

**FINGERBOARDS MINERAL SANDS PROJECT**  
**INQUIRY AND ADVISORY COMMITTEE**  
**SUBMISSIONS ON VARIATIONS TO THE PROJECT**  
**ON BEHALF OF KALBAR OPERATIONS PTY LTD**

**INTRODUCTION**

1. The IAC has directed Kalbar Operations Pty Ltd ('Kalbar'), as proponent of the Fingerboards Mineral Sands Project ('the Project'), to provide submissions on whether the proposed replacement of temporary tailing storage facility ('TSF') the centrifuge raises any significant legal issues in terms of the Environment Effects Statement process and the work of the IAC, particularly by reference to the *Environment Effects Act 1978*, the *Environment Protection and Biodiversity Conservation Act 1999*, the *Environment Protection 1970* and the IAC's Terms of Reference ('Terms').

**THE PERMISSIBILITY OF VARIATIONS**

2. The submission of additional information to the IAC regarding the environmental effects of proposed works, including potential alterations to those works to achieve superior environmental outcomes, is not only consistent with the various legislative frameworks in which the IAC operates, but also expressly contemplated by the IAC's Terms.

*The IAC's Terms of Reference*

3. As set out in clause 5(b), the purpose of the IAC is to:

*consider and report on the potential environmental effects of the project, their significance and acceptability, and in doing so have regard to the draft evaluation objectives in the EES scoping requirements and relevant policy and legislation*

4. The IAC is not asked to resolve a dispute between parties based on issues defined in pleadings or points of claim (techniques used for defining the dispute between parties in conventional litigation). Rather, it is charged with making factual findings

about the effects of the project, including their significance and acceptability judged against specified criteria.

5. The IAC would not be discharging its Terms if it were to exclude or refuse to receive information relevant to its task, even if that information relates to a potential change to the Project. This is confirmed by a number of other clauses in the Terms:

a. Clause 5(c) identifies a further purpose of the IAC as being to identify avoidance, mitigation and management measures 'including any necessary project modifications'

b. Clause 34 requires the IAC's report to include its recommendations on *any feasible modifications to the project (e.g. extent, design, alternative configurations, or environmental management) that would enable more appropriate environmental outcomes*

c. Clause 28 provides that the IAC may 'inform itself in any way it sees fit', but must consider, among other things:

i. Any information provided by the proponent that responds to submissions; and

ii. '[A]ny other relevant information that is provided to, or obtained by, the IAC.'

6. Having regard to the fact that clause 5(c) and 34 specifically require the IAC to consider and report on feasible project modifications, it must follow that information regarding project modifications (including their feasibility) is, at the very least, 'other relevant information' under clause 28.

7. The Terms invite consideration of the effects of the Project. If a modification to the Project would diminish the environmental effects, the modification is clearly relevant and must be considered.

8. The nature of the proposed modification here is to one part of the mining process. The Project remains a mining proposal of the same resource.

9. The modification now proposed for consideration by Kalbar is one which lies squarely within the scope of the Terms that govern the task of the IAC.

### *Statutory Provisions*

10. No legal issues arise as a result of the replacement of the TSF with centrifuges under the statutory frameworks referred to by the IAC. The Acts referred to by the IAC specifically contemplate that a proponent may be given the opportunity to provide additional information to the decision-maker without necessarily attracting an obligation to undertake further public consultation.

#### *The Environment Effects Act*

11. The *Environment Effects Act 1978* ('EE Act') does not itself require that an EES be the subject of public comment at all.
12. As a matter of law, the Minister is not required to appoint an inquiry (whether public or private) into the environmental effects of any works or to seek comment from the public or any part of it on those effects.<sup>1</sup>
13. In this case, the Minister has called for public exhibition and has appointed an inquiry – subject to the Terms. The Terms themselves described the four corners of the IAC's task. The Terms, which expressly invite the consideration of modifications, are clearly permissible terms within the scope of the EE Act.
14. Section 5 of the EE Act expressly provides that the Minister may 'at any time' call for a supplementary statement 'containing any additional information that he or she considers necessary'.
15. That power resides with the Minister and does not derogate from or alter any of the Terms.

#### *The Environment Protection Act 1970*

16. Section 22 of the *Environment Protection Act 1970* empowers the EPA to require an application for a works approval licence to provide additional information. Notably, nothing in the Act precludes the EPA from considering modifications to proposal.

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<sup>1</sup> Sections 9(1) and (2), *Environment Effects Act 1978*. This discretion is constrained by the Commonwealth – Victorian *Bilateral agreement made under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) relating to environmental assessment* which specifies minimum public engagement requirements where the EES process is used to assess a controlled action under the EPBC Act.

*The Environment Protection and Biodiversity Conservation Act 1999*

17. By operation of the Commonwealth – Victorian *Bilateral agreement made under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) relating to environmental assessment* (‘the Bilateral Agreement’), the provisions of Part 8 the EPBC Act relating to the assessment of impacts from a controlled action are inapplicable to the Project.<sup>2</sup>
18. Under the Bilateral Agreement, the effects of a controlled action may be assessed through the EES process and the assessment report will then be provided to the Commonwealth Minister for his decision.<sup>3</sup> Consequently, the procedural provisions of Part 8 of the Act do not have any bearing on the conduct of the EES process. Again, the Terms which govern and direct the IAC in its task properly include a power to consider modifications.

*Conclusion on Variation*

19. Having regard to the above, it is respectfully submitted that there is no legal impediment to the proposed replacement of the TSF by the centrifuge.

**TRANSFORMATION**

20. The IAC has asked whether the concept of “transformation” in a planning context is relevant in this instance.
21. The Project description in the Terms is as follows:

*The project proposes to develop the Fingerboards Mineral Sands Project which has an approximate area of 1,675 hectares and is located approximately 20 kilometres north-west of Bairnsdale in East Gippsland, Victoria. The proposed mining methods involve open pit mining to extract approximately 170 million tonnes (Mt) of ore over a projected mine life of 20 years to produce approximately 8 Mt of mineral concentrate. Mine products are proposed to be transported via road or by rail for export overseas. The project includes the following elements:*

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<sup>2</sup> Section 83, *Environment Protection and Biodiversity Conservation Act 1999*.

<sup>3</sup> Section 47(4), *Environment Protection and Biodiversity Conservation Act 1999*.

- a. *the development of a mineral sands mine;*
  - b. *two mining unit plants;*
  - c. *wet concentrator plant (comprising mineral separation processing and tailings thickening and disposal plant);*
  - d. *water supply infrastructure;*
  - e. *tailings storage facility;*
  - f. *additional site facilities, such as a site office, warehouse, workshop, loading facilities and fuel storage.*
22. The only change proposed is the replacement of the TSF with centrifuges.
23. The proposal is to use the land for the purpose of a mine. The description of the project sets out some, but not all elements of the project. The TSF is identified as one “element”. It is proposed to substitute one element in the mining process for different, and Kalbar says, better, element. The proposal remains that of a mine.
24. This Inquiry is concerned with the effects of the proposal. It is for the IAC and for any party to investigate and or submit that any element of the proposal (whether listed in the project description or not) be modified, replaced or altered in order to mitigate the environmental effects of the project. Consideration of the centrifuge amounts to no more than that exercise.
25. In substance, all that is proposed is the deletion of item ‘e.’ from the above list and its replacement with centrifuges. The remainder of the project elements are the same, including in particular, the development of a mineral sands mine.
26. There is no plausible basis upon which the proposed modification of the Project can be described as a “transformation” to the extent that the term is understood in a planning context.
27. An area of fertile debate might exist as to whether or not the concept of “transformation” as generally understood in planning circles (emanating from the

decision in *Addicoat v Fox (No. 2)*<sup>4</sup> under very different legislation, and evolved over time) has any role to play in proceedings of this type, but given that the proposed modification could not be properly regarded as transformative of the Project, it is not necessary to deal with those matters here.

## **FURTHER CHANGES**

28. No further changes to the design of the Project are currently contemplated.

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Instructed by White & Case

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<sup>4</sup> [1979] VR 347.