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Dr Peter Williams
Commissioner and Panel Chair for the
McPhillamys Gold Project (SSD 9505)
Independent Planning Commission of New South
Wales



Dear Dr Williams

McPhillamys Gold Project SSD 9505 – Request for LFB to be given a reasonable opportunity to respond to significant new material relied on by objectors

1. **PURPOSE**

We act for Regis Resources Limited and its subsidiary LFB Resources NL (**LFB**) in relation to LFB's application for a State significant development consent for the McPhillamys Gold Project (SSD 9505) (**Project**).

As you know, the (extended) deadline for lodging written submissions with the Commission was Friday 17 February 2023.

We understand that on Friday 17 February 2023:

- (a) various expert reports and other documents were submitted to the Commission on behalf of the Belubula Headwaters Protection Group (**BHPG**); and
- (b) a further expert report was submitted to the Commission on behalf of Nyree Reynolds.

The Environmental Defenders Office (**EDO**) acts for the BHPG and for Ms Reynolds.

The purpose of this letter is to:

- (a) identify the relevant additional material submitted to the Commission on behalf of the BHPG and Ms Reynolds;
- (b) explain why we consider that procedural fairness requires LFB to be given a reasonable opportunity to respond to this additional material (which includes significant new information that is adverse to LFB's interests); and
- (c) request that the Commission give LFB seven business days (from the date of granting the request) to submit a written response (prepared with the assistance of LFB's various consultants) to this additional material.

2. **ADDITIONAL MATERIAL SUBMITTED TO THE COMMISSION ON BEHALF OF THE BHPG AND NYREE REYNOLDS**

The expert reports and other documents submitted to the Commission on behalf of the BHPG include:

- (a) an acoustic assessment peer review report by RCA Australia (dated 14 February 2023) (**RCA Australia Report**);
- (b) a submission concerning the potential amenity and social impacts of the Project by Warwick Giblin (undated);
- (c) a report concerning the potential impacts of the Project on the Koala by Associate Professor Mathew Crowther (undated);
- (d) a report concerning the potential groundwater and surface water impacts of the Project by Dr Ryan Vogwill (dated 10 February 2023);
- (e) a social impact assessment review report by Dr Alison Ziller (dated 13 February 2023);
- (f) an Aboriginal cultural heritage assessment review report by Doug Williams (dated February 2022) (**Williams Report**);
- (g) a health facts sheet by Brenda Leitch (undated);
- (h) a report concerning the Tailings Storage Facility and mine rehabilitation by Associate Professor Gavin Mudd (dated 15 February 2023);
- (i) a costs benefit analysis review report by Andrew Buckwell and Professor Christopher Fleming (undated);
- (j) a report concerning potential water quality impacts by Dr Ian Wright (undated);
- (k) an EDO letter concerning the granting of a specific purpose access licence with respect to the Project (dated 17 February 2023);
- (l) submissions by Melissa McGrath of counsel (dated 15 February 2023); and
- (m) an EDO letter which provides feedback on a draft Government fact sheet concerning the interpretation of excluded works exemptions under the *Water Management (General) Regulation 2018* (NSW) (dated 11 November 2022).

We understand that all of these documents were lodged with the Commission on Friday 17 February 2023 (except for the Warwick Giblin submission, which was also separately lodged on 14 February 2023).

The documents lodged with the Commission on behalf of Ms Reynolds include an Aboriginal cultural heritage assessment review report by Peter Kuskie (dated 11 February 2023) (**Kuskie Report**). We understand that this report was also lodged with the Commission on Friday 17 February 2023.

Although not submitted on behalf of the BHPG or Ms Reynolds, we also note that Lisa Paton's written submission (**Paton Submission**) and Tony Newman's written submission

(**Newman Submission**) address the Aboriginal cultural heritage impacts of the Project and were submitted to the Commission on Friday 17 February 2023.¹

3. **SIGNIFICANT NEW INFORMATION CONTAINED IN THE ADDITIONAL MATERIAL**

Aboriginal cultural heritage information

As identified above, the additional material includes the Kuskie Report, Williams Report and Paton Submission.

With respect to the Kuskie Report, we note that:

- (a) this report:
 - (i) provides an expert opinion on the appropriateness and adequacy of the Aboriginal cultural heritage assessment for the Project;
 - (ii) reviews and criticises the primary Aboriginal cultural heritage assessment report for the Project prepared by Dr Matthew Cupper (see at [9]-[29] and [41]-[51]);
 - (iii) claims at [50] that "there is sufficient justification for the original assessment ... to be set aside ... until detailed investigation of the sub-surface Aboriginal heritage resource within the impact area has been completed ..."; and
- (b) Mr Kuskie did not deliver a presentation to the Commission and the Kuskie Report was not lodged with the Commission until Friday 17 February 2023.

With respect to the Williams Report, we note that:

- (a) the Williams Report provides an expert opinion relating to a pending application by Nyree Reynolds under section 10 of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) for a declaration to protect a specified area within the Project mine site;
- (b) the Williams Report:
 - (i) reviews and criticises three Aboriginal cultural heritage expert reports relied on by Regis for the purpose of this section 10 application;
 - (ii) reviews and criticises the primary Aboriginal cultural heritage assessment report for the Project prepared by Dr Matthew Cupper (see at [24]-[37]), and claims that this report should not be relied on until various alleged deficiencies are rectified (see at [37]);
- (c) Mr Williams did not deliver a presentation to the Commission and the Williams Report was not lodged with the Commission until Friday 17 February 2023.

While the Williams Report was submitted on behalf of Ms Reynolds as part of the section 10 application process, our client was not aware that this report would be submitted to the

¹ Ms Paton and Mr Newman are also objectors to the Project.

Commission for the purpose of the determination of the development application for the Project.

With respect to the Paton Submission, we note that this document criticises the primary Aboriginal cultural heritage assessment report for the Project prepared by Dr Matthew Cupper and we understand that it contains new information such as:

(a) the claim on page 2 that:

The Wiradyuri Traditional Owners Central West Aboriginal Corporation (WTOCWAC). have reviewed the report by Lance and Kamminga and disagree with their findings that all of these trees are not of Cultural Significance and assert from viewing these photos within the report that some of these trees are indeed of Aboriginal Cultural origin and would like to be able to view all of the listed trees to ensure a proper representation of their origin.

(b) the claim on page 8 that:

Given the inaccuracies in the Landskape report the hut that is on the same property as the Nurawong property (which is under investigation as the property owned by Sir John Wylde) , it is possible that this hut is the hut that is mentioned on page 100 of Gudyarra where on 20th July 1823 (Gapps 2021) – stockman Henry Alsop was attacked by the Wiradyuri and severely injured, this event led to the Wiradjuri/Wiradyuri getting possession of a gun and then two other stockmen Butcher and Booth becoming involved in a serious altercation with the Wiradjuri/Wiradyuri, and one of the Aboriginals was shot dead.

(c) the claim on page 9 that:

In the area of the MGP-H5 hut complex on the Belubula Riverbank, there is a tree that was viewed from the Dungeon Road by Uncle Bill Allen from the Wiradyuri Traditional Owners Central West Aboriginal Corporation (WTOCWAC). He believes this tree is a Cultural Tree, however as we do not have access to the location could not view the tree properly.

(d) the claim on page 17 regarding two songlines.

Similarly, we understand that the Newman Submission contains new information on the discovery of cultural heritage items on land now owned by Regis (although not within the mine site): see pages 5-7.

Expert reports

As identified above, the new expert reports lodged with the Commission on 17 February 2023 also include the reports prepared by RCA Australia (noise impacts), Mathew Crowther (impacts on koala habitat), Ryan Vogwill (groundwater and surface water impacts), Alison Ziller (social impacts), Gavin Mudd (TSF and rehabilitation), Andrew Buckwell and Christopher Fleming (costs benefit analysis) and Ian Wright (water quality).

With respect to the RCA Australia Report, we note that the author of this report did not deliver a presentation to the Commission and the report was not lodged with the Commission until Friday 17 February 2023 (although Warwick Giblin did summarise parts of this expert report in his written submission).

While the authors of the other abovementioned expert reports did deliver a presentation to the Commission, the reports were not lodged with the Commission until Friday 17 February 2023. In this regard, the reports contain significantly more information than that provided in the presentations to the Commission. For example, the 24 page report by Dr Ziller contains a detailed table (on page 8) which assesses various proposed mitigation measures

against mitigation criteria and also contains an analysis (on pages 9-15) of 5 proposed measures to mitigate impacts on Kings Plains.

Other documents

As identified above, the documents lodged with the Commission on 17 February 2023 include two EDO letters relating to the regulation of water take under the *Water Management Act 2000* (NSW). Our client did not have access to these EDO letters prior to 17 February 2023.

With respect to the submissions by Melissa McGrath, this document contains more information than that provided in Ms McGrath's presentation to the Commission. For example, in relation to the allegation that many of the recommended conditions of consent lack certainty and effectiveness, the document includes a table explaining why the BHPG submits that 5 particular conditions fall within this category.

4. **WHY PROCEDURAL FAIRNESS REQUIRES LFB TO BE GIVEN A REASONABLE OPPORTUNITY TO RESPOND TO THE ADDITIONAL MATERIAL**

In our view, it is clear that:

- (a) LFB has had no opportunity to consider and respond to the abovementioned expert reports and other relevant documents submitted to the Commission on 17 February 2023;
- (b) this additional material contains new information which is significant and adverse to LFB's interests; and
- (c) in order to avoid practical injustice in the circumstances here, procedural fairness requires LFB to be given a reasonable opportunity to respond to the abovementioned additional material.

In this regard, we note that:

- (a) the duty to afford procedural fairness is a common law doctrine that applies to the making of public decisions that directly affect a person's (or corporation's) individual rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.² Broadly, procedural fairness requires fair decision-making procedures that are appropriate and adapted to the circumstances of the particular case.³ Fairness is not an abstract concept, it is practical. The purpose of the doctrine is to avoid practical injustice;⁴
- (b) where the decision is made under legislation, such as the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), the content of the duty depends on the nature of the inquiry required by the legislation, the subject matter, and the regulations under which the decision-maker is acting;⁵
- (c) one long-established element of the obligation to afford procedural fairness dictates that "in the ordinary case ... an opportunity should be given to deal with adverse

² *Kioa v West* (1985) 159 CLR 550, 576, 581, 632.

³ *Medway v Minister for Planning* (1993) 30 NSWLR 646, 653.

⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (per Gleeson CJ at [37]).

⁵ *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at [54].

information that is credible, relevant and significant to the decision to be made";⁶ and

- (d) the Commission's present task is to examine and determine, in accordance with the EP&A Act, the application for the development consent to carry out the Project. There is nothing in the circumstances of the present situation, including the framework of the EP&A Act, to suggest that this is an out-of-the-ordinary case in which the content of the duty to afford procedural fairness is constrained by the legislation.

Further, we consider that the Commission will almost certainly be assisted by receiving a response (prepared with the assistance of LFB's consultants) to the abovementioned additional material. It would unnecessarily put the Commission in a difficult and unorthodox position if the Commission was required to consider the various new criticisms and claims in the abovementioned expert reports and other additional documents, without knowing what LFB's response is to those specific criticisms and claims.

5. **REQUEST**

On behalf of our clients, we request that the Commission give LFB seven business days (from the date of granting the request) to submit a written response to the abovementioned additional material submitted to the Commission on behalf of the BHPG, the Kuskie Report, the Paton Submission and the Newman Submission.

By 5pm tomorrow (Wednesday 22 February 2023), could you please confirm whether the Commission grants this request?

Please contact Mark Brennan [REDACTED] if you wish to discuss this letter.

Yours sincerely

[REDACTED]

Ashurst

⁶ *Kioa v West* (1985) 159 CLR 550, 629; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at [123] (McHugh J) and [227] (Kirby J).