APPENDIX K1

STATUTORY CONSIDERATIONS

IPC INTERIM REPORT (IPCIR) – RESPONSE TO RECOMMENDATIONS R26 & R29

Purpose

The purpose of this document is to address recommendations R26 and R29 in the IPCIR.

In order to assist the Independent Planning Commission (Commission) and Department of Planning, Industry and Environment (Department) to properly assess the Projects, the Applicant considers it necessary and appropriate to respond to recommendations R26 and R29, despite these recommendations being expressly directed at the Department.

The Applicant's ultimate objective is to ensure that, unlike the significantly flawed and prejudicial assessment carried out by the Department in its Preliminary Assessment Report (PAR), the Commission is in a position to carry out a credible and proper final merit assessment of the Projects in accordance with the *Environmental Planning and Assessment Act 1979* (EP&A Act).

This document is structured in two sections.

Section 1 sets out, for context, extracts from the PAR and the IPCIR relevant to addressing recommendations R26 and R29.

Section 2 provides a detailed analysis of the legal issues associated with recommendations R26 and R29. Most importantly, the Applicant seeks to identify and remedy instances where important legislative provisions of the Mining SEPP have been, in the Applicant's view, misinterpreted or misapplied in the PAR or IPCIR.

Recommendations R26 and R29 are matters directed to the Department of Planning, Industry & Environment (Department). Given the previous concerns by the Applicant about the Department's Preliminary Assessment Report (PAR), the Applicant submits that the consent authority should be cognisant of the proper application of the law and this the Department's final assessment report be based on a proper merit assessment of the Applicant's development application, including the correct application of the law concerning the relevant statutory considerations.

Section 1

The below table identifies, for context, the most relevant extracts from the Department's PAR (as quoted by the Commission in the IPCIR) and the IPCIR.

Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
Mining SEPP – cl 12 suitability of the site - R26	406. The Department's PAR makes the following comments: "The Department acknowledges that there are some advantages to the site as a coal mine, most notably the existence of a valuable coal resource and the presence of existing transportation infrastructure." "However, the targeted coal resource is located in a shallow seam that is inherently difficult to extract without causing adverse environmental impacts and disturbing existing land uses. The project is also located within the upper reaches of Sydney's drinking water catchment." "In addition, while coal mining plays a part in the Southern Highlands region's history and heritage, the region is now more widely known for its rural land uses, small-scale agriculture, scenic landscapes and tourism. The area surrounding the proposed coal mine features relatively dense, small-scale agricultural lots with most properties holding registered bores in order to gain access to productive groundwater aquifers." "These unique characteristics have led to an unconventional mine design that presents a range of uncertainties and safety risks, as well as the likelihood of significant impacts on water resources." "Consequently, the Department is concerned that the project site is not suitable for the development of a new coal mine."	409 The Commission in its assessment of merits of the Project has given particular regard to its consideration of the suitability of the site of the Project. The Commission has had regard to the Material before it and given particular consideration to the issues raised in public submissions, which included: • the Project site is not suitable for the development of the new coalmine; • impact of the mine on the Hawkesbury Sandstone aquifer, both in terms of protection of the quality and volume of water in the aquifer and the ability of the Applicant to make good the lowering of head in bores at properties surrounding the mine; • impacts of noise and air quality on communities like Berrima; and • concern that the sight of the mine infrastructure from the Hume highway might deter tourists from visiting Berrima. 410 It is the finding of the Commission that matters to do with protection of aquifer and the ability of landowners with registered bores to maintain their access to groundwater loom perhaps largest in the community's mind about the suitability of a mine on this site. The Commission has also noted in its consideration of the issues discussed in the foregoing sections that the Department's PAR does not demonstrate that a comprehensive assessment has been undertaken of a number of issues, including social, economics, greenhouse gas emissions, visual impact." 438. From the Material provided and the locality tour conducted on 28 February 2019, the Commission finds that there are a number of existing and approved land uses within the vicinity of the Project. These land uses include, but are not

Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
	407. Under 'Other Impacts' the Department's PAR further commented: "The Department has also undertaken a comprehensive assessment of the full range of other potential impacts, including economics, noise, vibration, air quality, greenhouse gas emissions, traffic, biodiversity, heritage, agriculture and rehabilitation. The Department considers the majority of these potential impacts would be similar to, or less than, other approved underground mining projects. The Department accepts that these potential impacts are able to be managed, mitigated or offset to achieve an acceptable level of environmental performance, subject to the provision of additional information or via suitable conditions of consent."	limited to rural residential, hobby farms and commercial agricultural pursuits, with industrial, residential and commercial activities occurring further afield." 439. From the Material provided the Commission finds that the WLEP is the most relevant representation of what land uses are most likely to be considered the preferred uses of land in the vicinity of the Project. In producing a LEP, Council will: • select zones as appropriate to the needs of the local area, informed by studies and consultation with the public and relevant agencies; • outline the zone objectives, which are used to clarify the role and function of the zone; and • determine for each zone whether to permit (with or without consent) or prohibit various land uses. 440. In considering the Mining SEPP, the Commission is required to establish whether or not the development is likely to have a significant impact on the preferred uses of land. Regardless of the permissibility exemptions afforded to mining pursuant to clause 7 of the Mining SEPP, the WLEP has sought to exclude mining as a permissible use in all zones within the vicinity of the site. The nature of the existing surrounding land uses and those permissible under the WLEP are clearly different to the Project. 441. Based on the Material, the Commission finds that the preferred land uses are those which are consistent with the existing locality and future land use direction as outlined in the WLEP. 442. Based on the Material currently before it, the Commission finds that at this stage the **Project may create negative impacts on the preferred land uses**. As

Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
		discussed in the sections above there **are uncertainties about the extent of the impacts of the Project and further information is required to determine whether it would be "significant" or can be mitigated to the extent that it is acceptable.** 443. Based on the Material, and for the reasons cited above the Project is a land use that is different to the surrounding existing uses and to those uses that are permissible in WLEP**. The Project is likely to generate impacts that are beyond those that would be generated by the preferred land uses**. The Commission finds that the Project **may be incompatible with these land uses.** 444. Based on the Material, the Commission accepts that there could be significant public benefits derived from job creation and the revenue and expenditure generated as a result of the Project. The public of NSW could also benefit from increased Government expenditure directly resulting from mining **royalties. However, based on the Material, the extent of the economic benefits of the Project remain unclear. Furthermore, there remain uncertainties about the impacts of the Project, including its social impact**. The Commission, at this stage, is therefore unable to evaluate the respective public benefits of the Project and the surrounding land uses. 445. The Commission considers it important, when evaluating and comparing the respective public benefits of the Project and the existing and proposed land uses identified within the vicinity of the Project, to highlight that whilst both the Project and other land uses generate benefits, noting the limitations of current information about economic assessments

Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
		and impacts, there is a significant difference in the nature of these land uses and subsequent benefits that make any direct comparison challenging. 446. However, based on the Material, the Commission's provisional view **is that the preferred land uses are sustainable in the long term and will play a significant role in the future growth and development of the Southern Highlands region. The Commission considers that this is an important and relevant distinction** in evaluating the public benefits of the development and the land uses referred to in paragraph (a) (i) and (ii). As with the other matters addressed in this Report, further consideration of this issue will need to be given as further information becomes available. 447 Based on the Material, the Commission finds **that not all measures proposed to avoid or minimise impacts, and therefore incompatibility have, at this stage been satisfactorily resolved**. 448 at this stage of the process the Commission finds that the **Project may not be consistent with clause 12 of the Mining SEPP**
Mining SEPP – cl 14		"431. The Commission in its assessment of merits of the Project has had regard to its consideration of the relevant statutory requirements. 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: • simply not consistent with NSW planning law for a new coal mine to go ahead in NSW in terms of the Paris Agreement; 449. Commission finds that it is not satisfied with the overall level of

Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
		assessment provided by the Department regarding Part 3 of the Mining SEPP because the Department has not provided a detailed assessment within the Department's PAR of other relevant requirements, in p**articular clause 14 in relation to natural resource management and environmental management, including greenhouse gas emissions."**
WLEP	420. In relation to the Hume Coal Project permissibility the Department's PAR has considered the zoning of the site in accordance with the provisions of the *Wingecarribee Local Environmental Plan 2010* (**WLEP**). Pursuant to the WLEP the site is zoned: • E2 – Environmental Conservation; • E3 – Environmental Management; • RU2 – Rural Landscape; • RU3 – Forestry; and • SP2 – Infrastructure. 421. In relation to the permissibility of the Hume Coal Project, the Department's PAR stated that under the WLEP, "*… mining development is prohibited in all of these land zones. While clause 7(1)(a) of the Mining SEPP permits 'underground mining' to be carried out on any land, it is only allowed subject to development consent*." 423. In relation to the permissibility of the Berrima Rail Project, the Department's PAR stated "*Under the LEP, the proposed rail works are permissible in the IN1 and IN3 zones but prohibited in the RU2, SP2, E2 and E3 zones. However, under clause 7(1)(b) of the Mining SEPP, development for the purpose of 'mining' (which includes*	COMMISSION'S FINDINGS AND RECOMMENDATIONS 431. The Commission in its assessment of merits of the Project has had regard to its consideration of the relevant statutory requirements. 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: • Under the Wingecarribee LEP, mining development is prohibited in all of these land zones; 435. In relation to the Project permissibility **the Commission notes that pursuant to the WLEP, all the land use zones within the site prohibit mining activities**, however clause 7(1) of the Mining SEPP stated that: … 436. Based on the Material, the Commission finds that both the Hume Coal Project and Berrima Rail Project are permissible with consent pursuant to clause 7(1) of the Mining SEPP, and **accepts the assessment provided by the Department in relation to this matter."**

Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
	"transportation of materials extracted") may be carried out on land: *• where development for the purposes of agriculture or industry may be carried out (i.e. both the RU2 and E3 zoned land); or* *• on land that is the subject of a mining lease (i.e. the E2 zoned land)."* *"Consequently, the proposed rail works are permissible in the land zoned RU2, E2 and E3, however it is prohibited under both the LEP and the Mining SEPP on the land zoned SP2."* *"…the consent authority has the power to override a partial prohibition for State Significant Development…".* "424 that "… the zoning provisions of the LEP are relevant to the extent that they influence the existing, approved and likely preferred land uses in the project area and its surrounds."	
Drinking SEPP	426. In addressing the Drinking Water SEPP, the Department's PAR identified that due to its residual concerns around the underground impoundment of water "If the mine water cannot be stored underground or in surface dams, it would ultimately need to be discharged at the surface." 427. Furthermore, the Department's PAR stated that "While the EIS mentions a water treatment plant as "provisional infrastructure" and the potential discharge of treated water to Oldbury Creek, the Response to Submissions confirms that neither of these aspects are included in the project, and	The Commission in its assessment of the Project is satisfied that the Project is consistent with the provisions of the following EPIs: *• State Environmental Planning Policy (State and Regional Development) 2011;* *• State Environmental Planning Policy No 33 – Hazardous and Offensive Development;* *• State Environmental Planning Policy No 44 – Koala Habitat Protection;* *• State Environmental Planning Policy No 55 – Remediation of Land; and* *• State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011.* 431. The Commission in its assessment of merits of the Project has had regard to its

Topic	Commission quoting the Department's PAR (emphasis added)	IPCIR (emphasis added)
	neither have been assessed. The discharge of untreated mine water may cause significant adverse impacts on the receiving environment given the quality of the mine water. This is particularly problematic as the project is located within Sydney's drinking water catchment, which means it must comply with the 'neutral or beneficial effect' (NorBE) test." 428. In relation to Agency submissions the Department's PAR stated that WaterNSW had "residual concerns about the Applicant's assessment of the impacts of the project against the neutral or beneficial effect test (NorBE), particularly in relation to a lack of mass balance analysis for Medway Rivulet", and "recommended the imposition of strict performance criteria including a 'negligible reduction' in both surface water flow and water quality." 429. The Department's PAR concluded that "the project may not conform with the Drinking Water Catchment SEPP."	consideration of the relevant statutory requirements. 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: • very little attention given to the State Environmental Planning Policy relating to the Sydney drinking water catchment and that the Project had to achieve the NorBE criteria; 433. However, the Commission has formed the view that greater consideration of the Drinking Water SEPP and the Mining SEPP is required. 434. In relation to the Drinking Water SEPP the Commission finds should the proposal to impound water in the underground voids behind bulkheads be achieved and no discharge of mine related water occurs to surface waters; the Commission is satisfied that the Project can achieve the objectives of the Drinking Water SEPP. The Commission notes however that the provision of additional information may change this view.

Section 2

Whilst Section 2 deals with specific recommendations from the IPCIR directed specifically to the Department of Planning Industry & Environment (Department), this section provides a detailed analysis of the legal issues associated with recommendations R26 and R29 in the IPCIR. Most importantly, the Applicant seeks to identify and remedy instances where important legislative provisions of the Mining SEPP have been, in the Applicant's view, misinterpreted or misapplied in the PAR or IPCIR.

IPCIR Recommendations R26 and R29

Recommendation R26

> *"The **Department** should provide an updated and detailed assessment of all relevant components under Part 3 of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 with its Final Assessment Report, based on any additional information made available since the issue of the Department's Preliminary Assessment Report."*

Recommendation R29

> *"The **Department** should include in its Final Assessment Report to the Commission an assessment of the public benefits of the Project which give consideration of whether:*
>
> > *i. the economic benefits of the Project outweigh its costs to the local community (section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979); and*
> >
> > *ii. the public benefits of the Project outweigh the public benefits of other land uses (clause 12 (b) of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007)."*

In this document, R26 and R29 are considered together as both recommendations deal with matters required to be considered under Part 3 of the Mining SEPP and, therefore, under s4.15 of the EP&A Act.

However, before considering R26 and R29, it is important to first understand the context and ambit of s4.15, which is the principal provision regulating the consent authority's evaluation of a development application.

S 4.15 Evaluation

Section 4.15 of the EP&A Act contains a number of matters that, if of relevance to the development, must be considered by the consent authority in determining a development application. It relevantly states (emphasis added):

> *"4.15 Evaluation*
>
> *(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…"*

"Have regard to" or "take into consideration"

It is useful to establish the content of the requirement to "take into consideration" the relevant matters set out in in s4.15.

The EP&A Act provides no guidance as to what weight should be given to the various considerations mandated under s4.15. As such, it is up to the consent authority to decide what weight should be given to each of the various mandatory considerations. In this exercise, a particular mandatory consideration might be given a low weight[1] and it is inevitable that some of the considerations will conflict with each other.

In order to understand the necessary decision-making steps a consent authority must take to properly determine a development application under the EP&A Act, the judgment of Justice Preston (Chief Judge of the Land and Environment Court (LEC)) in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 (upheld on appeal) is instructive (noting that this judgment concerned a determination under the now repealed Part 3A of the EP&A Act that also required the decision maker to make a decision after having "considered" a number of mandatory factors, similar to s4.15).

In this judgment, Preston CJ of LEC relevantly identified the four decision-making steps as follows (emphasis added):

> *"35 … The decision the Minister must make under s 75J of the EPA Act to approve or disprove of the carrying out of a project is a good example. The **criteria to be considered are numerous, cannot be objectively weighted, and are interdependent. The decision-maker must not only determine what are the relevant matters to be considered in deciding whether or not to approve the carrying out of the project, but also subjectively determine the weight to be given to each matter.** Eisenberg suggests that where this is the case, an*

[1] *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 41.

optimal solution can normally be arrived at by vesting a single decision-maker with managerial authority; that is, authority not only to select and apply relevant criteria but also to determine how much weight each criterion is to receive, and to change those weights as new objectives and criteria may require (Eisenberg at 425).

36 The process of decision-making under s 75J of the EPA Act therefore involves: ***first, identification of the relevant matters needing to be considered; secondly, fact finding for each relevant matter; thirdly, determining how much weight each relevant matter is to receive, and fourthly, balancing the weighted matters to arrive at a managerial decision****.*

37 The first step requires analysis of the statutes which contain the power of the original decision-maker (the Minister) to make the administrative decision to disapprove or to approve, with or without conditions, the project application, and the power of the reviewer (the Court) to review on the merits that decision so as to determine the nature, scope and parameters of the powers and the matters which the decision-maker must consider (is bound to consider) and those which the decision-maker may consider (is not bound to ignore). In an application for approval to carry out a project under Part 3A, the relevant matters will include the various impacts on the environment the project is likely to have.

38 Having identified the relevant matters which must or may be considered, the decision-maker needs, as a second step, to undertake fact finding and inference drawing so as to enable consideration of these matters. On a merits review appeal, facts are found and inferences are drawn based on the evidence before the reviewer, in this case the Court. Amongst the relevant matters to be considered in determining an application for approval to carry out a project are the likely impacts of the project on the environment. The process of fact finding and inference drawing to enable consideration of these impacts includes ascertaining the nature and extent of each type of impact and the nature and efficacy of measures proposed in the application for approval, or that could be imposed as conditions of approval, to prevent, mitigate or compensate for each type of impact.

39 The third step requires the original decision-maker and the reviewer exercising the functions of the decision-maker to determine how much weight each relevant matter should receive. Occasionally, although rarely, the statutes regulating the making or reviewing of the administrative decision may dictate or indicate the weight or relative weight that should be assigned to the relevant matter. More commonly, however, the weight to be assigned is in the discretion of the decision-maker. The assigning of weight is a subjective task. The decision-maker needs to evaluate the relative importance of the relevant matters, each compared to the others. The decision-maker cannot delegate that task to others or subordinate it to the marketplace.

40 In the absence of any statutory indication of the weight to be given to the various considerations, it is generally for the decision-maker to determine the appropriate weight to be given to the matters to be taken into account: Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24 at 41. There are, however, limits to this

proposition and a decision-maker who fails to give adequate weight to a relevant factor of great importance, or gives excessive weight to a relevant factor of no great importance may have made a decision that is manifestly unreasonable: Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223. The exercise of managerial authority in the sense elaborated on by Fuller and Eisenberg is, subject to the ultimate limits of Wednesbury unreasonableness, consistent with the approach required by Peko-Wallsend.

41 ***The fourth step requires the weighted matters to be balanced, each against the others****. Because all of the matters may not be, or be capable of being, reduced to a common unit of measurement, such as money, balancing of the weighted matters is a* ***qualitative and not quantitative exercise****. The ultimate decision involves an* ***intuitive synthesis*** *of the various matters. …*

42 The result of the balancing exercise, the intuitive synthesis, is a determination of whether the project ought to be approved or disapproved and, if approved, what modifications or conditions should be imposed."

In summary, the *Bulga* case provides a decision-making 'roadmap' for the consent authority outlining four steps:

1. identity the relevant factors;
2. gather facts on the factors;
3. decide on the appropriate weight to give a particular factor; and
4. once all the factors are given a weight, balance all the competing factors in a qualitative "intuitive synthesis" (i.e. a "qualitative and not quantitative exercise")[2].

However, what is *not* permitted is for the consent authority to treat each of the mandatory considerations as a minimum threshold, such that the Projects are refused if the consent authority's findings for one of the mandatory matters for consideration is adverse to the Applicant. Such an approach would be contrary to the EP&A Act and result in an error of law.

To elaborate, it would certainly be an error of law, for example, for the consent authority to consider itself bound to refuse the Projects if it finds that the Projects are not consistent with a particular object of the EP&A Act, such as the principles of ecologically sustainable development (ESD), and therefore the Projects are not consistent with the objects of the EP&A Act, and therefore not in the public interest

In that scenario, the error of law would be manifold:

1. Incorrectly regarding the principles of ESD to be the minimum threshold test or the sole test for the objects of the EP&A Act, when ESD is but one facet of the objects so that what is required is a balancing of different objects[3];

[2] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 at [41].
[3] *Minister for Urban Affairs and Planning v Rosemount Estates P/L and Ors* [1996] NSWSC 348 per Stein J

2. Incorrectly regarding the objects of the EP&A Act to be a minimum threshold test or the sole test for public interest, when objects of the EP&A and principles of ESD but one facet of public interest so that what is required is a balancing of competing public interests[4];
3. Incorrectly regarding public interest to be a minimum threshold test or the sole test for determining development application, when public interest is but one factor amongst many factors that must all be weighed up in an "intuitive synthesis"[5] ;and
4. Incorrectly regarding the decision as a dichotomy between approval or refusal, when the consent authority should also consider whether the Projects can be approved with appropriate conditions[6].

s4.15(1)(a) – "the provisions of (i) any environmental planning instrument, and"[7]

The IPCIR stated at paragraph 433 that the Projects are consistent with the following SEPPs:

"• *State Environmental Planning Policy (State and Regional Development) 2011;*
• *State Environmental Planning Policy No 33 – Hazardous and Offensive Development;*
• *State Environmental Planning Policy No 44 – Koala Habitat Protection;*
• *State Environmental Planning Policy No 55 – Remediation of Land; and*
• *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011."*

As such, these SEPPs are not discussed in this document.

It is emphasised that the Mining SEPP and the Drinking Water SEPP are just two of the applicable environmental planning instruments (EPIs), and that EPIs are just one of the various matters that must be considered by the consent authority under s4.15 of the EP&A Act. The Mining SEPP and the Drinking Water SEPP are discussed below under response to Recommendation 26.

To reiterate, what is clear from the relevant case law is that *none* of the mandatory matters to be considered under s4.15 are minimum thresholds, such that an adverse finding in relation to a matter within one relevant EPI would result in the automatic refusal of the Projects. Rather, what is required of the consent authority is to: consider all the relevant matters in s4.15, give appropriate weight to each matter, and balance the conflicting and competing factors to arrive at an 'intuitive synthesis' decision.[8]

[4] *Hogan v Hinch* (2011) 243 CLR 506, [31]
[5] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 at [41]
[6] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 at [42]
[7] Section 3.6 of the EIS discussed the relevant planning instruments.
[8] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 at [42].

s4.15(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"

Recommendation 29(i) stated (emphasis added):

> *"The Department should include in its Final Assessment Report to the Commission an assessment of the public benefits of the Project which give consideration of whether:*
>
> *i. the economic benefits of the Project outweigh its costs to the **local community** (section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979); and"*

Section 4.15(1)(b) of the EP&A Act states (emphasis added):

> *"(1) 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**,"*

With regard to R29(i), it is noted that s4.15(1)(b) does *not* require that the economic benefits of a development *outweigh* its costs to the *local community*. It simply requires the consent authority to consider the likely impacts, which include social and economic impacts in the locality.

Neither does section 4.15(1)(b) state that the consent authority must consider the extent to which a development's economic benefits outweigh the costs.

Further, section 4.15(1)(b) is but one of the factors that must be considered by the consent authority. As such, it may be appropriate for a project to be approved even if the economic benefits do not outweigh the costs (e.g. because of other, important public interest reasons in accordance with s4.15(1)(e), such as allowing critical production of steel and electricity).

Even if the consent authority is to consider whether the economic benefits of a development outweigh the costs, the Applicant submits that it is incorrect to limit this inquiry to the *local* level. R29 states*: "Project **outweigh** its costs to the **local community**"* (emphasis added). Section 4.15(1)(b) requires a consideration of the project as a whole, rather than only focusing on the impacts at the local level for the purposes of the balancing act, where the relative costs will be the greatest, compared to the rest of the State. Section 4.15(1)(b) simply does not state that the comparison of pros and cons of the likely impacts must be at the local level only.

With that in mind, the Applicant refers to its Economic Impact Assessment (Oct 2018) and the economic impact assessment accompanying this response to the IPC recommendations. These

assessments show that the economic benefits of the Projects outweigh the costs (plus externalities) at the local level and more broadly.

s4.15(1)(c) – "the suitability of the site for the development"[9]

Coal mine needs to go where the coal is

As obvious as it is, it is important to emphasise that the proposed site is perfectly suited for the development of a coal mine because a coal mine can only be built where the coal is located.

As Preston CJ of LEC noted in relation to windfarms, "it is **necessary**" for windfarms to go where the wind is:

> *"It is common that the areas that are best suited to wind energy are also the most visually prominent locations. In constructing windfarms, it is **necessary** to go where the wind is."*[10]

Similarly, in constructing coal mines, a coal mine needs to go where the coal is. It is a necessity and not an optional factor. Unless NSW bans all new coal mines, or all new hard coking coal mines, in constructing a coal mine, "it is necessary to go where the" coal is. In this respect, the site is perfectly suited for a coking coal mine.

As confirmation of the NSW Government's long-term commitment to supporting the development of valuable coal resources, the Department has stated as recently as 14 March 2020 in 'Net Zero Plan Stage 1: 2020-2030', under the heading "Coal innovation", that mining will continue in the future, and that NSW's action on climate change to reduce GHG by 35% by 2030 compared to 2005 and net zero emission by 2050 "does not undermine" mining businesses (emphasis added):

> "**Coal innovation**
>
> New South Wales' $36 billion mining sector is one of our biggest economic contributors, supplying both domestic and export markets with high quality, competitive resources. Mining will continue to be an important part of the economy into the future and it is important that the State's action on climate change does not undermine those businesses and the jobs and communities they support."[11]

The Net Zero Plan also states that NSW Government will invest more money in a coal innovation program to reduce emissions from the mining and use of coal, rather than stopping or reducing coal mining (emphasis original):

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[9] Suitability of the site was discussed in Chapter 24 of the EIS. The lack of visual impacts was discussed in Chapter 16 of the EIS. The groundwater impacts were discussed in Chapter 7 of the EIS.

[10] *Taralga Landscape Guardians Inc v Minister for Planning and Another* [2007] NSWLEC 59 at [82].

[11] Department of Planning, Industry and Environment, 'Net Zero Plan Stage 1: 2020-2030', page 22, <www.environment.nsw.gov.au/topics/climate-change/net-zero-plan>.

"The NSW Government will invest in a **Coal Innovation Program** to reduce emissions from the mining and use of coal. The program is identified as a priority program for Bilateral funding."[12]

With respect to the Projects in particular, it is noted that not all coals can be used to make steel. Only coking coals can be used to make steel. As such, a coking coal mine needs to go where the coking coals are. There is coking coal in the Southern Coalfields, where the Projects are located, and the composition of the Wongawilli seam coal to be mined is ideal for blending with Bulli seam coal to meet the specifications of the Australian and international steel industry.

This is an important and relevant matter in considering the zoning of land where the resource is located (see below) and, in particular, the important role of the Mining SEPP in facilitating mining development on land throughout the entire State (regardless of inconsistent zoning under a local environmental plan), and given that the deposition of mineral resources preceded the declaration of zonings and prior to knowledge that either the resource existed or before being determined it could be economically extracted for the benefit of the State.

Only project in NSW with hard coking coal

The Southern Coalfields is the only place in NSW that contain hard coking coal. The NSW Government has recognised that the Hume Coal Project is the only semi-hard coking coal (SHCC) development project in NSW.[13]

Every other development project in NSW produces either thermal or semi-soft coking coal (SSCC), as every other project is *not* located in the Southern Coalfields, but elsewhere like the Hunter Valley or Gunnedah Basin.

The 2016 table from the NSW Resource Regulator highlights the limited availability of hard coking coal resources in NSW.

[12] Department of Planning, Industry and Environment 'Net Zero Plan Stage 1: 2020-2030, page 22, <www.environment.nsw.gov.au/topics/climate-change/net-zero-plan>.

[13] <resourcesandgeoscience.nsw.gov.au/__data/assets/pdf_file/0005/584375/New-South-Wales-Coal-investment-profile-flyer.pdf> (accessed on 7/2/2020).

HUMECOAL PROJECT

Current project opportunities

The following list represents key coal projects within the state that are currently in exploration, planning or development. For more information on investment opportunities please contact us (see details below).

Operator	Mine name	Coalfield	2014–15 ROM Production (Mt)	Reserves (Mt)	Coal type
BHP Billiton	Mt Arthur OC	Hunter	19.7	1049	Th
Bloomfield	Rix's Creek OC	Hunter	1.5	45	Th / SSCC
Centennial Coal	Mandalong UG	Newcastle	6.3	98	Th
Centennial Coal	Springvale UG	Western	3.1	48	Th
Glencore	Bulga OC / UG	Hunter	9.9	360	Th / SSCC
Glencore	Mt Owen OC	Hunter	8.2	85	Th / SSCC
Glencore	Ravensworth North	Hunter	6.4	258	Th
Glencore	Ulan OC / UG	Western	11.6	182	Th
Idemitsu	Boggabri OC	Gunnedah	6.7	147	Th / SSCC
Peabody	Metropolitan UG	Southern	2.2	43	HCC
Peabody	Wilpinjong OC	Western	11.1	198	Th
Rio Tinto	Hunter Valley Ops	Hunter	13.5	381	Th / SSCC
Rio Tinto	Mt Thorley Wark	Hunter	11.3	390	Th / SSCC
South 32	Appin UG	Southern	3.1	157	HCC
Whitehaven	Maules Creek OC	Gunnedah	2.6	382	Th / SSCC
Whitehaven	Narrabri UG	Gunnedah	7.6	234	Th / SSCC
Yancoal	Austar UG	Newcastle	1.7	48	SSCC
Yancoal	Moolarben OC	Western	6.4	318	Th

Project	Mine name	Coalfield	Stage	Total JORC resource (Mt)	Coal type
POSCO	Hume UG	Southern	Exploration	115	Th / SHCC
Idemitsu	West Muswellbrrok	Hunter	Exploration	621	Th / SSCC
Malabar Coal	Spur Hill UG	Hunter	Exploration	626	Th / SSCC
Whitehaven	Oaklands North	Oaklands	Exploration	950	Th
KEPCO	Bylong OC / UG	Western	In Planning	423	Th / SSCC
Shenhua	Watermark OC	Gunnedah	In Planning	932	Th / SSCC

The importance of hard coking coal, or semi hard coking coal, is that it is necessary to manufacture coke, an essential element to make steel. Semi soft coking coal can only be used to make coke if it is blended with hard coking coal, demonstrating the need for diversified competitive coking coal sources. This is explained in the following extract (emphasis added):

> *"Metallurgical Coal Metallurgical coals are generally classified as having high carbon or energy levels, low moisture contents and low impurities such as ash, sulphur and phosphorous. Metallurgical coals are required inputs into the blast furnace method of steel production, and can generally be classified into three main categories:*
>
> *• Hard coking coal (HCC) - **a necessary input in the production of strong coke**. When heated in coke oven (which has an absence of oxygen), hard coking coal will swell to form coke.*

• Pulverised Coal Injection coal (PCI) - coal used for its heat value and injected directly into blast furnaces (without an intermediate coking phase) as a supplementary fuel, which reduces the amount of coke required and therefore costs. PCI coal can also be sold into the thermal coal market. It usually commands a higher price than semi-soft coking coal.

*• Semi-soft coking coal (SSCC) - **used in the coke blend along with hard coking coal**, but results in a low coke quality and more impurities. Semi-soft coking coal can also be sold as thermal coal."*[14]

The coking coal to be produced from the Projects is semi-hard coking coal, which is more valuable than semi soft coking coal.

The Projects are located in the perfect place to build a semi-hard coking coal mine because the Southern Coalfields is the only place with hard coking coals. And a hard-coking coal mines must go where the hard-coking coals are.[15]

The ACCC, in its investigation of the Southern Coalfields in 2017[16], highlighted the region as being essential for the competitive supply of coking coal that could not be supplied from other Australian sources, such as the Bowen Basin.

In addition, as explained in detail below, the Applicant submits that:

- the Projects will not cause unacceptable impacts,
- the Projects are therefore not incompatible with other land uses, and
- the site is a suitable location for the Projects.

"s4.15(1)(e) - "the public interest"

The matter of the "public interest" is separately discussed in response to Recommendations R27 and R28 of the IPCIR.

[14] 'Market Demand Study: Australian Metallurgical Coal – Report to the Minerals Council of Australia', 12/10/18 <minerals.org.au/sites/default/files/181012%20Commodity%20Insights%20Met%20Coal%20Report.pdf> (accessed on 7/2/2020).

[15] *Taralga Landscape Guardians Inc v Minister for Planning and Another* [2007] NSWLEC 59 at [82].

[16] <www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/south32-limited-proposed-acquisition-of-metropolitan-collieries-pty-ltd>.

Recommendation R26

Mining SEPP

Part 3 of the Mining SEPP – Legislative context

Recommendation R26 requires the Department to provide an updated assessment of the Projects against the matters for consideration under Part 3 of the Mining SEPP.

Before assessing the relevant provisions of the Mining SEPP, it is useful to consider the broader legislative context of the Mining SEPP, beginning with the aims of the SEPP. Clause 2 of the Mining SEPP states (emphasis added):

> *"2 Aims of Policy*
>
> *The aims of this Policy are, in recognition of the importance to New South Wales of mining, petroleum production and extractive industries:*
>
> *(a) to provide for the proper management and **development** of mineral, petroleum and extractive material resources for the purpose of promoting the social and economic welfare of the State, and*
>
> *(b) to facilitate the orderly and economic **use and development of land** containing mineral, petroleum and extractive material resources, and*
>
> *(b1) to promote the **development** of significant mineral resources, and*
>
> *(c) to establish appropriate planning controls to encourage **ecologically sustainable development through the environmental assessment, and sustainable management, of development** of mineral, petroleum and extractive material resources, and*
>
> *(d) to establish a gateway assessment process for certain mining and petroleum (oil and gas) development:*
>
> *(i) to recognise the importance of agricultural resources, and*
>
> *(ii) to ensure protection of strategic agricultural land and water resources, and*
>
> *(iii) to ensure a balanced use of land by potentially competing industries, and*
>
> *(iv) to provide for the sustainable growth of mining, petroleum and agricultural industries."*

It is clear from cl 2(a)–(c) that one of the key objects of the Mining SEPP is the "development" of valuable natural resources such as semi-hard coking coal.

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In this regard, it is relevant that the NSW Supreme Court has observed that the objects of the predecessor SEPP to the Mining SEPP (*State Environmental Planning Policy No 45—Permissibility of Mining*) "had a real, that is to say a direct and substantial, connection with" the objects of the EP&A Act", and referred to a memorandum accompanying the draft predecessor SEPP which noted the "importance of the mining industry in New South Wales".[17]

More recently, the importance of the mining industry was expressly cited by the Department in a 2006 brief to the Minister concerning the need for the draft Mining SEPP 2007. The following extract from that brief confirms that the mining industry is a key export industry and an important employer in regional NSW[18]:

4 Significance for Environmental Planning for the State

Under section 37(2) EP&A Act, before the Minister can direct that a SEPP be prepared, the Minister must form an opinion that the matters to be addressed by the SEPP are of "significance for environmental planning for the State". The mining industry is a key export industry, generating significant earnings for the State in terms of royalties and as an important employer in regional NSW. The emerging petroleum industry has potential to result in local gas supplies of importance particularly in relation to security of energy supply and in the State meeting its greenhouse targets. The extractive industries supply essential building material to meet housing, infrastructure, commercial and industrial needs to deliver economic growth in NSW.

The importance of the NSW mining industry was repeated at page 3 of the Department's 2007 brief recommending the making of the draft Mining SEPP[19] :

- The mining industry is a key export industry, generating significant earnings for the State in terms of royalties and as an important employer in regional NSW. The emerging petroleum industry has potential to result in local gas supplies of importance particularly in relation to security of energy supply and in the State meeting its greenhouse targets. The extractive industries supply essential building material to meet housing, infrastructure, commercial and industrial needs to deliver economic growth in NSW.

Consistently with the underlying purpose of the Mining SEPP to facilitate mining development, it is noted that cl 2(c) of the Mining SEPP provides that the principles of ESD will be encouraged through *"environmental assessment, and sustainable management, of **development** of mineral, petroleum and extractive material resources".* This objective of encouraging ESD through the "development" of natural resources is not a unique concept found only in the Mining SEPP. Instead, the development

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

[18] 'Department of Planning - Sector Strategies and Systems Innovation - For decision - Draft SEPP – Mining, Petroleum and Extractive Industries' at page 5, signed on 26 September 2006 by the Minister.

[19] 'Department of Planning, sector strategies and systems innovation – for decision – Recommendation to make the Mining, Petroleum Production and Extractive Industries SEPP 2007', signed by the Director General on 6 February 2007.

of natural resources is consistent with the statutory meaning of ecologically sustainable *development*[20]. That is, development is a fundamental element of ESD.

As such, it is clear that the aim of the Mining SEPP to develop mineral resources is consistent with the objects of the EP&A Act, and with the principles of ecologically sustainable development.

Specific Considerations of the Mining SEPP Provisions

Part 3 Development applications—matters for consideration

Cl 12AB Non-discretionary development standards for mining

> ***Cl12AB (1) "The object of this clause is to identify development standards on particular matters relating to mining that, if complied with, prevents the consent authority from requiring more onerous standards for those matters (but that does not prevent the consent authority granting consent even though any such standard is not complied with)."***

Clause 12AB of Part 3 of the Mining SEPP contains particular development standards that, if complied with, prevent the consent authority "from requiring more onerous standards for those matters."[21] That is, these standards are designed to facilitate, rather than restrict, mining development.

Cl12AB (1) does not state that the matters contained in cl 12AB can be used as standards that, if *not* complied with, the consent authority can rely on to refuse to grant development consent.

In fact, to prevent the clause from being misused and misinterpreted in that manner, the drafter of the Mining SEPP made it clear (in parenthesis) that **non-compliance** with cl12AB *"does **not** prevent the consent authority granting consent…".*[22]

As an example, it is useful to consider the interpretation and application of the non-discretionary development standard found in clause 12AB(7). This clause states:

"Aquifer interference

> ***Any interference with an aquifer caused by the development does not exceed the respective water table, water pressure and water quality requirements specified for item 1 in columns 2, 3 and 4 of Table 1 of the Aquifer Interference Policy for each relevant water source listed in column 1 of that Table."***

Clause 12AB(7)imposes a non-discretionary development standard by reference to item 1 of Table 1 of the Aquifer Interference Policy (AIP).

---

[20] See s6(2) of the *Protection of the Environment Administration Act 1991*.
[21] Clause 12AB (1) of the Mining SEPP.
[22] Clause 12AB (1) of the Mining SEPP.

In this regard, column 2 of item 1 of Table 1 of the AIP relevantly states:

> *"A maximum of a 2m decline cumulatively at any water supply work."*

As with many mining projects, the Projects are predicted to have a greater than 2m decline cumulatively at certain water bores. The consequence of not meeting this development standard in cl12AB(7) is that cl12AB(1) does not apply to prevent the consent authority *"from requiring more onerous standards for those matters (but that does not prevent the consent authority granting consent even though any such standard is not complied with)."*[23]

Therefore, it would be irrational to rely on the development standard in cl12AB(7) to assert that the consent authority should not approve the Projects because there is more than a 2m decline at water bores. Put another way, it would be perverse for clause 12AB (7) to be used as a justification for refusing the Projects when that development standard is intended to facilitate rather than restrict mining development.

Bylong IPC example

Regrettably, it is submitted that the IPC Panel for the Bylong Coal Project misinterpreted cl12AB(7) and relied on this misinterpretation as a reason to refuse the Bylong Coal Project. The Statement of Reasons (dated 18 September 2019) incorrectly stated or indicated at various paragraphs that cl12AB(7) was imposing a maximum threshold under the AIP (emphasis added):

> *"239. Clause 12AB (7) of the Mining SEPP requires that "[any interference with an aquifer caused by the development does not exceed the respective water table…*
>
> *292. … greater than 2m which exceeds the maximum drawdown threshold in the AIP….*
>
> *295. …exceeding the maximum drawdown threshold in the AIP…*
>
> *296. … there is a breach of the AIP's maximum drawdown …*
>
> *297. … unacceptable for the reasons … drawdown exceeds the AIP thresholds (ie 2m)"*

This is an incorrect interpretation of the Mining SEPP. First, clause 12AB does not say that the drawdown threshold in the AIP is a maximum drawdown threshold. Clause 12AB (1) states that if Clause 12AB is not complied with, it does not prevent approval.

> *"… (but that does not prevent the consent authority granting consent even though any such standard is not complied with)."*

Further, the AIP itself does not state that the 2m drawdown is a maximum threshold. The AIP states:

> *"Where the predicted impacts are greater than the Level 1 minimal impact considerations by more than the accuracy of an otherwise robust model, then the assessment will involve*

[23] Clause 12AB (1) of the Mining SEPP.

additional studies to fully assess these predicted impacts. If this assessment shows that the predicted impacts do not prevent the long-term viability of the relevant water-dependent asset, as defined in Table 1, then the impacts will be considered to be acceptable.

…
If more than 2m decline cumulatively at any water supply work then make good provisions should apply."

Hence, the consequence of not meeting the minimal impact considerations under the AIP for impacts on bores beyond the applicable thresholds, is simply that make good provisions should apply.

"Minimal harm" not turned on

In applying the AIP to developments, there has been confusion between the *"minimal impact considerations"* and *the "no more than minimal harm"* test. The two are separate and different tests, and the "no more than minimal harm" test has not even been 'turned on'. The AIP relevantly states (emphasis added):

"3.2.1 Aquifer impact assessment

The Water Management Act 2000 includes the concept of ensuring "no more than minimal harm" for both the granting of water access licences (see Section 2) and the granting of approvals. Aquifer interference approvals are not to be granted unless the Minister is satisfied that adequate arrangements are in force to ensure that no more than minimal harm will be done to any water source, or its dependent ecosystems, as a consequence of its being interfered with in the course of the activities to which the approval relates.

***While aquifer interference approvals are not required to be granted, the minimal harm test under the Water Management Act 2000 is not activated for the assessment of impacts**. Therefore, this Policy establishes and objectively defines minimal impact considerations as they relate to water-dependent assets and these considerations will be used as the basis for providing advice to either the gateway process, the Planning Assessment Commission or the Minister for Planning."*

Cl 12 - "Compatibility of proposed mine, petroleum production or extractive industry with other land uses"

Clause 12(a)(i) of the Mining SEPP states:

"Before determining an application for consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must:

(a) consider:(i) the existing uses and approved uses of land in the vicinity of the development[24]"

The IPCIR identified the following land uses in paragraph 438:

> *"These land uses include, but are not limited to rural residential, hobby farms and commercial agricultural pursuits, with industrial, residential and commercial activities occurring further afield."*

Clause 12(a)(ii) states (emphasis added):

> *"Before determining an application for consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must:*
>
> *(a) consider:*
>
> (ii) whether or not the development is likely to have a significant impact on the uses that, in the opinion of the consent authority having regard to land use trends, are likely to be the preferred uses of land in the vicinity of the development, and[25]"

Nature of the surrounding land

Zoning

The IPCIR stated at paragraph 440:

> *"Regardless of the permissibility exemptions afforded to mining pursuant to clause 7 of the Mining SEPP, the WLEP has sought to exclude mining as a permissible use in all zones within the vicinity of the site. The nature of the existing surrounding land uses and those permissible under the WLEP are clearly different to the Project."*

It is submitted that paragraph 440 of the IPCIR is incorrect. The WLEP permits (with consent) underground mining in the following three zones within and in the vicinity of the site (all within **2km** of the Projects):

Zones	Distance of the Zones to the Projects
IN1 General Industrial	The Hume Coal Project is approximately 2km from areas zoned IN1

[24] Land uses near the mine are described in Chapter 5 of the EIS, and include industrial, forestry, environmental management, agricultural, rural residential and residential developments.

[25] Employment impacts are discussed in Chapter 9.4.3 of the EIS. Valuing externalities was discussed in Chapter 19.3.6 of the EIS. Visual Impact Assessment found that visual impact was low, therefore low impacts to tourism (EIS Appendix N and RTS Appendix 5). Impact on existing agriculture is negligible and the Applicant holds sufficient water licences for the proposed development.

Underground mining is permitted with consent	The Berrima Railway Project lies on areas zoned IN1
IN2 Light Industrial Underground mining is permitted with consent	The Projects are approximately 2km from areas zoned IN2
IN3 Heavy Industrial Underground mining is permitted with consent	The Hume Coal Project is approximately 2km from areas zoned IN3 The Berrima Railway Project is approximately 1m from areas zoned IN3

Further, the WLEP permits development for the purpose of underground mining in many other zones regulated by the WLEP.

In the R3 Medium Density Residential Zone for example, item 3 provides that *"any other development not specified in item 2 or 4"* is permitted with consent.

Item 2 permits without consent, *"Environmental protection works; Home-based child care; Home occupations".*

While item 4 prohibits many uses, it does not prohibit development for the purpose of "underground mining":

"Agriculture; Air transport facilities; Amusement centres; Animal boarding or training establishments; Backpackers' accommodation; Camping grounds; Car parks; Caravan parks; Cemeteries; Commercial premises; Correctional centres; Crematoria; Depots; Eco-tourist facilities; Electricity generating works; Entertainment facilities; Extractive industries; Farm buildings; Farm stay accommodation; Forestry; Freight transport facilities; Function centres; Funeral homes; Heavy industrial storage establishments; Home occupations (sex services); Hotel or motel accommodation; Industrial retail outlets; Industrial training facilities; Industries; Mortuaries; Open cut mining; Passenger transport facilities; Pond-based aquaculture; Recreation facilities (major); Registered clubs; Research stations; Restricted premises; Rural industries; Rural workers' dwellings; Service stations; Sewage treatment plants; Sex services premises; Storage premises; Vehicle body repair workshops; Vehicle repair stations; Veterinary hospitals; Waste or resource management facilities; Water recreation structures; Water supply systems; Wharf or boating facilities; Wholesale supplies". Since 'underground mining' is not listed in items 2 or 4, it follows that 'underground mining' is ***permitted with consent*** in Zone R3 in the WLEP.

The Dictionary to the WLEP provides that the term 'extractive industry' **excludes** mining**:**

> ***"extractive industry*** *means the winning or removal of extractive* ***materials (otherwise than from a mine****) by methods such as excavating, dredging, tunnelling or quarrying, including the storing, stockpiling or processing of extractive materials by methods such as recycling, washing, crushing, sawing or separating, but does not include turf farming.*
> ***Note.***

*Extractive industries are not a type of **industry**—see the definition of that term in this Dictionary."*

*"**Mine** means any place (including any excavation) where an operation is carried on for mining of any mineral by any method and any place on which any mining related work is carried out, but does not include a place used only for extractive industry."*

*"**Mining** means mining carried out under the Mining Act 1992 or the recovery of minerals under the Offshore Minerals Act 1999, and includes—*

(a) the construction, operation and decommissioning of associated works, and

(b) the rehabilitation of land affected by mining.

Note.

Mining is not a type of industry—see the definition of that term in this Dictionary."

The WLEP provides that 'Extractive industry' does not include a 'mine', which is a place where 'mining' is carried out, and 'mining' is mining carried out under the Mining Act. Therefore, the prohibition against 'extractive industry' in Zone R3 does not prohibit mining.

Similarly, zone R3 prohibits 'Industry', but the definition of 'industry' excludes 'mining'.

*"**industry** means any of the following—*

(a) general industry,

(b) heavy industry,

(c) light industry,

***but does not include**—*

(d) rural industry, or

(e) extractive industry, or

*(f) **mining."***

The use 'open cut mining is similarly defined to exclude underground mining'.

*"**open cut mining** means mining carried out on, and by excavating, the earth's surface, but does not include underground mining."*

The WLEP defines 'underground mining' to exclude open cut mining.

"underground mining means—

(a) mining carried out beneath the earth's surface, including bord and pillar mining, longwall mining, top-level caving, sub-level caving and auger mining, and

(b) shafts, drill holes, gas and water drainage works, surface rehabilitation works and access pits associated with that mining (whether carried out on or beneath the earth's surface),

but does not include open cut mining."

Therefore, since 'underground mining' is not listed in items 2 or 4, 'underground mining' is ***permitted with consent*** in Zone R3 in the WLEP. Below is a table of all the zones in the WLEP and the permissibility of mining in those zones:

	Open cut mining permitted with consent	**Underground mining permitted with consent**	**Mining prohibited**
1	RU1 Primary Production	R3 Medium Density Residential	RU2 Rural Landscape
2		R5 Large Lot Residential	RU3 Forestry
3		B1 Neighbourhood Centre	RU4 Primary Production Small Lots
4		B2 Local Centre	R2 Low Density Residential
5		B4 Mixed Use	SP1 Special Activities
6		B5 Business Development	SP2 Infrastructure
7		B7 Business Development	RE1 Public Recreation
8		IN1 General Industrial	RE2 Private Recreation
9		IN2 Light Industrial	E1 National Parks and Nature Reserves
10		IN3 Heavy Industrial	E2 Environmental Conservation
11		SP3 Tourist	E3 Environmental Management
12			E4 Environmental Living

This table shows that 12 out of 24 zones in the WLEP permit either open cut and/or underground mining with consent(i.e. 50% of the possible zones in the WLEP). Indeed, the WLEP regards underground mining to be potentially so benign that it is permissible in a variety of zones such as the R3 and R5 *residential* zones, B4 Mixed Use zone and SP3 Tourist zone.

With mining being permissible in 12 out of 24 possible zones in the WLEP, it is incorrect to conclude at paragraph 440 *that "The nature of the* existing surrounding land uses and *those permissible under the WLEP are clearly different to the Project".*

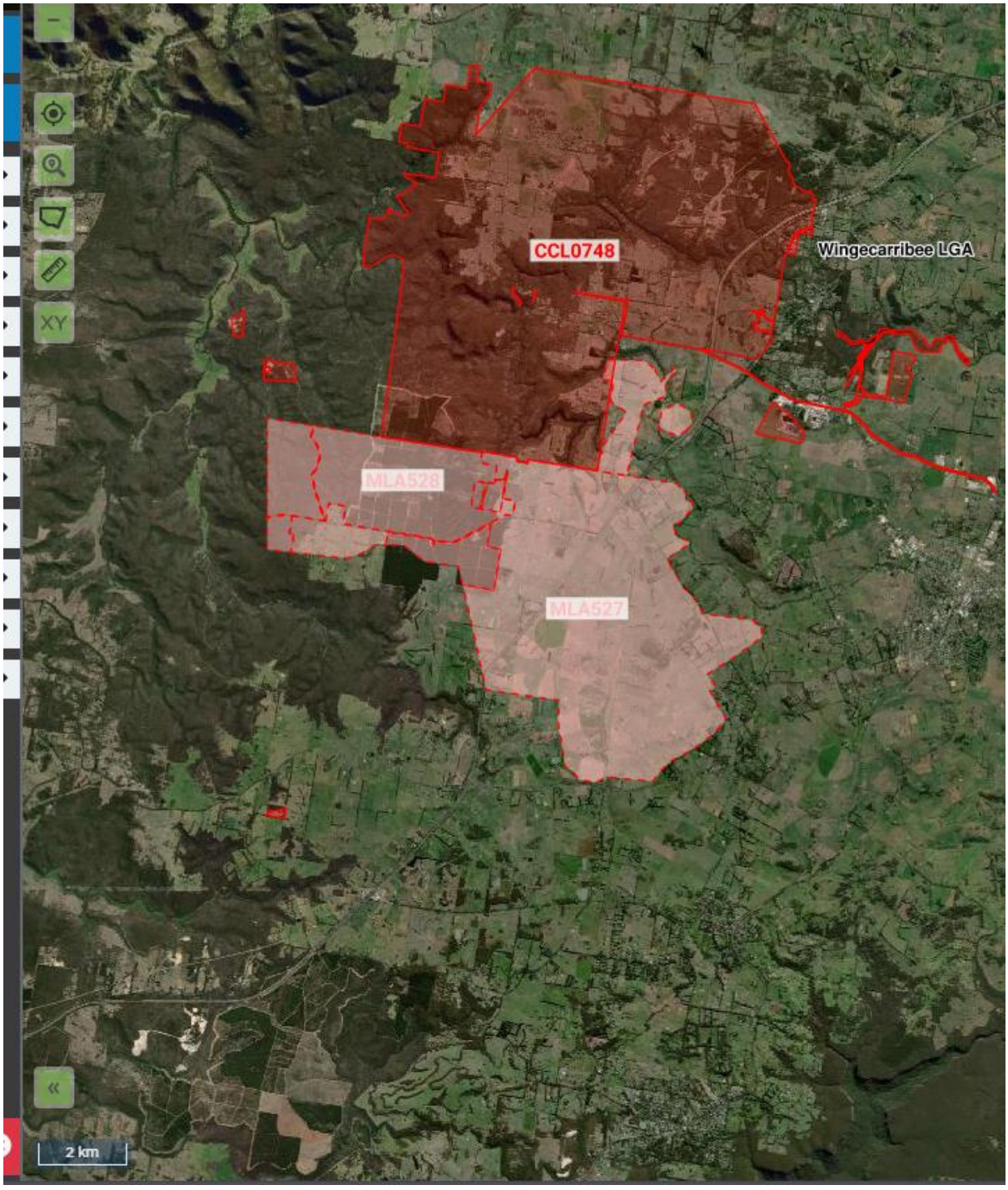
In addition, it should be noted that one of the express aims of the WLEP is to ensure that minerals are mined rather than left sterile. Clause 1.2(2)(o) states that a particular aim of the WLEP is (emphasis added):

"to ensure that ***extractive resources and mineral deposits are not rendered sterile*** *by future development, but at the same time ensuring that* ***subsequent extraction****, open cut mining and transportation activities are undertaken in a way that maintains residential amenity,"*

The conclusion in paragraph 440 that *"The nature of the existing surrounding land uses are clearly different to the Project"* is also incorrect. There are currently five quarries in operation, one coal mine in care and maintenance, and one quarry approved but not built in the vicinity of the Projects, all within the WLEP area, and all between **0-10km** distance from the Projects.

Below is a map of the Projects and the vicinity as depicted on Minview, an NSW government website[26], with red boundaries showing current mining leases, accessed on 11/2/2020:

[26] <www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/geoscience-information/services/online-services/minview>.



The below table shows the details of current mining leases in the vicinity of the Projects, all in the Wingecarribee Local Government Area and within **0-10km** from the Projects:

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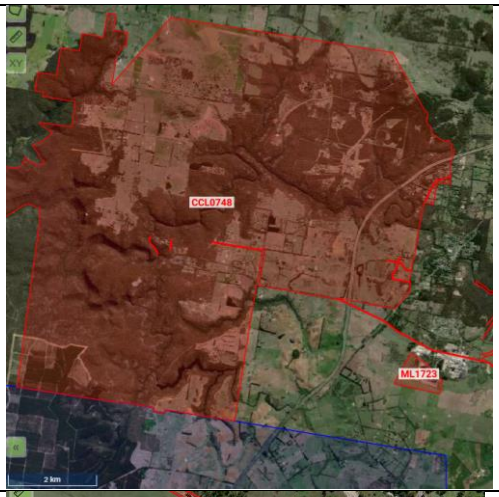
Mining lease number	Mineral and Zone	Status	Approx. distance	Plan view
CLL0748	Coal, underground Zoned E2, E3, RU2, RU4, SP2, E2, RE1	Care and maintenance	0km (adjacent)	
ML1723	Clay/Shale, open cut Zoned IN3	Operating	0km (adjacent)	
M(MO)L0006	Clay/Shale, Kaolin, Structural Clay, open cut Zoned E3	Open cut mine. Latest modification approved in 2017, not yet built	1km	

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Mining lease number	Mineral and Zone	Status	Approx. distance	Plan view
	Penrose quarries, open cut Zoned RU3	Operating	10km	
M(MO)L0008	Clay/Shale, Kaolin, Structural Clay, open cut Zoned E3	Operating	2km	

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Mining lease number	Mineral and Zone	Status	Approx. distance	Plan view
ML6143	Kaolin, Structural Clay, open cut Zoned E2	Operating	1km	
PLL1236	Bauxite, Clay/Shale, Kaolin, Structural Clay mine, open cut Zoned E2	Operating	5km	

What is of interest is that *none of the* **six** open cut mines within 10km of the Projects are on lands zoned RU1, which is the only zone in WLEP that permits open cut mining with consent. That is, it is the normal practice in the Wingecarribee Shire Council to rely on the Mining SEPP to override the WLEP zoning restrictions for mining.

It is also noted that, consistent with the express aim of not rendering mineral deposits sterile under cl 1.2(2)(0) of the WLEP, the Wingecarribee Local Government Area (light blue border) contains the Tahmoor underground coal mine and Dendrobium underground coal mine to the north east.

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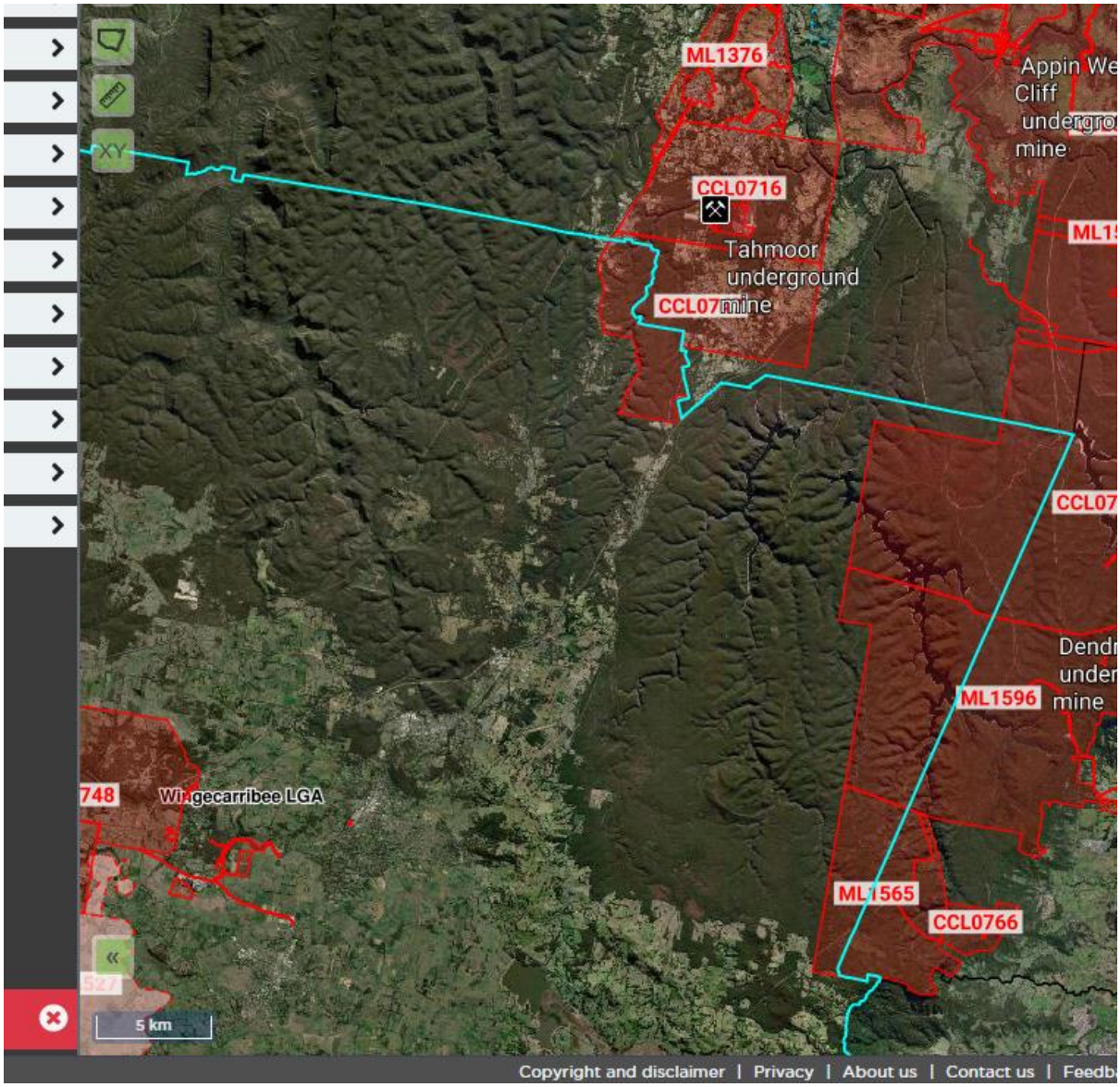

The Applicant submits that there are clear similarities between a quarry and a coal mine:

- both extract valuable material from the ground;
- an open cut quarry is akin to an open cut mine, where the topsoil and overburden is stripped to expose and extract the underlying material; and
- both a quarry and an open cut mine impact surrounding aquifers and draw groundwater into the workings.

As such, it is factually incorrect for the IPCIR to conclude at paragraph 440 that *"The nature of the existing surrounding land uses and those permissible under the WLEP are clearly different to the Project"*.

Significant impact

The IPCIR provided a preliminary conclusion at paragraph 442 that:

> *"442. Based on the Material currently before it, the Commission finds that at this stage the Project may create negative impacts on the preferred land uses. As discussed in the sections above there are uncertainties about the extent of the impacts of the Project and further information is required to determine whether it would be "significant" or can be mitigated to the extent that it is acceptable".*

The Applicant submits that this paragraph is both factually and legally incorrect.

Based on the Commission's reasoning in paragraphs 439 and 441 of the IPCIR, the preferred uses of land in the vicinity can be found in the WLEP. With 12 out of 24 possible zones in WLEP permitting mining, and with one of the specified aims of the WLEP being to "extract" mineral deposits such as coal, it is clear that one of the preferred land uses outlined in the WLEP is mining. Therefore, the Applicant submits that it is incorrect for the IPCIR to conclude in paragraph 442 that the *"Projects may create negative impacts on **the** preferred land uses", as if "**the** preferred land uses"* excludes mining. The Projects are at least beneficial to one of the preferred land uses (i.e. 'mining').

The second error is that the scientific facts and the environmental assessment clearly show that the Projects do not create significant negative impacts on preferred land uses, and where impacts have been identified, they have been mitigated or minimised to the fullest extent practicable (so as not to preclude the benefits of other land uses, such as agriculture and tourism and the aesthetic values attributed to the surrounding landscape, taking account of nearby industrial activities, previously approved by the Department and/or Council).

In this regard, it should also be noted that the PAR and IPCIR do not appear to properly recognise that any negative impacts on preferred land uses are temporary (i.e. the Projects will not continue indefinitely).

The Applicant also submits that uncertainties about the extent of the impacts of an approvable major mining project are common and can be appropriately addressed by way of conditions of consent.

As stated by Preston CJ of LEC in the *Ulan case*, the question to be addressed is whether there is *"sufficient, credible information upon which to assess the impacts of a project and make a decision"* if the modelling output *on "impacts are considered plausible and there were no outstanding … issues that might impede development of underground mining".*[27]

Applying the law to the facts, the environmental assessment provided by the Applicant is more than *"plausible"*, and has been found to be fit for purpose by multiple peer reviewers. As such, the

[27] *Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185 at [95].

consent authority has sufficient information to determine that the impacts, together with the mitigation measures, do not have significant impacts on the preferred land uses, and that mining is compatible with those preferred land uses.

A legally "proper" way of dealing with any *residual* uncertainty is by way of adaptive management conditions of consent, as stated by Preston CJ of LEC in the *Ulan* case (emphasis added):

> *"Such an adaptive management response is a **proper** approach to deal with uncertainty as to potential impacts."*[28]

Impermissible reliance on objects of a zone

The Applicant submits that the Department's reliance on the objects of land use zones to conclude that the Projects *"may not be compatible with the existing, approved and likely preferred land uses"* is not a permissible use of the objects of the zones.

In *Abret Pty Ltd v Wingecarribee Shire Council* [2011] NSWCA 107, an issue before the Court of Appeal was the role of the objects of a zone in determining whether a seniors housing development was prohibited or permissible under the WLEP.

In the first instance, the trial judge held that the seniors housing was prohibited in the zone despite the fact that it is *technically permissible*, on the basis of an *"inference"* that the "primary focus of the [WLEP], read together" was "preserving prime rural land".

> *"35 When one looks at the relevant provisions of the applicable instruments, the inference simply must be drawn that, while seniors housing is to be encouraged, it is not to be approved at the expense of what is clearly the primary focus of the instruments, read together, namely preserving prime rural land, such as the subject site, and cl 13(3) of the LEP clearly ' defines the conditions under which [it] can be erected ' ...*
>
> *36 The fact that ' seniors housing ' is defined in the LEP cannot and does not make seniors housing generally permissible. One discerns a major intention of the draftsman as the preservation of prime rural land. One house per 40ha covers all housing development on such land, and you cannot overcome it by classifying the project as seniors housing. I accept the Council's submissions in this respect ..."*[29]

The *"relevant provisions of the applicable instruments"* that influenced the trial judge were:

1. The protection of prime crop and pasture land is also a particular aim of the WLEP under cl 2(2)(d), which stated:

[28] *Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185 at [99].
[29] *Abret Pty Ltd v Wingecarribee Shire Council* [2011] NSWCA 107, at[21].

"protect the agricultural production potential of rural land and prevent fragmentation of viable agricultural holdings, particularly where land is designated as being of prime crop and pasture potential";

2. The land zone objective stated:

"(a) to provide suitable land for agricultural use,
(b) to regulate the subdivision of rural land to ensure that actual or potentially productive land is not withdrawn from production and to prevent the fragmentation of viable rural holdings, particularly in those areas designated as having prime crop and pasture potential,
...
(g) to ensure development is carried out in a manner that minimises risks from natural hazards, particularly bushfires and flooding,
(h) to recognise that rural localities cannot be economically provided with the level of services that apply in urban locations, and
(i) to recognise the value of the rural scenic landscape to the local tourist economy and to protect these areas from small holding rural subdivision."

On appeal, the Court of Appeal held that the trial judge committed an error of law because it is impermissible to let objects of a zone control permissibility of development (emphasis added):

"42…. In my opinion, the trial judge erred in his approach and conclusions at [35] and [36]. Dealing first with [35], it is apparent that his Honour's reasoning is directed to the ***objectives of the zoning table. They are not provisions of the LEP that control development.*** *Rather, they set the framework in which the LEP operates.* ***The objectives themselves are not necessarily consistent, but reflect the conflicting demands*** *upon development within the particular Local Government Area. For example, there is an apparent conflict between paras (d) and (i) of the objectives. One aims for the protection of the agricultural production of prime crop and pastoral land: para (d). The other aims to provide a variety of residential environments: para (i). There is no provision in para (i), as there is in para (n), which promotes multiple occupancy, but not on prime and crop and pasture land. It was not suggested by Council that there is a priority of objectives in the clause****. Accordingly, there was no basis for the trial judge to rely upon the objective in para (d) rather than the objective in para (i).***

43. As the objectives themselves do not dictate permissibility…"

The IPCIR noted at paragraph 425 that (emphasis added):

*"425. The Department's PAR concluded that "…****that the project is not necessarily incompatible*** *with the existing or likely land uses in RU3 or SP2.* ***However, the objectives of the E2 and E3 zone are aimed*** *at protecting existing historic, ecological, cultural and aesthetic values.* ***Similarly, the RU2 zoning is focussed (sic) on maintaining*** *the "rural landscape character" and "encouraging sustainable primary industry"."*

> *"Importantly, both **the E3 and RU2 zones include non-mandatory objectives**, which reflects that there are specific characteristics of the existing land uses that Council would like to protect. Based on the limited list of permitted land uses and the non-mandatory objectives in both zones, the Department is concerned that a new coal mine may not be compatible with the "existing, approved and likely preferred land uses" of these zones."*

The Applicant submits that the Department's PAR at paragraph 425 contains the same error as that considered in the *Abret* case. The Department noted that the Project is not incompatible with existing or likely land uses in particular land use zones, but then seeks to rely on the objectives of the zone to state that the Project may be incompatible. This is an error, since the Department uses the zoning objectives to override the substantive provisions, when *"objectives of the zoning table … are **not** provisions of the LEP that control development."*[30].

The intention of the NSW Government to allow the Mining SEPP to override provisions in LEPs can be clearly seen in key government documents relating to the making of the Mining SEPP.

For example, in a 2006 brief to the Minister concerning the need for the draft Mining SEPP 2007,[31] it is explained on page 3 that the predecessor SEPP to the Mining SEPP was introduced to stop a LEP requirement regarding landscape impacts preventing approval of a coal mine:

- **SEPP 45 - Permissibility of Mining (1995)** states that where an EPI has performance criteria which must be complied with in order for the development to be permissible, mining can be undertaken even though it may not comply with the performance criteria. This SEPP was introduced to deal with the Bengalla coal mine which did not comply with Muswellbrook local environmental plan which stated that the only mining which was permissible is that which does not intrude into the landscape. The SEPP makes permissible mining which is likely to be inconsistent or incompatible with zoning objectives and/or environmental performance criteria. These provisions need to be updated and consolidated into the new SEPP, with SEPP 45 revoked.

This point was repeated in the Department's 2007 brief recommending the making of the draft Mining SEPP[32] ' at pages 2-3:

[30] *Abret Pty Ltd v Wingecarribee Shire Council* [2011] NSWCA 107 at [42].

[31] 'Department of Planning - Sector Strategies and Systems Innovation - For decision - Draft SEPP – Mining, Petroleum and Extractive Industries' Briefing to Minister, signed 26/9/2006.

[32] Department of Planning, sector strategies and systems innovation – for decision – Recommendation to make the Mining, Petroleum Production and Extractive Industries SEPP 2007'.

- **Performance criteria in LEPs**

SEPP 45 - Permissibility of Mining (1995) states that where an EPI has performance criteria which must be complied with in order for the development to be permissible, mining can be undertaken even though it may not comply with the performance criteria. This SEPP was introduced to deal with the uncertainty of mining permissibility where performance criteria would otherwise restrict or prevent a mine from operating (e.g. Bengalla coal mine did not comply with Muswellbrook local environmental plan which stated that the only mining which was permissible is that which does not intrude into the landscape). SEPP 45 makes permissible mining which is likely to be inconsistent or incompatible with zoning objectives and/or environmental performance criteria. These provisions have been updated and consolidated into the new draft SEPP, and will require SEPP 45 to be revoked. Furthermore, the provisions for mining under SEPP 45 have been extended in the draft SEPP to include petroleum production and extractive industries development.

- Remove the need to comply with any provisions in an LEP which state that mining, extractive industries or petroleum production development is permissible only if the development meets certain performance provisions of the plan, for example in relation to visual amenity. This replaces SEPP 45 which was introduced in response to a Bengalla mining court case, and extends the policy's application to include extractive industries and petroleum production;
- Provide for an assessment of land-use compatibility as part of an application for

- The mining industry is a key export industry, generating significant earnings for the State in terms of royalties and as an important employer in regional NSW. The emerging petroleum industry has potential to result in local gas supplies of importance particularly in relation to security of energy supply and in the State meeting its greenhouse targets. The extractive industries supply essential building material to meet housing, infrastructure, commercial and industrial needs to deliver economic growth in NSW.

The above excerpts confirm that the Mining SEPP is designed to (emphasis added) "makes permissible mining which is likely to be inconsistent or incompatible with **zoning objectives** and/or environmental performance criteria". The Applicant considers that it is perverse that the Department is now seeking to rely on cherry-picked zoning objectives to recommend refusal of a mining project, when the very Mining SEPP that the Department championed specifically states that one of the purpose of the Mining SEPP is to not let local zoning objectives prevent the approval of mines.

Austral Bricks example

When the Projects are compared with other major development within the WLEP, the Applicant submits that there is a double standard being applied.

The new Austral Brick open cut quarry project was wholly within the WLEP E3 Environmental Management zone[33], which prohibits extractive industries like an open cut quarry. The E3 zone prohibits mining, industry, and extractive industries.

The Austral Bricks project involves the development of an open cut shale quarry, approximately 1 km from Berrima, originally approved in 2012 on 51 ha of land. The mine lease was amended in 2014/15 to increase the size of the quarry from 7.7 ha to 11.7 ha, to extract a maximum of 150,000

33 <majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=MP08_0212%2120190708T035521.692%20GMT> at page 3-13 (accessed on 18/2/2020).

tonnes per annum. In 2019, the Wingecarribee Shire Council approved a masonry manufacturing facility covering an additional 60,000 sqm, capable of producing 50 million bricks per annum.

For that project, the Department raised no issues of incompatibility with other land uses, despite the new open cut project being in the vicinity of the Project, and the new open cut project being closer to the town of New Berrima and Berrima than the Projects. The Department simply referred to how the Mining SEPP overrides the WLEP zoning and stated (emphasis added):

> *"The site is predominantly zoned E3 Environmental Management under the Wingecarribee Local Environmental Plan 2010. … Extractive industry development is not listed as a use that is permissible with consent in the E3 zone, and is therefore prohibited development in the E3 zone. Notwithstanding this prohibition,* ***Clause 7(3)(a) of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 makes extractive industry development permissible*** *with consent in the E3 zone (as agriculture is permissible in the zone). Further, the Department has considered the* ***Objectives of the zone*** *including the objective to "provide for a range of development and land use activities that provide for rural settlement….****and other types of economic and employment development****". The Department considers the proposal to be generally consistent with the objectives of the zone. Consequently, the* ***Project as a whole is permissible*** *with consent on the site. Consequently, the Minister or his delegate* ***may approve the Project****."*[34]

The Department reaffirmed this stance as recent as 2015 in relation to a modification application[35].

This approach is in stark contrast to the comments made by the Department in relation to the Projects, where, despite the Mining SEPP similarly overriding the WLEP, the Department referred to the same objects of E3, but this time ignored the words *"other types of economic and employment development"* to state that a new coal mine is not compatible:

> *"425. The Department's PAR concluded that "…that the project is not necessarily incompatible with the existing or likely land uses in RU3 or SP2. However, the objectives of the E2 and E3 zone are aimed at protecting existing historic, ecological, cultural and aesthetic values. …*
>
> *"Importantly, both the E3 and RU2 zones include non-mandatory objectives, which reflects that there are specific characteristics of the existing land uses that Council would like to protect. Based on the limited list of permitted land uses and the non-mandatory objectives in*

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34 <majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=MP08_0212%2120190708T035552.163%20GMT> at page 7 (accessed on 18/2/2020).

35 'DPE Assessment Report – New Berrima Shale Quarry – Modified Extraction Area' at page 5 <live.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2015/11/new-berrima-shale-quarry-modification/department-of-planning--environments-assessment-report/assessmentreportpdf.pdf>(accessed on 18/2/2020).

both zones, the Department is concerned that a new coal mine may not be compatible with the "existing, approved and likely preferred land uses" of these zones."

This example of using one section of the objects of a zone to recommend the approval of a new open cut quarry, and using a different section of the exact same objects to recommend refusal of a new underground coal mine, is arbitrary and has no legal basis, because there is no *"priority of objectives in the clause", and "*objects do not dictate permissibility" [36].

Korea-Australia Free Trade Agreement (KAFTA) - Investor-State Dispute Settlement (ISDS)

Investor-state dispute settlement (ISDS) is a mechanism in a free trade agreement (FTA) or investment treaty that provides foreign investors, including Australian investors overseas, with the right to access an international tribunal to resolve investment disputes.

As Australia has a Free Trade Agreement with South Korea (KAFTA)[37], the Applicant submits that KAFTA is relevant to the Department's assessment of the Projects.

Article 11.3.1 of the KAFTA requires Australia to accord to investors from Korea *"no less favourable than it accords, in like circumstances"* to Australian investors. It states:

> *"Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."*

This obligation extends to regional level of government, such as the State of NSW. Article 11.3.3 states:

> *"The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part."*

A 'catch-all' clause exists to guarantee a minimum standard of treatment of aliens, which includes fair and equitable treatment. Article 11.5.1 states:

> *"Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security."*

[36] Abret Pty Ltd v Wingecarribee Shire Council [2011] NSWCA 107 at [42]–[43].
[37] <https://dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Pages/full-text-of-kafta.aspx>

The conduct of the State of NSW will be attributed to the Australian Government for the purposes of the FTA. Article 1.3.1 states:

> *"In accordance with customary international law and unless otherwise provided in this Agreement, for the purposes of determining a Party's compliance with this Agreement, the exercise of, or failure to exercise, governmental authority of that Party:*
>
> *a. by a central, regional or local level of government; or*
>
> *b. delegated by a central, regional or local level of government,*
>
> *shall be considered an exercise of, or failure to exercise, governmental authority by a Party."*

The Austral Brick example above is just one example of the Department's inconsistent, arbitrary and legally incorrect assessment of recent mining projects, which Hume Coal considers to be unfair and unequitable.

If there is a breach by Australia or the State of NSW of the obligations under the KAFTA, the parent company of the Applicant, POSCO, can commence an international arbitration against Australia for damages under the 'Investor-State Dispute Settlement' (ISDS) mechanism. Article 11.16.1 states:

> *"In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*
>
> *a. the claimant, on its own behalf, may submit to arbitration under this Section a claim:*
>
> *i. that the respondent has breached:*
>
> *A. an obligation under Section A;*
>
> *B. an investment authorisation; or*
>
> *C. an investment agreement; and*
>
> *ii. that the claimant has incurred loss or damage by reason of, or arising out of, that breach"*

The ISDS article has been successfully used by private companies to receive compensation for damages suffered as a result of governments unfairly refusing to award mining leases.

A recent example is the case of *Tethyan Copper v Pakistan*[38], where the Pakistan Government was ordered on 12 July 2019 to pay the Australian company Tethyan Copper USD$4bn plus interest (the claim was brought in 2012) in damages, plus legal fees of USD$59million and arbitration costs of USD$3.7million. The International Arbitrator held that, in refusing to grant a mining lease, the State of Pakistan did not meet the legitimate expectations set out in the legislative instruments relevant to mining leases, denying justice through unfair and inequitable treatment to Tethyan. The tribunal further found that the refusal to grant the mining lease was tantamount to expropriation by depriving the investment of its value and thus was in breach of the treaty. The large damages

[38] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1).

amount reflects the revenue foregone as a result of Pakistan's unfair and unequitable conduct in failing to grant the mining lease.

Assessment of incompatibility

With the above in mind, the Applicant has provided (through the EIS, RTS and response to the IPCIR) additional information requested by the Commission, which demonstrates that there are no impacts to other preferred land uses that would preclude these land uses from co-existing with mining, and that the public benefits accruing from the Projects are additional to those from existing and continuing land uses.

The Applicant's response to the IPCIR addresses the matters raised by the Commission, and further identifies measures to minimise environmental impacts of the Projects.

The Applicant respectfully submits that the Projects will not have significant impact on the preferred land uses (other than the preferred land use of mining) because:

- it is a temporary underground coal mine with imperceptible subsidence impacts; and
- impacts to other land uses do not exist, are negligible and are mitigated to the fullest extent practicable (so as not to jeopardise the economic, environmental, cultural, heritage and aesthetic values of the surrounding landscape).

Cl12(a)(iii) "any ways in which the development may be incompatible with any of those existing, approved or likely preferred uses, and"

Cl12(c) "evaluate any measures proposed by the applicant to avoid or minimise any incompatibility, as referred to in paragraph (a) (iii).”

The consent authority must consider the incompatibility of the Projects with existing, approved or likely preferred uses pursuant to cl 12(a)(iii) of the Mining SEPP.

In this regard, the Applicant refers to paragraph 443 of the IPCIR (emphasis added):

> *“443. Based on the Material, and for the reasons cited above the Project is a land use that is different to the surrounding existing uses and to those uses that are permissible in WLEP**. <u>The Project is likely to generate impacts that are beyond those that would be generated by the preferred land uses</u>**. <u>The Commission finds that the Project **may be incompatible with these land uses.”**</u>*

The Applicant submits that the question of whether the Projects will generate impacts that are greater than other preferred land uses is the wrong question to ask under the Mining SEPP.

The question before the consent authority under cl12(a)(iii) of the Mining SEPP is whether the Projects are ***incompatible***, rather than whether the Projects generate *more* impacts. It is possible that a development could generate more impacts than other land uses, but not be incompatible

with those land uses. An example is a non-caving underground mine, since the surface activities can continue unabated whilst mining is underfoot with no discernible impacts on other land uses.

The Projects' environmental assessment confirms that there will be negligible impacts on existing agricultural output, tourism, heritage and the general cultural and visual landscape of the area subject to underground mining and surface infrastructure activities.

To the extent that any incompatibility exists, this incompatibility has been mitigated to the fullest extent possible, including by adopting the following measures:

- choice of underground mining method;
- location of the pit top;
- non-caving, imperceptible subsidence; and
- progressive sealing of the mine workings to expedite groundwater recovery.

The Applicant submits that the Projects are not incompatible with the other preferred land uses, such as rural residential use, hobby farm use, commercial agricultural use, industrial use, residential use and commercial use.

Cl12(b) "evaluate and compare the respective public benefits of the development and the land uses referred to in paragraph (a) (i) and (ii), and"

Clause 12(b) of the Mining SEPP provides that the consent authority must evaluate and compare the respective public benefits of Projects and the land uses referred to above.

Paragraph 444 of the IPCIR states:

> *"444. Based on the Material, the Commission accepts that there could be significant public benefits derived from job creation and the revenue and expenditure generated as a result of the Project. The public of NSW could also benefit from increased Government expenditure directly resulting from mining royalties. However, based on the Material,* ***the extent of the economic benefits of the Project remain unclear. Furthermore, there remain uncertainties about the impacts of the Project, including its social impact****. The Commission, at this stage, is therefore unable to evaluate the respective public benefits of the Project and the surrounding land uses."*

The Applicant makes the following observations relating to paragraph 444.

Presence of uncertainty is not a bar to approval

The consent authority is obliged to evaluate competing factors, even if there are some residual uncertainties. As Preston CJ of LEC stated in the *Ulan* case:

> *"95 First, the mere existence of uncertainty is not a bar to an administrative decision-maker making a decision to issue an approval for a project. At a basic level, there will always be*

> *uncertainty in environmental impact assessment. By its nature, environmental impact assessment involves a prediction of likely future impacts of a project that has not yet occurred on an environment about which there will invariably be imperfect knowledge. Where the environment is to a large extent hidden, such as underground strata and aquifers, the uncertainty is necessarily heightened. Nevertheless, decisions need to be made."*[39]

Applying this established principle to the Projects, the Applicant submits that the *"mere existence of uncertainty is not a bar to [the consent authority] making a decision to issue an approval for the [Projects]".* More specifically, any residual uncertainty does not prevent the consent authority from evaluating and comparing the respective public benefits of the Projects and other land uses.

The threshold for *"sufficient certainty"* is mere *"credible" or "plausible"*

The Applicant submits that there is *"sufficient certainty"* to undertake the assessment required under cl12 of the Mining SEPP because the various water and economic models and environmental assessment reports for the Projects are *"credible"* and *"plausible".*

The *Ulan* case provides clear guidance as to the threshold for certainty, identifying that it needs to be "credible" or "plausible" information only (emphasis added):

> *"95 … The question is whether there* ***is sufficient, credible information*** *upon which to assess the impacts of a project and make a decision. That is a factual question for the decision-maker to answer*
>
> *"96 Secondly, the degree of uncertainty about water supply was, in the end, not as extreme as Ulan suggests. Through the process of the Director-General's environmental assessment requirements, the IHAP hearing and report, the Mackie Report, and Moolarben's detailed responses thereto, and the Director-General's Environmental Assessment Report, the issue of the availability of water supply to match water demands for the Project was thoroughly canvassed.*
>
> *97 Uncertainty as to the issue was reduced through this process. The IHAP, represented by Mr Mackie on the groundwater impacts, concluded that "the uncertainty relating to groundwater model predictions" had been reduced, that the revised models were more* ***representative*** *of the underground mining process, that the "predicted groundwater related impacts are considered* ***plausible****", and that there were* ***"no outstanding groundwater related issues that might impede development*** *of underground mining". The Director-General in the Environmental Assessment Report to the Minister agreed with the IHAP's conclusions."*

The Applicant submits that there is sufficient certainty for the consent authority to approve the Projects. This is because the scientific modelling done to date, together with the overall

[39] *Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185 at [95].

environmental assessment, is "credible", and the models are "representative of the underground mining process", and the predicted impacts are "plausible". More specifically:

1. The Groundwater model has been accepted as Class 2 by the Applicant's modeller, the Applicant's independent peer reviewer, the Department's peer reviewer, and also by the third peer reviewer appointed at the Commission's recommendation.

2. The economic model has been certified as credible and plausible. It has been peer reviewed. The Department's economic assessment attempts to manufacture uncertainty where none exists. Arbitrary uncertainty was created by applying the public project (Treasury) guidelines to a privately-owned project, something that has not been done for any other private project in NSW. The Department's economic assessment manufactures a 'lack of transparency' by claiming that commercially sensitive financials were not provided, when they are not provided for all other private projects.

3. The social impact assessment, together with the updated archaeological heritage and cultural landscape assessment, satisfies the requirements of the Heritage Council.

4. The Applicant's peer reviewed mining method and mine safety strategy has been assessed as credible and plausible, and determined by the Resources Regulator to be credible and plausible.

Another test for determining whether sufficient certainty exists to approve a coal mine is whether there are outstanding technical *"issues that might impede development of underground mining".*

In holding that there was sufficient certainty to allow an approval decision, Preston CJ of LEC noted in the *Ulan* case that (emphasis added):

> *"97 Uncertainty as to the issue was reduced through this process. The IHAP, represented by Mr Mackie on the groundwater impacts, concluded that "the uncertainty relating to groundwater model predictions" had been reduced, that the revised models were more representative of the underground mining process, that the "predicted groundwater related impacts are considered plausible", and that there were* ***"no outstanding groundwater related issues that might impede development of underground mining"****."*

Similarly, there is sufficient certainty as there is *"no outstanding [technical] related issues that might impede development of underground mining"*. There is more than sufficient information. The level of detail provided in this development application process is above and beyond what has conventionally been needed in obtaining a determination, when compared with other underground mining applications.

Residual uncertainty is to be dealt with by way of conditions of consent

Even if there is residual uncertainty as contended by the Department in its PAR, the Applicant refers the consent authority to the *Ulan* case, which confirms that the appropriate approach to deal with

such residual certainty is to impose appropriate conditions of consent, rather than to refuse the project.

In the *Ulan* case, the NSW Planning Minister chose to deal with residual water supply uncertainty by imposing a condition of consent of adaptive management. Preston CJ of LEC said such an adaptive condition of consent is the "appropriate" response (emphasis added):

> *"98 Thirdly, the Minister's decision responded to the residual uncertainty (the uncertainty as to the water supply may have been reduced but it had not been eliminated). Although the preferred model MC 1.6 predicted that the water supply from inflows to the open cut and underground mines together with pumping from the proposed borefield would provide sufficient water supply for all stages of the Project, there was still a possibility that if the permeabilities were lower, as predicted by model MC 1.9, insufficient water would be able to be obtained from the borefield over the planned mine life. A precautionary approach to this possibility (and the residual uncertainty) was recommended to the Minister by the IHAP and the Director-General.*
>
> *99 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…***[40]

It is submitted that this is an appropriate way for the consent authority to deal with any matters of residual uncertainty (rather than to not evaluate the respective public benefits or to refuse the Projects).

Evaluation

In evaluating and comparing the respective public benefits, it should be noted that all of the existing land uses could continue to occur concurrently with the Projects (except, for a temporary period, grazing on 117 ha of land dedicated to surface infrastructure). As such, the comparison of the different land uses is a moot question, because the question is not an 'either or', mutually exclusive decision between, say, an open cut mine and other permitted land uses.

Rather, the Projects can proceed concurrently with all other land uses. Therefore, the public benefit from the Projects is an ***additional*** public benefit, not a replacement public benefit. The Applicant submits that it does not add much value to evaluate and compare the public benefits of *non-competing* land uses, except to demonstrate the relative public benefits of mining against the existing benefits of agriculture, tourism, cultural and heritage landscape (and the overall well-being of the local and regional area served by the Projects).

[40] *Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185 at [98]-[99].

Cl12(b) does not require the Projects to outweigh other land uses in terms of public benefit

The Applicant respectfully submits that Recommendation 29(ii) asks the wrong question of the Department. Recommendation 29(ii) states (emphasis added):

> *"The Department should include in its Final Assessment Report to the Commission an assessment of the public benefits of the Project which give consideration of whether:*
> *…*
>
> *ii. the public benefits of the Project outweigh the public benefits of other land uses (clause 12 (b) of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007)."*

Clause 12(b) requires the consent authority *to "evaluate and compare the respective public benefits".*

In contrast to R29, clause 12(b) does ***not*** state that the consent authority must consider whether the project's public benefit will outweigh other land uses. Further, clause 12(b) does not state that in order to be approved, a project's public benefit *must* outweigh the public benefits of other land uses. The consent authority can evaluate and compare the respective public benefits without having to decide whether the public benefits of the development *"outweigh the public benefits of other land uses"*.

In reality, not all land uses are in conflict with each other, and not all land uses are mutually exclusive. In cases such as the Projects, where two different land uses can co-exist at the same location, vertically abutting, one on the surface and one underground, it makes no sense for there to be a question of which land use will produce the most public benefit. Both public benefits can be enjoyed at the same time.

It is recognised that all land uses have public benefits *and* public costs. In the case of the Projects, it can be demonstrated that the public benefit of all land uses (including the Projects) has a public benefit when considered as a whole, comprising a range of land uses which contribute to community well-being through a diversified, robust economy.

The comparison of the public benefits of the different land uses is important to understand the Projects' incremental public benefit (that is, *in addition* to the public benefits of other land uses, rather than 'instead of'). Other land uses can continue unabated whilst the Projects are underfoot, because mining will be underground, not occupying the same area as the other land uses, and, as the impacts from the Projects are not significant and mitigated, there is no incompatibility with other land uses.

For the above reasons, the Applicant requests that the Department and the Commission assess the *additional* public benefits that will accrue as a result of the Projects.

Conclusion on compatibility

Under cl 12 of the Mining SEPP, the consent authority must consider the compatibility of the Projects with other land uses. The Applicant has shown from the aims of the WLEP, and the fact that mining is permissible in half the potential zones under the WLEP, that one of the preferred land uses is mining.

Aside from mining land uses, the Applicant has demonstrated with sufficient certainty - in that the impacts modelled are "credible" (to use the language of the LEC in the *Ulan* case) - that, after the mitigation measures, there will not be significant impacts on other land uses and the Projects are not incompatible with other land uses.

The Applicant has also compared the respective public benefits and public costs of the Projects and demonstrated that the net public benefit of the Projects *is in addition* to the benefits provided by other land uses. Therefore, the consent authority can approve the Projects without having to make a value decision as to which land uses has the biggest net public benefit. Notwithstanding this, a comparative analysis of other land uses allows the consent authority to make an informed decision as to the cumulative public benefits of all land uses, particularly where the Projects impacts do not displace the public benefits of existing land uses.

Sustainability

The IPCIR noted what the Commission considered to be an important distinction relating to the sustainability of different land uses in paragraph 446:

> *"446. However, based on the Material, the Commission's provisional view is that the preferred land uses are sustainable in the long term and will play a significant role in the future growth and development of the Southern Highlands region. The Commission considers that this is an important and relevant distinction in evaluating the public benefits of the development and the land uses referred to in paragraph (a) (i) and (ii). As with the other matters addressed in this Report, further consideration of this issue will need to be given as further information becomes available."*

However, sustainability of different land uses is of little relevance to the current decision before the consent authority given that there is no need to choose between mutually exclusive land uses that compete and conflict with each other. For example, compare the Projects with an open cut mine proposal where the open cut may not restore the productive capacity of the land after mining and would leave a perpetual void with other attendant permanent waste rock emplacements. In this respect, it is also important to emphasise that the Projects are only a temporary development, and will not prevent the sustainable use of the site after the underground mine is permanently closed (and surface infrastructure is removed from the land).

The Projects, being an underground mine with imperceptible subsidence, disposing of waste material underground through progressive rehabilitation and water reinjection to maximise the

period of groundwater recovery, with negligible or mitigated impacts on other land uses, can **co-exist** with other land uses in the landscape.

It could also be argued that the issue of relative sustainability between different land uses, say an underground coal mine, a cement works, brick quarry, grazing, tourism, agriculture and ancillary activities should be given little weight, as the consent authority is able to assess the public benefits from the Projects ***in addition*** to the public benefits from other land uses.

The Applicant submits that it would be irrational to refuse to grant consent to the Projects on the basis that the Projects are not consistent with the principles of ESD. Taking the principle of intergenerational equity as an example, the Projects – as the temporary or time limited development of an underground coal mine - would deliver significant economic benefits to the present generation and future generations, whilst only having negligible impacts on future generations.

The term "sustainability" was introduced in environmental policy discourse when the World Commission on Environment and Development published *Our Common Future* (1987). "Sustainability" was defined as *"development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*

The Permanent Court of Arbitration in the Iron Rhine Railway case[41] found that the exercise of environmental protection did not mean the exclusion of development rights, nor could the measures to protect the environment render the exercise of development rights be made unreasonably difficult.

Further refinement was evident in the *US Shrimp case, Recourse to Article 21.5 by Malaysia*.[42] The WTO Panel found that the concept of sustainable development *"is elaborated….so as to put in place development that is sustainable…that 'meets the needs of the present generation without compromising the ability of future generations to meet their own needs'."*

That is, principles of ecologically sustainable development considers the need of the present generation as well as the future. Hume Coal submits that the product coal is essential for the present generation, and as stated by the NSW's 'Net Zero Plan, Stage 1 2020-2030' report, a new coal mine does not jeopardise the future generation because of the whole suite of GHG emission reduction gains to be had elsewhere.

[41] Permanent Court of Arbitration: In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway, between the Kingdom of Belgium and the Kingdom of the Netherlands (May 24, 2005)

[42] 8 United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia (15 June 2001), WTO Doc. WT/DS58/RW at note 202

Cl12A "Consideration of voluntary land acquisition and mitigation policy"

Cl12A (1)

"In this clause:
***voluntary land acquisition and mitigation policy* means the *Voluntary Land Acquisition and Mitigation Policy* approved by the Minister and published in the Gazette on the date on which *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Air and Noise Impacts) 2018* is published on the NSW legislation website."**

The provisions of the VLAMP have been considered in the noise and air quality assessments, as discussed in Chapters 11 and 12 of the EIS and the RTS respectively.

Cl12A (2)

"Before determining an application for consent for State significant development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider any applicable provisions of the voluntary land acquisition and mitigation policy and, in particular:"

Cl12A (2)"(a) any applicable provisions of the policy for the mitigation or avoidance of noise or particulate matter impacts outside the land on which the development is to be carried out, and"

Cl12A (2) "(b) any applicable provisions of the policy relating to the developer making an offer to acquire land affected by those impacts."

Cl12A "(3) To avoid doubt, the obligations of a consent authority under this clause extend to any application to modify a development consent for State significant development for the purposes of mining, petroleum production or extractive industry."

Cl12A "(4) This clause extends to applications made, but not determined, before the commencement of this clause."

Requested by the Landholder

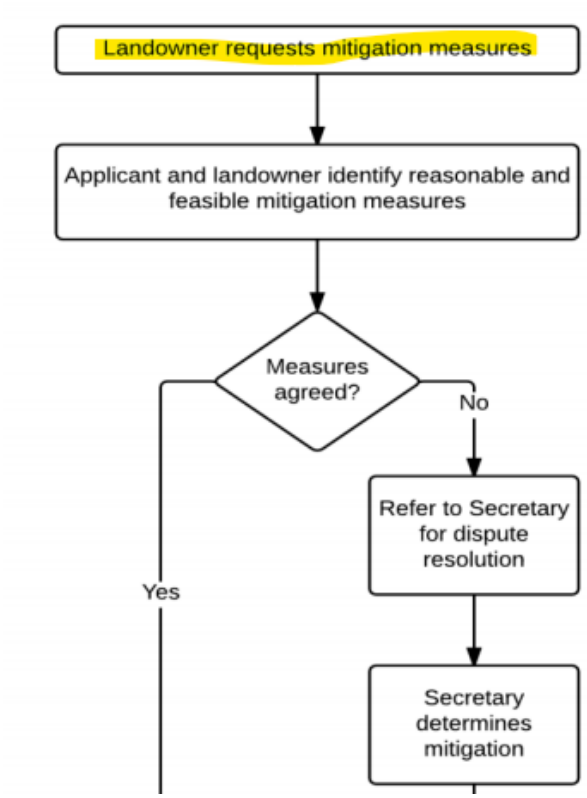
The Applicant notes that the VLAMP[43] states at page 10 that, the mitigation measures are performed at the request of the landholder:

[43] <www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Att-E-Revised-VLAMPaccessible-version.pdf?la=en> (dated September 2018).

Voluntary mitigation process

Under the terms of any conditions of consent, mitigation works can only be carried out by applicants on private land when requested, in writing, by the landowner.

The process for obtaining these mitigation measures is summarised in Figure 2 below.



The VLAMP confirms that for noise and dust, the Applicant's ability to obtain land access to perform mitigation measures is built into the very process by being invited on the land by the landholder.

Hence, that is why it is called the '*Voluntary* land acquisition and mitigation policy' – it is voluntary for the landholders to opt in, but compulsory for the Applicant once the landholder opts in.

The Applicant submits that there is no policy, legal or logical reason that the position relating to the mitigation of groundwater impacts should work differently to that for noise and dust impacts. That is, the make good arrangements for groundwater impacts would be made good by the Applicant, when requested to do so by the landholder. If the landholder elects not to request make good arrangements, the make good obligation lies dormant until the landholder elects to make the request.

Conventional Standard Compensatory Water Condition of Consent

Conventional standard 'compensatory water' conditions of consent are in place for some fourteen mine approvals. They require the provision of 'compensatory water' in the event that mining

impacts on the availability and quantity of water to which a landowner has a legal entitlement. The compensatory condition mechanism is triggered by realised mining impacts (rather than anticipated impacts).

For example, on 29 August 2029 the IPC approved the United Wambo project[44] and issued the following compensatory water condition of consent that is similar to all other coal mine approvals in NSW:

Compensatory Water Supply

B41. Prior to the commencement of mining operations, the Applicant must notify owners of privately-owned licensed groundwater bores that are predicted to have a drawdown of greater than 2 metres as a result of the development.

B42. The Applicant must provide a compensatory water supply to any landowner of privately-owned land whose rightful water supply is adversely and directly impacted (other than an impact that is minor or negligible) as a result of the development, in consultation with DPIE Water, and to the satisfaction of the Planning Secretary.

B43. The compensatory water supply measures must provide an alternative long term supply of water that is equivalent, in quality and volume, to the loss attributable to the development. Equivalent water supply should be provided (at least on an interim basis) as soon as practicable after the loss is identified, unless otherwise agreed with the landowner.

B44. If the Applicant and the landowner cannot agree on whether the loss of water is to be attributed to the development or the measures to be implemented, or there is a dispute about the implementation of these measures, then either party may refer the matter to the Planning Secretary for resolution.

B45. If the Applicant is unable to provide an alternative long term supply of water, then the Applicant must provide compensation, to the satisfaction of the Planning Secretary.

Notes:

- *The Water Management Plan (see condition B52) is required to include trigger levels for investigating potentially adverse impacts on water supplies.*
- *The burden of proof that any loss of surface water or groundwater access is not due to mining rest with the Applicant.*

The condition of consent is in same form as that recommended by the DPE in DPE's preliminary assessment report[45]. The IPC simply adopted the DPE's recommended compensatory water conditions and concluded at paragraph 255 of the State of Reasons dated 29 August 2019 that the abovementioned compensatory water condition of consent is adequate because it "appropriately manages and mitigates" the water resource impacts:

> "water resources have been adequately assessed and the IESC's advice has been appropriately considered and incorporated in the conditions of consent. Potential impacts are appropriately managed and mitigated, with trigger levels imposed for identifying potential adverse impacts and a Water Management Plan to manage potential impacts, for the reasons set out in paragraphs 381-391"

The conventional water compensation provision provides a fair and equitable mechanism to:

(a) mitigate impacts on water supply by the Applicant, at the landowner's request;
(b) compensate for such impacts in circumstances where mitigation measures are not feasible; and

[44] <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/determination/ssd-7142-recommended-conditions-of-consent-final.pdf>
[45] <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/department-of-planning-and-environment-assessment-report/appendix-f-recommended-conditions.pdf> at B55-B58

(c) appropriately confer the Secretary of the Department with a function to resolve disputes between the Applicant and the landowners as to mitigation measures and the provision of compensatory water supplies.

In many cases, the provision of compensatory water supply is also dealt with as part of a Site Water Management Plan. For example, the Cadia East SSD Consent (Condition 35 Schedule 3) states that the following must be included in the Site Water Management Plan:

> *"measures to mitigate and/or compensate potentially affected landowners in accordance with compensatory water supply requirements in Condition 24…"*

It is accepted practice by the Department to utilise such standard conditions, including dispute resolution by the Secretary of the Department. Incidentally, the Applicant is not aware of any recorded occurrences where the Department has been called upon to resolve a dispute.

Neither the DPE nor the IPC raised any issues relating to the procedural or technical feasibility of implementing the make good measures under the standard compensatory water condition of consent in the United Wambo case or in other cases. Indeed, it would be perverse for the DPE to question the adequacy of the standard condition of consent that the DPE itself recommends the IPC to make in all previous cases.

Nevertheless, that is what happened in the case of Hume Coal, as noted in paragraph 11 of the IPCIR. Hume Coal regards that this is just another example of the NSW Government according Hume Coal treatment less favourable than NSW accords in like circumstances to its other investors.

Applicant's Protocol for Implementing Water Compensatory Condition of Consent

The Applicant has developed an approach to implementing a conventional water compensation condition which is consistent with the Department's VLAMP. The VLAMP can be regarded as an analogous policy for the purpose of proposing mitigation measures for mining related impacts on aquifer water supply works.

The Applicant's implementation protocol for compensatory water is to offer water compensation or mitigation prior to mining impacts, subject to conducting a baseline bore assessment. This is unlike the application of the conventional water compensatory provision that applies post-impact. The baseline bore assessment and subsequent mitigation will be offered to potentially impacted landholders based on predictive groundwater modelling.

Any requirement for access to conduct initial baseline monitoring and subsequent mitigation is only done at the request of the landowner, similar to the mechanism applicable to VLAMP mitigation measures for noise and dust.

Whilst the standard mitigation measures for noise and dust apply for the project life, impacts on water supply works are temporary, occur at different times for different bores and require varying forms of mitigation during the life of the mine. Mitigation ceases when the monitored bore standing water level returns to less than the 2m drawdown threshold.

The mechanism for the implementation of standard water compensation conditions of consent is further detailed in the 'make good' section of the Applicant's response to the IPCIR.

Cl14 "Natural resource management and environmental management

Cl14(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:"

It is important to recognise the ambit of clause 14 of the Mining SEPP. Clause 14(1) relevantly states:

> *"before granting consent …, the consent authority must consider whether or not the consent should be issued subject to conditions ..."*

Two important points should be made about the application of cl14(1) above:

Condition precedent

Clause 14 (1) is triggered only where the consent authority is minded to grant consent *after* having regard to all of the mandatory considerations in s4.15 of the EP&A Act. It states*: "before granting consent …".*

This language can be contrasted with cl12, which requires the determining authority to consider something in deciding *whether* to grant consent:

> *"**Before determining** an application for consent … the consent authority must…"*

That is, the factors listed in cl14 have no direct bearing on *whether* to grant the development consent, because at that stage of the decision making, the condition precedent is not satisfied, the condition precedent being that the consent authority has already decided to grant the consent. As such, the matters in cl14 should not be relied upon to justify the refusal to grant development consent.

Consequence

Where cl 14 is engaged, the consent authority must consider whether specific conditions of consent should be imposed on the consent to be granted. Clause 14(1) relevantly states (emphasis added):

> *"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…**"*

That is, the consequence of considering clause 14 is not to refuse the project. That is because you cannot have a condition of *consent* if there is no consent for the condition to attach to. The only consequence of cl 14 applying is that there could be additional or amended conditions of *consent*.

Example of misinterpretation

The Applicant submits that the IPC Panel's Statement of Reasons[46] for the refusal of the Bylong Coal Project involved the misinterpretation of cl14. At paragraph 696, the IPC stated (emphasis added):

> *"The Commission notes that the Applicant has committed to develop an Energy and Greenhouse Gas Management Plan which will set out measures to minimise GHG emissions from the Project (refer to paragraph 660). The Commission notes that these measures appear to relate only to Scope 1 and 2 GHG emissions.* ***The Commission is therefore of the view that the Applicant has not minimised Scope 1, 2 and 3 GHG emissions to the greatest extent practicable as required under Clause 14****(1)(c) of the Mining SEPP. The Commission also notes that there are no offset measures proposed in either the Project or Recommended Revised Project from the Applicant."*

In that case, the IPC misconstrued the provisions of cl14 as imposing an obligation on the proponent to minimise GHG emissions to the greatest extent practicable. However, clause 14 does not require the proponent to do anything. Clause 14 places an obligation on the decision maker, and the decision maker only. Clause 14 states:

> *"Before determining an application for consent …* ***the consent authority must****…"*

Clause 14 does not state that the '*…Applicant* must*…'.*

Further, the IPC cited clause 14 in the final paragraphs 817-819 in support of one of the reasons for refusing the development application:

> *"The Commission has considered the merits of both the Project and Recommended Revised Project and finds that:*
> *…*
> - *the Recommended Revised Project will slightly reduce the GHG emissions compared to the Project. However, the Commission is of the view that the Applicant has not minimised Scope 1, 2 and 3 GHG emissions to the greatest extent practicable as required under Clause 14(1)(c) of the Mining SEPP.*
> - *…*
>
> *In determining the development application for the Project, the Commission has taken into account all of the matters in this Statement of Reasons, including the anticipated benefits and adverse impacts of the Project, and on balance has reached the following conclusion.*
> *For all the reasons outlined in this Statement of Reasons for Decision (not limited to those set out in this Conclusion), the Commission has determined to refuse consent for the Project dated 18 September 2019."*

This is an error because the only consequence of cl 14 is that the decision maker must consider whether additional conditions of consent should be imposed on the *consent*. Instead, the IPC in that

[46] Dated 18/9/19, SSD 6367.

case relied on cl 14, a clause requiring condition of *consent* to *refuse* the project, compounding a series of legal missteps.

Cl14(1)(a) "that impacts on significant water resources, including surface and groundwater resources, are avoided, or are minimised to the greatest extent practicable,"

The Applicant is open to discuss any additional condition of consent to ensure that impacts on significant water resources, including surface and groundwater resources, are avoided, mitigated or are otherwise minimised to the greatest extent practicable.

Cl14(1)(b) "that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable,"

The Applicant is open to discuss any additional condition of consent to ensure that that impacts on threatened species and biodiversity, are avoided, mitigated or are minimised to the greatest extent practicable.

Cl14(1)(c) "that greenhouse gas emissions are minimised to the greatest extent practicable."

The Applicant is open to discuss any additional condition of consent to ensure that greenhouse gas emissions are minimised to the greatest extent practicable.

The following conditions could be contemplated could include the Applicant to sell only to countries that are signatories of the Paris Agreement and to implement all practical and feasible measures to mitigate greenhouse gas emissions, as included in the Applicant's GHG response to the IPCIR.

Cl14(2) "Without limiting subclause (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions."

To the extent that it is relevant, the Applicant refers to and adopts the legal submissions made by United Wambo in the document titled 'Response to the findings in the *Rocky Hill* and *Wallarah 2* cases on climate change and greenhouse gas emissions', dated 14 April 2019.[47]

[47] <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 17/2/2020).

Cl14(3) "Without limiting subclause (1), in determining a development application for development for the purposes of mining, the consent authority must consider any certification by the Chief Executive of the Office of Environment and Heritage or the Director-General of the Department of Primary Industries that measures to mitigate or offset the biodiversity impact of the proposed development will be adequate."

An assessment of greenhouse gas emissions, biodiversity, and water resources were addressed in Chapters 13, 10 and 7 of the EIS and RTS respectively.

"State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011"

The IPCIR stated in relation to the Drinking Water SEPP in paragraph 434:

> *"434. In relation to the Drinking Water SEPP the Commission finds should the proposal to impound water in the underground voids behind bulkheads be achieved and no discharge of mine related water occurs to surface waters, the Commission is satisfied that the Project can achieve the objectives of the Drinking Water SEPP. The Commission notes however that the provision of additional information may change this view."*

The Applicant agrees with the Commission that the Projects can achieve the objectives of the Drinking Water SEPP.

It is also noted that no surface water discharge will occur and that no water treatment plant forms part of the development.