



MEMORANDUM

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EPBC REFERRAL AND PROJECT RISKS

This Memorandum is provided to Indicoal Mining Australia Pty Ltd (Indicoal) to outline perceived risks in the event that the Langloh Coal Project (the project) is assessed under the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Golder Associates Pty Ltd's (Golder) proposal for mine environmental permitting for the Langloh Coal Project (Golder reference number: P17613396-001-L-Rev4, March 2012) was developed on a relatively low-impact Project. The extent of previous disturbance and the likelihood of any impacts being mitigated made it unlikely that matters of environmental significance as defined under the EPBC Act would be triggered and, as such, would not need to be referred to the Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC) for assessment under the EPBC Act.

This Memorandum identifies the potential project risks associated with an EPBC Referral.

1.0 BACKGROUND TO EPBC REFERRAL

The EPBC Act is the Australian Commonwealth Government's central piece of environmental legislation and is administered through the DSEWPaC. The EPBC Act provides a legal framework to protect and manage nationally and internationally significant flora, fauna, ecological communities and heritage, which are classed as "matters of national environmental significance" (MNES). The EPBC Act provides that a person proposing to take an action that the person thinks may be a "Controlled Action" must refer the proposal to the Minister for Sustainability, Environment, Water, Population and Communities (Minister). A Controlled Action is an action that:

- Will have or is likely to have a significant impact on:
 - World heritage areas;
 - National heritage places;
 - Ramsar wetlands of international importance;
 - Commonwealth listed threatened species and communities;
 - Commonwealth listed migratory species;
 - Commonwealth marine areas;
- The environment on Commonwealth land; or
- The Great Barrier Reef Marine Park;
- Is undertaken by the Commonwealth and will have or is likely to have a significant impact on the environment;



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- Is undertaken by any person on Commonwealth land and will have or is likely to have a significant impact on the environment; or
- Is a nuclear action.

The EPBC Act sets out the process for identifying and listing the MNES including listed threatened species and listed migratory species.

1.1 Assessment procedures

Under the EPBC Act, approval is required if a project is likely to have a significant impact on one or more of the defined matters of MNES. In summary, the procedure for referral, determination, assessment and approval of activities under the EPBC Act is as follows:

- **Preliminary assessment:** The proponent conducts a preliminary assessment to determine if the action is likely to be a controlled action;
- **Referral:** If the proponent thinks that the activity might be a controlled action, or if the proponent wants confirmation as to whether the action is a controlled action, the proponent refers the action to the Commonwealth DSEWPac for a determination on whether the activity is a controlled action;
- **Controlled action determination:** After receiving a referral, the Minister has 20 business days to determine whether the activity is:
 - **not a controlled action:** the action requires no further assessment or approval under the EPBC Act providing it is carried out in accordance with the referral;
 - **not a controlled action but must still be carried out in a particular manner:** The manner in which the activity must be carried out is specified in the Minister's notification. Providing the activity is carried out in this manner, it will not require EPBC Act approval;
 - **clearly unacceptable:** the action cannot be approved or otherwise undertaken; or
 - **a controlled action:** the action requires assessment and approval under the EPBC Act.
- **Assessment procedures:** If the Minister determines that the activity is a controlled action then the Minister must determine the assessment procedure that will apply to the activity. The assessment procedure may include:
 - Assessment on referral information (ie the matter is assessed based purely on the referral documentation);
 - Assessment on preliminary documentation: including referral documentation and any additional information required by the Minister;
 - Assessment by an environmental impact statement, project environment report or strategic assessment prepared in accordance with the EPBC Act;
 - Assessment by way of public inquiry; or
 - Assessment under State assessment procedures accredited for the purposes of the EPBC Act by a bilateral agreement between the relevant State and the Federal Government.



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If DSEWPaC determine that the project is not likely to result in a significant impact to a MNES the project is declared to be 'not a controlled action' and the Commonwealth government is no longer involved in the environmental assessment process.

A project referral can be made either voluntarily by a proponent or a referral can be requested by DSEWPaC based upon its own or a third party query.

A voluntary EPBC Act referral has the benefit of timing the submission to correspond with Indicoal's overall project approvals schedule and allows the project to be assessed under the bilateral agreement between the Commonwealth and Tasmanian State governments. It also provides surety as to the Commonwealth Government's involvement early in the approvals process.

However, if a voluntary referral is not made by the proponent, DSEWPaC can request a referral at any time during the approvals process. When DSEWPaC request a referral it is termed 'calling in' the project. If a project is called in it has the potential to add to the approval requirements and timeframes and can remove the ability for the project to be assessed under the bilateral agreement.

2.0 SUMMARY OF DISCUSSION WITH THE ENVIRONMENT PROTECTION AUTHORITY

Prior to the submission of the draft Notice of Intent (NOI), Golder Associates Pty Ltd (Golder) discussed the requirements of the NOI with the Tasmanian Environment Protection Authority (EPA). During telephone discussions with Ms Kate Duttmer (25 September 2012) enquired if an EPBC Referral was going to be made for the project as assessment under the bilateral agreement requires the EPA to coordinate with the Commonwealth.

A follow up telephone discussion with Mr Malcolm Budd from the EPA (31 October 2012) again raised the issue of the EPBC Referral. Mr Malcolm Budd discussed the potential administrative procedures associated with the bilateral agreement if a project was declared to be a controlled action. He also said that the EPA would consult with the Commonwealth during their assessment to inform them of the project.

Golder received comments on the draft Notice of Intent (NOI) from the EPA on 9 November 2012. These comments included the question as to whether an EPBC Referral for the project was to be undertaken.

3.0 PROJECT RISK

As previously discussed, an EPBC Referral can be submitted voluntarily to the Commonwealth – that is it is not an automatic legislative requirement for all projects. Once a project is referred, the Commonwealth will assess and determine the referral based on the level of impact to matters of MNES. If the Commonwealth determine that a project is not a controlled action, the Commonwealth will have no further involvement in the environmental assessment of a project.

If a project has been declared to be not a controlled action, the Commonwealth will not call in the project if a third party request is made. If no referral is made by the proponent, a third party request is highly likely to trigger the Commonwealth to call in the project.

Unless the project is a nuclear action, the type of development (e.g., coal mine, tourism or industrial development etc) does not in itself trigger the EPBC Act. However, as described in the draft Langlosh Coal Stakeholder Engagement Plan (Golder reference number 127613050-004-R-RevA, August 2012), there is a level of opposition from the Australian Greens political party and other green groups to any new or expansion of existing coal mines. This opposition has the potential to increase the risk that a third party may request the Commonwealth call in the project.

If the project is called in after the EPA has officially commenced their assessment, the bilateral agreement between the Commonwealth and the Tasmanian EPA cannot be used for the project. Under this



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circumstance the project would be required to prepare two assessment documents and would be assessed under two different processes.

While the project, at its current phase of assessment, appears unlikely to have a significant impact on a matter of environmental significance, if DSEWPaC requested a referral and declared the project a controlled action part way through the assessment by the Tasmanian EPA, it could pose a significant schedule risk to Indicoal.

A voluntary project referral to the DSEWPaC will provide surety as to the assessment process for the project and provide strategic value for the project to prevent interruption mid-process. As the NOI has been submitted as a draft, it is possible to prepare and submit an EPBC Referral prior to formal submission of the NOI.

An EPBC Referral must be made in a standard format set by the DSEWPaC. However, much of the information contained in the NOI would be used for the EPBC Referral.

4.0 RECOMMENDED ACTIONS

The preparation of an EPBC Referral is currently outside the approved scope of work. Golder recommends that a teleconference is undertaken between Indicoal and Golder to further discuss the EPBC Referral process and associated project risks. The outcome of this discussion (i.e. decision to refer the project or not) to be communicated to the EPA.

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