

25 AUG 2015



Office of the
Coordinator-General

Mr Dave Stewart
Director-General
Department of the Premier and Cabinet
Executive Building
100 George Street
Brisbane QLD 4002

Dear Mr Stewart

I refer to the Administrative Review Report (Review Report) on the environmental impact statement (EIS) process for the New Acland Coal Mine Stage 3 project (the project) and the opportunity to prepare a submission addressing the issue raised in the Review Report regarding my consideration of submissions on the additional information to the EIS (AEIS).

Thank you for the opportunity to read the Review Report and to respond to the review's findings.

I note that the Review Report concluded that a thorough environmental impact statement (EIS) process had been undertaken for the project, in accordance with the relevant provisions of the *State Development and Public Works Organisation Act 1971* (SDPWO Act).

The Review Report also commented that there was arguably insufficient documentary evidence from the review of my personal consideration of the submissions on the AEIS.

I personally considered the relevant AEIS submissions on the project in satisfaction of the requisite statutory and common law standards.

This one potential issue raised in the Review Report is a reflection of the limitations and constraints of the terms of reference which confined the review to an examination only of documents and specifically excluded any capacity to take evidence.

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The Review Report specifically highlighted this pre-determined limitation by qualifying its statements on the issue of my personal consideration of the AEIS submissions by stating that further information may be required from me to determine whether or not this personal consideration requirement had been satisfied to the requisite standard. The Review Report further stated that only the Coordinator-General can provide the evidence as to whether the further submissions on the AEIS were considered to the requisite standard.

Section 35(1) of the SDPWO Act requires the Coordinator-General to consider specified material including submissions accepted by the Coordinator-General about the EIS for a project. The purpose of that requirement is to allow the Coordinator-General to prepare a report evaluating the EIS (see ss 35(3) and (4) of the SDPWO Act).

I was required to evaluate a lengthy and complex EIS and, in doing so, the SDPWO Act provides me with power to seek assistance. I am entitled to rely on departmental officers who have read and considered every submission.

My evaluation of the EIS for the project occurred over an extended period of time through an interactive process with departmental officers. I am satisfied that the meetings and detailed discussions held with my officers over the course of evaluating the EIS for the project were sufficient to provide me with enough information about the facts, opinions and arguments in the submissions on the AEIS to enable me to meet the required standard of consideration for the purposes of section 35(1) of the SDPWO Act.

In summary, I considered the submissions made in relation to the AEIS to the standard required by Part 4 of the SDPWO Act. I disagree that there is not sufficient evidence of my personal consideration of those submissions.

I provide this response and further information in two parts.

The first part of this response sets out the relevant legal considerations about the appropriate standard to be applied to my consideration of the section 35(1) material.

The second part describes in detail the facts and documents evidencing the application of my intellectual effort in considering, weighing and evaluating the relevant matters in accordance with section 35 of the SDPWO Act, and specifically the submissions on the AEIS.

PART A – CASE LAW

I would like to place the case law¹ relied upon by the Review Report author in the context of my evaluation of an EIS under Part 4 of the SDPWO Act.

The requirement that the Coordinator-General considers the matters listed in s 35(1) of the SDPWO Act is a function of the Coordinator-General assigned to the Coordinator-General by the SDPWO Act within the meaning of s 10(1). Unlike the decision maker in the *Tickner* decision, the Coordinator-General may delegate that function to a person or body of persons under s 11 of the SDPWO Act. Absent such a delegation, the Coordinator-General must perform the function described in s 35(1) of the SDPWO Act.

Various provisions of the SDPWO Act expressly provide the Coordinator-General with the power to seek assistance in performing the functions under the SDPWO Act. In particular, in the performance of the function under s 35(1), the Coordinator-General is authorised:

- i. to undertake and commission such investigations, give such directions, and take such steps and measures as the Coordinator-General thinks necessary or desirable to perform the function (see s 10(2)(b) of the SDPWO Act);
- ii. to appoint any person to help the Coordinator-General in the performance of the Coordinator-General's functions (see s 14(1) of the SDPWO Act); and
- iii. obtain the advice or retain the services of such technical advisers as the Coordinator-General considers necessary for the proper performance by the Coordinator-General of the Coordinator-General's functions (see s 16(1) of the SDPWO Act).

The function of considering the material set out in s 35 of the SDPWO Act is a function:

- iv. involving an active intellectual process directed at that material: *Tickner v Chapman* (1995) 57 FCR 451 at 462C;
- v. of applying one's mind to the issues raised by that material, by obtaining an understanding of the facts and circumstances set out in the material and an understanding of the contentions urged based on those facts and circumstances: *Tickner* at 476F;

¹ • *Tickner v Chapman* (1995) 57 FCR 451
• *Koowarta v State of Queensland* (2014) 316 ALR 724
• *Meshlawn Pty Ltd v State of Queensland* [2009] QSC 215.

- vi. which requires the person to have regard to what is said in the material, to bring the person's mind to bear upon the facts stated and the arguments or opinions put forward in that material and to appreciate who is making those arguments or expressing those opinions: *Tickner* at 495G.

The courts have not accepted that an obligation to consider a document requires that the person actually read the document, although it has been accepted that in some instances reading a document will be the only way of considering it.

In the *Tickner* decision:

- vii. Kiefel J said at 497D that a consideration of representations (submissions) does not require the person obliged to consider them to personally read each representation, but it may be as well for the person to do so because if his or her staff are relied on to convey what is contained in the representations they must do so in a way which provides a full account of what is in them.
- viii. Black CJ said at 464E-G said that the Minister (in that case the person required to consider representations) is not denied the assistance of his or her staff in the process of considering the representations, and that while some representations would be capable of effective summary, there would be others where nothing short of personal reading would constitute proper consideration of the representation. As His Honour also said, at 462-463, the degree of effort that consideration of a particular representation may involve will vary according to its length, its content and its degree of relevance.
- ix. Burchett J endorsed the approach of Gibbs CJ in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31 that the Minister in that case could not be expected to read for himself all the relevant papers and it would not be unreasonable to rely on a summary of relevant facts provided by department officers, provided the summary included all material facts the Minister was bound to consider.

To similar effect were statements by Brennan J in *Peko-Wallsend* at 65-66, noting that part of a department's function is to undertake an analysis, evaluation and précis of material to which a Minister is bound to have regard, and that a Minister retains his power to make a decision while relying on his department to draw his attention to the salient facts.

Similar sentiments were expressed by Mason P in *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 426-427 [211] where His Honour said:

- x. *"I see nothing wrong in principle with an examiner and reporter, or even a decision-maker, assigning to an agent the task of recording, collating, organising and summarising a mass of submissions covering a range of discordant issues (see Tickner v Chapman (1995) 57 FCR 451 at 464, 476-477). Anyone familiar with controversial environmental impact studies would recognise this as a common method of handling material that would be lost or overlooked because of its sheer mass and complexity. Naturally there are submissions and submissions, and some will call for additional attention.*

- xi. *But it is unrealistic and unhelpful to expect a single decision-maker or a small panel of decision-makers to wade through every submission in the first instance. It will always be open to those mounting administrative law challenges to argue that the substance or detail of particular submissions have not been considered or taken into account, but the onus of establishing such allegations will rest upon them. Proof that assistance from a consultant such as PKF Utility was engaged will not in itself establish abdication of function or denial of procedural fairness. South Sydney City Council did not establish that the commissioners failed to read or consider all submissions."*

The function of considering submissions as required by section 35 of the SDPWO Act is performed if I understand the facts, circumstances and arguments or opinions set out in the submissions and apply my mind to that material in the sense of applying intellectual effort in weighing and evaluating that material. I need not necessarily read a submission in order to consider it. I am entitled to rely on the assistance of departmental officers in analysing, evaluating and summarising such material, so long as the substance or detail of a submission is accurately presented to me for consideration.

The onus of showing that no consideration or inadequate consideration has been given to a submission rests on the person making that allegation. There is no obligation on the Coordinator-General to explain how each submission was considered. The Coordinator-General is to consider submissions and the other section 35(1) material for the purpose of preparing a report evaluating the EIS including doing the things mentioned in section 35(4). Such a report is not an occasion for describing how every individual submission was considered or evaluated.

PART B: MY CONSIDERATION OF AEIS SUBMISSIONS

As the terms of reference limited the review to only a documentary review of my evaluation, in reaching a conclusion, the reviewer was unable to take into account all the (non-documentary) evidence that included an interactive process of detailed consideration that occurred over an extended period of time with my officers.

The Review Report concluded that I had personally considered the 1,397 submissions lodged during the public notification period from 18 January 2014 to 3 March 2014 on the EIS, in compliance with Part 4 of the SDPWO Act. Central to this conclusion was the existence of documentary evidence in the form of summaries of the arguments, opinions, facts and circumstances contained in each submission attached to two of my decision briefs (the relevant sections of the briefing notes are included at Attachments 1 and 2).

However, the Review Report then comments that I arguably may not have personally considered the 614 submissions lodged during the public notification period from 1 September 2014 to 29 September 2014 for the AEIS. The review commented that as there is no similar documentary evidence (within the scope of the review terms of reference) of an equivalent submission analysis document being given to me, that I may arguably not have considered the AEIS submissions.

That comment fails to recognise my high degree of personal involvement and active intellectual effort in the evaluation of the project over a two year period. In addition, it does not recognise the integrated nature of the various assessment stages in the EIS evaluation process under the SDPWO Act, with each stage progressively building upon the previous stage. In particular, it does not take into account the consistencies between key issues raised in submissions on the EIS and AEIS.

My consideration of the AEIS submissions and my understanding of the arguments, opinion, facts and circumstances contained in them were informed by the following and involved the following processes of consideration.

1. Comprehensive assessment by Office of the Coordinator-General (OCG) project team

The OCG project team assigned to undertake the project's EIS process included a project manager with nine years' experience managing EIS assessments, and a social impacts assessment (SIA) project manager with eight years' experience managing SIA EIS processes. Both project managers were supported by a team of a senior project officer and two project officers, each with extensive experience with the EIS process. The project manager has worked on the

project since 2011; the SIA project manager had over one year experience with the project by the time drafting of the evaluation report commenced.

This OCG project team was responsible for analysis of the AEIS submissions, assisted by two additional experienced EIS process project officers who documented submissions into a 525 page (A3) submissions analysis database (Attachment 3). The project manager and SIA project manager read electronic and hard copies of submissions while the originals were being entered into the database. The senior project officer oversaw the processing of the submissions.

Records indicate 1,030 hours were spent by OCG project officers from 29 September to 5 December 2014 on the analysis of AEIS submissions and advancing drafting of my evaluation report taking into account the submission issues.

At my direction, the two project managers scrutinised submissions in order to ascertain if key issues raised in the AEIS were the same as those raised in EIS submissions; and to understand what issues raised in AEIS submissions needed to be further addressed by the proponent in order to inform my evaluation.

I relied upon this analysis to inform my consideration and understanding of the AEIS submissions. I was confident such analysis contained all the material facts that I was bound to consider.

2. Weekly project meetings

Following my appointment as Coordinator-General in March 2012, I initiated weekly projects meetings for coordinated projects. These were attended by me, the Assistant Coordinator-General of Coordinated Project Delivery, and the relevant Executive Directors, Directors and Project Managers.

My initial involvement with the project was in early 2012 when I participated in meetings with the proponent about the community's, and government's, concerns with the project's scope and impacts. These concerns resulted in the proponent's proposal to significantly reduce the project's impacts, including reduction of the project footprint by 60 per cent.

Accordingly, at my direction, the New Acland Stage 3 project was included on the agenda every week since I commenced the meetings in April 2012. Discussion about the project would range in duration from between 15 minutes to 45 minutes depending on the substance of the matters to be considered and the stage of the project and EIS process at that time.

Special purpose meetings were also convened when a greater level of discussion was required on specific project matters, such as a meeting I

convened on 3 December 2014 to specifically discuss the project's AEIS submissions.

In the weekly meetings on the project, I was briefed on project and EIS process updates; the proponent's consultation with the community and local landholders, including statistics of contact with the proponent's Oakey information centre, and updates about regular Community Reference Group meetings; contact made by [REDACTED] and [REDACTED] with my office and issues raised; and media discussion about the project.

The weekly meetings were an opportunity for copies of documents to be provided to and/or discussed with me by the OCG project team, including submission statistics, key submissions, analyses, agency advice, media statements, and EIS excerpts.

These weekly sessions were interactive project management meetings where I asked questions of the OCG project team, requested further information where necessary regarding the EIS process, and discussed the specific submitters concerns in detail and ways to address them.

For example, at the point of analysing submissions on the TOR, the EIS and the AEIS these weekly meetings provided me with the forum to exchange information on key issues raised by submitters, relevant EIS assessments about project impacts and mitigation measures proposed; advice on the adequacy of these measures; and proposed solutions to address the issues.

In particular, from the conclusion of the AEIS submission period in late September 2014 to the finalising of the CGER in December 2014, the New Acland Stage 3 project was discussed with me at 11 weekly project review meetings. At these meetings, from 2 October to 12 December 2014, analysis of the 614 AEIS submissions was regularly discussed.

Also specifically discussed with me at these meetings were four written requests (dated 23 September 2014, 2 October 2014, 8 October 2014 and 4 November 2014 (Attachments 4a-4d)) made by the OCG project team to the proponent seeking further information to the AEIS. For example, the proponent was asked to respond to points raised in specific AEIS submissions (e.g. the [REDACTED], [REDACTED] and [REDACTED], [REDACTED] and [REDACTED]).

The results of these four information requests were included in the proponent's final information document that I reviewed prior to completing the evaluation report. This document (*New Acland Coal Mine Stage 3 Project Information Clarification to the AEIS* (December 2014) (Attachment 5)) was subsequently published with the evaluation report.

Further, within the weekly project meetings from early November 2014 to mid-December 2014, I regularly discussed the progressive preparation of the draft

evaluation report and consistently applied my intellectual consideration to how best to avoid, mitigate, manage or offset any potential impacts raised by submitters (e.g. air, noise, land impacts, groundwater, and transport impacts).

It was within the numerous project review meetings and my consideration of the EIS submission analysis prepared by the OCG project team that I developed my understanding of the AEIS submitter issues and the commonality of the issues between the EIS and AEIS submissions.

3. Common key issues: EIS and AEIS submissions

The EIS was advertised for public comment from 18 January to 3 March 2014. My personal review of the 1,397 submissions received on the EIS, along with a comprehensive and thorough submissions analysis prepared by the OCG project team (Attachment 1) informed my decision that an AEIS was required to be provided by the proponent that responded to key submitter issues.

My previous consideration of the 1,397 submissions to the EIS informed my understanding of the AEIS submissions, particularly in view of the following:

- of the 614 AEIS submissions:
 - 219 submitters had previously made submissions on the EIS, and their AEIS submissions repeated the same key issues.
- Of the remaining 395 AEIS submissions:
 - 289 were template submissions with key issues that had already been included in my EIS submissions consideration (e.g. air, noise, land impacts, economics)
 - 106 were not template submissions and consisted of:
 - 95 in support of the project
 - 11 that raised no new issues that had not already been considered by me on the EIS submissions.

4. Special purpose meeting

I convened a special meeting on 3 December 2014, at a critical point in my evaluation process, to inform my consideration and understanding of the AEIS submissions, and to progress development of the draft CGER. The meeting was attended by the Office of the Coordinator-General's Executive Director, Director and Project Manager assigned to the project. It was one hour in duration.

At the meeting a document summarising the key issues raised in AEIS submissions formed the agenda for the meeting (Attachment 6a). In addition,

the meeting discussion was further informed by the AEIS submission analysis summary prepared by the OCG project team (Attachment 6b).

The meeting greatly assisted my understanding of the AEIS submissions and built upon my existing knowledge of the EIS issues. This discussion was critical to formulating the basis for the extensive and rigorous conditions that subsequently underpinned my final evaluation.

In particular, during this meeting I worked through in detail the following key issues and discussed potential mitigation and management measures:

- land impacts: I was informed that a significant number of EIS and AEIS submitters raised concerns with the project's impacts on strategic cropping land.

The issues raised in AEIS submissions on the matter, including submitters' dissatisfaction with the proponent's discussion in the AEIS on the matter, were discussed with me.

- social impacts: I was informed about concerns raised in AEIS submissions regarding social impacts. I provided direction and discussed potential conditions, such as requiring regular reporting to me on the results of community engagement, particularly with nearby residents; and requiring the proponent to publish online the results of air and noise monitoring. Notes from the meeting confirm I said 'they [the proponent] have to do better'.
- relocation of the existing rail load-out facility at Jondaryan. I was informed that AEIS submitters were concerned the facility would either not be relocated, or if it was such relocation would not be done quickly.

Notes from the meeting confirm I decided that any relocation needs to be in place from 'day 1 of stage 3' commencing.

- road closure impacts: I was informed of concerns raised in AEIS submissions about additional travel times that would result for nearby residents due to the mine's proposed closure and diversion of roads. Potential safety risks due to emergency vehicle additional travel times were also discussed.

Notes from the meeting confirm I decided an alternate access route must be properly sealed.

- noise impacts: I was informed about the key concern of noise as raised in AEIS submissions. In particular, significant discussion occurred regarding the submissions from [REDACTED] proposed mining operations.

- air impacts: I was informed about issues raised in AEIS submissions regarding air impacts, particularly the submitters' lack of confidence that set emission thresholds would be achieved. I then decided on potential conditions for real time monitoring and public reporting on monitoring results.

5. The Coordinator-General's evaluation report (CGER)

The process of producing the CGER involved very detailed reviews, edits and discussion between the team and me on the issues and conditions. The Review Report acknowledged this by stating I exercised a high degree of control over its production.

The end result of an extensive and rigorous assessment process was my CGER for the project (Attachment 7). The CGER provides documentary evidence demonstrating my substantial personal consideration of the matters raised in EIS and AEIS submissions. Indeed, the structure of the CGER is purposely aligned with many of the issues raised in submissions.

Much of the discussion in the CGER makes specific reference to submitter issues and the particular conditions I imposed to manage and mitigate these matters. Specifically issues such as the Jondaryan rail load out facility, fauna, transport route interruptions, land impacts, water impacts, air emissions, noise and vibration, economics and community engagement.

Some of the specific CGER measures I developed as a direct result of my detailed consideration of the EIS and AEIS submissions included:

- i. ensuring the mine's existing rail load-out facility 1km from Jondaryan is relocated 8km away from day one of the stage 3 expansion (page 158, Attachment 7)
- ii. requiring a new access road to be built from Acland to Jondaryan, to alleviate additional travel distances and times that would occur due to road closures (page 208, Attachment 7)
- iii. stringent noise and dust limits requiring real-time dust and noise monitoring, which will trigger alarms if limits are close to being exceeded, resulting in immediate changes to mine activities (pages 174-176, Attachment 7)
- iv. requiring two additional real time monitors to be purchased and located near residents, beyond the one monitor proposed in the EIS (page 174, Attachment 7)
- v. requiring an offset to the State for groundwater lost from aquifers closer to the surface that are an important supply source for communities and the environment (page 212, Attachment 7)

- vi. stringent and detailed mined land rehabilitation requirements to ensure the best possible post-disturbance land suitability (pages 159-161, Attachment 7)
- vii. conditions include the requirement that at least 50 percent of land originally meeting or exceeding either class 3 grazing land or class 4 cropping land must still meet or exceed these classifications. Ongoing monitoring of the success of the rehabilitated land is required, with rectification needed if issues arise (page 161, Attachment 7)
- viii. for land to be lost due to mine voids: land elsewhere equivalent to the amount, and land types, of that to be lost is to be secured by covenant. The equivalent land's values are to be improved and managed until the mining lease is surrendered (page 163, Attachment 7)
- ix. monthly online reports are to be published on the project's compliance with air and noise limits; and reporting on complaints management, project progress and project updates is required (page 158, Attachment 7)
- x. requiring the establishment of a flora and fauna conservation zone along Lagoon Creek in the mining lease area, with a particular focus on improving koala habitat. Rehabilitation criteria to ensure the degraded riparian area will be restored to a functional ecosystem were included in conditions (pages 166-168, Attachment 7)
- xi. requiring biodiversity offsets that include offset requirements for koala habitat (page 195, Attachment 7).

The CGER for the project sets conditions on key matters raised in submissions on the EIS and the AEIS for the project. These stringent conditions address key issues raised by submitters on both the EIS and again on the AEIS. They require a level of management, mitigation, and offsets to a degree that exceeds the requirements of standard mining conditions. The comprehensive stringent conditions are the result of my consideration of all issues.

In total, 137 conditions were applied by me and each condition represents the result of my intellectual effort in weighing and evaluating the relevant matters in accordance with section 35 of the SDPWO Act, including the submissions on the AEIS.

6. Information Clarification to AEIS

This document was included in the Briefing Note (Attachment 8) that finalised my CGER on the project (Attachment 2 of Attachment 8) and also made publicly available with the release of my evaluation report. This document was described in that briefing note as *'the document: Information Clarification to the additional information to the environmental impact statement (AEIS) (December 2014)*

which compiles the proponent's responses for further information, including responses to key issues raised in AEIS submissions'.

This particular document was an important document in my consideration of the matters raised in the AEIS submissions as it is evidence of the specific submitter issues that I considered in detail as part of my intellectual deliberations.

As discussed previously, at my direction the officers providing me with evaluation assistance made four written requests to the proponent seeking further information to the AEIS such as being asked to respond to points raised in specific AEIS submissions such as the [REDACTED], [REDACTED] and [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

To illustrate this point, the following examples are extracted from the 8 October 2014 email request from the OCG project manager to [REDACTED] of New Hope Coal (Attachment 4c):

Items 4 and 5: *"From [REDACTED] submission, a response is sought on the following items:*

- *Pages 29, 30: mine water usage, including Toowoomba Regional Council Waste Water Treatment Plant (TRC WWTP) supply figures vs EIS data; and respond to comment regarding preferential use of bore water*
- *Page 30: comment regarding Oakey waste water use and potential hazards of its use. Additionally – how is the brine used on-site; and what quantities are likely to be sourced for the project?"*

Items 7 and 8 – *"Note comments in attached email "submission on additional EIS information: by [REDACTED] From the submission, please respond to:*

- *Page 13 – monitoring at [REDACTED] residence*
- *Page 14 – proximity to above residence."*

Items 11 and 12 – *"Note comments in attached submission from [REDACTED] pdf "DEPC14 1812, including Acland maintenance and management suggestions. From the submission, respond to:*

- *Page 11 re EMP section 3.14.2 – Heritage Acland township*
- *Page 20 re 5.3.44.3 re blasting fume events when was the last event? How frequently have these occurred in recent years?"*

Items 13 and 14 – Note comments in submission from [REDACTED] – pdf
“Final Stage 3 AEIS. From the submission, respond to:

- *Page 8 – comment regarding age of study that informed discussion on agricultural trends*
- *Page 12 – choice of BOM dataset re evaporation*
- *Page 33 – 34 – assumptions used for GGEs – noted section 10.4.2 of the EIS does not specifically address assumptions.”*

On 4 November 2014, a response (Project Memorandum No. 3) (Attachment 9) was received from New Hope Coal to the matters raised in the OCG project team requests. This memorandum then formed much of the Information Clarification document attached to briefing material I considered in deciding on my final CGER.

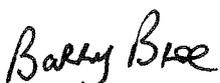
This is another example of the level of my active involvement in personally considering the matters raised in the AEIS submissions.

Conclusion

To conclude, I would emphasise the point that the issue of my personal consideration of the AEIS submissions raised in the Review Report is a reflection of the limitations and constraints of the terms of reference of this administrative review. The administrative review was restricted to an examination of the documents and specifically excluded any capacity to take any evidence. The Review Report most appropriately acknowledged this inherent limitation and advised that further information was required from me to determine whether or not this personal consideration requirement has been satisfied to the requisite standard.

The information contained in this response demonstrates the manner in which my evaluation of the project has satisfied the requirements of the SDPWO Act. In particular, I have satisfied the requisite standards for my consideration of the AEIS submissions through the extent and depth of my active intellectual process directed at the arguments, opinions, facts and circumstances contained in the AEIS submissions.

Yours sincerely



Barry Broe
Coordinator-General

Att.