

## Response to Department of Planning and Environment's Secretary's Environmental Assessment Report (Section 89E of the Environmental Planning and Assessment Act 1979) November 2016 for the Wilpinjong Extension Project (SD 6764)

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This review will assess the Report and how it conforms to the NSW Offset Policy for Major Projects.

### 1. Extent of Impact on Biodiversity

*"The project would disturb around 1,000 hectares of land comprising a mixture of woodland and cleared grazing land on the valley floors between the Goulburn River National Park and the Munghorn Gap Nature Reserve. In total, the project would clear 354 hectares of native woodland vegetation, including 19 hectares of endangered ecological communities and 190 hectares of threatened Regent Honeyeater habitat."*

The project will also affect habitat for the Koala and *Ozothamnus tessellatus* also Commonwealth listed species along with the Regent Honeyeater.

### 2. Fulfillment of Policy Principles

**Principle 1: Before offsets are considered, impacts must first be avoided and unavoidable impacts minimised through mitigation measures. Only then should offsets be considered for the remaining impacts.**

As the proposed action will impact on the critically endangered Regent Honeyeater, this is a 'matter for further consideration' as identified in the Offset Policy, despite it being in the 'Transition Phase'. There was no substantive guidance within the SEARs in relation to this issue, as supposed elaboration of what constitutes a 'matter for further consideration' for critically endangered species with a wide distribution has never occurred.

Has the proponent given due consideration to avoidance? The Secretary's Assessment Report (SAR) states, *"The Department is satisfied that WCPL has avoided impacts on biodiversity as far as practicable, and due to the location of the coal resource there are limited opportunities to further avoid these impacts."*

In other words, the economic benefit to the company (with a marginal benefit to the community) has precedence over the impacts upon biodiversity. While the state government gave clear precedence of economic outcomes over environmental ones in a previous policy, this has now been rescinded to maintain a 'triple bottom line' or in other words each factor, economic, social and environmental is now given equal consideration. Supposed economic advantage cannot alone be provided as the over-arching reason to have significant impact upon biodiversity. If the DoPE was serious about the application of this principle, it would weight up the dollar benefit of the action in terms of flow back to the community (the area in question represents about 1% of the total output from the proposed mine extension) against the dollar value of the impact upon irreplaceable biodiversity. There are ways to measure biodiversity in dollar terms, if the DoPE was serious about this principle it would take a more balanced approach to this issue.

The one-side nature of the approach taken by DoPE is reflected in its approach to the issue of the buffer width in areas adjacent to the nature Reserve, as shown in the following excerpt from the SAR:

*“OEH in its submission raised concerns over potential indirect impacts from mining operations on the Munghorn Gap Nature Reserve. In particular, OEH recommended that a 50 m buffer to the open cut pit and mine infrastructure be required to minimise connectivity and indirect impacts. WCPL did not specify any buffer distance from the reserve boundary, but in response to OEH’s concerns proposed that the edge of the open cut be limited to 20 m distance from the reserve, with ancillary infrastructure (such as roads and water infrastructure) to be placed within this buffer.”*

What scientific evidence was provided by the proponent to show that a 20 or 50m buffer was sufficient to minimise impacts on the Nature Reserve? This was apparently not a consideration by the mining company. When blasting and noise, dust, air pollution and toxic fumes are taken into account, being within 50m of a mine or its infrastructure would place the biological entities within a ‘high impact zone’ as it would for any person. But the SAR maintains that:

*“Based on the additional advice provided by WCPL, the Department and OEH are satisfied that the indirect impacts (such as dust, noise, light and vibration) from operating within a 50m buffer of the reserve, would be short term. Further, a large portion of the areas to be impacted are already subject to edge effects from adjoining cleared agricultural land.”*

In reality, any further incursion by the mine into the freehold fingers that protrude into the areas surrounded by the Nature Reserve may have profound and ongoing impacts on this high value conservation zone. It is not a question about what is being done within the buffer, but the distance of the open cut to the boundary. Even if operations within the buffer may be short-lived, the operation of the mine is likely to have ongoing impacts on the use and dispersal of the Regent Honeyeater and a variety of other species within adjacent areas of the reserve for an undetermined distance. No amount of native vegetation planting is likely to ameliorate this impact for about 30 generations of Regent Honeyeaters, taking into account the life-span of a Regent Honeyeater and the time taken for mature vegetation to emerge that would have any prospect of ameliorating the ‘indirect’ effects of an open cut mine.

Despite the concerns by OEH, a 20m buffer was the width agreed to in the end by the all parties. The Department’s blinkered view in relation to this issue is most telling when it comes to the removal of the habitat of a critically endangered species, the incursions into the strips of land surrounded by Munghorn Gap Nature Reserve and the failure to insist on a 50m buffer, which in itself, is a ludicrously small buffer width, to protect biodiversity. These factors alone suggest strongly that the DoPE has not weighed up the issue of avoidance in a fair and equitable manner.

The approval of the Moolarben Stage 2 Mine in 2015 has set a precedent for a 50m buffer with Munghorn Gap Nature Reserve. While still a very minimal buffer zone, this precedent should be maintained for any further consideration of open cut mining operations adjacent to the Reserve.

The impact of these mining incursions should be severe enough, particularly as a ‘matter for further consideration’ is involved and the fact that these impacts cannot be adequately ameliorated, for the mine application to be rejected or major alterations to the design of the mine be made.

**Principle 2: Offset requirements should be based on a reliable and transparent assessment of losses and gains.**

The proponent has used the Framework for Biodiversity Assessment (FBA) as the tool for undertaking the assessment process for impacts upon biodiversity and the biodiversity benefits of

the offset strategy and has used accredited BioBanking Assessors for the assessment. While the approach taken by the proponent seems to be consistent with this Principle, the question of how the Offset Policy has been implemented, particularly in terms of the dealing with the biodiversity credit deficit is a critical issue here and will be dealt with below.

**Principle 3: Offsets must be targeted to the biodiversity values being lost or to higher conservation priorities.**

As most impacts have a direct and indirect influence on Regent Honeyeater, Koala, *Ozothamnus tessellatus* and the Munghorn Gap NR itself, the proponent proposes to compensate for these impacts through a biodiversity offset strategy, incorporating:

- 996 ha of native vegetation, including 46.5 ha Box Gum Woodland EEC, 203 ha Slaty Box Woodland EEC, 601.5 ha of Regent Honeyeater habitat and 647.5 ha Koala habitat.
- rehabilitation of almost 3,000 hectares of the land disturbed by mining to woodland, targeting vegetation communities suitable for the Regent Honeyeater; and
- \$660,000 towards the recovery program for the Regent Honeyeater targeting release of captive birds into the wild.

There is a significant shortfall in credits needed to retire the impact upon the Regent Honeyeater (10,359 credits residual). This shortfall was made up an extensive rehabilitation program and a significant investment in a breeding and release program. How consistent is this arrangement with the current offset policy?

Details of the offset strategy proposed is given below. Figures are in hectares:

Category	Total native veg	Box Gum CEEC (inclusive of total)	Cleared land	Mechanism
<b>Existing offsets</b>				
'ECAs'	295	80	185	Conservation agreement
Offsets D/E	211	47.8		Transfer to NPWS
Mine Rehab			921 (107 existing rehab)	none
Additional lands			311	none
<b>New offsets</b>				
Offsets	996	46.5		Transfer to NPWS
Agriculture rehab			1,049	none
<b>Total</b>	<b>1,502</b>	<b>174.3</b>	<b>2,466</b>	

While the SAR states that about 2,900 ha of rehabilitation will provide biodiversity benefits, only 2,466 ha can be found in the figures provided in Tables 9 and 10 of the SAR. It not clear how the SARE has derived its figures. In addition, 1,049 ha of this is will be, "... rehabilitated back to open woodland/ agriculture land use and while there would be some biodiversity benefits in paddock trees, an agricultural land use post approval is envisaged". In other words, this land will be primarily rehabilitated for agricultural purposes, with scattered paddock trees providing some biodiversity value. One wonders how old paddock trees could be established within the timescale of the project,

and even if this was possible, this land should not be considered to be a biodiversity outcome under the terms of the Offset Policy.

The offset strategy will only cover 1,509 ha of land which has existing remnant vegetation, including 174 ha of Box Gum CEEC. This land will be either transferred to the NPWS estate or set up under a Conservation Agreement with NPWS. None of the other mine rehab lands will be subject to a conservation mechanism.

*In reality, only 1,222 ha of rehab lands outside of the secured conservation mechanisms will have a primarily biodiversity outcome.*

This surely raises serious questions about the figures provided in the SAR which purport to account for retirement of credits and the level of credit being given to proponent, all of which is 50% (see below).

Objective 3 of the Offset Policy states clearly that to provide a practical and achievable offset scheme for proponents the policy will achieve by increasing flexibility for achieving offset requirements by allowing:

*– providing funds for supplementary measures when offsets are not available. These are other measures that benefit biodiversity but do not specifically involve protecting and managing a site.*

*– ecological rehabilitation of mine sites will be recognised in calculation of offsets where there are good prospects of biodiversity being restored.*

*– variations to like-for-like requirement, recognising that exactly the same biodiversity is not always available for an offset, the policy allows for variations in the 'like-for-like' requirement so offsets do not always need to be strictly matched to the biodiversity impacted on, but can be targeted to relevant equal or higher conservation priorities. Variation rules can be applied only after all reasonable steps have been taken to satisfy the like-for-like offset requirements.*

There are rules by which these principles are applied, and this is appropriate, as decisions relating to credit retirement are used to inform approvals. No variations were applied in this case, and Peabody has relied on the provision of supplementary and mine site rehabilitation measures.

However, both The Regent Honeyeater and the Box Gum CEEC are 'matters for further consideration', though under the 'transitional implementation', *"Work will be undertaken to further refine the definition of 'impacts requiring further consideration' during the transitional period. Given this, there will be some flexibility to the above requirement that offsets for these impacts be secured before the impact occurring during the transitional period. A consent authority may decide this is not a requirement where it can be demonstrated that the prospect of finding an appropriate offset is high. This will be considered by the consent authority when undertaking further consideration around these impacts."*

Given the shortfall in credits for the Regent Honeyeater, it would seem that the proponent has either:

- Not adequately assessed other potential lands which may be available which contain suitable habitat for the Regent Honeyeater, or
- There is simply no land available.

If it is the first, then the Peabody has breached Principle 6 which outlines 'reasonable steps' to locate appropriate offsets, if it is the second, then clearly the Regent Honeyeater cannot have its residual

impacts retired under the terms of the Offset Policy, as there is little prospect of finding land which can offset the impacts. In this case, therefore, **there is no basis for the application of 'flexibility' as outlined during the 'transitional phase'**.

Instead it should be used to inform a re-appraisal of the suitability of the offset arrangements for the Regent Honeyeater by the Secretary of the Environment. Under NSW or Commonwealth policy, this would constitute an irreversible impact on a critically endangered entity. While there are strong doubts whether this level of impact could be approved by the Commonwealth, it surely is not consistent with the current policy that seeks to avoid extinction of populations of critically endangered species and given the uncertainties associated with the extent and investment in mine rehabilitation and supplementary measures as suitable offset mechanisms.

The fact that the SAR has relied so heavily upon the contingencies of the use of mine rehabilitation and supplementary measures to offset the impact on this species, in this light seems inappropriate.

### **Mine rehabilitation**

The vast majority of credits for the Regent Honeyeater are 'retired' through the use of mine rehabilitation as per the policy.

The Department considers that the project presents an *"important opportunity to improve the current situation through rehabilitation of land disturbed by mining back to self-sustaining woodland communities on a broad scale"*.

However, three serious question cloud this outcome.

1. Only 2,466 ha are identified in the figures provide in the SAR
2. Of this only 1,222 ha will have a primary biodiversity outcome
3. None of the mine rehab land will be secured under a conservation covenant.

In addition, while the Department is satisfied that 2,906 ha (?) of rehabilitation could be used to meet the shortfall in both ecosystem and species credits, of the 921 ha of existing offset committed to rehabilitation to woodland under the previous project approval, only 107 ha contain rehabilitation which has already commenced.

The FBA allows 50% of the credits level that a mature community would generate to be counted for the offset strategy for rehabilitation projects. However, this is fraught with issues, particularly as about half of the rehab commitment is not for a biodiversity outcome and the vast majority of this land will not be subject to any conservation covenant.

Given these shortcomings, this is an unprecedented rehabilitation program being proposed by Peabody, even if a bond is signed, it is difficult to see how a proponent with such a large corporate credit liability, could meet such a commitment. But putting that issue to one side, there is simply no evidence that such a plan could ever be achieved.

Use of the Framework for Biodiversity Assessment or the Biobanking Assessment Methodology may provide the numbers but the fact is that despite many commitments being made in the Hunter and Goulburn River Valleys by mining companies, there are no examples of Box Gum CEEC being successfully rehabilitated on any mine site land and no evidence that any such projects are proceeding successfully.

They are also happy that *"additional management actions and enhancement to re-focus the rehabilitation to Regent Honeyeater habitat and vegetation communities"* is possible.

Neither of these contentions has any basis in the scientific literature, apart from some projects restoring White Box woodlands within areas where they formerly occurred on undisturbed substrates. These documented restoration projects tended to focus on areas of existing woodland.

The SAR deals with the issue of additionality by providing a 25% rehabilitation credit for already approved offset areas. *“Both the OEH and the Department consider there is benefit in moving from rehabilitation based on vegetation formation to rehabilitation targeting specific plant community types and Regent Honeyeater habitat.”* Using lands which are subject to a prior land use agreement raising question as to the ‘additionality’ of these offsets and a breach of Principle 4. Instead, Peabody are rewarded for having existing offsets under a previous approval and given additional credits for them (see below, Principle 4).

DoPE propose to address the issue of habitat for the Regent Honeyeater by restricting the number of vegetation communities to only three BVTs that would be acceptable for rehabilitation areas to meet Regent Honeyeater species credits. But even this is watered down as the DoPE then allows for, *“some flexibility to include additional BVT’s subject to the approval of the Secretary in consultation with OEH. This would allow further vegetation communities to be included during the mine life, pending updated Regent Honeyeater survey information or expert review by OEH.”* This proviso makes a mockery of the initial contention that only three BVTs are to be used, and is clearly put in the SAR so as use rehabilitation which is not suitable for the Regent Honeyeater.

The important information about what may constitute ‘Regent Honeyeater habitat’, whatever BVT it may be, is not mentioned. The scientific advice to the Minister for the listing of the species as critically endangered species states, *“It prefers taller and larger diameter trees for foraging, as these typically produce more nectar (Franklin et al., 1989; Menkhorst et al., 1999; Oliver, 2000; Webster and Menkhorst, 1992)”*. The time taken for a eucalypt to become ‘large’, say over 50 cm wide, may take a hundred years. Despite the DoPE’s willingness to set in place completion criteria it seems that the provision of ‘preferred foraging trees will never be achieved over the life of the mine.

Claims accepted by the DoPE that ecosystem and species credits will be offset by the extensive mining rehabilitation proposal are unsubstantiated or impossible and the 50% credit level awarded to these areas is very tenuous given that about half of this land is not designed for a primary biodiversity outcome.

#### **Principle 4: Offsets must be additional to other legal requirements.**

This principle states that, *“offsets must provide an actual addition to biodiversity rather than something that was going to occur anyway. To ensure this, the policy applies the principle that improvements to biodiversity made through undertaking management actions must be in addition to other legal obligations for conservation that are attached to the land.”*

The SAR has endeavoured to keep within the parameters set by this principle, by stating that the improvements to the existing offsets will provide Regent Honeyeater habitat, whereas previously they weren’t. This is even though of the 900 h of existing offsets used in this proposal for ‘additional’ work’, only 100 ha has existing rehabilitation. Presumably the rest of the areal extent are still in their unmanaged state.

How can the proponent be awarded a 25% credit discount on these lands, when:

- (a) Most have no rehabilitation. If no rehabilitation exists, then how can an ‘additionality’ be awarded to these lands?
- (b) The 100 ha which does have existing rehabilitation is not of the right BVT for the Regent Honeyeater (i.e. Lacking the right tree species?). Of course, the NSW Government has allowed flexibility here.

Even under the broad framework set by The NSW Government to retire offsets, the additionality measures have been inconsistently applied.

As discussed above, ‘habitat’ for the Regent Honeyeater not only means the right two or three eucalypt species, but ‘foraging’ and presumably nesting habitat is usually undertaken by this species in ‘large’ trees which cannot be realised within the life of the mine. The existing offsets are in no condition to become Regent Honeyeater habitat in the next twenty years, even if they are planted out with Regent Honeyeater ‘food trees’.

**Principle 6: Supplementary measures can be used in lieu of offsets.**

Another substantial component of the residual credit deficit for the impact on the Regent Honeyeater (1,700 credits) is use of a supplementary measure, in the case the funding of a recovery action, that is to breed and release program supposedly in conjunction with the Taronga Park Zoo.

But has the proponent undertaken the necessary steps to ensure that no like-for-like offsets are available? These are laid out below:

*Reasonable steps to locate like-for-like offsets include, in addition to consideration of any feasible sites known to the proponent:*

- *checking the biobanking public register and having an expression of interest for credits on it for at least six months*
- *liaising with an OEH office (or Fisheries NSW office for aquatic biodiversity) and relevant local councils to obtain a list of potential sites that meet the requirements for offsetting*
- *considering properties for sale in the required area*
- *providing evidence of why offset sites are not feasible – suitable evidence may include: the unwillingness of a landowner to sell or establish a biobank site or the cost of an offset site itself should not be a factor unless it can be demonstrated the landowner is charging significantly above market rates.*

Evidence hasn’t been provided which has shown that these steps have been undertaken.

With respect to this supplementary measure, this isn’t the first time that a breeding and release program for the Regent Honeyeater has been proposed by DoPE. Both the Bulga Optimisation Project and the Warkworth Extension Project have proposed similar programs. I wonder if this money will be pooled and I wonder how far the breeding program already in place (supposedly) has progressed?

This seems to be the consistent ‘get out of jail free card’ that the DoPE constantly uses to retire any residual credits. \$660 000 is a lot of money but how will it be spent? Where is the written consent by the Taronga Park Zoo indicating this proposal is a legitimate one. Without further evidence, this

would seem to be a bureaucratic response rather than any real measure to benefit the Regent Honeyeater, like the previous 'programs'.

## In Conclusion

This SAR has supported an offset package for the Regent Honeyeater that is deficient in several ways:

Such a low level of credit retirement by actual Regent Habitat is very low with the majority of residual credits retired by mine site rehabilitation programs and supplementary measures. This is not appropriate given the uncertainties associated with the rehabilitation and the supplementary measures outlined above. Such a low level of credit retirement through high quality offsets is not appropriate for a critically endangered species due to the high level of risk. Despite the SAR stating that there would be no significant impact on this species, leading to local extinction, this conclusion cannot be supported in light of the lack of scientific evidence.

*“Overall, the Department considers that the proposed avoidance, mitigation and offsetting measures for the Regent Honeyeater, Box Gum Woodland and Ozothamnus tessellatus are comprehensive and that no further offsets or supplementary measures would be required. In particular, the Department considers that with the proposed measures, the project would be unlikely to cause the extinction of, or significantly reduce the viability of these 3 species.”*

The decision making process in NSW has been captured by a number crunching methodology and credit retirement policy, which pretends to take account of biodiversity loss resulting from the removal of remnant vegetation. The notion you can offset this kind of biodiversity loss in this way does not stand up to scientific scrutiny, as pointed out on many occasion by other scientific experts and even internal staff reviews. But there are other flaws in the SAR which undermine the conclusions drawn by the NSW government agencies:

- The risk associated with this offset proposal would not pass the assessment of significance requirements for the EPBC Act and so consent by the Commonwealth is uncertain (Appendix).
- The avoidance provisions in the Offset Policy have not been documented sufficiently. The notion that a 20m wide buffer zone against the Munghorn Gap NR is sufficient to protect biodiversity doesn't stand up to scientific scrutiny or the precautionary principle. It also flies in the face of existing precedents for mine buffers.
- The allocation of 50% credit benefit to mine rehab areas should also be questioned as almost half of this commitment is for lands without a primary biodiversity outcome.
- The areal figures provide for the rehabilitation offsets is inconsistent.
- There is simply no scientific evidence to support the notion that the enormous amount of rehabilitation proposed will generate Box Gum CEEC or habitat for the Regent Honeyeater. Giving a 25% credit benefit to existing offset lands to promote Regent Honeyeater habitat lacks scientific merit and is inconsistent in that most of this land has no existing rehabilitation.
- Given the risk associated with placing so much of the credit retirement on rehabilitation lands without any scientific evidence to support the process is a dangerous outcome for biodiversity. Rehabilitation outcomes should not constitute more than 50% of the total credit retirement would be appropriate given the risks.



- There is no evidence provided as to how well the proponent followed the endeavours to locate appropriate offsets.
- There is no evidence that previously funded breeding and recovery programs in NSW have been successful or even undertaken in any significant way. Without this precedent, the outcomes for this investment must be questioned.

Based on this evidence the Planning and Assessment Commissioner should recommend the project not proceed or have major design modifications before consent could be given mainly due to the undue risk associated with the offset strategy in relation to the Regent Honeyeater and the inconsistent ways in which credits have been retired.

A review of the meeting the requirements of the Commonwealth Offset Policy is provided overleaf.

## Appendix

### How well the SAR conforms to the Commonwealth Offset Principles

**1. deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected by national environment law and affected by the proposed action**

According to the State Offset Policy, this is being delivered, but too many questions around the indirect offset measures, makes this objective uncertain.

**2. be built around direct offsets but may include other compensatory measures**

This is not the case in this instance with an offset policy built around mine rehabilitation and programs. Rehabilitation should not be classed as 'direct' offset.

**3. be in proportion to the level of statutory protection that applies to the protected matter**

While a large area and large number of biodiversity credits are being generated by the FBA methodology to offset the residual impact, again this is undermined by the uncertainty. Being a critically endangered entity, the actions proposed are not in proportion of the statutory protection of this animal.

**4. be of a size and scale proportionate to the residual impacts on the protected matter**

The scale of the proposed actions is large by any measure, though most of it occurring over what is now and will be a mine void. The scale is not proportionate or appropriate based on habitat and risk factors.

**5. effectively account for and manage the risks of the offset not succeeding**

Not taken into account, the rehabilitation efforts are just given a 25% or 50% credit rating, this then takes care of the risk as far as the NSW government is concerned. No account taken of the risk to the breeding and release program.

**6. be additional to what is already required, determined by law or planning regulations or agreed to under other schemes or programs (this does not preclude the recognition of state or territory offsets that may be suitable as offsets under the EPBC Act for the same action, see section 7.6)**

There are overlaps in that offsets given under previous arrangements to the mine have been used to achieve Regent Honeyeater 'upgrades' for this consent and a 25% credit benefit was handed to the company to restore Regent Honeyeater habitat. It is questionable whether this action is consistent with this Principle.

**7. be efficient, effective, timely, transparent, scientifically robust and reasonable**

This is difficult to answer given the uncertainties, though the question of the robustness of the supplementary measure being proposed makes this risky.

**8. have transparent governance arrangements including being able to be readily measured, monitored, audited and enforced.**

Governance arrangements involve mostly transfer to the reserve estate and so this would be a transparent outcome.

In assessing the suitability of an offset, government decision-making will be:

**9. informed by scientifically robust information and incorporate the precautionary principle in the absence of scientific certainty**

There are serious deficiencies in the measures being proposed and in the absence of scientific certainty in this case the precautionary principle has not been applied.

**10. conducted in a consistent and transparent manner.**

Was conducted in a consistent and transparent manner, though transparently BAD!