

**UNDERTAKING GIVEN UNDER SECTION 9.5 OF THE ENVIRONMENTAL
PLANNING AND ASSESSMENT ACT 1979 BY WILLIAMTOWN SAND
SYNDICATE PTY LIMITED AS TRUSTEE FOR THE TRUSTEE FOR
NEWCASTLE SAND UNIT TRUST (ACN 606 820 875)**

ENFORCEABLE UNDERTAKING

This is an Enforceable Undertaking given under Section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the Act**) by Williamtown Sand Syndicate Pty Limited as trustee for The Trustee for Newcastle Sand Unit Trust (ACN 606 820 875).

1. Person(s) giving the Undertaking

1.1 This Undertaking is given to the Department Planning and Environment (**the Department**) by Williamtown Sand Syndicate Pty Limited as trustee for The Trustee for Newcastle Sand Unit Trust (ACN 606 820 875), for the purposes of section 9.5 of the Act.

2. Background

The Land and Planning Controls

2.1 Williamtown Sand Syndicate Pty Limited as trustee for The Trustee for Newcastle Sand Unit Trust (**Newcastle Sand**) is the operator of the sand resource quarry located at 398 Cabbage Tree Road, Williamtown being Lot 100 DP 1263921, Lot 121 DP 556403, Lot 11 DP 629503, Lot 1012 DP 814078 (**the Site**).

2.2 The Independent Planning Commission issued development consent SSD-6125 (**the consent**) to Williamtown Sand Syndicate Pty Limited on 9 May 2018, and modified on 26 March 2020 and 12 March 2021, to construct infrastructure and undertake sand extraction, processing and rehabilitation activities on the Site (**the project**).

2.3 The Site has an area of 176.2ha of which 42.25ha of the site will be cleared for the extraction of sand. The Site has a total extraction area of 53.9ha.

2.4 Clearing on the Site for the Project commenced on 27 August 2019. The project is approved to undertake sand extraction until 31 December 2033.

2.5 The Site is zoned RU2 Rural Landscape under the Port Stephens Local Environmental Plan 2013 (**PSLEP**).

The Alleged Offence

2.6 Development Consent SSD-6125 granting approval for Newcastle Sand's operation was granted on 9 May 2018 subject to various Schedule conditions. Condition 37 created various biodiversity obligations under a Biodiversity Rehabilitation Management Plan (BRMP), the alleged breach of which was the subject of the Department's investigation.

2.7 Following an investigation, the Department has found the following conduct to be in breach of the BRMP:

- a) Clearing of vegetation without supervision of a suitably qualified ecologist on site during all clearing on 14, 15 and 27 August 2019, 1 and 2 September 2019, and 8 January 2020.
- b) Habitat tree felling without supervision of a suitably qualified ecologist on site during the felling of habitat tree number 242 on 3 September 2019.
- c) Failure to undertake pre-clearance surveys to identify any trees occupied by fauna, including koalas, the clearance boundaries, habitat trees and areas of noxious weeds prior to clearing on 14, 15 and 27 August 2019, 1, 2 and 3 September 2019, 14 October 2019 and 8 January 2020.
- d) Failure to undertake nocturnal fauna surveys prior to clearing on 13, 25 and 31 August 2019, 13 October 2019, 7 January 2020 and 26 July 2020.

- e) Failure to undertake diurnal surveys the morning of clearing on 14 and 26 August 2019, 1 September 2019, 14 October 2019 and 8 January 2020.
 - f) Failure to install nest boxes as replacement habitat for tree hollows felled on site, up to 12 months prior to clearing where feasible. Installation November 2020, 15 months following clearing which commenced in August 2019. Further, two feathertail gliders were identified in a hollow during clearing activities.
 - g) Failure to install Koala exclusion fence during construction along boundaries and driveways to limit movement of koalas onto Cabbage Tree Road and avoiding vehicle strike. Clearing occurred for eight (8) months before the koala exclusion fence was installed in April 2020. The fence was required to be installed during the construction stage to prevent koala movement to Cabbage Tree Road and driveways, particularly as koalas are more active during the breeding season (September to February), which coincided with the construction period.
 - h) Failure to install Frog exclusion fence to be installed prior to or immediately following vegetation clearing along the boundaries of disturbed vegetation areas to prevent frog access, and failure to follow the approved design in the BRMP and install the fence along the entrance haul road and infrastructure area (weighbridge, sheds, parking lot) until 27 November 2020, approximately 15 months following commencement of clearing and construction.
 - i) Failure to conduct Koala monitoring for at least 60 days during breeding season (September to February), following installation of the fence. Clearing and construction occurred for eight (8) months before the koala exclusion fence was installed in April 2020. Koala monitoring was required to have occurred between September 2019 and February 2020, with or without a fence, given koala breeding season and heightened activity coincided with construction. Monitoring should have occurred along the site perimeter and the driveways, to observe the presence and the effectiveness of preventing koalas from moving towards Cabbage Tree Road and driveways. The Department also noted fence monitoring occurred at three (3) locations, not four (4) as required by the BRMP, between September 2020 and February 2021 and video footage was not reviewed for at least 60 days.
 - j) Failure to conduct two (2) separate frog monitoring events during the breeding season (between September and May), following rainfall. Approximately 75 mm, 45 mm and 52 mm of rainfall fell in September, October and November 2019 respectively and only one (1) monitoring event occurred in March 2020 during the 2019/2020 breeding season.
 - k) Failure to protect and maintain biodiversity offset areas or mark disturbance and extraction boundaries to avoid encroaching beyond the boundary. Between 13 August 2019 and 24 June 2020, disturbance activities occurred in a small area of the offset area to the west of the weighbridge. The activities included stockpiling of sand, stockpiling of logs, removal of gravel and spreading of topsoil. At the time of the disturbance, the offset area boundary was not adequately defined or delineated.
- 2.7.1 In response to the department's investigation, Newcastle Sand has acknowledged that its conduct contravened the *Environmental Planning and Assessment Act 1979* and has offered this Undertaking to the Department.

3. Commencement of this Undertaking

3.1 This Undertaking comes into effect when:

- a) this Undertaking is executed by Newcastle Sand; and
- b) this Undertaking so executed is accepted by the Planning Secretary of the department or delegate.

(the **Commencement Date**).

4. Undertaking

4.1 Newcastle Sand undertakes for the purposes of section 9.5 of the Act that it will do the following:

- i. Pay the sum of \$20,000 (excluding GST) to each of the following beneficiaries:
 - a. W.I.N.C. (Wildlife in Need of Care) (ABN 60 837 207 746); and
 - b. Port Stephens Koala & Wildlife Preservation Society t/as Port Stephens Koala Hospital (ACN 614 265 833).
- ii. The payment will be made to the beneficiaries within 28 days of the Commencement Date.
- iii. The payment will be made directly into the nominated bank account of the beneficiaries and as detailed in **Annexure A**.

Budgeting and finance

- iv. The beneficiaries have agreed to produce invoices and/or orders of resources or services as detailed in **Annexure A** to Newcastle Sand within 6 months of receipt of funds.
- v. Newcastle Sand shall provide a status report of this Undertaking to the Department within ten (10) months of the Commencement Date.

Use of funds

- vi. Wildlife in Need of Care will use the sum of \$20,000 towards:
 - Specialty milk for orphan wildlife;
 - Education of members;
 - Upgrade rescue equipment;
 - Upgrade roadside signage;
 - Public education (various methods);
 - Equipment to monitor bat colonies during summer months;
 - Veterinary care for sick or injured wildlife; and
 - Replanting drought impacted wildlife release areas.
- vii. Port Stephens Koala Hospital will use the sum of \$20,000 towards:
 - Dental X-Ray unit; and
 - Miscellaneous clinical equipment or supplies.

4.2 Correspondence from the above beneficiaries is annexed to this Undertaking and marked "**Annexure A**".

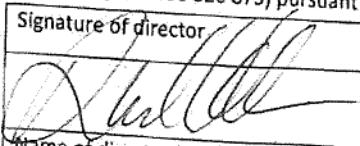
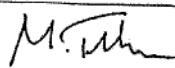
5. Acknowledgments

5.1 Newcastle Sand acknowledges that:

- a) the department will make this Undertaking publicly available including by publishing it on the department's public register of section 9.5 undertakings on its website;
- b) there is no conflict of interest with beneficiaries;
- c) the department will, from time to time, make public reference to this Undertaking including in news media statements and in department's publications; and
- d) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.
- e) the department is not barred from future enforcement or other actions arising as a result of any contraventions or incidents in the future, including with respect to the enforcement of this undertaking.

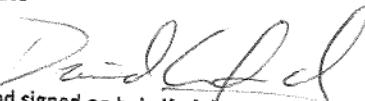
Executed as an Undertaking

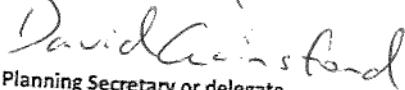
Executed by Williamtown Sand Syndicate Pty Limited as trustee for The Trustee for Newcastle Sand Unit Trust (ACN 606 820 875) pursuant to section 127(1) of the *Corporations Act 2001* by:

Signature of director	Signature of a director/company secretary
	
Name of director (print)	Name of director/company secretary (print)
David Williams Date 3.3.2022	MURRAY TOWNROW Date 03/03/2022

Accepted by the Planning Secretary of the Department Planning, Industry and Environment pursuant to Section 9.5 of the *Environmental Planning and Assessment Act 1979* on:

Date


and signed on behalf of the Department:


Planning Secretary or delegate

Date

26/5/22

Annexure A – Letters from Beneficiaries



Care
Education
Research

Phone: 0401 727 795
Email: secretary@portstephenskoalas.com.au

Port Stephens Koalas & Wildlife
Preservation Society Limited –
trading as Port Stephens Koalas
562 Gan Gan Road
ONE MILE NSW 2316
PO Box 60
ANNA BAY NSW 2316

ABN: 27614265833
ACN: 614265833

Ann Hagerthy
Senior Compliance Officer
Energy, Industry & Compliance | Planning & Assessment
Department of Planning, Industry and Environment

RE: Newcastle Sand Enforceable Undertaking Proposal

Dear Ann

Port Stephens Koala & Wildlife Preservation Society, trading as Port Stephens Koala Hospital was contacted by Mr Murray Towndrow of Newcastle Sand regarding the potential of a monetary payment to our organisation.

It is understood the payment is in relation to alleged breaches of Newcastle Sand's Development Consent relating to land clearing procedures and the protection of wildlife during such activities.

Port Stephens Koala Hospital does not approve of the previous actions of Newcastle Sand, however, acknowledges the positive outcome that may result from an Enforceable Undertaking being entered into between the Department and Newcastle Sand with Port Stephens Koala Hospital being a beneficiary.

As previously informally communicated Port Stephens Koala Hospital if determined a satisfactory recipient for a payment of \$20,000.00 would direct the funds towards an urgently needed dental X-Ray unit and with any remaining funds buy miscellaneous clinical equipment or supplies.

Please refer to Annexure 1 & 2 providing details of the device and its use.

It is envisaged following receipt of the fund the equipment would be ordered and be available for use within 60 – 90 days.

Funds can be deposited directly into the following bank account.

Account Name	Port Stephens Koala Hospital
BSB	637000
Account Number	721586006
Description	Newcastle Sand Enforceable Undertaking
Amount	\$20,000.00

Following receipt of the funds Port Stephens Koala Hospital will issue a receipt to Newcastle Sand.

Within 28 days of receipt of the funds Port Stephens Koala Hospital will provide to Newcastle Sand a copy of invoice/s totalling \$20,000.00 (or greater) for the purchase/order of the x-ray unit described in the Annexure plus any other miscellaneous clinical equipment.

Upon delivery of the purchased equipment Port Stephens Koala Hospital will furnish evidence of the equipment and or make it available for The Department of Planning, Industry and Environment representatives to inspect should they require.

I trust the above and attached description of process and proposed expenditure meets the requirements of The Departments Enforceable Undertaking guidelines and look forward to our Organisation and the Koala's benefiting from this contribution.

Regards

Sign here

R. Sand 24.1.21

PORT STEPHENS
KOALAS



**PORT STEPHENS
KOALAS**

Ron Land

President - Port Stephens Koalas



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Ann Hagerthy
Senior Compliance Officer
Energy, Industry & Compliance | Planning & Assessment
Department of Planning, Industry and Environment

RE: Newcastle Sand Enforceable Undertaking Proposal

Dear Ann

Wildlife in Need of Care were contacted by Mr Murray Towndrow or Newcastle Sand regarding the potential of a monetary payment to our organisation.

It is understood the payment is in relation to alleged breaches of Newcastle Sand's Development Consent relating to land clearing procedures and the protection of wildlife during such activities.

Wildlife in Need of Care does not approve of the previous actions of Newcastle Sand, however we acknowledge the positive outcome that may result from an Enforceable Undertaking being entered into between the Department and Newcastle Sand with Wildlife in Need of Care being a beneficiary.

As previously informally communicated Wildlife in Need of Care if determined a satisfactory recipient for a payment of \$20,000.00 would direct the funds towards a variety of general operational cost including;

Table 1 – Proposed Expenditure

Item Number	Item Description	Expenditure
1.	Specialist milk for orphans	\$6,000.00
2.	Training of volunteer member	\$2,000.00
3.	Rescue Equipment	\$2,000.00
4.	Roadside signage information update	\$2,000.00
5.	Public Education (signs, flyers, web site upgrade, social media).	\$2,000.00
6.	Bat monitoring equipment	\$2,000.00
7.	Veterinary Bills	\$3,000.00
8.	Habitat replanting previously affected by drought.	\$1,000.00
Total		\$20,000.00

It is envisaged following receipt of the funds the above expenditure would commence and be expended within 6 months.

Funds can be deposited directly into the following bank account:

Account Name	Wildlife in Need of Care
BSB	637000
Account Number	723980178
Description	Newcastle Sand Enforceable Undertaking
Amount	\$20,000.00

Following receipt of the funds Wildlife in Need of Care will issue a receipt to Newcastle Sand.

At the 6 months anniversary of the receipt of the funds Wildlife in Need of Care will furnish evidence of the expenditure and furnish invoices and a summary letter.

I trust the above and attached description of process and proposed expenditure meets the requirements of The Departments Enforceable Undertaking guidelines and look forward to our Organisation benefiting from this contribution.

Regards



Nicole Sauer
President



