned by Whitehaven Coal and Idemitsu/Boggabri Coal.

NRAR's response to the Regional Water Strategy (RWS) is contained in a letter dated 6th November 2018, which is discussed below.

The Regional Water Strategy provides, among other things, for water sharing between the three mines, Maules Creek, Boggabri and Tarrawonga. Whitehaven Coal states that it had to undertake these Modifications currently under assessment because they were unable to reach a commercial agreement on access to water under the water sharing provisions of the RWS. A better understanding of the reasons for this is called for. It is not sufficient just to say that MCCM could not reach agreement with Boggabri Coal over access to its (estimated) available 500ML of water from Roma bore. Was the failure to reach agreement based on financial reasons, or were the conditions of the water sharing unreasonable? We strongly urge the decision makers to ascertain the answer to this.

We question why the Water Sharing Plan has already collapsed, and one mine is already seeking to source water from outside the agreed limits of the Regional Water Strategy.

It is clear on the face of it that if NRAR approved the RWS in November 2018, and the RWS did not include or envisage Whitehaven Coal accessing bore water or groundwater, then the current activities are outside the scope of the RWS and the modelling in the RWS is not to be relied upon.

If this is the case, which we believe to be true, the water carting operation and pipeline construction should cease until there is a planning approval for the practice and NRAR has approved the transfer of water from farm properties to the mine.

In summary, our concerns are:

- Accessing bore water or groundwater when this was never proposed/modelled/approved through the original EA or any modification
- The newly constructed pipeline from *Olivedene* to *Velyama*
- The newly constructed pipeline from *Brighton* to *Velyama*
- The transfer of water between zones

- Water carting operation
- Failure of water sharing in accordance with Leard Forest Mine Precinct Regional Water Strategy

We also assert that Whitehaven has undermined the RWS in other ways, as suggested in the timeline below which shows initiatives the company was undertaking before the ink was dry on the RWS.

Timeline:

- March 2019 Maules Creek mine purchases water from Olivedene. Questions are asked to the company and DPIE, about the need for a Modification.
- May 2019 Whitehaven transfers water licences from Gunnedah (believed to be May 2019 – requires confirmation) to a bore in Boggabri, believed to be Brighton (subject to advice from Water NSW) under approval from NRAR
- July 2019 Final RWS published – this does not include any mention of the water being imported from outside the modelled impacts.
- October 2019 Water carting by Namoi Waste using fleet of double-tankers purchased specifically for conveying water to mine from Brighton commences without any approval whatsoever, on the grounds that it is “generally in accordance with the EA” (statement by Stephen O’Donoghue, Resource Assessments)
- October 2019 pipeline construction commences

In light of the above, Whitehaven has acted in Bad Faith towards the DPIE and Boggabri Coal, by continuing the ruse that the RWS would apply following its completion, when all the time disregarding it. This conduct needs to be considered by the consent authority, unless of course it can be shown that the consent authority knew all along that the RWS was going to be ignored.

5. CONSIDERATION: NATURAL RESOURCE ACCESS REGULATOR

In terms of the risks posed by MCCM Mod 5 and Mod 6, consideration of several matters is indispensable.

We refer to correspondence between the Natural Resource Access Regulator and Stephen Shoemith, DPIE (from Graeme White, Director Regional Water Regulation (West-Murray Darling) Department of Industry – Natural Resources Access Regulator, 5th November 2019), in which the water regulator delivered a scathing review of the ability of Regional Water Strategy to safely predict cumulative impacts of mining on water. The 30-point NRAR recommendations have been comprehensively ignored.

The NRAR advice to DPIE stated that trigger levels for approved water taking limits needed “to be set below the approved impact limit with adequate contingency planning”, and that the risk to Zone 4 was “misleading” and “Impact Mitigation” was “unclear”.

Overall, the NRAR stated there was “low confidence” in the capacity of the mines to respond to cumulative impacts effectively.

With Whitehaven Coal already facing possible prosecution for unlawful surface water harvesting following a report by NRAR last July, and two subsequent water access investigations underway by NRAR, it is irresponsible in the extreme for the DPIE to wave through these Modifications without an Environmental Assessment which would thoroughly assess whether NRAR's 30 recommendations were adequately addressed.

In these times of water scarcity, and mindful of the Conditions of Approval of the Maules Creek coal mine (Cond. 36) which required it to scale back production if water is unavailable, careful scrutiny of the company's economic claims is needed while they are pushing for more water now. Whitehaven has earned over \$1.5Billion in profits in three years.

In light of the above, DPIE should proceed with extreme caution in the face of risks to Namoi groundwater, and not fast-track the acquisition of water from farms to the MCCM.

6. FAILURE TO CONSIDER THE WATER CARTING ASPECT OF THE OPERATIONS – Mod 6 only

The Mod 6 for Roma and Brighton should also include particulars for assessment of the water carting operation. This is not substantially the same as what is included in the MCCM Transport Assessment, nor in the traffic statistics underpinning the MCCM Transport Management Plan.

7. NATIVE TITLE ACT 1994 (Cth)

The Modification Reports make no mention of Native Title over the Crown land, being the Therribri Rd Travelling Stock Route which has been excavated without an indigenous cultural assessment. Members of the Wando Conservation and Cultural Centre have recently surveyed the TSR in question and found what is believed to be a high quality cultural object. This is a significant area which should have been surveyed before excavation.

Excavation of the Travelling Stock Route apparently has been undertaken without due consultation with traditional owners.

There is no mention of the Native Title Act. This is an omission which renders the Modification Report, in its attempt to pose as a Statement of Environmental Effects, flawed.

8. TARRAWONGA MINE

It is not disclosed in Mods 5 and 6 that some of that water being sourced from farm bores may be intended for Tarrawonga coal mine, not only MCCM. This seems to be common knowledge in the region. Therefore, we call on the DPIE to investigate the matter and obtain conclusive evidence as to whether the water which is subject of Mods 5 and 6 is solely for MCCM, or not. The implications are serious. If it is found that Whitehaven Coal has deliberately not disclosed such information in

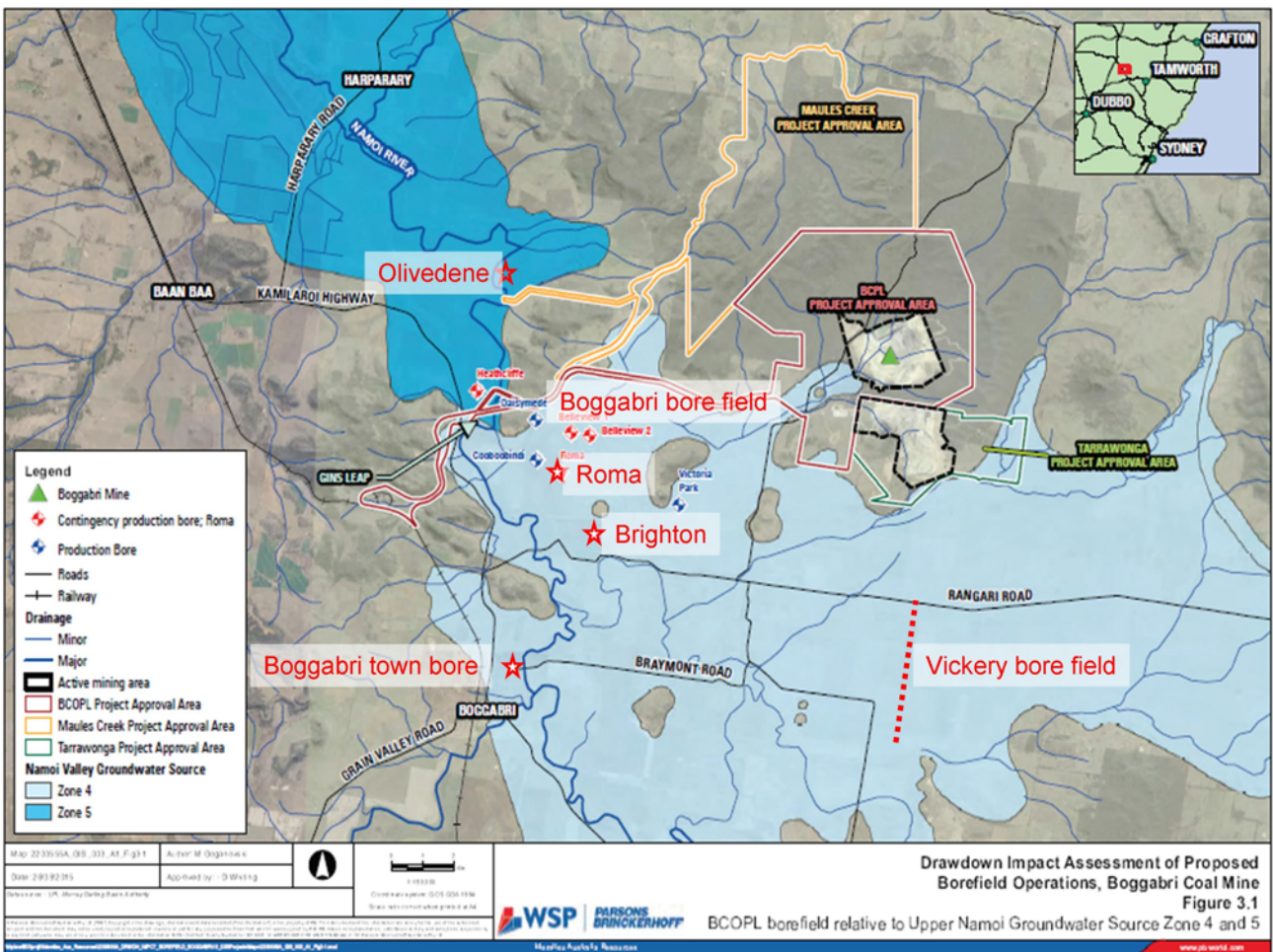
the Modification Reports appropriate corrective action, or in the alternative, punitive action, should be taken under the EP & A Act.

9. RISK TO BOGGABRI TOWN WATER SUPPLY

There is sufficient circumstantial evidence from the collapse of the Quipolly Aquifer near Whitehaven’s Werris Creek mine, and the Maules Creek Aquifer, near the Maules Creek mine, not to mention the groundwater in the vicinity of the Narrabri Underground mine, that a Whitehaven mine poses a grave risk to the groundwater wherever the company operates.

See below an adaptation of a diagram from the Boggabri Coal Mod 5, which clearly shows the proximity of the Roma and Brighton bores with the Boggabri town bore, both being in the same Zone.

Critical human water needs are at stake. No modelling has been done, or at least none has been made public. Also, the fact that the Department has labelled Mod 6 as “minor environmental impact” shows that it has not seen fit to examine this risk.



Wando Conservation and Cultural Centre Inc., Maules Creek NSW
December 2019



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19 December 2019

Mr Jim Betts
Secretary
Department of Planning and Public Spaces

Jim.betts@planning.nsw.gov.au

Dear Mr Betts,

Wando Conservation and Cultural Centre Inc, of Maules Creek NSW, wishes to object to the newly announced Modifications 5 and 6 of the Maules Creek Coal mine Project Approval.

The labelling of the Modifications as of minimal environmental impact is incorrect.

These modifications are of very high public concern. As our submission states, the Natural Resource Access Regulator wrote to the Department of Planning with a 30-point list of recommendations for the Regional Water Strategy (from Graeme White, Director Regional Water Regulation (West-Murray Darling) Department of Industry – Natural Resources Access Regulator, 5th November 2019). The final RWS dated July 2019 does not reflect the NRAR recommendations were implemented. In the absence of a reliable regime for managing cumulative groundwater impacts makes it even more imperative that Mods 5 and 6 are subjected to a thorough Environmental Impact Assessment, not just the Statement of Environmental Effects which bypasses proper assessment of potential groundwater impacts.

We also express our strongest condemnation of the way the Department has acquiesced to the construction of Whitehaven's borefield upgrade, pipeline, concrete slabs, pumps and water trucking operation in defiance of its own precedent when it required Boggabri Coal to undertake its Mod 5 for a borefield in 2015.

The farm-to-mine pipeline system is placing immense pressure on the groundwater reserves, as suggested by the fact that water pressure is lost within a very few hours of the working day, and has to be replenished via large holding tanks.

Preposterous assertions being put forward by the Proponent that 1. That the *Water Management Act 2000* overrides all relevant conditions of consent PA 10_0138 and makes conditions irrelevant, and 2. That the new methods of sourcing water for the mine from groundwater and a pipeline system transferring water from agricultural use to mining are "substantially the same". Little could be less "the same".

The Department's wildly divergent positions on the pipeline in recent weeks, together with the questionable legal advice apparently being relied upon, suggest that extreme caution be exercised and a full EIA be conducted forthwith, which includes public exhibition and meaningful consultation.

Yours faithfully,
Peter Wills, Chair,
Wando Conservation and Cultural Centre Inc

NB: on page 5 of the attached submission:
(estimated) available 5000ML of water from Roma bore
Should read
(estimated) available 500ML of water from Cooboobindi bore



Wando Conservation and Cultural Centre Inc.
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E: wandocco@gmail.com ABN 66 884 936 813

8 January 2020

Mr Michael Barnes
NSW Ombudsman
Level 24, 580 George Street, Sydney NSW 2000
Email: nswombo@ombo.nsw.gov.au

Dear Mr Barnes,

Complaint about Department of Planning
Re: Maules Creek coal mine, Modifications 5 and 6 and accessing groundwater

Wando Conservation and Cultural Centre Inc, requests that the NSW Ombudsman investigate the conduct of the NSW Department of Planning for:

- 1) not requiring the Maules Creek Coal Mine to submit a modification to their Project Approval to access groundwater, given access to groundwater by the Maules Creek coal mine was not permitted under the conditions of consent for MP10_0138 and
- 2) not requiring the Maules Creek Coal Mine to submit a modification to their Project Approval for constructing new borefields, pipelines and associated infrastructure outside their approved project boundary.

From early October 2019 (possibly earlier) the Department acquiesced to breaches of the Maules Creek coal mine approval by permitting the works to be done, dishonestly claiming to members of the public that the works did not require approval as they were covered by the *State Environmental Planning Policy (Mining)* which they did not.

The Department clearly knew (or ought to have known) that changes to the approved project, such as accessing groundwater or adjusting the project boundary to accommodate new borefields, pipelines and associated infrastructure, required planning modification. Evidence of this being the Department's own precedent in 2015 when Idemitsu Resources was required to undertake Modification 5 of its Boggabri Coal Approval and in 2014 when Whitehaven Coal was required to undertake Modification 2 of its Maules Creek Coal Mine Approval.

Boggabri's Mod 5 included the "*conversion of existing test bores to operational production bores and the installation of ancillary infrastructure located on agricultural properties in areas adjacent to the mine*". For this modification an environmental assessment, including modelling groundwater impacts, and public exhibition were undertaken. This case is indistinguishable in all relevant aspects.

In the Maules Creek Coal Mine's Mod 2 – Minor Pipeline Realignment, the proponent states "*This Modification is required to enable the realignment of the pipeline and relocation of the pump*

installation where the final engineering design has resulted in minor adjustments to that currently approved.” Again, an environmental assessment and public exhibition were undertaken.

By all appearances, the Department has acted dishonestly throughout the construction period, insisting despite its own precedent, and despite all available legal advice, that the new borefield and pipeline network did not require modification of approval despite being outside the approved mine boundary and despite the use of groundwater for mining operations never being proposed in the original environmental assessment or approved in the Project Approval document.

In doing so, the Department has aided and abetted Whitehaven Coal in avoiding its lawful obligations under its Maules Creek mine approval, yielding to public pressure only once the development was completed. Finally, in response to public outrage, the company Whitehaven Coal undertook modifications, being MP10_0138-Mod-5 (Olivedene Water Pipeline Modification) and MP10_0138-Mod-6 (Roma and Brighton Water Pipeline Modification). However, these modifications only related to the “continued use” of the borewater pipelines and not for accessing the use of groundwater in the first place, or constructing the new infrastructure. To date, no modification, with accompanying environmental assessment and groundwater modelling, has been undertaken for accessing groundwater. This, we believe, is a serious error of judgment on the part of the Department, considering the prior poor environmental record of Whitehaven Coal and the level of concern about groundwater impacts already in evidence in the North West of NSW. Secondly, no modification has been submitted for constructing the new borefields, pipelines and associated infrastructure outside the approved mine boundary. Furthermore, the two modifications that were submitted were deemed by the Department to be of “minimal environmental impact” and thus not subjected to an environmental assessment or exhibition period.

As is well-known to the Department, the NSW Resources Regulator, NSW EPA and the NRAR are all independently considering prosecuting Whitehaven Coal over various environmental breaches including unlawful surface water harvesting. The company has had imposed a suspension of its Narrabri Underground mine exploration licence (suspended in August, and remains suspended four months later with prosecution likely) and a Prohibition Notice which caused the Maules Creek mine to be shut down due to its poor record of workplace accidents. In light of these matters, it is unreasonable to regard the water operations by Whitehaven Coal as of minimal environmental impact considering the elevated risks involved.

Many public submissions against Modifications 5 and 6 were sent to the Department of Planning, and the number could exceed the number needed to refer the Modifications to the NSW Independent Planning Commission. We request that the Ombudsman investigate how many submissions and complaints against the borefield pipeline network were received by the NSW Department of Planning, including the Secretary Mr Jim Betts.

If the number of submissions exceeds 25, the Modifications should be annulled and referred to the NSW Independent Planning Commission.

In this context, we also request the Ombudsman to investigate the Department’s practice of complete reliance on a proponent’s legal advice, without question, in the face of its own precedent to the contrary. At the very least, the Department should have obtained an opinion and not placed complete reliance on Whitehaven Coal’s alleged legal advice, which has now been found to be incorrect.

The error of judgment made by the Department in deeming modifications were not required for the water harvesting development and the “continued use” of the borewater pipelines to be of “minimal environmental impact” is possibly also indicative of misfeasance on the part of those responsible. The Department has aided and abetted breaches of the mine’s planning consent conditions, thus creating a benefit in the form of a continuing use which Whitehaven then utilised to argue “minimal environmental impact”.

Accessing groundwater, construction of a 12 km pipeline network, bore upgrades, a 2 megalitres per day water carting operation involving a fleet of newly acquired tankers, storage tanks and associated infrastructure, plus excavation of the Travelling Stock Route, all occurred while the Department claimed publicly that modification of the Maules creek mine conditions of consent were not required.

Relevant to the question of whether Modifications 5 & 6 could justly be termed of “minimal environmental impact” we also refer the Ombudsman to consider the recommendations which were made by the NSW Natural Resource Access Regulator concerning the Leard Mines Precinct Regional Water Strategy (5 November, 2018). The NRAR stated that it has “low confidence” in the ability of the Regional Strategy to manage cumulative impacts of the mines on water resources. This should have signalled to the Department that substantial changes in groundwater access constituted more than “minimal” risks and were not “minimal environmental impact”.

Whitehaven has relied heavily on the claim that 650 jobs are at stake if the Modifications were not fast-tracked. At no time has this claim been substantiated. This claim should have been subjected to an EA and public scrutiny.

Here are some recent references to these matters, including an Editorial in The Northern Daily Leader and blog article and letter to Mr Jim Betts, Secretary of the Dept of Planning, Industry and Environment from the North West Protection Advocacy:

<https://www.northerndailyleader.com.au/story/6547204/mine-pipeline-backflip-reeks-of-easier-to-seek-forgiveness-than-permission/>

<https://www.northerndailyleader.com.au/story/6558612/mines-late-application-for-water-pipelines-approved-in-just-days/>

<https://nwprotectionadvocacy.com/whitehaven-coals-water-farming-pipeline-network-under-assessment-by-planning-but-it-has-already-been-built/>

Wando CCC also attaches for your reference a previous complaint, once again demonstrating undue bias towards Whitehaven Coal. We regard this new instance as an escalation of our previous concerns of a lack of consistency, and undue favouring of Whitehaven Coal.

Yours faithfully,
Peter Wills,
Chairperson, Wando Conservation and Cultural Centre Inc

Attached:

1. Submission of the Wando Conservation and Cultural Centre Inc, re Maules Creek mine Modifications 5 and 6
2. Letter to the Hon Rob Stokes, Minister for Planning and Public Spaces, concerning the behavior of the Department of Planning and the Environment in providing incorrect and misleading information to the NSW Independent Planning Commission in relation to Boggabri Coal Mine’s Modification 7; dated 24 September 2019.



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17 March 2020

The Hon.Minister Matt Kean MP
Minister for Energy and Environment
GPO Box 5341
SYDNEY NSW 2001

Email: hornsby@parliament.nsw.gov.au

Dear Minister,

MINING LEASE APPLICATION 578 – Fit and Proper Person test

It has come to public attention that Whitehaven Coal Limited has applied for a new mining lease at Boggabri. Mining Lease Application 578 was advertised recently, citing the name of Andrew Garrett as the authorised contact person, believed to be an employee of Whitehaven Coal.

We are writing to you in regard to the Fit and Proper Person test contained in s 380A of the Mining Act. It is clear that under s 380A grants the Minister the right to refuse the grant of a Mining Lease to Whitehaven Coal.

It provides for Ministerial discretion around allowing refusal on the ground of reputation and character of the applicant. According to s 380A, the Minister can refuse if : (c) the person or body corporate has held a mining right, or any other instrument issued or granted under relevant legislation, that has been suspended, cancelled or revoked.

Exploration Licence EL 6324 was suspended by the Resources Regulator in August 2019, and remains suspended to this day following serious breaches of the company's exploration conditions. Furthermore, it is understood that the Resources Regulator is continuing its investigations into the circumstances of the suspension and is considering prosecuting Whitehaven Coal (via its subsidiary Narrabri Coal Operations).

Even a reinstatement of EL 6324 would not avoid the application of the Ministerial discretion in s 380A, as the wording employs the present perfect continuous tense, which refers to an unspecified time.

We refer to the wording of the relevant section:

380A Fit and proper person consideration in making certain decisions about mining rights

- (1) Despite anything to the contrary in this Act, any of the following decisions under this Act may be made on the ground that, in the opinion of the decision-maker, a relevant person is not a fit and proper person (without limiting any other ground on which such a decision may be made)—
 - (a) a decision to refuse to grant or renew a mining right (a **relevant person** in such a case being an applicant for the grant or renewal of the mining right),
 - (b) a decision to refuse to transfer a mining right (a **relevant person** in such a case being the proposed transferee),
 - (c) a decision to cancel a mining right or to suspend operations under a mining right (in whole or in part), a **relevant person** in such a case being a holder of the mining right,
 - (d) a decision to restrict operations under a mining right by the imposition or variation of conditions of a mining right (a **relevant person** in such a case being a holder of the mining right).
- (2) ...
- (3) A person or body corporate has **compliance or criminal conduct issues** if—
 - (a) the decision-maker is satisfied that the person or body corporate has contravened any relevant legislation, whether or not the person or body corporate has been prosecuted for or convicted of an offence arising from the contravention, or
 - (b) in the previous 10 years, the person or body corporate has been convicted in New South Wales or elsewhere of a serious offence or an offence involving fraud or dishonesty, or
 - (c) *the person or body corporate has held a mining right, or any other instrument issued or granted under relevant legislation, that has been suspended, cancelled or revoked.*
- (4) The grant, renewal or transfer of a mining lease can be refused on the ground that the Minister is of the opinion that the applicant is not a fit and proper person even if—
 - (a) the mining lease is necessary for the carrying out of State significant development that is authorised by a development consent, despite section 89K of the *Environmental Planning and Assessment Act 1979 (the Planning Act)*, or
 - (b) the mining lease is necessary for the carrying out of approved State significant infrastructure under Part 5.1 of the Planning Act, despite section 115ZH of that Act, or
 - (c) the mining lease is necessary for the carrying out of a transitional Part 3A project under Schedule 6A to the Planning Act, despite section 75V of that Act, or
 - (d) section 91A or 93 of the Planning Act would otherwise prevent that refusal.

[Emphasis added]

We request that the Minister also take into account that Whitehaven Coal has been prosecuted for violations of its conditions at the Rocglen coal mine relating to blasting.

We note that Whitehaven Coal operates under a number of different names of subsidiary companies, but the personnel involved regularly move between mines, in particular Rocglen and Maules Creek coal mines have experienced considerable movement of staff from one to the other.

Coal mines operated by Whitehaven Coal and its subsidiaries in Namoi Valley are therefore the same company, and the fit and proper person test should apply to the parent company and not be isolated to individual subsidiaries to avoid application of the Fit and Proper Person test.

This is a matter of serious import to the public if the Minister were to find himself unable or unwilling to invoke the Fit and Proper Person test to deny Whitehaven Coal approval of its application, given that preconditions exist for the exercise of the Minister's discretion.

Yours faithfully,

Peter Wills
Chairman

Wando Conservation and Cultural Centre Inc.

Cc The Hon. Roy Butler, MP for Barwon
The Hon. Kevin Anderson, MP for Tamworth
Mr John Hann, Chair, Vickery Extension Project Panel, Independent Planning Commission
Prof. Chris Fell AM Vickery Extension Project Panel, Independent Planning Commission,
Prof. Zada Lipman, Vickery Extension Project Panel, Independent Planning Commission