

4. Statutory and planning framework

This section provides the statutory and planning framework for the proposal and considers the provisions of relevant state environmental planning policies, local environmental plans and other legislation.

4.1 Environmental Planning and Assessment Act 1979

4.1.1 State Environmental Planning Policies

State Environmental Planning Policy (Infrastructure) 2007

State Environmental Planning Policy (Infrastructure) 2007 (ISEPP) aims to facilitate the effective delivery of infrastructure across the State.

Clause 94 of ISEPP permits development on any land for the purpose of a road or road infrastructure facilities to be carried out by or on behalf of a public authority without consent. As the proposal is for a road and road infrastructure facilities and is to be carried out on behalf of Transport, it can be assessed under Division 5.1 of the *Environmental Planning and Assessment Act 1979*. Development consent from council is not required.

Part of the proposal is on land within Hartley Historic Village which comprises land reserved under the *National Park and Wildlife Act 1979* (NPW Act). Development within national park estate cannot proceed by virtue of Clause 94 of ISEPP until the land is revoked from the national park estate via an Act of Parliament. This revocation process is currently ongoing.

The proposal does not require development consent or approval under State Environmental Planning Policy (Coastal Management) 2018, State Environmental Planning Policy (State and Regional Development) 2011 or State Environmental Planning Policy (State Significant Precincts) 2005.

Part 2 of ISEPP contains provisions for public authorities to consult with local councils and other public authorities prior to the commencement of certain types of development. Consultation, including consultation as required by ISEPP (where applicable), is discussed in Section 5 of this REF.

State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011

The proposal is located within the boundary of the Sydney Drinking Water Catchment. Consequently, the SEPP (Sydney Drinking Water Catchment) is applicable to the proposal.

Clause 9 of the SEPP states that any development or activity within this catchment should incorporate the Sydney Catchment Authority's (SCA) current recommended practices and performance standards that relate to the protection of water quality.

Clause 12 of the SEPP (Drinking Sydney Water Catchment) states that: 'A public authority must, before it carries out any activity to which Part 5 of the Act applies, consider whether the activity would have a neutral or beneficial effect on water quality.'

While the SEPP does not affect the permissibility of the proposal, consideration would be required regarding the proposal's impact on water quality. A qualitative Neutral or Beneficial Effect (NorBE) water quality assessment has been carried out and is included in Appendix I.

State Environmental Planning Policy (Koala Habitat Protection) 2021

The Koala Habitat SEPP applies to a range of local government areas including Blue Mountains and Lithgow.

Part 2 of the Koala Habitat SEPP regulates impact on Koala habitats. While the SEPP does not affect the permissibility of the proposal as a Division 5.1 or 5.2 assessment, consideration would be required regarding the proposal's impact on Koala habitat.

There are previous records for the Koala adjacent to the study area and a record within the investigation area near Little Hartley.

4.1.2 Local Environmental Plans

Lithgow City Local Environmental Plan 2014

Land use and development within the Blue Mountains local government area is primarily regulated by the Lithgow City Local Environmental Plan 2014 (Lithgow 2014 LEP).

The investigation area traverses a number of zones outlined in under the Lithgow 2014 LEP. These zones are summarised in Table 4-1 and shown on Figure 4-1.

Table 4-1 Consistency of the proposal with Lithgow LEP 2014

| Zone | Objectives of the zone | Consistency of the proposal with objectives |
|------|--|--|
| R2 | <ul style="list-style-type: none"> To provide for the housing needs of the community within a low density residential environment. To enable other land uses that provide facilities or services to meet the day to day needs of residents. To maintain or improve the water quality of receiving water catchments. | The proposal would support the needs of residents by improving the transport network. |
| R5 | <ul style="list-style-type: none"> To provide for a range of land uses, services and facilities that are associated with a rural village. To maintain and enhance the unique character of each of the rural villages. To encourage and promote opportunities for population and local employment growth commensurate with available services and infrastructure capacity. To minimise the impact of non-residential uses and ensure those uses are compatible with surrounding residential development. To maintain or improve the water quality of receiving water catchments. | The proposal would support the needs of residents by improving the transport network and minimising impacts on rural land. |
| RU1 | <ul style="list-style-type: none"> To encourage sustainable primary industry production by maintaining and enhancing the natural resource base. To encourage diversity in primary industry enterprises and systems appropriate for the area. | The proposal has been designed to minimise impacts on land used for primary production and farming. |

| Zone | Objectives of the zone | Consistency of the proposal with objectives |
|------|---|---|
| | <ul style="list-style-type: none"> • To minimise the fragmentation and alienation of resource lands. • To minimise conflict between land uses within this zone and land uses within adjoining zones. • To minimise the environmental and visual impact of development on the rural landscape. • To provide for recreational and tourist development and activities of an appropriate type and scale that do not detract from the economic resource, environmental or conservation value of the land. • To maintain or improve the water quality of receiving water catchments. | |
| E1 | <ul style="list-style-type: none"> • To enable the management and appropriate use of land that is reserved under the <i>National Parks and Wildlife Act 1974</i> or that is acquired under Part 11 of that Act. • To enable uses authorised under the <i>National Parks and Wildlife Act 1974</i>. • To identify land that is to be reserved under the <i>National Parks and Wildlife Act 1974</i> and to protect the environmental significance of that land. | <p>The proposal has been designed to minimise impacts to land protected under the <i>National Parks and Wildlife Act 1974</i>. The proposal will revoke the impacted section of National Park and offset impacts with compensatory land of equivalent or greater value.</p> |
| E3 | <ul style="list-style-type: none"> • To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values. • To provide for a limited range of development that does not have an adverse effect on those values. • To facilitate the management of environmentally sensitive lands and riparian areas. • To protect and conserve the vegetation and escarpment landscape surrounding Lithgow. • To maintain or improve the water quality of receiving water catchments. | <p>The proposal has been designed to minimise its impact on environmental values of the area.</p> |
| SP2 | <ul style="list-style-type: none"> • To provide for infrastructure and related uses. • To prevent development that is not compatible with or that may detract from the provision of infrastructure. • To maintain or improve the water quality of receiving water catchments. | <p>The proposal would be consistent with the objectives of this zone as it is road infrastructure.</p> |

Except for the E1 National Parks and Nature Reserves zone (where roads are prohibited) and the E3 Environmental Management zone (where roads are permitted with consent), development for the purposes roads is permitted without development consent in all the affected zones. The ISEPP operates to remove those consent requirements. Within the E1 zone, the only permitted development is that which is authorised under the *National Parks and Wildlife Act 1974*. Authorised development is permitted without consent. Impacts on land zones is further discussed in Section 6.10 Socio-economic.

The Lithgow City LEP 2014 also provides a listing of local heritage items. Potential impacts to heritage items located near the proposal are discussed and assessed in Section 6.5 Non-Aboriginal Heritage.

Consultation carried out for the proposal as required by the ISEPP is detailed in Section 5.4.

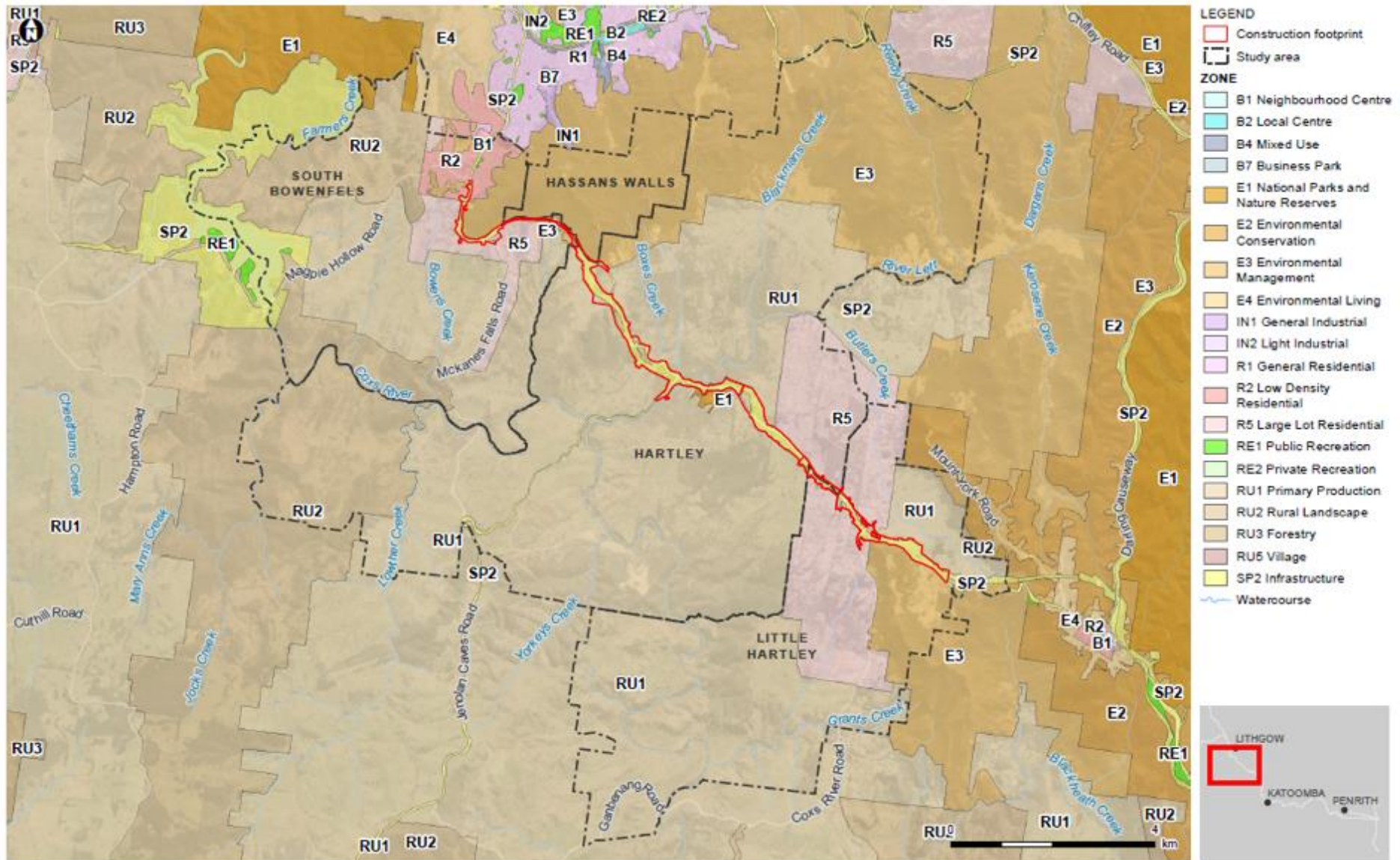


Figure 4-1 Land zones within and surrounding the proposal

4.2 Other relevant NSW legislation

4.2.1 Roads Act 1993

Part 2 of the Roads Act sets out the provisions for the opening of public roads, including notification procedures. Part 4 of the Roads Act sets out the provisions for the closing of public roads, including notification procedures.

The proposal requires construction work on Great Western Highway, which is a classified road within the Lithgow City LGA, and temporary interruption to traffic along the proposal. A Road Occupancy Licence is required for any activity likely to impact on traffic flow, even if that activity takes place off-road. Transport is the proponent and the relevant roads authority for the proposal.

4.2.2 Crown Lands Management Act 2016

Under Division 5.8 of the Crown Land Act, the Minister may on the application of a holder of land, grant a permit (an enclosure permit) to the holder of the land to enclose, whether wholly or partly, any Crown road or Crown watercourse that crosses or bounds the land.

There are nine Crown Land lots that are located within the construction footprint. These lots would be partially or fully acquired for the construction of the proposal.

In accordance with the Crown Land Act, work proposed to be carried out on Crown Land requires a permit from the Department of Planning, Industry and Environment (Crown land). A licence would be sought following consultation with the Department of Planning, Industry and Environment (Crown land).

4.2.3 Protection of the Environment Operations Act 1997

The *Protection of the Environment Operations Act 1997* (POEO Act) provides the legal framework for the management of air, noise, water and waste pollution. Under Section 48 of the POEO Act, scheduled activities (as defined in Schedule 1 of the Act) require an environment protection licence (EPL).

Part 3.2 of the POEO Act requires an environment protection licence (EPL) for scheduled development work and the carrying out of scheduled activities (as set out in Schedule 1 of the POEO Act). This section of the Act was updated on 5 July 2019 making clauses 16 and 19 no longer apply to road construction activities. Clause 35 of Schedule 1 of the POEO Act applies to road construction, meaning the construction, widening or rerouting of roads. Development activities require an EPL under the POEO Act if those activities meet the following assessment criteria:

Clause 35(3)(a) the extraction or processing (over the life of the construction) of more than:

- 50,000 tonnes of materials in the case of premises in the regulated area or in the local government areas of Bega Valley, Eurobodalla, Goulburn Mulwaree, Queanbeyan-Palerang Regional or Snowy Monaro Regional.

Clause 35(3)(b) the existence of 4 or more traffic lanes (other than bicycle lanes or lanes used for entry or exit) for a continuous length of at least:

- (iii) 5 kilometres — where the road is not in a metropolitan area and is classified, or proposed to be classified, as a main road, freeway or tollway under the Roads Act 1993.

The proposal is likely to require a substantial volume of earthworks and at least five kilometres of road with four or more lanes, which would trigger the need for an EPL under Schedule 1.

4.2.4 Heritage Act 1977

Approval under section 60 of the *Heritage Act 1977* is required for any action that would adversely affect an item that is subject to an Interim Heritage Order or a listing on the State Heritage Register. A section 60 permit may not be required if the works are undertaken in accordance with the *Standard Exemptions for Works Requiring Heritage Council Approval* (Heritage Council of NSW 2020). Three State Heritage Register listed items are located within the study area. The Hartley Historic Village and Fernhill would be moderately impacted by the proposal. Bowenfels National School Site would have a negligible impact from the proposal. A section 60 permit for Fernhill and the Hartley Historic Village will be required for the Proposal.

An excavation permit is required to disturb or excavate any land knowing or having reasonable cause to suspect that the disturbance or excavation will or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed. A permit is also required to disturb or excavate any land on which the person has discovered or exposed a relic. Section 139(4) of the *Heritage Act 1977* makes provision for the issuing of an exception in certain prescribed circumstances. An excavation permit will be required for the Proposal where there is archaeological potential.

4.2.5 National Parks and Wildlife Act 1979

The *National Parks and Wildlife Act 1974* (NPW Act) provides the basis for legal protection and management of National Parks estate and Aboriginal sites and objects in NSW. The NPW Act reserves land as historic sites to protect and conserve areas associated with a person, event or historical theme, or containing a building, place, feature or landscape of cultural significance.

The proposal is on land reserved under the NPW Act being the Hartley Historic Village. Where a new non-permissible activity or development is proposed by another party and requires the use of NPWS land, the park boundary can be re-defined to exclude the proposed development or the development cannot proceed because it would encroach upon the park. In order for the land to be transferred to Transport under Part 11 of the Act, it would need to be revoked from the gazetted park by an Act of Parliament.

Transport submitted a proposal to revoke a section of national park estate in September 2021. The submission addresses the requirements of National Park and Wildlife Service (NPWS) *Revocation, recategorisation and road adjustment policy*, including an outline of the potential impacts of the revocation. A compensation package will also be negotiated with NPWS.

The harming or desecrating of Aboriginal objects or places is an offence under section 86 of the NPW Act. Under section 90, an Aboriginal heritage impact permit may be issued in relation to a specified Aboriginal object, Aboriginal place, land, activity or person or specified types or classes of Aboriginal objects, Aboriginal places, land, activities or persons.

The Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW (Department of Environment, Climate Change and Water, 2010). The due diligence process and the Procedure for Aboriginal Cultural Heritage Consultation and Investigation (PACHCI) (Roads and Maritime Services, 2011) would need to be followed during detailed environmental assessment.

There are 25 registered Aboriginal heritage sites within the investigation area. If harm to these objects or any other found through the PACHCI process cannot be avoided, an Aboriginal Heritage Impact Permit (AHIP) would be required (unless the proposal is State Significant Infrastructure and assessed under Part 5.2 of the EP&A Act).

4.2.6 Water Management Act 2000 and Water Act 1912

The study area is covered by the Water Sharing Plan for the Greater Metropolitan Region Unregulated River Water Sources 2011 and the Water Sharing Plan for the Greater Metropolitan Region Groundwater Sources. It is subject to the provisions of the Water Management Act 2000. Potentially relevant Water Management Act approval requirements are reviewed in Table 4-2.

Table 4-2 Water Management Act 2000 approvals

| Provision | Application |
|---|--|
| Water access licences (s.56 & s.60A) | Exemption for roads authorities in relation to water required for road construction and road maintenance under clause 21 and Schedule 4 of the Water Management (General) Regulation 2018. |
| Water use approval (s.89 & s.91A) | Exemption for roads authorities in relation to water required for road construction and road maintenance under clause 34 and Schedule 5 of the Water Management (General) Regulation 2018. |
| Water supply work approval | Water supply works generally not proposed. Limited exemptions in clause 39 and Schedule 1 of the Water Management (General) Regulation 2018 |
| Controlled activity approval Required for carrying out controlled activities including works on waterfront land (s.91 and s.91E). | Exemption in clause 41 of the Water Management (General) Regulation 2018. |

The Water Act 1912 remains relevant for aquifer interference activities such as construction dewatering because the requirement for aquifer interference approvals under the Water Management Act 2000 has not yet commenced. Localised dewatering of construction excavations is expected to benefit from a Crown exemption under Section 112 of the Water Act 1912.

Predicted groundwater level reductions are less than the NSW Aquifer Interference Policy (AIP) minimal impact considerations. The beneficial use category of groundwater sources is not anticipated to be lowered beyond 40 metres of the proposal, which is an AIP water quality criterion. It is not anticipated that an Aquifer Interference License will be required for the proposal.

4.2.7 Fisheries Management Act 1994

Section 220 of the Fisheries Management Act 1994 requires the Minister to issue a permit for causing a barrier to fish passage.

The proposal includes bridge structures to traverse River Lett, Boxes Creek and Whites Creek, which are mapped as 'Key Fish Habitat' under the Fisheries Management Act 1994 Key Fish Habitat mapping.

The proposal would be designed in such a way that fish movement is not impeded, and carried out so that fish passage would be maintained throughout construction. This would be verified during detailed design, including the potential impact on creek realignments if found to be required. Should it be determined that

avoiding impact on fish passage is not feasible during detailed design, a permit to block fish passage would be obtained under Section 220(1) of the Act prior to construction.

Section 199 of the Fisheries Management Act 1994 was developed to assist in the protection of key fish habitats. The proposal would be carried out so that fish habitat would be protected and maintained throughout construction. This would be verified during detailed design.

The study area contains a number of first, second and third order streams. Schedules 4, 4A and 5 of the Fisheries Management Act 1994 list species, populations and ecological communities that have been identified as being endangered, critically endangered and vulnerable to extinction, respectively. If a threatened species, population, ecological community or their habitat could be impacted by an activity, an assessment that addresses the requirements of Section 5A of the EP&A Act must be completed to determine the significance of the impact.

4.2.8 Biodiversity Conservation Act 2016

The purpose of the Biodiversity Conservation Act 2016 (BC Act) is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development.

The NSW Biodiversity Offsets Scheme is established under Part 6 of the BC Act and the Biodiversity Assessment Method (BAM) is established under Section 6.7 of the BC Act. The purpose of the Biodiversity Assessment Method is to prescribe requirements for the assessment of certain impacts on listed threatened species, populations and ecological communities, areas of outstanding biodiversity value, and key threatening processes.

Section 7.3 of the BC Act provides a test for determining whether proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats. Where a significant impact is likely, a Species Impact Statement or a Biodiversity Development Assessment Report (BDAR) must be prepared.

The assessment applied to threatened species and ecological communities relevant to the proposal is presented in Section 6.1 and Appendix D. The proposal is likely to have a significant impact on the critically endangered ecological community White Box – Yellow Box – Blakely’s Red Gum Grassy Woodland and Derived Native Grassland, listed as critically endangered under the BC Act, therefore a BDAR has been prepared (Appendix D).

4.2.9 Aboriginal Land Rights Act 1983

Through the *Aboriginal Land Rights Act 1983*, vacant Crown land not lawfully used or occupied or required for an essential purpose or for residential land, is returned to Aboriginal people (and vested in Aboriginal Land Councils). In accordance with Section 42B of the Aboriginal Land Rights Act, land vested in an Aboriginal Land Council can only be acquired by Transport through an Act of Parliament.

A review of controlling interests specified in the Digital Cadastral Database identified several parcels of Crown land within the investigation area (map set 4.0 in Appendix A).

Correspondence from the Office of the Registrar dated 6 March 2019 confirmed that many of the Crown land parcels in the section of the investigation area between Katoomba and Mount Victoria were subject to claims. An updated search covering the whole of the investigation area should be carried out as part of the proposal development process.

Previous correspondence from the Office of the Registrar and a schedule of Crown land derived from the Digital Cadastral Database is included in Appendix S.

4.2.10 Coal Mine Subsidence Compensation Act 2017

Under Section 21 of the *Coal Mine Subsidence Compensation Act 2017*, a person must not carry out work, or cause work to be done, in connection with the erection or alteration of an improvement within a mine subsidence district, except in accordance with the approval Subsidence Advisory NSW. For the purposes of the Act 'improvement' includes infrastructure, whether above or below the surface of the land. Part of the construction footprint is directly adjacent to the boundary of the Lithgow South Mine Subsidence District.

4.3 Commonwealth legislation

4.3.1 Environment Protection and Biodiversity Conservation Act 1999

Under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) a referral is required to the Australian Government for proposed actions that have the potential to significantly impact on matters of national environmental significance or the environment of Commonwealth land. These are considered in Appendix D and Section 6 of the REF.

A referral is not required for proposed road activities that may affect nationally listed threatened species, endangered ecological communities and migratory species. This is because requirements for considering impacts to these biodiversity matters are the subject of a strategic assessment approval granted under the EPBC Act by the Australian Government in September 2015.

Potential impacts to these biodiversity matters are also considered as part of Section 6 of the REF and Appendix D.

Findings – matters of national environmental significance

The assessment of the proposal's impact on matters of national environmental significance and the environment of Commonwealth land found that there is unlikely to be a significant impact on relevant matters of national environmental significance or on Commonwealth land. Accordingly, the proposal has not been referred to the Australian Government Department of Agriculture, Water and the Environment under the EPBC Act.

Findings – nationally listed biodiversity matters (where the strategic assessment applies)

The assessment of the proposal's impact on nationally listed threatened species, endangered ecological communities and migratory species found that there is unlikely to be a significant impact on relevant matters of national environmental significance. Section 6 of the REF describes the safeguards and management measures to be applied.

4.3.2 Native Title Act 1993

The *Native Title Act 1993* recognises and protects native title. The Act covers actions affecting native title and the processes for determining whether native title exists and compensation for actions affecting native title. It establishes the Native Title Registrar, the National Native Title Tribunal, the Register of Native Title Claims and the Register of Indigenous Land Use Agreements, and the National Native Title Register. Under the Act a future act includes proposed public infrastructure on land or waters that affects native title rights or interest.

A search of the Native Title Tribunal Native Title Vision website was undertaken, with two Native Title holders/claimants identified (refer to Table 4-3).

Table 4-3 Native title search results

| Type | Name | Tribunal file no. | Status |
|-------------------------------|----------------------------|-------------------|---------------------|
| Native title claim | Warrabinga-Wiradjuri #7 | NC2018/002 | Registered 22/11/18 |
| Indigenous Land Use Agreement | Gundungurra Area Agreement | NI2014/001 | Registered 27/02/15 |

Transport will provide a notice of the proposal to NTSCORP under Section 24KA of the Act and will invited comment on the proposal.

4.4 Confirmation of statutory position

The proposal is categorised as development for the purpose of a road and road infrastructure facilities and is being carried out by or on behalf of a public authority.

Transport has commenced a process to revoke a portion of the Hartley Historic Village. Subject to the revocation being passed by Parliament, the proposal can proceed by virtue of Clause 94 of ISEPP. Under clause 94 of ISEPP the proposal is permissible without consent. The proposal is not State significant infrastructure or State significant development. The proposal can be assessed under Division 5.1 of the EP&A Act.

Transport is the determining authority for the proposal. This REF fulfils Transport's obligation under Section 5.5 of the EP&A Act including to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the activity.