

## APPENDIX K2

### LEGISLATION, PLANNING INSTRUMENTS AND POLICIES

#### Overview

A detailed assessment of the Hume Coal and Berrima Rail Projects (Projects) against the relevant Commonwealth and NSW regulatory and policy framework can be found in Chapter 3 of the Hume Environmental Impact Assessment (EIS), Chapter 4 of the Berrima Rail EIS and Chapter 6 of the Hume Coal Response to Submissions (RTS).

In the IPC Interim Report (IPCIR) of 27 May 2019, the Independent Planning Commission (Commission) made two related recommendations concerning the objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the principles of ecologically sustainable development (ESD) (being recommendations R27 and R28). The purpose of this document is to address recommendations R27 and R28.

In addressing these recommendations, the Applicant seeks to demonstrate that the Preliminary Assessment Report (PAR) prepared by the Department of Planning, Industry and Environment (Department) included a number of significant, adverse preliminary findings which resulted from a misinterpretation or misapplication of provisions of the EP&A Act. In particular, the Department's consideration of the objects of the EP&A Act, the principles of ESD (including the precautionary principle) and the "public interest" was, in the Applicant's view, significantly flawed and prejudicial.

These matters have been identified for further work in the IPCIR directed at both the Applicant and the Department.

#### Recommendations R27 and R28

Recommendation R27, which is directed to the Applicant, states:

*"The Applicant should update its consideration of the objects of the Environmental Planning and Assessment Act 1979 and utilise the definition of 'Ecologically Sustainable Development' from the Protection of the Environment Administration Act 1991."*

Recommendation R28, which is directed to the Department, states:

*“The Department should provide an updated and detailed assessment of the public interest, the objects of the Environmental Planning and Assessment Act 1979 and ‘Ecologically Sustainable Development’ with its Final Assessment Report, based on any additional information made available since the issue of the Department’s Preliminary Assessment Report, including the further information recommended in this Report by the Commission.”*

The Applicant considers it necessary and appropriate to address both of these related recommendations even though recommendation R28 is directed to the Department.

In order to provide the relevant context for the Applicant's response to these recommendations, the below table summarises the most relevant extracts from the PAC (as quoted by the Commission in the IPCIR) and the IPCIR.

### Summary of Relevant Extracts from the IPCIR

Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
<b>Public Interest, ESD and Objects</b>	<p><i>The Department considers that there is a <u>threat of serious harm to both groundwater and surface water resources, and there is currently considerable scientific uncertainty about the level of environmental damage to both.</u></i></p> <p><i>Consequently, the <u>‘precautionary principle’ is triggered and the project as currently proposed should not be considered an ‘ecologically sustainable development’.</u></i></p> <p><i>The Department considers that the <u>economic benefits cannot be realised without significant adverse impacts on the environment and the local community, particularly in relation to groundwater impacts. At this stage, the Department does not consider that the economic benefits outweigh the likely adverse impacts on the environment and community.</u></i></p>	<p>472. "The Commission in its assessment of merits of the Project has had regard to its consideration of public interest, the objects of the EP&amp;A Act and ESD. The Commission has had regard to the Material before it and given consideration to the issues raised in public submissions. Relevant excerpts from the submissions included:</p> <ul style="list-style-type: none"> <li>• Hume Coal Project as contrary to public interest;</li> <li>• public interest includes the principles of ESD, and this Project is contrary to the precautionary principle, is therefore contrary to the elements of ESD and must be refused; and</li> <li>• it was inconsistent with the objects of the EP&amp;A Act and that the precautionary principle should be applied."</li> </ul>

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Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
	<p><u>Consequently, based on the information currently available, the Department considers that the project should not be approved.</u></p> <p>[N.B. This is followed by the Commission quoting the Applicant's RTS, which correctly interprets and applies the precautionary principle ]</p>	<p>473. "The Commission finds that that the <u>Applicant and Department have considered and assessed the Project against the public interest and the objects of the EP&amp;A Act.</u> However, the Commission has given further consideration to the public interest, the objects of the EP&amp;A Act and the principles of ESD, and in this regard the Commission makes the following findings:"</p> <p>476 "Commission's provisional view is that due to the Material currently before it, and the extent of information being sought by this Report, <u>there is at this stage no sound basis on which to conclude that the Project is consistent with the following objects of the EP&amp;A Act or ESD, and therefore it may not be currently in the public interest:</u></p> <p>478. "At this stage of its assessment the <u>Commission finds that it is not satisfied with the overall level of assessment provided by the Department regarding public interest, objects of the EP&amp;A Act and ESD.</u>"</p>

## The objects of the EP&A Act

### How to apply the objects of the EP&A Act

Any consent authority responsible for assessing and determining a development application has a duty to apply the relevant provisions of the EP&A Act assessment regime and to follow the relevant guidance provided by the Courts.

In order to properly assess the Projects against the objects of the EP&A Act, it is necessary to first properly understand the ambit of the objects of the EP&A Act.

Considering the objects of the EP&A Act

The Applicant submits that it is uncontroversial that the objects of the EP&A Act should not be applied so as to dictate a particular outcome in the determination of a development application.

It is also uncontroversial that the consent authority is entitled to consider the objects of the EP&A Act, such as the principles of ESD, in evaluating a development application under s 4.15 of the EP&A Act.<sup>1</sup>

It is a matter for the consent authority as to what weight it affords to the consideration of particular objects of the EP&A Act in determining a development application.<sup>2</sup>

### *Objects can be at extreme levels of generality*

The High Court stated in *Victims Compensation Fund Corporation v Brown* [2003] HCA 54 at [33] that, in the context of the object provision of a compensation Act, the purpose of any legislation is just too general to be of use in interpreting the meaning of the substantive provisions:

*“It is difficult to state the legislative purpose except at such extreme levels of generality that it is not useful in construing particular parts of the legislative language.”*

### *The objects of an Act must be found having regard to the Act as a whole*

It is also submitted that the section of an Act that specifically contains the ‘objects’ of the Act, is *not* the only relevant provision where the objects of the Act can be identified. Rather, the objects of an Act must be construed having regard to the Act as a whole<sup>3</sup>.

As recently confirmed in *Cappello v Roads and Maritime Services* [2019] NSWCA 227, at [39]-[40] (emphasis added):

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<sup>1</sup> See, eg, *Carstens v Pittwater Council* [1999] NSWLEC 249 at [25].

<sup>2</sup> *Carstens v Pittwater Council* [1999] NSWLEC 249 at [26], referring to *BP Australia Ltd v Campbelltown City Council* (1994) 83 LGERA 274 per Mahoney JA at [279].

<sup>3</sup> *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129

*“It may be accepted that “purposes” and “objects” can, depending on context, be treated as synonyms.*

...

*Even assuming that the section headed “objects” was headed “purposes”, the phrases “For the purposes of this Act” or “For the purposes of this document” or “For the purposes of this instrument” are well-known shorthand phrases used in drafting legislation. The phrase “For the purposes of this Act” is not to be conflated with the objects of the Act. As Pearce and Geddes in *Statutory Interpretation in Australia* (8th ed, 2014, LexisNexis) say at [4.51]:*

“It has also to be borne in mind when considering an objects clause that it alone will not represent the object of the legislation. Intention is to be gleaned from the whole of the Act and regard must also be had to other sections ...”

This means that, depending on which section is being applied, the objects of the EP&A Act are not found exclusively in section 1.3, but are to be gleaned from the Act as a whole.

### ***No legislation pursues its purposes at all costs***

The Courts have also relevantly confirmed that the objects of the Act are not to be pursued at all costs, because objects can often conflict with each other.

As Spigelman CJ<sup>4</sup> stated in *Victims Compensation Fund v Brown* [2002] NSWCA 155; (2002) 54 NSWLR 668, citing the Supreme Court of the United States in *Rodriguez v United States* 480 US 522 (1987) at 525–6 (emphasis added):

*... **No legislation pursues its purposes at all costs.** Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.*

Put differently, the Courts have stated that in construing a provision, knowing what the objects or the purpose of the Act is not always helpful because pursuing the purpose to the fullest extent can actually be against the words of the law. In the High Court’s decision in *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138; 239 ALR 415 at [5] Gleeson CJ explained that the purposive approach:

*“... may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act.*

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<sup>4</sup> Dissenting judgment, endorsed on appeal by the High Court: *Victims Compensation Fund Corporation v Brown* [2003] HCA 54; (2003) 77 ALJR 1797; 201 ALR 260.

*Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which legislation achieves a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose”* (emphasis added)

*Conflicting objectives of the EP&A Act*

The existence of competing objectives under the EP&A Act was recognised in *Minister for Urban Affairs and Planning v Rosemount Estates P/L and Ors* [1996] NSWSC 348. In this judgment, it was relevantly recognised that "choices would have to be made between what may be competing and opposing objects" (emphasis added):

Per Handley JA:

*“Planning involves the making of choices between alternatives suggested by the conflicting objects in s 5 (a). These include the proper development and conservation of natural resources, the promotion of the economic use and development of land, and the protection of the environment. The working out of these conflicting objects in a given policy, plan or decision will inevitably present to a legislative planner or decision-maker a range of choices within the scope of any power.”*

And per Sheller JA:

*“The Environmental Planning and Assessment Act 1979 (the Act) has amongst its stated objects (s5) the proper management and development of natural resources for the purpose of promoting the economic welfare of the community. Section 5 states this as one of several objects including the conservation of natural resources for the purpose of promoting the social welfare of the community and a better environment. A reading of s5 as a whole shows that the legislature contemplated that choices would have to be made between what may be competing and opposing objects. The legislature reposed in the Minister the responsibility of making those choices.”*

And per Stein J:

*“It is apparent from the objects enunciated in s.5 and the provisions to which I have referred that the objects, scope and purpose of the Act include the provision of instruments of various degrees of particularity which will indicate or specify the response of government at a local, regional or state level to the manner in which land is to be used, whether for economic, domestic or recreational purposes with the intent that the welfare of the community and the welfare of the environment is fostered. It is apparent from those objects that a balancing of competing views is required and that different perspectives regarding problems of balance or predominance of interest may arise at different local, regional and state levels.”*

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### *Development vs conservation spectrum*

The *Rosemount* case confirms that the objectives of the EP&A Act can conflict with each other and within each other. For example, on one hand, ss1.3(a), (b) and (e) seek to conserve resources, which is promoted by leaving the resources in the ground, and, on the other hand, ss1.3(a), (b) and (c) seek the development of the same resources, which is promoted by exploiting the resources (in an ecologically sustainable manner).

Below is a table that shows the potential conflict within and amongst the different objectives of s1.3 of the EP&A Act (emphasis added):

S1.3	Objectives of developing resources	Objectives of conserving resources
(a)	“to promote the social and economic welfare of the community and a better environment by the proper management, <u>development</u> and conservation of the State’s natural and other resources”	“to promote the social and economic welfare of the community and a better environment by the proper management, development and <u>conservation</u> of the State’s natural and other resources”
(b)	“to facilitate ecologically sustainable <u>development</u> by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment”	“to facilitate <u>ecologically sustainable</u> development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment”
(c)	“to promote the orderly and <u>economic use and development</u> of land”	
(e)		“to protect the environment, including the <u>conservation</u> of threatened and other species of native animals and plants, ecological communities and their habitats,”

In this context, where the objective of “development” is clearly contained in s1.3(a), (b) and (c) of the EP&A Act, it is incorrect to uncritically assert that the Projects, which seek to develop a valuable coal resource, are not at least partially consistent with s1.3(a), (b) and (c).

### *All words of the legislation must be given meaning*

It is submitted that any simplistic assertion that the Projects are not consistent with s1.3(a), (b) and (c) misreads these sections by selectively choosing to ignore the word “development” in those sections. This approach is inconsistent with the general principle of statutory interpretation that all



words must be given some meaning and effect: *Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405 at 414 per Griffith CJ<sup>5</sup>:

*“[In] The King v Berchet [1 Show 106] a case decided in 1688, it was said to be a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.”*

If all the words of ss1.3(a), (b) and (c) are given meaning and effect, the word “development” must be given meaning. Hence, it is nonsensical to deny that the Projects are not at least partially consistent with those objectives, because the Projects will “develop” a valuable coal resource.

### Mining SEPP’s objectives have a real connection to EP&A Act objectives

The Mining SEPP is an environmental planning instrument created for the purpose of achieving the objects of the EP&A Act. Section 3.13 of the EP&A Act states:

*“... an environmental planning instrument may be made in accordance with this Part for the purposes of achieving any of the objects of this Act”*

With respect to SEPP 45, the predecessor SEPP to the current Mining SEPP, it was observed that the former Mining SEPP’s clauses had a real connection with the objects of the EP&A Act (emphasis added):

*“In my opinion quite plainly an **examination of the objects of the Act, to achieve which the Minister was empowered to make an SEPP, demonstrates that SEPP 45 had a real, that is to say a direct and substantial, connection with those objects.** The terms of the memorandum accompanying the draft SEPP which the Director submitted to the Minister on 28 July 1995 confirmed this. The significant portions of the memorandum are set out in Cole JA’s judgment and I need not repeat them. Suffice it to say that it referred to the importance of the mining industry in New South Wales and the unacceptable level of uncertainty introduced by the provisions of some environmental planning instruments into the decision making process for important mining projects.”<sup>6</sup>*

The former Mining SEPP 45’s aims were similar to those of the current Mining SEPP, in that both sought to promote the development of the State’s natural resources (similarities underlined below):

<b>Mining SEPP 45</b>	<b>Current Mining SEPP</b>
“2. (1) This Policy aims:	“2 Aims of Policy

<sup>5</sup> This statement was endorsed in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355; 153 ALR 490 at [71] per McHugh, Gummow, Kirby and Hayne JJ.

<sup>6</sup> Per Sheller JA in *Minister for Urban Affairs and Planning v Rosemount Estates P/L and Ors* [1996] NSWSC 348.



Mining SEPP 45	Current Mining SEPP
<p>(a) to promote the <u>economic development</u> of the State; and</p> <p>(b) to facilitate the <u>development of the State's natural resources</u>; and</p> <p>(c) to facilitate the <u>development of significant export-earning industries for the State</u>; and</p> <p>(d) to create significant employment opportunities within the State; and</p> <p>(e) to make provision concerning;</p> <p>(i) the circumstances in which mining may be permitted under environmental planning instruments; and</p> <p>(ii) the determination of development applications for consent to carry out development for the purposes of mining.</p> <p>..."</p>	<p>The aims of this Policy are, in recognition of the <u>importance to New South Wales of mining, petroleum production and extractive industries</u>—</p> <p>(a) to provide for the proper management and development of mineral, petroleum and extractive material resources for the purpose of promoting the social and <u>economic welfare of the State</u>, and</p> <p>(b) to facilitate the orderly and <u>economic use and development of land containing mineral, petroleum and extractive material resources</u>, and</p> <p>(b1) to promote the <u>development of significant mineral resources</u>, and</p> <p>(c) to establish appropriate planning controls to encourage ecologically sustainable development through the environmental assessment, and <u>sustainable management, of development of mineral, petroleum and extractive material resources</u>, and</p> <p>(d) to establish a gateway assessment process for certain mining and petroleum (oil and gas) development—</p> <p>(i) to recognise the importance of agricultural resources, and</p> <p>(ii) to ensure protection of strategic agricultural land and water resources, and</p> <p>(iii) to ensure a balanced <u>use</u> of land by potentially competing industries, and</p> <p>(iv) to provide for the <u>sustainable growth of mining, petroleum and agricultural industries.</u>"</p>

Since the objectives of the former Mining SEPP and the current Mining SEPP are similar, it is submitted that the current Mining SEPP's objectives of seeking to exploit natural resources have a "real, that is to say a direct and substantial, connection with" the objects of the EP&A Act.

This is relevant in understanding the objectives of the EP&A Act – i.e. that development of mining projects (as stated in the Mining SEPP) promotes the objectives of the EP&A Act contained in s1.3(a) – (c).

Summary of how to apply the objects of the EP&A Act

The consent authority is required to determine a development application in accordance with the requirements of the EP&A Act and the guidance of relevant case law.

While it is uncontroversial that the consent authority may consider the statutory objects under s 1.3 of the EP&A Act in determining a development application, it is not permissible for the consent authority to treat the items in s1.3 as imposing a minimum threshold test, such that the inconsistency of the development with a particular object or objects of the EP&A Act will result in the refusal of the Project.

In fact, it is unlikely that a project will be consistent with all of the objects of the EP&A Act because some of the objectives within s1.3 of the EP&A Act conflict with each other, as confirmed by the LEC.

Accordingly, it would be incorrect and irrational to interpret *all* paragraphs in section 1.3 of the EP&A Act as setting a minimum hurdle that must be met in all cases before a project can be approved.

Put another way, it is incorrect to say that, because the Projects are inconsistent with one object of the EP&A Act, the Projects must be refused. It is obvious and natural that when the objects compete with each other and within themselves, a project may not be consistent with one or more of the specified objects. Therefore, the relevant case law confirms that what is required is an appropriate balancing exercise.

Thus, a project could be approved by the IPC even if some of the objectives of the EP&A Act would not be facilitated by the Projects, on the basis that, on balance, the positives of the Projects outweigh the negatives.

With this context established, this document will now assess the Projects against the objectives of the EP&A Act.

## Application of the objects of the EP&A Act

An analysis of how the Projects are consistent with the objects of the EP&A Act is set out below<sup>7</sup>.

*“(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources”*

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<sup>7</sup> The consistency of the Project with the objects of the EP&A Act was discussed in the EIS section 3.2.4.

The Projects promote the social<sup>8</sup> and economic welfare of the community.

Directly, the social welfare is promoted through providing stable and high-paying careers for approximately 300 FTE employees during mining operations, living within 45 minutes driving range of the Projects. There will also be 400 FTE employees/contractors during construction, who will be accommodated in a separate accommodation facility. Given that the average wages paid by the Projects will be three to four times the average median employed income in the Wingecarribee Shire, the disposable income provides economic stability and would support the social welfare of the families in the community.

A local procurement policy will also be adopted, which will require local goods and services to be used in the Projects' construction and operation where possible, thereby maximising opportunities for local businesses.

Indirectly, the Projects promote social and economic welfare by paying Federal and State taxes and royalties, who in turn provide social welfare to the community. For example, the 2019-2020 NSW Government budget half-yearly report confirms that the Government announced \$2bn in drought relief using the funds generated from various sources, including taxes and royalties<sup>9</sup>. Royalties from mining contribute approximately \$2 billion to the NSW budget annually.

Similarly, the Commonwealth government allocates billions of dollars to fund healthcare for the Australian community, using funds generated from various sources.<sup>10</sup>

It is reasonable to expect that the NSW and Commonwealth Governments will continue to provide social and economic welfare using the funds they will receive from the Projects .

The Projects will facilitate the recovery of 50 Mt of ROM coal reserves, being 55% metallurgical (coking) coal and 45% thermal coal, through significant capital and operation expenditure, using skills and employed labour in the region. If not approved, the economic and social benefits documented in Chapters 19 and 20 of the EIS and updated by the Economic Assessment in the Applicant's response to the IPCIR would remain unrealised.

The natural resources in the project area include coal, clay and other masonry resources for brickmaking, construction and hard rock quarries, land suitable for agricultural production, state forest, and land which has biodiversity and cultural heritage values. The Projects have been designed to efficiently recover the valuable coal resource without causing unacceptable environmental impacts, or impacts on existing and surrounding land uses that would preclude the continued operation of existing businesses.

The mine's main surface infrastructure area design avoids surface disturbance in the state forest and the disturbance of biodiversity and cultural heritage resources above the mine. Surface disturbance will be limited because mining will occur underground and will be first workings only, resulting in no

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<sup>8</sup> The social assessment was contained in Chapter 20 of the EIS.

<sup>9</sup> [www.budget.nsw.gov.au/half-yearly-review](http://www.budget.nsw.gov.au/half-yearly-review) (accessed on 13/1/2020).

<sup>10</sup> [www.budget.gov.au/2019-20/content/services.htm](http://www.budget.gov.au/2019-20/content/services.htm) (accessed on 13/1/2020).

predicted subsidence related impacts on biodiversity or cultural heritage assets. Impacts to surface water resources have also been assessed as minimal, with all potential impacts to surface water users and stream environments assessed as insignificant in accordance with the relevant Significant Impact Guidelines (DoE 2013). Where other impacts cannot be avoided, these have been mitigated or offset, as described in Part D of this EIS.

Hume Coal owns around 1,300 ha of land within and in the vicinity of the project area, making it one of the largest landholders in the area. The company has leased the properties to a pastoral company that is now running a productive agricultural business, comprising principally beef cattle, on these properties, and will continue investing in initiatives to improve the land's agricultural productivity. In keeping with the current land uses, most of this land will continue to be farmed during and following mining.

The Projects therefore encourage the proper management and development of agricultural land. Within the 5,051 ha project area, approximately 117 ha will temporarily not be used for agriculture during the mine life because it will be given over to surface infrastructure. This is around 2% of the project area, and will be returned to grazing land at the end of the life of the Projects.

Importantly, the Projects will:

- employ over 400 people in construction and 300 in operation;
- deliver wages significantly higher than the median employed income for the area;
- generate significant local expenditure from operational employees being required to live within 45 minutes' drive time from the mine; and
- aim to maximise local procurement of goods and services.

The development of an underground mine with imperceptible subsidence is specifically designed to have no predicted impacts on biodiversity or cultural heritage.

To reiterate, impacts on surface water resources are assessed as minimal, with all potential impacts to surface water users and stream environments being insignificant in accordance with the Significant Impact Guidelines (DoE 2013). Impacts on groundwater users can be mitigated and no landowner will be denied water from water bores for the purpose for which they are licenced. Those impacts are mitigated to the fullest extent practicable.

Being an underground mine, surface disturbance is limited to 2% of the project area. Hume Coal owns 1300 ha of surrounding agricultural land that will remain in agricultural production. At the completion of mining, the disturbed area will be rehabilitated and returned to agricultural production.

Throughout the environmental assessment process, Whilst the Applicant has undertaken its environmental assessment on the basis of delivering coal for export from Port Kembla, it has become evident there is a latent demand for the Projects' product coal in the Australian market. Sourcing necessary product coal from a domestic supplier provides domestic users with significant

cost benefits. The Applicant's parent company has undertaken to use it in its Korean steel and power operations, guaranteeing sales.

Given the domestic interest in the Projects' output, the Applicant submits that the domestic use of its coal should be factored into the consideration of the Projects' contribution to the social and economic welfare of the State and local region.

### Coal for Steel

The primary product from the Projects is coking coal, which is essential for the production of steel, being a necessary resource underpinning social and economic development.

Significantly, the ACCC has determined that the Southern Coalfield is essential for the supply of competitive coking coal to the Australian steel industry and that shipping coal from other destinations imposed uncompetitive costs on the domestic steel industry. Existing supplies, particularly Wongawilli seam coal, are under threat from declining resources in geologically challenging areas which are subject to environmental constraints not associated with the Projects.

The critical dependence on local coking coal for domestic steel production was highlighted by BlueScope Steel<sup>11</sup>:

*"Steel is a fundamental building block of any modern society and a domestic steel manufacturing capability is a critical and strategically valuable asset for Australia's future economic security and prosperity.*

...

*Coal is one of a small group of raw materials – along with iron ore and fluxes – that are essential ingredients in the manufacture of virgin iron and steel.*

*There are broadly two types of coal in the world: thermal or 'energy' coal, which is used for generating electricity; and metallurgical or 'coking' coal, which is used to manufacture iron and steel.*

*There are a number of alternatives to thermal coal for the production of electricity, including gas generation, wind, solar and hydro.*

*There are currently no alternatives to the use of metallurgical coal for the production of virgin iron and steel. There is research & development being undertaken worldwide to find a way to manufacture virgin iron without coal, but there is yet to be a commercially viable breakthrough. That is because the carbon in the coal is the essential ingredient in the chemical reaction to extract iron from iron ore. While steel can be manufactured from scrap*

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<sup>11</sup> <[majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SUB-2991%2120190918T063410.904%20GMT](http://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SUB-2991%2120190918T063410.904%20GMT)> (accessed on 20/1/2020).

*via the electric arc furnace (EAF) process, global demand for steel is growing, meaning there is not enough scrap worldwide to meet demand solely from the EAF route. Virgin iron still needs to be manufactured from iron ore and metallurgical coal.*

*These technologies include the use of hydrogen as a reductant to produce iron, which has yet to be demonstrated at a commercial scale. Even then, the technology will require a fundamental transformation in energy generation and hydrogen supply infrastructure to enable steel producers to adopt this technology.*

*The production of virgin iron units manufactured using coke from metallurgical coal will continue to be the predominant method of making iron and steel in Australia and worldwide for the foreseeable future.*

As such, the Projects will contribute to domestic economic welfare by providing potential coking coal supply to the Australian steel industry. In this regard, it is emphasised that BlueScope Steel has stated that sourcing local coal from the Southern Coalfields (not just any coal from anywhere) is critical to the survival of the steel mill at Port Kembla (emphasis added):<sup>12</sup>

*“... continuation of mining at the Dendrobium Mine situated in the Southern Coalfield of NSW. This continuation is vital for the continuing protection of the economic health of the Illawarra region and NSW at large, including the 3,500 direct jobs and 5,400 indirect jobs that rely on Port Kembla Steelworks, the largest steel production facility in Australia.*

*The Dendrobium Mine Project produces metallurgical coal for steelmaking. Currently, there is no economically viable, commercial-scale alternative to the use of metallurgical coal in the blast furnace method of steelmaking, which is employed at Port Kembla Steelworks. The Project would provide a local and continued supply of metallurgical coal to the Steelworks, allowing BlueScope to continue to generate at least \$6.5 billion in regional economic output for the Illawarra region.*

*BlueScope is widely recognised as producing the world’s best quality coke due to its unique location adjacent to the Southern Coalfields; one that makes it logical and economically advantageous to use high quality coal, which in turn ensures reliable, consistent and efficient production of high-quality coke.*

*Because of its proximity to the Southern Coalfields, BlueScope has been able to economically optimise its blend of coals while maintaining an output of coke of the required quality. In particular, the compatibility in coal properties between Dendrobium and Metropolitan coals, due in large part to them coming from adjacent locations, has facilitated a synergy within*

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<sup>12</sup> <[majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SUB-2991%2120190918T063410.904%20GMT](https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SUB-2991%2120190918T063410.904%20GMT)> (accessed on 20/1/2020).

*the coal blend that, in BlueScope's view, is quite unique and unable to be replicated to any meaningful extent.*

*Coal is supplied to the Steelworks from the Southern Coalfields in a 'just-in-time' (JIT) arrangement. This coal is transported to the Steelworks in daily deliveries by truck and rail transport.*

*There are no facilities at Port Kembla Steelworks to allow BlueScope to stockpile coal sufficient to feed the coal beds, and therefore the operation of the Steelworks is reliant on uninterrupted just-in-time supplies of coal from the Southern Coalfields.*

*The Port Kembla Steelworks will continue to rely on competitive sources of locally mined coal for the foreseeable future. In fact, it is not an exaggeration to say that without access to the coal supply from the Southern Coalfields, the Steelworks would not have been built in the Illawarra region. Without this supply, steelmaking would struggle to remain viable at Port Kembla.*

*The importance of the local coal supply to BlueScope was also observed in the ACCC's consideration of the proposal for South32 to acquire Peabody's Metropolitan mine in 2016 (subsequently abandoned). The ACCC identified the effective existence of a "...narrower market for the supply of coking coal to Australian customers and suppliers in this market (that) may be limited to coal producers in the Illawarra".*

It is essential for the continuation and economic survival of BlueScope's Port Kembla Steelworks that it has access to a reliable and long-term supply of coking coal from the Southern Coalfields.

The abovementioned statements made by BlueScope Steel, make reference to two existing mines in the Southern Coalfields, namely South 32's Dendrobium Mine and Peabody's Metropolitan Mine. What is important for the IPC to understand, is that both of those approved mines cannot be relied upon to be a source of long-term supply. This is because:

1. the SSD consent for the Metropolitan Mine only authorises mining operations for the period ending 22 June 2032;
2. the SSD consent for the Dendrobium Mine authorises the continuation of mining operations only until 2030.

The operating life of the Dendrobium Mine however, cannot continue to 2030 because, as acknowledged by South 32 in its EIS for the pending SSD development application for the Dendrobium Extension Project, the "current mineable reserves (for the existing approved mine) will be depleted by 2024".

There is no certainty that the Dendrobium Extension Project will be granted SSD consent. Having regard to the above facts, it would be economically imprudent to sterilise the Projects' coking coal resource and deny that resource from being available to meet part of the Steelworks' demand for Southern Coalfield's coking coal.



## Coal for Energy

Similarly, the Projects promote social and economic welfare because the globalised Australian economy and society is reliant on domestic and foreign goods and services, which are generated using electricity, the majority of which are generated from coal. For example, the estimated proportion of electricity generated in NSW in 2018-2019 attributable to thermal coal was 80.8%.<sup>13</sup>

Electricity is an essential element to support the employment generating industries necessary to promote social and economic welfare.

For example, the Department has previously accepted that because the Springvale Coal Mine is the only local mine supplying thermal coal to the Mt Piper Power Station, the Springvale Extension development application should be approved.<sup>14</sup>

In September 2019, Mt Piper Power Station's parent company, Energy Australia announced 'an acute coal shortage' at Mt Piper due to problems in sourcing supply from the Springvale Mine. In the year to date, it generated 40% less electricity than the comparable period a year earlier<sup>15</sup>. Despite a short-term rail and truck solution being implemented late in 2019, it is evident that the long-term sourcing of thermal coal for Mt Piper will require other suppliers. The Projects, if approved, have the potential to supply Mt Piper with between 16-20% of its annual requirements by rail, within existing rail constraints.

The remaining coal-fired power stations in NSW are currently critical for providing secure base-load electricity supply. Save for the Mt Piper power station, the other power stations in the State are mature and nearing the end of their operating lives. The Mt Piper power station has a current design life which should ensure that it can continue to provide secure dispatchable electricity to 2043, which corresponds with the proposed operating life of the Hume Projects.

What is important for the IPC to understand, is that the SSD consent for the Springvale Mine Extension which was granted in 2015, authorises coal extraction only to 2028.

Having regard to the above facts, it would be economically imprudent to sterilise the Projects' thermal coal resource and deny that resource from being available to meet part of the Mt Piper Power Station's demand for quality thermal coal.

In view of the Department having previously determined that the Springvale Mine Extension was in the public interest, it is submitted that a similar justification applies to the Applicant's Projects.

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<sup>13</sup> [energy.nsw.gov.au/media/1926/download](https://energy.nsw.gov.au/media/1926/download) (accessed on 13/1/2020).

<sup>14</sup> Springvale Mine Extension Project Final Assessment Report (SSD 5594), September 2015, p 3.

<sup>15</sup> *Lithgow Mercury*, Sept 4 2019.

*“Better environment by the proper management, development and conservation of the State’s natural and other resources”*

The Projects will be developed on land that is largely privately owned and therefore not generally available for public purposes. Approximately 1,296 ha of the Belanglo State Forest is within the project area. Surface infrastructure within the State Forest will be limited to one downcast ventilation shaft, some access tracks and environmental monitoring equipment, with the mine surface infrastructure area constructed on privately owned land outside the State Forest. Therefore, the Projects will not restrict public access to this area. Parts of the project area also contain public roads. Access will be maintained along these roads throughout the project life.

The Projects promote a better environment by the proper management, development and conservation of the State’s natural and other resources. This is discussed below in more detail in relation to each relevant natural resource.

#### Groundwater

The groundwater resource will be properly managed and conserved due to the following features of the mine:

1. Due to the non-caving mining method chosen, less groundwater will enter the mine workings and this groundwater will be accounted for within the volume of water licences already held by the Applicant;
2. As the mine workings will be progressively sealed within a bulk-head, groundwater levels will recover progressively during the mine life, rather than at the end of the mine life;
3. The backfilling of the mine workings with rock and water paste, will accelerate the recovery of groundwater levels and remove any need for post-mine surface emplacements for waste rock, thus removing the need for ongoing management;
4. Underground reject emplacement will use natural material originating from the ground (rocks and water), with no impact on groundwater quality. The addition of limestone to any emplaced material provides additional protection for groundwater quality. Further, the Projects meet the requirements of the Drinking Water SEPP 2011.

#### Surface water

Yield impact assessment results for the Medway Dam catchment are provided in Section 4.2.2.1 Table 4.2 of the Hume Coal Project RTS Revised Surface Water Assessment Report (WSP 2018).

A 0.3% reduction in yield is predicted for the Medway Dam catchment during the 19-year mining period. The predicted annual maximum volumetric loss is 278.1 ML/yr under wet climatic conditions and 120.9 ML/yr under dry climatic conditions.

The revised base case flow impact assessment predicts that local impacts on yield in the Oldbury Creek sub-catchment will be 4.3% (mean of 159.1 ML/yr) for wet conditions and 4.5% (mean of 71.9 ML/yr) for dry conditions. However, there are no known or probable stream water users in this sub-catchment except for the farming operation affiliated with Hume Coal.

The predicted yield impact for the wider Medway Rivulet Management Zone (which includes the Oldbury Creek catchment) is 0.9% (mean of 433.9 ML/yr) under wet conditions and 1.6% (mean of 239.1 ML/yr) under dry conditions.

These changes in the Medway Rivulet Management Zone would produce negligible changes in flow downstream in the substantially larger Lower Wingecarribee Management Zone, and therefore, negligible changes to the volume of water available for Sydney water supplies and other regional supplies.

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment

The concept of ecologically sustainable development (ESD) is defined in the EP&A Act so as to have the same meaning as the definition contained in section 6(2) of the *Protection of the Environment Administration Act 1991*. This definition is discussed in greater detail in Chapter 24 of the EIS.

Recommendation R27 requests the Applicant to further address the definition of 'Ecologically Sustainable Development' (ESD) in accordance with the definition from s6(2) of the *Protection of the Environment Administration Act 1991*. As such, the principles of ESD are given detailed consideration below.

#### *ESD principles are aspirational*

It is noted that the principles of ESD are drafted in deliberately aspirational language that contains inconsistencies. In this regard, Stein J has stated extra-judicially:

*"... some of the principles contain vague statements, some might call aspirations, as well as ambiguities, inconsistencies and uncertainties. Difficulties of interpretation and application are manifest. There is even discussion on whether the principles are merely guiding or whether they are also operational."*<sup>16</sup>

This is the natural consequence of the fact that the principles of ESD found in s6(2) of the *Protection of the Environment Administration Act 1991* are adopted verbatim from the international treaty developed at the UN Conference on Environment and Development, the 'Earth Summit' in Rio de Janeiro in June 1992. In international law, multi-lateral treaties are deliberately drafted in an aspirational manner so as to enable as many countries as possible to adopt the treaty.

*"6(2) ... ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. ..."*

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<sup>16</sup> 'Are decision makers too cautious with the precautionary principles? (2000) 17 *EPLJ* 3.

The principle of effectively integrating social, economic and environmental considerations into decision-making under the EP&A Act is also reflected in s4.15(1)(b) of the EP&A Act, which mandates that the consent authority considers social and environmental impacts as well as economic impacts.

*"4.15 Evaluation (cf previous s 79C)*

*(1) Matters for consideration—general*

*In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—*

*(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*  
*..."*

The Applicant addressed the precautionary principle in its submission to the IPC, dated March 2019.<sup>17</sup> This submission was based on the following definition of the principles of ESD:

*"Ecologically sustainable development can be achieved through the implementation of the following principles and programs"*

*(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:*

*(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and*

*(ii) an assessment of the risk-weighted consequences of various options,"<sup>18</sup>*

As the IPCIR noted at paragraph 469, the Department's position appears to be that, because there is a threat of serious harm, and there is scientific uncertainty as to the level of the harm, the precautionary principle is triggered, and the consequence is that the Projects are not ecologically sustainable development.

However, the Department's PAR misconstrued the precautionary principle and misapplied it to the Projects. Further, the Department misunderstood the consequences of the precautionary principle and recommended that the Projects be refused on the basis of the precautionary principle.

This is concerning given that the Department's approach is clearly inconsistent with the statutory definition of the precautionary principle and relevant case law.

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<sup>17</sup> Section 5.1 of the Applicant's submission to the Commission (dated March 2019).

<sup>18</sup> *Protection of the Environment Administration Act 1991*, s 6(2).

As noted in the IPCIR at paragraphs 470 and 471, the Applicant's position is that the Department's PAR clearly fails to properly consider and apply the precautionary principle.

#### The two condition precedents

There are two condition precedents that must be proved before the precautionary principle is triggered<sup>19</sup>. As succinctly stated by Justice Preston (Chief Judge of the Land and Environment Court) in *Telstra Corporation Limited v Hornsby Shire Council*, these conditions precedents are (emphasis added):

*"The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: **a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage.** These conditions or thresholds are cumulative. **Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken** to avert the anticipated threat of environmental damage, but it should be proportionate."*

#### Not every claim is sufficient

The Court has repeatedly warned against giving weight to baseless claims that the application of the precautionary principle is warranted:

- *"Not every claim or scientifically unfounded presumption of potential risk to human health or the environment can justify the adoption of national protective measures."*<sup>20</sup>
- *"...The mere apprehension of a possible 'peril' could not suffice..."*<sup>21</sup>
- *"The precautionary principle does not apply, and precautionary measures cannot be taken, to regulate a threat of negligible environmental damage."*<sup>22</sup>
- *"...simple hypothesis, speculation, or intuition" is insufficient to establish the second condition precedent"*.<sup>23</sup>
- *"Rationality dictates that the precautionary principle and any preventative measure cannot be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified."*<sup>24</sup>
- Regarding the second condition precedent, *"On a literal reading, the threshold is crossed whenever there is a lack of "full" scientific certainty. Yet, such a literal interpretation of the principle would render this condition meaningless."*<sup>25</sup>
- "the [precautionary] principle's field of application must exclude those risks characterised as residual, that is, hypothetical risks resting on purely speculative considerations without any

<sup>19</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [128]-[139].

<sup>20</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [134].

<sup>21</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [136].

<sup>22</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [138].

<sup>23</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [148].

<sup>24</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [159].

<sup>25</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [142].

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scientific foundation. Speculation, conjecture, intuition, warnings, denunciations, or implications should not suffice in and of themselves to justify an attitude of precaution".<sup>26</sup>

If the threat is serious but not uncertain

The Applicant emphasizes that the precautionary principle does not apply if the first condition precedent is satisfied but the second is not. If this is the case:

*"Measures will still need to be taken but these will be preventative measures to control or regulate the relatively certain threat of serious or irreversible environmental damage, rather than precautionary measures which are appropriate in relation to uncertain threats"*<sup>27</sup>

That is, the precautionary principle is solely for uncertain threats. If the threat is relatively certain, the precautionary principle does not apply at all.

Onus of proof

The two conditions precedent must be proved by the party seeking to rely on the precautionary principle.<sup>28</sup> Put simply, it is not the proponent that must prove that the precautionary principle does not apply, it is for the objectors or the Department to prove that both conditions precedent are met.

The consequence of the precautionary principle applying

If the precautionary principle applies, the decision-maker is "to assume that there is, or will be, a serious or irreversible threat of environmental damage and to take this into account notwithstanding that there is a degree of scientific uncertainty about whether the threat really exists".<sup>29</sup>

Simply put, the precautionary principle provides that "...lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

The application of the precautionary principle does not "necessarily prohibit the carrying out of a development". That senseless approach would "result in a paralysing bias in favour of the status quo and against taking precautions against risk."<sup>30</sup>

Further, the *Telstra* case relevantly states at paragraphs 179 and 180 (emphasis added):

*"179 The precautionary principle, where triggered, does not necessarily prohibit the carrying out of a development plan, programme or project until full scientific certainty is attained. ...*

*180 If the precautionary principle were to be interpreted in this way, it would result in a paralysing bias in favour of the status quo and against taking precautions against risk. The precautionary principle so construed would ban "the very steps that it requires": C R Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge University Press, 2005*

<sup>26</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [160].

<sup>27</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [149].

<sup>28</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [150].

<sup>29</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [152].

<sup>30</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [180].

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*at pp. 4, 14 and 26. It must be recognised that “precautions against some risks almost always create other risks”: C R Sunstein, supra at p. 53.”*

As such, a consequence of the precautionary principle being triggered is that the decision maker must *“assess the risk-weighted consequences of various options and select the option that affords the appropriate degree of precaution for the set of risks associated with the option.”*<sup>31</sup>

The Department appears to suggest in its PAR that the Projects should be refused because of the precautionary principle, rather than proposing additional mitigation measures. This is a prime example of *“paralysing bias in favour of status quo”* that the Courts warned about in the Telstra case.

The Court in *Telstra* warned that refusing a project on the basis of the Precautionary Principle as the Department suggests is a logical non-sense, because if you ban a project in order to take mitigation measures in face of an environmental damage caused by the project, there is no project for the precautionary principle to attach to in the first place. The Department is seeking to “ban the very steps that [the precautionary principle] requires”, which is non-sensical and impossible.

Contrary to the Department's irrational position, the appropriate response, if the precautionary principle is triggered, is the *“taking of proportionate precautionary measures ... to avert the anticipated threat of environmental damage.”*<sup>32</sup>

An example of this is the recent approval of the Ulan coal mine, where the LEC said that the NSW Government's choice to approve the coal mine subject to availability of water (rather than refusing the mine altogether) is the appropriate outcome of the precautionary principle applying:

*“This precautionary approach involved imposing numerous conditions, including requiring monitoring and adaptive management, notably, adjusting the scale of mining operations (and hence the demand for water) to match the available water supply. Such an adaptive management response is a proper approach to deal with uncertainty as to potential impacts: see Telstra Corp Ltd v Hornsby Shire Council (2006) 67 NSWLR 256 at 276 [162]-[165]; 146 LGERA 10 at 46 [162]-[165] and Environment Protection Authority v Ballina Shire Council (2006) 148 LGERA 278 at 290 [74] – 291 [75].”*<sup>33</sup>

#### ***Precautionary measures to be scientific***

Once the precautionary principle is triggered, the case law clearly confirms that it does *not* follow that a Project is to be refused. The consequence is that the mitigation measure that was attempted to be avoided is to be adopted.

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<sup>31</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [179]-[181].

<sup>32</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [128], [156].

<sup>33</sup> *Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185 at [99].



In adopting precautionary measures, the Courts reiterate the need to be scientific in choosing which precautionary measures to adopt:

***Be balanced***

The need to be scientific includes being balanced: *“There is nothing in the formulation of the precautionary principle which requires decision-makers to give the assumed factor ... overriding weight compared to the other factors”*<sup>34</sup>.

Accordingly, in selecting the appropriate precautionary measures, the consent authority should examine *“both sides of the ledger: the costs associated with the project, process or product (which tends to increase the degree of precaution) as well as the benefits of the project, process or product (which tends to decrease the degree of precaution commensurate with realising the benefit).”*<sup>35</sup>

***Be proportionate***

The words *“wherever practicable”* means that *“The precautionary principle embraces the concept of proportionality. The concept of proportionality is that measures should not go beyond what is appropriate and necessary in order to achieve the objectives in question.”*<sup>36</sup>

**Application of law to the Projects**

Applying the precautionary principle to the Projects, the Applicant has never relied on a lack of full scientific certainty as a reason to postpone mitigation measures. In fact, the Applicant has never sought to postpone any mitigation measures. The Applicant has taken on board all reasonable, practical and scientifically proven mitigation measures.

As seen above, to suggest that the precautionary principle somehow justifies the refusal of the Projects is irrational and relies upon a misinterpretation of the precautionary principle.

Even if the precautionary principle does apply to the Projects, the logical and legal consequence is that appropriate mitigation measures are adopted as a precaution, rather than the Projects simply being refused.

A clear example of the misuse of the precautionary principle is the way that the advice from the Independent Expert Scientific Committee was misused by the Department.

***Independent Expert Scientific Committee (IESC) Advice***

Contrary to the Department's interpretation of the IESC Advice, the IESC Advice does not prove that the Projects satisfy the two conditions precedent.

To demonstrate this, below is an analysis of the relevant statements contained in the IESC Advice.

This analysis should not be read as a commentary on the correctness of the IESC Advice.

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<sup>34</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [154] and [177].

<sup>35</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [177].

<sup>36</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [166]-[178].

### ***“Key potential lists”***

The IESC Advice lists a number of issues as “key potential impacts”<sup>37</sup>.

However, this content in the IESC Advice does not indicate that any of the identified issues amounts to a finding that there is evidence of any threat of serious or irreversible environmental damage. The lists are silent on whether the issues are serious or irreversible, or whether there is scientific evidence establishing a reasonable scientific plausibility that there is a cause-and-effect relationship. As such, the “key potential impacts” do not enliven the precautionary principle.

### ***‘Inability to verify key conclusions’***

The IESC Advice refers to an inability to “verify” “key conclusions”.<sup>38</sup>

Not being able to verify key conclusions (a lack of a conclusion) does not amount to evidence of (or a finding of) a threat of serious or irreversible environmental damage (a positive conclusion, which is required to satisfy the first condition precedent).

Similarly, not being able to verify “key conclusions” (a lack of a conclusion) does not establish a reasonable scientific plausibility that there is a cause-and-effect relationship between the project and the threat of damage (a positive conclusion, which is required to satisfy the second condition precedent).

Relying on the IESC’s inability to verify key conclusions as a basis for satisfying either or both of the two condition precedents misconstrues the precautionary principle. The onus is on the party claiming that the precautionary principle applies to adequately demonstrate that the two conditions precedent have been met.<sup>39</sup>

Merely claiming that the proponent has failed to provide sufficient certainty as to particular environmental impacts incorrectly reverses the burden of proof by requiring the proponent to prove the negative, which is impossible. As paragraph 144 of the *Telstra* case states:

*“It cannot be unequivocally stated that a particular phenomenon will never cause adverse effects. This is because a null hypothesis can never be proven through processes of inductive logic.”*

### ***Ways to improve limitations or inconsistencies in the Applicant's environmental assessment***

The IESC Advice identifies limitations or inconsistencies in the Applicant's environmental assessment, and suggests ways to improve it<sup>40</sup>.

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<sup>37</sup> Under the heading “Key potential impacts” on page 2, and numbered paragraph 21.

<sup>38</sup> Under the heading “Relevant data and information” on page 2, and numbered paragraph 25.

<sup>39</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [150].

<sup>40</sup> Under the heading “Application of appropriate methods and interpretation of model outputs”, and numbered paragraphs 1, 2.a., 2.c-d, 3-10, and 28.

Even if the Applicant's environmental assessment "could be improved" or particular deficiencies exist, this would not be sufficient to establish scientific reasoning, scenarios or evidence of the threat of serious or irreversible environmental damage (i.e. the first condition precedent of the precautionary principle).

Put another way, not being able to verify something is not the same as saying the thing will cause environmental damage, or that the damage will be serious or irreversible.

Indeed, the IESC was not even asked if the threats of environmental damage were serious or irreversible.

Identifying alleged deficiencies in the Applicant's environmental assessment cannot rationally be treated as sufficient scientific evidence to demonstrate that there is a threat of serious or irreversible environmental damage is scientifically likely, something that must be proved positively before the second condition is satisfied.

Lack of full assessment does not equate to scientific reasoning that there is a threat of serious or irreversible environmental damage.

Even if the Principle applied, the appropriate response is to provide further information around the mitigation measure as the IESC requested, rather than refusing the project.

### ***Potential underestimation of environmental impacts***

The IESC Advice notes at paragraph 2.b. that the groundwater model's environmental impacts may be underestimated or in some cases, overestimated.

However, again, this paragraph contains no analysis of whether the increased (*or decreased*) impact gives rise to an evidence-based threat of serious or irreversible environmental damage", an assessment which must be based on science.

Further, the consideration of the seriousness or irreversibility of threatened environmental damage depends on various factors such as the spatial scale of the threat, the temporal scale of possible impacts, the reversibility of the possible impacts and, if reversible, the time frame for reversing the impacts, and the difficulty and expense of reversing the impacts<sup>41</sup>. The IESC Advice does not consider any of these factors, or even make a claim that the underestimated impacts present a threat of serious or irreversible environmental damage.

As such paragraph 2.b. does not satisfy the first condition precedent.

Even if paragraph 2.b. was sufficient to trigger the precautionary principle, the appropriate response would not be to refuse the Projects, but to commission a sensitivity analysis of the groundwater model, as was requested by the IESC in paragraph 2.b. The words of the principle itself case law makes it clear that the effect of triggering the principle is to enable taking of measures to mitigate the threat of environmental harm, where such measures are practicable. As such, the appropriate

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<sup>41</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [131].

response to the finding in paragraph 2.b. was to recalibrate the groundwater model (as requested by the IESC), rather than refusing the project.

### **Proposed mitigation measures need more proof or consideration**

The second and third questions put to the IESC by the Department concern the mitigation measures to be taken, assuming the Projects go ahead.<sup>42</sup>

The IESC raises concerns that some of the measures “still needs to be proven” or “need further consideration”. For others, the IESC recommends additional data, such as additional monitoring locations or updating the model with newer data.

The IESC Advice does not contain any discussion that the alleged unproven measures present a threat of serious or irreversible environmental damage, or that the failure of the alleged unproven measures would present a threat of serious or irreversible environmental damage. As such, the first condition precedent is not satisfied.

An assertion that the mining method “still needs to be proven”, or that a proposed measure needs to be given “further consideration”, is merely an assertion of a lack of certainty (a negative statement) about the mining method. It is not a claim that there is a threat of serious or irreversible environmental damage, based on scientific reasoning that there is a likelihood of the environmental damage (required to satisfy the second condition precedent).

Additionally, it is submitted that the IESC Advice lacks the requisite “*empirical scientific data*” to indicate that it is “*reasonable to envisage a scenario*” “*where a threat or risk of environmental damage is considered scientifically likely*”. The IESC also has not presented a “*hypothesis formulated with methodological rigour and wins the support of part of the scientific community*” that a “*threat or risk of environmental damage is considered scientifically likely*.”

At best, the IESC statement is a “*claim or scientifically unfounded presumption of potential risk to human health or the environment*” which cannot “justify the adoption of national protective measures.”<sup>43</sup>

### **Proposed mitigation measures can be improved by additional data, etc.**

The third and fourth question to the IESC address how the mitigation measures can be improved.<sup>44</sup>

Suggestions of additional monitoring or management measures do not constitute scientific evidence of a threat of serious or irreversible environmental damage, or demonstrate any scientific uncertainty as to such environmental damage.

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<sup>42</sup> Numbered paragraph 11, 12 and 17.

<sup>43</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [134].

<sup>44</sup> Numbered paragraph 13-20, and 22-28.

Although paragraphs 15, 16, 20, 25 purport to justify the extra measures contained in it by reference to some “uncertainty” as to the extent of environmental impacts, this is incorrect.

None of those paragraphs, or the IESC Advice as a whole, satisfies the two conditions precedent. Those paragraphs do not provide a scientific analysis of whether the alleged impacts present a threat of serious or irreversible environmental damage, which is necessary to satisfy the first condition precedent.

Those paragraphs, and the IESC Advice as a whole, also do not provide “*empirical scientific data*” or a “*hypothesis formulated with methodological rigour that wins support of minor part of the scientific community*” that such environmental damage is likely, which is required to satisfy the second condition precedent.

All those paragraphs simply claim is that there is some degree of “*uncertainty*” as to environmental impacts, which is not unusual in the context of an underground mining operation. But “*simple hypothesis, speculation, or intuition*” is insufficient to establish the second condition precedent.<sup>45</sup>

Mere claim of unfounded “*uncertainty*” misconstrues how the initial burden of proving the two condition precedents is on the party seeking to have the principle applied. It is the IESC that must prove positively that there is scientific uncertainty (based on scientific facts), rather than IESC demanding that the Applicant proves to IESC’s satisfaction that there is no uncertainty. Indeed, case law recognises that “*It is impossible to be completely certain about the threats of environmental damage.*”<sup>46</sup>

Even if the precautionary principle was activated as a result of the IESC Advice, the appropriate response would not be to refuse the Projects<sup>47</sup>, but to adopt precautionary measures.<sup>48</sup> Indeed, the IESC advises measures such as building flexibility into the “make good” process or establishing an arrangement with a water storage operator. The IESC does not recommend the refusal of the Projects as a result of the scientific uncertainty identified.

As such, it would be irrational to assert that the precautionary principle is activated as a result of the IESC Advice, or that the IESC Advice justifies a decision to refuse to grant consent for the Projects.

***Claim that other experts highlight lack of data and use of inappropriate parameters***

The submission drafted by Marylou Potts (Potts Submission) states that “*other Experts highlight lack of geological data, the use of parameters which are not applicable to the site for hydraulic conductivity*”. As such, it is concluded that the precautionary principle is activated. Because the Potts

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<sup>45</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 [148].

<sup>46</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 [142-144].

<sup>47</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [154].

<sup>48</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [179]-[181].

Submission does not provide any more information on these supposed experts, this response assumes that the claim is true for the sake of providing a complete response.

As discussed above, mere criticism of a lack of data (a negative claim) cannot amount to the requisite scientific evidence of a threat of serious or irreversible environmental damage, or scientific hypothesis that the threat is likely (a positive claim).

Even if the Applicant was shown to have used inappropriate data, all this would mean is that the claims made by the Applicant on the basis of that data may be incorrect. It does not mean that the objector has scientifically proven that there is threat of environmental damage, let alone a threat of serious or irreversible environmental damage. For the precautionary principle to apply, the objector must prove that the conditions precedent have been satisfied.<sup>49</sup>, rather than for the proponent to provide full scientific certainty<sup>50</sup>.

***“Hume’s admission of harm ... means the precautionary principle has not been satisfied”***

The Potts Submission also appears to claim that because the precautionary principle has been triggered, the burden of proof has shifted to the Applicant to prove that the threatened harm will not eventuate, but because the Applicant has admitted the harm, the Principle is applied. And as a consequence of the Principle applying, the project should be refused:

- (iv) **the Precautionary Principle is triggered** requiring Hume to prove that the threat does not exist or is negligible. Hume’s admission of harm set out above means the precautionary principle has not been satisfied. Development consent should be refused on this basis.

This claim is incorrect because, as discussed above, the Potts Submission has not established that the two conditions precedent are satisfied. Therefore, the precautionary principle has not been triggered.

Further, this claim completely misses the point of the precautionary principle. The precautionary principle applies to uncertain threats only. This is because, if the threat is relatively certain, there is no role for the precautionary principle. The precautionary principle does not apply to *certain* threats.

<sup>51</sup>

Even if the precautionary principle were to apply, it is incorrect to reason that this would require the refusal of the Projects.<sup>52</sup> The application of the precautionary principle requires the consent authority to assume that the threat is real, “*assess the risk-weighted consequences of various options and select the option that affords the appropriate degree of precaution for the set of risks associated*

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<sup>49</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [150].

<sup>50</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 [142-144].

<sup>51</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [149].

<sup>52</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [154].

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*with the option.*<sup>53</sup> The consent authority is not to give more weight to the assumed threat over other factors that are relevant to the decision.<sup>54</sup>

### Summary of the Precautionary Principle

The precautionary principle does not apply to the Projects. The Department's misguided application of the precautionary principle was a fatal and significant flaw in the PAR.

Even if the precautionary principle were to apply, the Applicant has not sought to postpone any mitigation measures for reasons of lack of full scientific certainty. The only consequence of the precautionary principle applying would be that scientifically reasonable mitigation measures should be imposed as conditions of consent. The Applicant has always been open to considering any additional mitigation measures that are in line with the established case law explained above – scientific, unbiased and proportionate.

Thus, refusing the Projects on the basis of precautionary principle, as suggested by the Department, would be irrational and refutable by established case law.

*(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,*<sup>55</sup>

### Current generation has equal rights

Importantly, the *Telstra* judgment confirms that the concept of inter-generational equity involves the consideration of the equity of both the current AND future generations, rather than the current OR future generations. As stated by Preston CJ of LEC (emphasis added):

***“Ecologically sustainable development***

*107 ... I will first outline the basic concept of ecologically sustainable development and then its applicability to the determination of development applications under the EPA Act. ...*

*108 Ecologically sustainable development, in its most basic formulation, is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”: World Commission on Environment and Development, Our Common Future, 1987 at p. 44 (also known as the Brundtland Report after the Chairperson of the Commission, Gro Harlem Brundtland).*

*109 First, from the very name itself comes the principle of sustainable use - the aim of exploiting natural resources in a manner which is “sustainable” or “prudent” or “rational” or “wise” or “appropriate”: P Sands, Principles of International Environmental Law, 2nd ed, Cambridge University Press, 2003 at p. 253. The concept of sustainability applies not merely to development but to the environment. The Australian National Strategy for Ecologically*

<sup>53</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [179]-[181].

<sup>54</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at [154] and [177].

<sup>55</sup> Discussed in RTS section 29.3.5.ii.



*Sustainable Development makes this explicit in defining ecologically sustainable development as “development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends”: National Strategy for Ecologically Sustainable Development, Australian Government Publishing Service, 1992 at p. 8.”*

...

*116 Fourthly, there are principles of equity. There is a need for inter-generational equity - the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations: see s 6(2)(b) of the Protection of the Environment Administration Act 1991; s 3.5.2 of the Intergovernmental Agreement on the Environment; and Principle 3 of the Rio Declaration on Environment and Development.*

*117 There is also a need for intra-generational equity. This involves considerations of equity within the present generation, such as use of natural resources by one nation-state (or sector or class within a nation-state) needing to take account of the needs of other nation-states (or sectors or classes within a nation-state): P Sands, Principles of International Environmental Law, 2nd ed, Cambridge University Press, 2003 at p. 253 and E Brown Weiss, “Intergenerational Equity: a legal framework for global environmental change” in E Brown Weiss (ed), Environmental Change and International Law: New Challenges and Dimensions, UN University Press, 1992, p. 385 at pp. 397-398. **It involves people within the present generation having equal rights to benefit from the exploitation of resources** and from the enjoyment of a clean and healthy environment: B Boer, “Institutionalising Ecologically Sustainable Development: The Role of National, State and Local Governments in Translating Grand Strategy into Action” (1995) 31 Willamette Law Review 307 at 320.”*

What is clear from the case law is that the principles of ESD recognise the right of the **present** generation to appropriate development that meets their needs. It starts with the premise that the present generation can benefit from developments that will meet their current needs. It does not force the present generation to forgo its own needs in order to fulfil the needs of the future generation. The case law refers to “**equal rights** to benefit from exploitation of resources”.

Applying this to the Projects, the principles of ESD and intergenerational equity support the rights of the current generation to have access to steel and electricity generated from the product coal of the Projects. The principles of ESD and intergenerational equity of itself should not be used uncritically as a reason to refuse the Projects and to deny the current generation from accessing the benefits of the steel and electricity that will be generated from the product coal.

### Intergenerational equity assumes resources to be exploited

It is also clear from the above case law excerpts that the principles of ESD begin with the premise that ESD involves the *exploitation and development* of natural resources. ESD assumes that natural resources will be exploited where appropriate.

This is emphasised by key statements from the *Telstra* case (emphasis added):

- **“development** that meets the needs of the present”
- “First, from the very name itself comes the principle of sustainable use - the aim of **exploiting natural resources**”
- **“development** that improves the total quality of life, both now and in the future”
- “It involves people within the present generation having equal rights to benefit from the **exploitation of resources**”

Hence, ESD and intergenerational equity assume that valuable natural resources like coal will be exploited and developed, not needlessly sterilised. Therefore, the application of the principle of intergenerational equity with respect to the Projects should not result in the refusal of the Projects. Instead, it should result in the grant of development consent with appropriate safeguards to ensure the long-term conservation of the health, diversity and productivity of the environment. That is, it applies to qualify the development, rather than to deny the development.

This position is supported by the following relevant observation of Preston CJ of LEC (albeit with respect to windfarms) that ALL energy supply involves environmental impact:

*“Unfortunately, all energy supply involves some level of environmental impact. Wind farm development in Australia has raised controversy in the community in relation to the positioning of windfarms, the noise levels created by the turbines and the impact the construction and operation of the turbines might have on local native flora and fauna.”<sup>56</sup>*

As all major energy projects have environmental impacts, it is not possible to demand that a major energy project must have no environmental impacts whatsoever. What should be considered is whether the environmental impacts of the Projects are acceptable when weighed against the benefits of that Project to the present and future generations.

Finally, it is noted that objectors to the Projects appear to uncritically assume that the benefits of the Projects will be confined to the present generation. Given the lifespan of the Projects and the associated significant direct and indirect economic contribution, this assumption is unjustified.

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<sup>56</sup> *Taralga Landscape Guardians Inc v Minister for Planning and Another* [2007] NSWLEC 59 at [80].

## Health of the environment

The Applicant submits that the Projects are consistent with the proper conservation of the environment for future generations. This proposition can be demonstrated by considering the Projects' greenhouse gas (GHG) related impacts.

The principles of ESD and intergenerational equity protect the rights of the current generation to appropriately exploit valuable resources through “development that improves the total quality of life”. The Applicant submits that the Projects are consistent with the principles of ESD and intergenerational equity despite the GHG related impacts associated with the burning of product coal by third parties, such as the steel or electricity sectors (domestic or offshore).

The *Paris Agreement* is the key instrument in the international climate change legal framework. The primary mechanism to control global GHG emissions under the *Paris Agreement* is the use of Nationally Determined Contributions (NDCs), which are the aspirational commitments of each party state to reduce GHG emissions and prevent a greater than 2° C increased in global temperatures.

Despite Australia being the second largest exporter of coal, it is still only responsible for 4% of world production. Notwithstanding this, the Projects will commit to reducing Scope 1 and 2 emissions, where practicable, and limiting Scope 3 emissions, where practicable, in consideration of the *Paris Agreement*. To this end, the Applicant is committed to only providing coal to nations who are signatories to the *Paris Agreement*.

In the event coal is sold into the domestic market, Scope 3 emissions will be accounted for with the Australian NDC. If With respect to product coal exported to POSCO's Korean power plants, Scope 3 emissions will be accounted for and regulated in Korea in accordance with the Korean NDC.

In July 2018, the Korean Cabinet approved a 2030 greenhouse gas ‘roadmap’ and the allocation plan for the second phase (2018-2020) of the national emissions trading system (ETS). Both are key elements of the Republic of Korea's strategy to achieve their NDC goal for 2030 under the *Paris Agreement*.

The ‘roadmap’ establishes a protocol towards achieving Korea's NDC of a 37 per cent reduction in GHG emissions below the BAU case.

Carbon dioxide constitutes the majority of GHG emissions generated from POSCO's Pohang Works and Gwangyang Works. In 2018, GHG emissions amounted to 72.49 million tons, while CO<sub>2</sub> emissions per ton of crude steel produced was 1.92 t- CO<sub>2</sub> /t-S. POSCO is on target to reduce emissions from its operations by 9 percent by the end of 2020.

In addition to POSCO's GHG mitigation measures, South Korea is undertaking a substantial programme to convert its existing coal powered electricity generation fleet to High Energy Low Emission (HELE) power plants. As of December 2018, 83% of South Korea's coal-fuelled generation capacity were HELE plants. At least 90% of planned and under construction capacity are HELE units. In the years to 2023, at least 7 GW of HELE generating capacity is expected to come online in South Korea.

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Should the Applicant's product coal be used for POSCO's Korean operations, its combustion would be accounted for within the Korean NDC (potentially resulting in lower emissions than if the thermal coal was used in an Australian power plant).

In consideration of the above, the refusal of the Projects on the basis of GHG related impacts would be irrational and needlessly deny the current generation the right to the benefits of the steel and electricity associated with the Projects' product coal.

Further, the Applicant submits that the refusal of a coking coal mine on the basis of GHG related impacts is akin to 'biting the hand that feeds you'. This is because, without coking coal, there can be no steel production, and steel is needed for a vast array of critically important demands, including for new wind turbines and other renewable energy infrastructure. In this respect, it is relevant to note that the Projects could potentially become an essential supplier of coking coal to Australia's local steel industry, and of thermal coal to essential domestic coal fired power stations (some of which, in light of the continued heavy reliance of the NSW electricity sector on coal (80%), will continue to operate for decades).

The Projects are required as potential suppliers to the local steel industry and the domestic power sector until at least the retirement of NSW's youngest power plant in 2043, coinciding with the end life of the Projects.

In summary, the Projects are consistent with the principle of intergenerational equity because:

- the principle of intergenerational equity recognises the equal rights of the present generation to develop valuable natural resources to maintain its quality of life and the principles of intergenerational equity assumes that natural resources will. In this respect, it is relevant that the Projects could be a domestic source of thermal coal (currently producing 80% of electricity used in NSW) and coking coal (without which new steel cannot be made);
- the quality of life of future generations will be conserved because the Projects have been designed to incorporate appropriate safeguards to protect the environment. In particular, it is noted that:
  - two thirds of the coal resource will not be extracted, so as to protect the environmental values of the area, including biodiversity, heritage and water resources (this will also conserve a natural resource for future generations);
  - the economic benefits of the Projects will be significant for the present generation and these economic benefits will also be enjoyed by future generations (including via government expenditure of tax revenue from the Projects);
  - 55 per cent of product coal will be coking coal, which will continue to be needed to produce the essential economic resource of steel, a necessary ingredient to manufacture renewable energy, with the objective of delivering a GHG emission reduction to future generations.

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*(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,*

The conservation of biological diversity and ecological integrity has been a fundamental consideration in the design of the Projects and this matter has been considered in detail in the Environmental Impact Assessment (EIS), Applicant's Response to Submissions (RTS) and the Applicant's response to the IPC Interim Report (IPCIR).

Conservation of biological and ecological integrity has been and is a fundamental consideration in the decision-making process. Following are some of the legal sections that mandate conservation of biological diversity and ecological integrity as a fundamental consideration in deciding on the development application of the Projects.

Section 4.15(1)(b) of the EP&A Act requires consideration of biological diversity and ecological integrity as a mandatory consideration for the IPC:

"4.15 Evaluation (cf previous s 79C)

(1) Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—

***(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality, ...***

Environmental planning instruments

Section 4.15(1)(a)(i) requires the IPC to consider provision any relevant environmental planning instrument, which are many:

***Mining SEPP***

Addressed in detail in response to IPCIR Recommendations R26 and R29.

***"14 Natural resource management and environmental management***

***(1) Before granting consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following—***

***(a) that impacts on significant water resources, including surface and groundwater resources, are avoided, or are minimised to the greatest extent practicable,***

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*(b) that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable,*

*(c) that greenhouse gas emissions are minimised to the greatest extent practicable.*

#### **Drinking Water SEPP**

Addressed in detail in response to IPCIR Recommendations R26 and R29.

*“10 Development consent cannot be granted unless neutral or beneficial effect on water quality*

*(1) A consent authority must not grant consent to the carrying out of development under Part 4 of the Act on land in the Sydney drinking water catchment unless it is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on water quality.”*

These requirements, and the Secretary’s Environmental Assessment Requirements (SEARS), all demonstrate that conservation of biological diversity, ecological integrity, impact on water resources such as GDE’s require consideration from the very beginning and that any development proposal must address:

***4.15(1)(b) the likely impacts of that development including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.***

*“(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:*

*(i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,”*

The Projects are consistent with the ‘polluter pays’ principle. For example, the Applicant will be responsible for rehabilitating the land after the Projects are completed. A second way in which the Applicant will be accountable for pollution is the security rehabilitation bond payable upon the grant of a Mining Lease, which will guarantee sufficient resources to meet the Applicant's rehabilitation obligations, irrespective of future events.

For Scope 3 GHG emissions, the ‘polluter pays’ principle is satisfied because the Applicant has committed to selling to businesses in nations that are signatories of the Paris Agreement. The downstream polluters will bear the cost of containment, avoidance or

abatement. This matter was usefully discussed in a submission to the Commission by United Wambo,<sup>57</sup> and contained a detailed country-by-country analysis.

“(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,”

“(iii) environmental goals, having been established, should be pursued in the most **cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.**”

As set out above the principles of ESD require that:

*"the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources"*

*"environmental goals ... should be pursued in the most cost effective way, ... to enable those best placed to maximise benefits or minimise costs to develop their own solutions"*

In the context of GHG emissions, the responsibility for minimising and accounting for the costs of scope 3 GHG emissions should rest with *"those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems."* It is logical that this be the entity actually burning product coal.

This position is consistent with the *Paris Agreement*, as Scope 1 and 2 GHG emissions are the responsibility of the nation mining the product, while Scope 3 emissions are the responsibility of the destination nation where the coal is burnt.

There is a domestic demand for the product for the Australian steel and power industries, and domestic users will have cost advantage of not having to pay for overseas transport. So, the product coal is more likely to be sold to businesses in Australia.

If product coal is domestically consumed, the Scope 3 GHG emissions will have to be accounted for in accordance with i the domestic regulatory and policy regime designed to enable Australia to meet its NDC, and subject to the Paris Agreement, leaving the most cost-effective way to reduce GHG to frameworks established by governments by international convention.

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<sup>57</sup> [www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/information-from-applicant/submission-2--united-wambo-jv--submission-to-ipc-on-climate-change-and-ghg-matters.pdf](http://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/information-from-applicant/submission-2--united-wambo-jv--submission-to-ipc-on-climate-change-and-ghg-matters.pdf) (accessed on 21/1/2020).

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The Paris Agreement does not ban new coal mines. In contrast, the Paris Agreement specifically requires signatory countries to save the trees in Article 5.1: *“conserve and enhance ... sinks and reservoirs of greenhouse gases, including forests.”*

With respect to the Applicant's commitments to minimise environmental costs, it is noted that the Projects will clear approximately 60 trees. The Applicant has planted some 4000 trees to date, and intends to make further plantings towards achieving a 100 per cent offset of fugitive emissions (as well as improving the biodiversity outcomes for habitat and riparian corridors on the Applicant's land).

It is the Australian Government and the Paris signatory countries who are best suited to determine the most cost-effective way of reducing GHG. This could be replacing coal powerplants with renewables, or planting more trees, or carbon sequestration. Notably, the Australian Government have not banned out new coal mines and the NSW Government has no policy to rule out new coal mine approvals.

The Applicant submits that the Projects are consistent with the above two principles of ESD.

#### Summary on ESD

The Applicant contends that, once the proper meaning of ESD and the precautionary principle is identified from the case law and properly applied, it is clear that the Projects are consistent with the objective of promoting ecologically sustainable development. Further, it has been demonstrated that the precautionary principle does not warrant the refusal of the Projects.

Similarly, the Applicant submits that the Projects also serve the objective of promoting the orderly and economic use and development of land.

#### *Orderly use and development*

The Projects are consistent with the orderly use and development of land because the site is adjacent to the Berrima Cement Works and the Moss Vale Enterprise Zone, which incorporate the recently approved Austral Masonry plant and 11 ha quarry greenfield site, nearby Berrima. As such, the Projects are a natural extension of an established industrial corridor.

As an underground operation, it is also important to recognise that the proposed mine will have imperceptible subsidence impacts, users of groundwater will continue to have access to groundwater, and the surface of the land immediately above the mine workings will be used for existing agricultural and other activities.

#### *Economic use and development of land*

The Projects represent the most economic use and development of land, adding to the economic output from existing land uses, when assessed against economic and social benefits from existing activities on and in the immediate vicinity of the Projects.

**(d) to promote the delivery and maintenance of affordable housing,<sup>58</sup>**

The Applicant notes that temporary negative impacts on housing affordability will be avoided through the commitment to build a temporary construction village, which will house the approximately 400 construction workers.

*Protection via design decisions*

The Projects enhance the object of protecting the environment as the development adopted a number of design imperatives specifically selected to protect the environment through avoidance.

The Projects are able to implement design decisions because they are a 'greenfield' proposal, allowing the Applicant and the community to evaluate different design options and ensure maximum protection of the environmental and other values of the project area, consistent with the surrounding cultural landscape.

This can be contrasted with other State significant developments where the proposal is constrained by existing factors preventing innovative design decisions. For example, some existing expansion projects have historically enshrined mining systems, limiting the flexibility to adopt the latest innovations in mine design, infrastructure location and reducing the operational footprint.

The most significant environmental protection related design decision for the Projects is that the industry-common long-wall mining method was rejected in favour of a non-caving mining method (which has significantly reduced environmental impacts).

This decision reflects the outcome of an iterative decision-making process which has relied on the best available expertise to protect the environment wherever reasonable and feasible, where each decision was made for the purpose of protecting the environment and, at the same time, increasing productivity and cost effectiveness.

The specific environmental protection measures incorporated in the Projects is detailed in the following sections of the EIS:

- 6.2 Mining method and mine plan
- 6.3 Surface infrastructure and equipment
- 6.4 Reject emplacement
- 6.5 Water management
- 10.4 Impact avoidance and mitigation

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<sup>58</sup> A detailed analysis of the Projects' impacts on the housing market is provided in the Social Impact Assessment (Appendix R) of the EIS.

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

The Projects will promote the sustainable management of built and cultural heritage, including Aboriginal cultural heritage.

#### *Built and Aboriginal heritage*

The Projects will promote the sustainable management of built and Aboriginal cultural heritage by adopting design features such as:

1. the location of surface infrastructure has been chosen to be on grazing land, meaning that no built heritage is impacted, and any impact on Aboriginal cultural heritage has been minimised to those artefacts that have already been disturbed since 1823 through clearing and cultivation by farming animals and tractors; and
2. the non-caving mining method means that there is no subsidence on the surface (unlike all other mines approved in NSW to date). That means that built heritage will not be damaged (e.g. cracking), and that Aboriginal cultural heritage like rock paintings or grinding groves will not be disturbed.

#### *Cultural heritage*

The Projects will promote the sustainable management of cultural heritage by adopting the following design features:

1. The mine is located on land that is rich in cultural heritage associated with coal mines and iron works:
  - a. there have been numerous coal mines in the project area for over 150 years. In fact, the nearby Berrima Colliery adjacent to the Project Area was Australia's longest continuously running mine;
  - b. NSW's first commercial iron smelting works 'Fitzroy Ironworks' was built in 1848 in nearby Mittagong because of the presence of coal and iron ore in the Southern Highlands<sup>59</sup>;
  - c. the Berrima railway spur was built by enactment of the *Berrima Coal-mine Railway Act 1881*<sup>60</sup>, which stated in its preamble that:

*"...certain persons have opened coal-mines and established collieries on ...  
land situated near Berrima ...*

<sup>59</sup> [en.wikipedia.org/wiki/Fitzroy\\_Iron\\_Works#cite\\_note-2-7](https://en.wikipedia.org/wiki/Fitzroy_Iron_Works#cite_note-2-7) (accessed on 21/1/2020).

<sup>60</sup> [www.legislation.nsw.gov.au/acts/1881-bcm.pdf](http://www.legislation.nsw.gov.au/acts/1881-bcm.pdf) (accessed on 21/1/2020).

*... to facilitate communication between the said coal-mines and the Great Southern Railway such Company is desirous of constructing a railway ...  
... It shall be lawful for the said Company to make and construct a railway..."*

The Projects will use the Berrima Railway spur for coal, continuing the heritage of the 1881 Act; and

- d. the section of former Remembrance Drive on the Old Hume Highway donated by the former Australian Steel Association after the Second World War is within the Project Area, highlighting the long historical connection between coal and steel and the local area.
2. The cultural landscape is not unduly impacted because:
- a. underground mining means that there is no open cut pit;
  - b. the location of the surface infrastructure is nestled between naturally undulating hills, such that visibility is very limited;
  - c. emplacing the waste rock underground means that there will not be a permanent overburden stockpile impacting on the cultural landscape; and
  - d. the Applicant has planted thousands of trees to minimise any visual impact.

(g) to promote good design and amenity of the built environment,

The Applicant submits that this objective is not particularly relevant to the Projects. Nevertheless, the Projects are not inconsistent with this objective.

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

Although not particularly relevant to the Projects, this objective is indirectly promoted by the Projects because the proper construction and maintenance of modern buildings, including the protection of the health and safety of their occupants, requires steel (which cannot be produced without coking coal) and electricity (which, in NSW, is mostly generated by using thermal coal).

For example, steel bars are used to make reinforced cement concrete. Without reinforcement, constructing modern structures with concrete material would not be possible, due to concrete's relatively low tensile strength and ductility. Steel is also used to manufacture rail lines' locomotives and rolling stock to transport product coal to Port Kembla.

Another example is the use concrete to construct the administration buildings and the coal preparation plant, using cement in the manufacturing process.

Maintenance of buildings, including the protection of the health and safety of their occupants, use electricity. Fire alarms and emergency exit signs are all operated using electricity, 80 percent of which in NSW is generated from thermal coal.

It is submitted that product coal is essential for quality, cost effective construction. It is the fundamental building block of the world steel industry. Non-OECD nations alone account for 82.6 per cent of worldwide coal consumption, mostly with the Asia Indo-Pacific region<sup>61</sup>. Buildings and infrastructure use 51 per cent of all steel produced<sup>62</sup>.

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

Although this objective is not considered to be particularly relevant to the Projects, it is submitted that the relevant local government and all relevant government agencies in the State have had considerable opportunity to contribute to the State significant development assessment process for the Projects. Further, it is noted that the environmental planning instruments and policies relevant to the assessment of the Projects were made with the input of various levels of government.

In this way, as is appropriate, all levels of government in the State have had a significant role in, and responsibility for, shaping the assessment of the Projects.

In that regard, the need to remove duplicate regulation at State and local level for SSDs was recognised in the *Minister for Urban Affairs and Planning v Rosemount Estates P/L case*:

*"Suffice it to say that it referred to the importance of the mining industry in New South Wales and the unacceptable level of uncertainty introduced by the provisions of some environmental planning instruments into the decision-making process for important mining projects. There were potential adverse implications not only for the developer, but for neighbouring property owners and the local community, who might be affected by the proposed mine. **The so-called two stage process to determine whether or not development consent could be granted led to delays and uncertainties in the decision making process for important mining projects.** The Muswellbrook LEP was an example of these types of provision. The SEPP was designed to overcome this problem. In my opinion this was a legitimate and reasonable design for an SEPP serving the objects of the Act."*

That comment was made in relation to the former Mining SEPP 45, which survives to date in Mining SEPP clause 8. So, the comments in the Rosemount case is still applicable to the Projects.

(j) to provide increased opportunity for community participation in environmental planning and assessment."

The details of the community consultation were described in Chapter 4 of the EIS.

The Applicant submits that the Projects further the objective of increasing community participation.

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<sup>61</sup> International Energy Agency, *Coal Information Overview 2019*.

<sup>62</sup> World Steel Association 2018.

The community has had two significant formal opportunities to participate in the assessment of the Projects, being:

1. the exhibition of the EIS; and
2. the IPC Public Hearing.

Another way to demonstrate the level of community participation is by looking at the number of informal communications made between members of the community and the Department. For example, a Government Information Public Access application showed that community members had at least **49** emails, meetings and phone calls with the Department in the period 5 January 2018 to 6 September 2018 (inclusive), which is approximately one communication every five days.

#### Communications between the Department/DPE and the community members

Battle for Berrima (B4B)				Coal Free Southern Highlands (CFSH)		
	Date	Sender	Recipient	Date	Sender	Recipient
1	15/1/18	B4B	DPE	5/1/18	DPE	CFHS
2	16/1/18	DPE	B4B	6/1/18	CFSH	DPE
3	1/2/18	B4B	DPE	31/1/18	CFSH	DPE
4	23/3/18	B4B	DPE	5/2/18	DPE	CFSH
5	25/3/18	B4B	DPE	5/2/18	DPE	CFSH
6	26/3/18	B4B	DPE	5/2/18	CFSH	DPE
7	28/3/18	B4B	DPE	5/2/18	DPE	CFSH
8	10/4/18	B4B	DPE	8/2/19	DPE & CFHS teleconference	
9	10/4/18	DPE	B4B	21/3/18	CFHS	DPE
10	10/4/18	B4B	DPE	2/7/18	CFHS	DPE
11	11/4/18	B4B	DPE	2/7/18	CFHS	DPE
12	14/4/18	B4B	DPE	2/7/18	CFHS	DPE
13	19/4/18	DPE & B4B meeting		31/7/18	CFHS	DPE
14	20/4/18	B4B	DPE	31/7/18	CFHS	DPE
15	21/4/18	B4B	DPE	21/8/18	DPE & CFHS meeting	

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16	21/4/18	B4B	DPE		23/8/18	CFHS	DPE
17	30/4/18	B4B	DPE		31/8/18	DPE & CFHS meeting	
18	24/5/18	B4B	DPE		3/9/18	CFHS	DPE
19	25/5/18	B4B	DPE		3/9/18	CFHS	DPE
20	6/6/18	B4B	DPE		4/9/18	DPE	CFHS
21	8/6/18	B4B	DPE				
22	13/7/18	B4B	DPE				
23	14/8/18	B4B	DPE				
24	22/8/18	B4B	DPE				
25	24/8/18	DPE	B4B				
26	24/8/18	B4B	DPE				
27	26/8/18	B4B	DPE				
28	1/9/18	B4B	DPE				
29	6/9/18	B4B	DPE				

To put that high level of community participation in perspective, the proponent had approximately 20 communications with the Department/DPE in the same period, 29 less than the members of the community.

#### Balancing the objectives

The objects of the EP&A Act conflict with each other and within each other, so that competing interests must be balanced by the Commission.

As discussed above, the Projects are considered to be consistent with all of the relevant objects of the EP&A Act.



## Public interest

### *Public interest is undefined*

There is nothing in the EP&A Act that attempts to define what the ‘public interest’ is for the purposes of s4.15(1)(e). As such, the content of the phrase ‘public interest’ must be determined by the subject matter and scope and purpose of the EP&A Act.

In *Hogan v Hinch*<sup>63</sup>, French CJ relevantly stated that when “...used in a statute, the term [public interest] derives its content from “the subject matter and the scope and purpose” of the enactment in which it appears. The court is not free to apply idiosyncratic notions of public interest.”

Similarly, it has been observed that:

*“...the expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable...”<sup>64</sup>*

### *Public interest requires balancing of competing interest*

Similarly to how the objects of an Act can be conflicting, public interest considerations can also conflict with each other.

In *Hogan v Hinch*<sup>65</sup>, French CJ noted that (emphasis added):

*“The application of a public interest criterion may require a balancing of competing interests and “be very much a question of fact and degree.”*

It has also been observed that:

*“The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that ‘the public interest’ can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, anti-terrorism, defence or*

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<sup>63</sup> *Hogan v Hinch* (2011) 243 CLR 506 at [31] – [32].

<sup>64</sup> *O’Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson & Gaudron JJ at [13].

<sup>65</sup> *Hogan v Hinch* (2011) 243 CLR 506 at [31].

*international obligations may be of overriding significance when compared with other considerations.”<sup>66</sup>*

More relevantly, in the context of a case involving the grant of a mineral sands mining lease, it was stated that (emphasis added):

*“Any consideration of the public interest for the purposes of [the regulation in question] should, I think, involve the weighing of benefits and detriments.... In some special contexts questions of the public interest may not involve this process of weighing against each other conflicting merits and demerits; where however the concept of the public interest occurs as a factor in the grant or refusal by the Crown of a mining lease it can, I think, have only this meaning.”<sup>67</sup>*

Failure of one facet of public interest is not failure of public interest

This concept of the error of insisting that failure of one element public interest necessarily leads to refusal of the project was explained by the High Court in the context of Freedom of Information Act:

*“16. Logically, the view of the majority in the Full Court appears to mean that, so long as there is anything relevant to be said in support of the view that disclosure would be contrary to the public interest, an applicant for review under s 58(5) must fail. We cannot accept that. To take the example mentioned by Tamberlin J, the preservation of confidentiality of intra-governmental communications prior to making a decision could always be advanced, in the case of internal working documents of the kind with which we are concerned, as a relevant consideration. How could that facet of the public interest ever be served by disclosure? How, then, could an applicant ever succeed? If it were enough for the Minister to point to one facet of the public interest that is served by non-disclosure, then it would be enough to say that non-disclosure preserves confidentiality. Of course, it does. By definition, a facet is one side of something that has many sides. Looking only at a facet of an object is a necessarily incomplete way of looking at the object. Looking only at a facet of the public interest is a necessarily incomplete way of looking at the public interest.”<sup>68</sup>*

The case law thus clearly states that the content of ‘public interest’ is not simply taking the ‘objects’ section of an Act and treating each aim as a test, so that if any of the ‘object’ is not satisfied, the ‘public interest’ test as a whole had failed. It requires balancing of competing public interests that are relevant in that case, rather than pointing to one facet of the public interest not being promoted.

<sup>66</sup> Per Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC142.

<sup>67</sup> *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 523.

<sup>68</sup> *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [16].

## Public interest can impinge on private interest

The Applicant emphasises that there can be no doubt that a major project may be in the "public interest" even though it has particular adverse impacts on the interests of private persons.

Every year, consent authorities and the Land and Environment Court determine countless significant development application under the EP&A Act which are found to be in the public interest even though the development will have unavoidable adverse impacts on third parties.

The Full Court of the Federal Court stated that 'public interest' is to be balanced *against* private interest: *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 per Tamberlin J (at 245):

"10. The expression 'the public interest' is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination..."

In the context of mineral sands mining lease application, Court said public interest is not mere individual interests, or interests of insignificant section of the public:

*"The interest, of course, must be the interest of the public and not mere individual interest which does not involve a public interest. Clearly enough, the material evidenced by the appellant did relate to a public interest not limited to the interests of a less than significant section of the public."*<sup>69</sup>

Hence, in assessing the Projects against the matter of the 'public interest', the Applicant emphasises that, while the Projects will have certain unavoidable impacts on private interests, it is critical that the consent authority focuses on whether the Projects are in the public interest (including the collective interest of those many silent members of society who stand to indirectly benefit from the economic impacts of the Projects).

In this regard, the Applicant submits that it is particularly important for the consent authority to carefully ensure that the assessment process for the Projects is not exploited by those opponents who may cloak or confuse their private interests in opposing the Projects with the broader public interest. This proposition is supported by the following observation of Jacobs J:

*"The interest of a section of the public is a public interest, but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by the public*

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<sup>69</sup> *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 523.

*interest in having the mining operation proceed. It does not, however, affect the quality of that interest.”<sup>70</sup>*

Further, given that the Projects are State Significant Developments and that the IPC is the decision maker, the members of the ‘public’ for the purposes of the ‘public interest’ for the Projects should be a larger group of people than if the Projects were local developments being decided by local Council members.

#### Error of conflating the objects of the EP&A Act with the public interest

Based on the above, the Applicant submits that it is important for the consent authority not to fall into the trap of conflating the objects of the EP&A Act with the public interest.

Similarly, it is not permissible for a consent authority to seek to apply the objects of the EP&A Act such that a development is axiomatically found not to be in the public interest if it is found to be inconsistent with or not to facilitate a particular objects of the EP&A Act.

In this regard, the objects of the EP&A Act are designed to provide guidance as to the overarching purposes of the EP&A Act. The public interest, as a matter for consideration in the specific context of evaluating a development application, is intended to focus the consent authority's mind on whether or not a particular development has sufficient merit to warrant approval.

It is also incorrect to equate the objectives in s 1.3 of the EP&A Act to be an exhaustive list of public interest considerations, such that failure to satisfy a single object in s1.3 automatically disqualifies the public interest consideration under s4.15(1)(e).

The IPCIR provided a preliminary conclusion at paragraph 476:

*“... there is at this stage no sound basis on which to conclude that the Project is consistent with the following objects of the EP&A Act or ESD, and therefore it may not be currently in the public interest...”*

Based on this preliminary conclusion, the Applicant is concerned to ensure that the Commission does not adopt an approach of allowing the consideration of particular objects of the EP&A Act, including the principles of ESD, to dictate whether or not the Projects are found to be in the public interest.

The objects and the ESD is not the sole public interest such that failure of ESD leads to a failure of the public interest test. Looking at one facet of public interest was held by the High Court to be an error of law, as an incomplete consideration, because public interest considerations conflict with each other.<sup>71</sup>

Nevertheless, the Applicant has demonstrated in detail above that the Projects are consistent with the relevant objects of the EP&A Act.

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<sup>70</sup> *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 (at 487) per Jacobs J.

<sup>71</sup> *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [16]

As discussed above, once ss 1.3 and 4.15(1)(e) are properly construed and applied to the Projects, the only objective that is not consistent with the Projects is s1.3(i), and that's only because of the Parliamentary intention to give special treatment to State Significant Developments.

Having generally considered the meaning of the public interest, this document now briefly considers the ambit of the public interest matter for consideration under s 4.15(1)(e) by examining the relevant context and purpose of the EP&A Act.

### *Purpose of the EP&A Act*

It is uncontroversial that the various objects of the EP&A Act conflict and pull in different directions. To illustrate this, the below table categorises the objects of the EP&A Act as either facultative or restrictive of development. Cole JA said, in relation to the EP&A Act, that:

*“The particular aspects addressed by the objects clause will inevitably conflict and require resolution within a planning instrument when the subject matter of the object is considered at the planning instrument stage. The conflict of objects may be resolved differently depending upon the level at which the planning instrument applies. The subject matter of the objects, in so far as it may require consideration in a different context under Part 4, and in particular pursuant to s.90, requires a new and different consideration in the weighing of competing matters in determining whether a particular consent is to be granted, refused, or granted upon conditions.”<sup>72</sup>*

<b>S1.3 paragraph</b>	<b>Restrictive</b>	<b>Facultative</b>
(a)	... Promote better environment by the proper management ... and <i>conservation</i> of the State's natural and other resources	Promote the social and economic welfare of the community ... by the proper ... <i>development</i> of the State's natural and other resources
(b)	Facilitate <i>ecologically sustainable</i> development	Facilitate <i>ecologically sustainable development</i>
(c)		orderly and economic use and development of land
(d)		delivery ... of affordable housing

<sup>72</sup> *Minister for Urban Affairs and Planning v Rosemount Estates P/L and Ors* [1996] NSWSC 348

(e)	protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats	
(f)	sustainable management of built and cultural heritage (including Aboriginal cultural heritage)	
(g)		promote good design and amenity of the built environment
(h)		proper construction ... of buildings ...

In consideration of the objects of the EP&A Act, it is submitted that it is in the public interest for development with social and economic benefits to be carried out, providing that the development can be carried out in an ecologically sustainable and environmentally responsible manner.

#### *ESD and the public interest*

The Applicant acknowledges that the consideration of the public interest under s 4.15(1)(e) of the EP&A Act embraces the consideration of the principles of ESD.<sup>73</sup>

However, as explained above, it would be wrong for the consent authority to fall into the trap of elevating the consideration of the principles of ESD so as to become the sole or dominant consideration in determining whether or not a development is in the public interest, or should be approved under the EP&A Act. Such an approach would be inconsistent with the requirements of the prescribed evaluation exercise required under the EP&A Act.

The Court of Appeal<sup>74</sup> took pains to emphasise that ESD is but one facet of public interest, and that failure to consider ESD does not make a development application decision void.

*“44 However, that does not of itself mean that a “mandatory” requirement that the Minister have regard to the public interest is necessarily breached in all cases where the Minister does not have regard to the principles of ESD. The “mandatory” requirement that the Minister have regard to the public interest does not of itself make it mandatory (that is, a condition of validity) that the Minister have regard to any particular aspect of the public interest, such as one or more of the principles of ESD. Whether or not it is mandatory to have regard to one or more of the principles of ESD must depend on statutory construction.”*

<sup>73</sup> *Minister for Planning v Walker* [2008] NSWCA 224 at [42], [43].

<sup>74</sup> *Minister for Planning v Walker* [2008] NSWCA 224 at [52].

The reason for this conclusion is because s4.15(1)(e) does not regard principles of ESD as the be-all and end-all consideration that dwarfs all other public interest considerations, but ESD is just one facet of public interest.

“52 In my opinion, one difficulty with the view that failure to consider ESD principles renders void a Minister’s decision, under sections such as s 75J and s 75O, is that the encouragement of ESD is just one of many objects set out in s 5 of the EPA Act, ....”<sup>75</sup>

As discussed at section discussing the s 1.3(b) of the EP&A Act, (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment the Projects are consistent with the principles of ESD.

The Projects are in the public interest

#### *Greenhouse Gas (GHG) emissions*

The Applicant submits that it would be incorrect and disturbing if the Commission was to find that the Projects are not in the public interest as a result of the GHG emissions associated with the Projects.

In this regard, it is noted that clause 14 of the Mining SEPP requires the consent authority to consider imposing conditions of consent to minimise GHG emissions, not eliminate GHG emissions, and requires the consent authority to consider an assessment of GHG emissions, rather than to refuse a project if there are GHG emissions. And the Mining SEPP is made for the purposes of achieving the objects of the EP&A Act. Section 3.13(1) of the EP&A Act provides that:

“...an environmental planning instrument may be made in accordance with this Part for the purposes of achieving any of the objects of this Act”

Therefore, the bare fact that the Projects will result in GHG emissions does not demonstrate that the Projects are not in the public interest, as is clearly recognised by the EP&A assessment regime for mining projects.

#### *Public Interest in Coal Mining*

The NSW Government has repeatedly recognised the public interest of exploiting minerals like coal.

In a Strategic Statement on Coal (August 2014) the NSW Government stated:

*“Mineral resources are a key source of wealth for the State. Our objective is to deliver strong and sustainable economic growth by getting the balance right between resource*

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<sup>75</sup> *Minister for Planning v Walker* [2008] NSWCA 224 at [52].



*development and the management of our other State assets – our farmland, our waterways, our parks and forests and our environment.*

*The NSW Government aims to realise this economic value while protecting our environment and the health of our communities.....*

*NSW is rich in coal resources - it is one of our particular strengths, contributing to our high standard of living. Coal mining has a long history in NSW and close ties with many regional communities in areas like Lithgow, the Hunter and the Illawarra....*

*Development of our coal resources has the potential to deliver significant economic benefits to local communities and provides a low cost and reliable source of electricity.*

*A stronger mining industry will create new jobs in regional NSW, drive investment in regional communities and increase export growth. Today, the coal industry directly employs around 23,000 and supports around a further 90,000 in mine and non-mine related jobs.*

*In NSW, 80% of the electricity we use comes from coal. Coal helps to keep electricity prices down, reducing pressure on household budgets and supporting local manufacturers and industry. Even as we look to diversify our sources of electricity, coal continues to be a major contributor to energy security for NSW.*

*The resources sector is a key contributor to economic growth and in NSW 2021 we set a target to increase the value of mining production by 30%.*

*Royalties paid by coal miners provide a significant source of tax revenue to fund essential services like hospitals, schools and roads that are used by people across NSW. The coal industry pays to the State \$1.2 billion in royalties per annum. That's the equivalent of some 11 rural hospitals or over 10,000 nurses.....*

*Avoiding unnecessary barriers to investment, growth and innovation. Regulation will be subject to review processes intended to contain compliance costs and remove duplicative and other unnecessary regulation, to ensure that the NSW coal sector is the first choice for investment in Australia."*

The public interest in NSW coal was reaffirmed by the Minister for Resources and Energy in 2014<sup>76</sup>:

*"Coal has always been critical to the NSW economy, providing a reliable energy resource and low-cost fuel supplies for families and businesses.*

*"80 per cent of the State's electricity comes from coal. The availability of this resource has helped keep input costs down for key business sectors such as steel, construction and heavy manufacturing.*

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<sup>76</sup> Media Statement (6 August 2014).

*“Coal is the State’s largest export, worth around \$15 Billion for 2012/13, and generated \$1.2 Billion in royalties that fund our hospitals, schools and roads.”*

Currently, coal royalties to the NSW government amount to around \$2 billion.

*Public interest in steel production*

The Projects are in the public interest because approximately 55 per cent of the product coal is coking coal, without which new steel cannot be made.

As discussed in

**Coal for Steel**, BlueScope Steel has identified that approximately 80 per cent of new steel is made with coking coal, the other 20 per cent being made using recycled steel and electricity. BlueScope Steel has stated that without coking coal, new steel cannot be made. Alternative methods are not available commercially, and because carbon is an essential element for steelmaking. Methods involving hydrogen remain under development but remain an inferior alternative to coal.

*Public interest in domestic steel production*

It is submitted that the importance of the domestic steel industry is confirmed by the fact that when a South Australian steel manufacturer went into voluntary administration and NSW’s BlueScope faced financial difficulties and laid off workers, the Federal Government tasked a Senate Standing Committee with identifying ways to support the Australian steel industry, confirming that the steel industry is strategically vital to Australia.<sup>77</sup>

On 26 November 2015, the Senate referred the following matters to the Senate Economics References Committee, for inquiry and report by the last sitting day of June 2016 (30 June 2016) (emphasis added):

- a. the future sustainability of Australia's strategically vital steel industry and its supply chain; and
- b. any other related matters.”

The Senate Committee noted<sup>78</sup>:

*“Executive Summary*

*1.1 This inquiry arose after a growing crisis in the Australian steel industry came to a head during the 44<sup>th</sup> Parliament. Australia's two major integrated crude steel producers, the Arrium steelworks in Whyalla, South Australia, and the BlueScope steelworks in the Illawarra*

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<sup>77</sup>

[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Futureofsteel45th/Report/b02](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Futureofsteel45th/Report/b02).

<sup>78</sup>

[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Futureofsteel45th/Report/b02](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Futureofsteel45th/Report/b02).

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*region, New South Wales, faced major financial issues, leading to the decision of both to lay off significant numbers of employees. On account of these financial problems, Arrium was placed into voluntary administration, leading to further uncertainty surrounding the future of the steel industry in Whyalla and Australia more broadly.”*

The importance of steel to Australian society, and modern civilisation, was noted in Chapter Two of the resulting report. It noted that steel is used in almost all infrastructure and construction:

*“Structure of the steel industry in Australia*

**2.3 Steel is used in almost all infrastructure and construction.**

*1. Significant amounts of steel have been produced in Australia since 1915.*

*2. Today, the Australian steel industry is an international leader in coatings, and is recognised globally for its leadership in safety and product development.*

*3. Steel remains an important part of the domestic economy, and the steel industry employs 90,000–100,000 people around the nation.*

**Economic contribution of the steel industry to Australia**

2.23 The steel industry is an important contributor to the Australian economy, both in terms of its earnings and as a provider of employment. In its submission, the Australian Steel Institute referred to ABS data showing that in 2011, the entire steel industry supply chain employed over 100,000 people in Australia, with an annual turnover in excess of \$35 billion.[32] According to 2013–14 ABS data referred to by the Australian Industry Group, the upstream steel industry (iron smelting and steel manufacturing) directly employed about 18,500 people, paid annual wages of \$1.5 billion and had an annual sales and service income of about \$11.1 billion.

**Economic contribution of the steel industry to local communities**

2.28 The Bureau of Steel Manufacturers of Australia also highlighted that 'many steelmaking facilities are... located in regional centres, and form the basis for the area's economy'. The presence of local steel plants leads to flow-on jobs in the education, health, banking and hospitality sectors, which service steel employees. Two examples of this are the Illawarra region and Whyalla. Both regional economies are heavily dependent on BlueScope and Arrium continuing to operate within their regions.

**Committee view**

2.71 The committee notes the important role to be played by governments in defending Australia's steel manufacturing value chain, from steel makers to steel fabricators, recognising that it is a strategic national asset. ... The committee considers that securing the future of the steel industry is essential for the broader Australian economy.”

### *Public interest in electricity generation*

The Projects are also in the public interest because approximately 45 per cent of the product coal is thermal coal and 80 per cent of NSW's electricity is generated from coal (and coal will remain a significant source for electricity generation for the projected life of the Projects).

There is significant public interest in approving the Projects, because as noted in It is essential for the continuation and economic survival of BlueScope's Port Kembla Steelworks that it has access to a reliable and long-term supply of coking coal from the Southern Coalfields.

The abovementioned statements made by BlueScope Steel, make reference to two existing mines in the Southern Coalfields, namely South 32's Dendrobium Mine and Peabody's Metropolitan Mine. What is important for the IPC to understand, is that both of those approved mines cannot be relied upon to be a source of long-term supply. This is because:

1. the SSD consent for the Metropolitan Mine only authorises mining operations for the period ending 22 June 2032;
2. the SSD consent for the Dendrobium Mine authorises the continuation of mining operations only until 2030.

The operating life of the Dendrobium Mine however, cannot continue to 2030 because, as acknowledged by South 32 in its EIS for the pending SSD development application for the Dendrobium Extension Project, the "current mineable reserves (for the existing approved mine) will be depleted by 2024".

There is no certainty that the Dendrobium Extension Project will be granted SSD consent. Having regard to the above facts, it would be economically imprudent to sterilise the Projects' coking coal resource and deny that resource from being available to meet part of the Steelworks' demand for Southern Coalfield's coking coal.

**Coal for Energy**, the youngest power plant in NSW has been facing coal shortages, being forced to operate at below-capacity:

*"Coal supply to the Mount Piper Power Station, which supplies around 15 per cent of the state's energy, will also be secured.*

*The station has been in "coal conservation mode" since September due to the low coal supplies at nearby Springvale mine, the station's sole source of power."*<sup>79</sup>

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<sup>79</sup> [www.abc.net.au/news/2020-01-31/nsw-strikes-landmark-energy-deal-with-federal-government/11916314](http://www.abc.net.au/news/2020-01-31/nsw-strikes-landmark-energy-deal-with-federal-government/11916314) (accessed on 31/1/2020).

Currently, Australia has a “continued elevated risk of expected unserved energy”.<sup>80</sup> In other words, Australia is at an elevated risk of “expected” blackouts based on forecasted supply and demand for the next decade.<sup>81</sup>

As such, Australia is at “greater risks of load shedding due to uncontrollable, but increasingly likely, high impact (‘tail risk’) events such as coincident unplanned outages.”<sup>82</sup> That is, there will be even more blackouts from *unexpected* outages of power plants.

The Australian Energy Market Operator (AEMO) therefore exhorts that action be taken *now* to increase capacity: “The forecast reaffirms that targeted actions must be taken now to provide additional dispatchable capacity to reduce the risks of supply interruptions during peak summer periods.”<sup>83</sup>

The Projects are in the public interest of providing reliable electricity to NSW because, as noted by AEMO, only coal power plants can reliably produce electricity during peak demands, the time when electricity is needed the most (emphasis added):

*“Most of the announced new generation projects are **variable renewable energy generators, which often do not generate at full capacity during peak demand times or may be positioned in a congested part of the network.** As a result, while providing significant additional energy during many hours of the year, **these projects are forecast to only make a limited contribution to meeting demand during peak hours.**”<sup>84</sup>*

In this regard, the current electricity network is designed for baseload electricity to be generated by coal fired power plants until at least 2040, and the Applicant can meet some of the demand as a coal supplier.

The actual number of hours of “forecasted” blackout for NSW is between 135,000 to 770,000 households without power for 3 hours during an extreme heat event:

*“However, as in Victoria this summer, following the gradual closure of Liddell, a combination of high summer demand and unplanned generator outages will leave New South Wales exposed to significant supply gaps and involuntary load shedding if no mitigation action is taken. In 2023-24, AEMO forecasts a risk to between 135,000 and 770,000 households in*

<sup>80</sup> “is energy that cannot be supplied to consumers, resulting in involuntary load shedding (loss of customer supply), as a result of insufficient levels of generation capacity, demand response, or network capability, to meet demand.”

<sup>81</sup> AEMO 2019 ‘Electricity State of Opportunities,’ page 3, [www.aemo.com.au/-/media/files/electricity/nem/planning\\_and\\_forecasting/nem\\_esoo/2019/2019-electricity-statement-of-opportunities.pdf?la=en](http://www.aemo.com.au/-/media/files/electricity/nem/planning_and_forecasting/nem_esoo/2019/2019-electricity-statement-of-opportunities.pdf?la=en) (accessed on 28/1/2020).

<sup>82</sup> AEMO 2019 ‘Electricity State of Opportunities,’ page 3.

<sup>83</sup> AEMO 2019 ‘Electricity State of Opportunities,’ page 3.

<sup>84</sup> AEMO 2019 ‘Electricity State of Opportunities,’ page 4.

*New South Wales being without power for three hours during an extreme heat event (that is, a 1-in-10 year peak demand event).<sup>85</sup>*

The Projects may be required to meet some of the projected shortfall in coal supply for the Mt Piper Power Station during its design life to 2043. As the product coal from the Projects will be washed, it has the additional advantage of requiring less volume for equivalent caloric value than the coal being currently used at Mt Piper Power Station (and has the potential to reduce GHG emissions in comparison to traditional unwashed raw coal).

#### Public interest in regional job creation

The Projects promote the public interest of creating necessary regional jobs. The Applicant has received over 600 expressions of interest for employment .

The Southern Highlands/Tablelands is suffering from job losses. For example, the Coles regional centre in Goulburn announced its closure in 2019, leading to loss of 250 jobs and another 60 jobs from associated transport contractors.

The Projects will employ 400 FTE during construction and 300 FTE during operation.

In addition, geological and environmental constraints are an issue for the Tahmoor Coal Mine (application suspended) and the Dendrobium Mine in the water catchment 'special area' (currently seeking an extension). Extensions to these projects require further approvals. In this context, the Projects will play an important role in supplying Wongawilli seam coal to the steel industry, given the declining production from other Southern Coalfield mines. In this respect, it is noted that new approvals are primarily targeting the Bulli seam coal.

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<sup>85</sup> AEMO 2019 'Electricity State of Opportunities,' page 4.