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6 May 2019

Mr Tony Pearson
Chair of Panel
Independent Planning Commission
Level 3, 201 Elizabeth Street
Sydney NSW 2100

By email: ipcn@ipcn.nsw.gov.au

Dear Mr Pearson

United Wambo Open Cut Coal Mine Project (SSD 7142) and associated modifications (DA 305-7-2003 MOD 16 and DA 177-8-2004 MOD 3) (Project): Supplementary Submission

1. We confirm we act for Hunter Environment Lobby (**HEL**) in relation to the Project.

2. We refer to:

   a. the Ashurst submission dated 14 April 2019 containing a response to the findings in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (***Rocky Hill* case**) and *Australian Coal Alliance Inc v Wyong Coal Pty Ltd* [2019] NSWLEC 31 (***Wallarah 2* case**) on climate change and greenhouse gas (**GHG**) emissions (**Ashurst Submission**);

   b. the Umwelt submission dated 12 April 2019 containing a response to the Independent Planning Commission (**IPC**) February 2019 public meeting (**Umwelt Submission**); and

   c. the letter dated 7 March 2019 from Mr Gary Wills, Operations Manager, United Wambo Joint Venture, to you (**Wills Letter**),

   (collectively, the **Proponent's April Submissions**).

3. In HEL's view, if the Proponent's April Submissions are to be taken into account by the IPC, the community should be afforded the right to respond to them in accordance with the principle of procedural fairness. HEL respectfully submits that any such community responses should be considered by the IPC despite being submitted after 14 February 2019.

4. Accordingly, EDO NSW is instructed to provide the following supplementary submission on behalf of HEL (**Supplementary Submission**) in response to the Proponent's April Submissions.

5. We note that due to the constrained timeframe for the preparation of this supplementary submission in light of the anticipated imminence of the IPC's decision on the Project, it has not been possible to address every aspect of the Proponent's April Submissions with which HEL disagrees. If the Supplementary Submission does not address a point raised in the Proponent's April Submissions, it should not be taken to mean the HEL concedes that point.

6. However, the Supplementary Submission can be considered to be a response to several key issues contained in the Proponent's April Submissions, in particular, those relating to GHG emissions and their likely contribution to climate change. If requested by the IPC, EDO NSW can provide further submissions on behalf of HEL elaborating on any point in the Supplementary Submission or in the Proponent's April Submissions.

Response to key points in Ashurst Submission

7. In response to several key points in the Ashurst Submission, HEL submits:

   a. While the *Rocky Hill* case is not binding authority, it is persuasive authority;

   b. The *Wallarah 2* case demonstrates the Court's tacit approval of the "wrong time" test for the assessment of fossil fuel developments;

   c. GHG emissions and their likely contribution to climate change were a key reason in the Court's "intuitive synthesis" of factors leading to the refusal of development consent in the *Rocky Hill* case; and

   d. The IPC, as a primary decision-maker determining the development application for the Project on its own merits, should consider the reasoning in the *Rocky Hill* case highly persuasive and is not constrained by the *Wallarah 2* case in doing so.

8. These submissions are discussed below.

a. While the *Rocky Hill* case is not binding authority, it is persuasive authority

9. As a decision of the NSW Land and Environment Court (**LEC**) in its class 1 jurisdiction, the *Rocky Hill* case involved the LEC substituting its decision in place of that of the original decision-maker, the Planning Assessment Commission (**PAC**) (now called the IPC).[1] The *Rocky Hill* case was a hearing *de novo* (a hearing anew), allowing new evidence to be adduced.[2] As a merits appeal, the *Rocky Hill* case was an exercise of administrative power.[3] It is acknowledged that such decisions do not create legal "precedent" because they are not exercises of judicial power. However, it is important to note that

[1] *Land and Environment Court Act 1979* (NSW), s 39(2); *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [7].
[2] *Land and Environment Court Act 1979* (NSW), s 39(3).
[3] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; [1979] FCA 39.

merits appeal decisions such as the Rocky Hill case, while not binding authority, are "**persuasive**" authority.[4]

10. In regard to the Administrative Appeals Tribunal, which, like the LEC, hears appeals on their merits, *Douglas and Jones's Administrative Law* notes:[5]

> The AAT's decisions are considered to be **authoritative and persuasive, though not conclusive in determining questions of law**. The tribunal does not adhere to a strict doctrine of precedent (which would be inappropriate in the context of decisions on matters of fact and value).
>
> [Emphasis added.]

11. In the LEC, decisions in the class 1 jurisdiction often refer to other merits appeal decisions, despite not being legally bound by them.[6] This is not acknowledged in the Ashurst Submission. Preston CJ has stated extracurially:[7]

> … in merits review appeals, ECT [environmental courts and tribunals] decisions can add value to administrative decision-making by formulating and applying non-binding principles. The principles derive from the case at hand, but can be of more general applicability. This involves rulemaking by adjudication and is distinguishable from legislative rulemaking. ECTs undertaking merits review can add value to administrative decision-making by **extrapolating principles from the cases that come before them and publicising these to the target audience, who can apply them in future administrative decision-making**.
>
> [Emphasis added.]

12. Moreover, the LEC has developed "planning principles" for use in cases of a similar kind,[8] although they are not legally binding.[9] According to then Senior Commissioner Roseth, a decision that states a planning principle makes "the decision clearer to those who are affected by it. It also assists in making future decisions of a similar kind consistent with the first."[10] The LEC's use of

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[4] See, for e.g., *Thorpe v Commissioner of Taxation* [2014] AATA 210, [123].

[5] Roger Douglas et al, *Douglas and Jones's Administrative Law* (2018), The Federation Press: Sydney, p. 276.

[6] See, for e.g., *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48.

[7] Hon Justice Brian J Preston SC, 'Characteristics of successful environmental courts and tribunals', Presentation by the Hon Justice Brian J Preston SC to the Eco Forum Global Annual Conference Guiyang 2013: The 3rd Environmental Justice Seminar, 19-21 July 2013, <http://www.lec.justice.nsw.gov.au/Documents/characteristics%20of%20successful%20ects%20-july%202013.pdf>, pp. 48-49, viewed on 2 May 2019.

[8] NSW Land and Environment Court, 'Planning principles', <http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/planning_principles.aspx>, viewed on 1 May 2019. See also, Linda Pearson, 'Policy, principles and guidance: Tribunal rule-making' (2012) 23 Public Law Review 16, pp. 23-24.

[9] *Segal v Waverley Council* (2005) 64 NSWLR 177; [2005] NSWCA 310; [96], [99]. See also Clifford Ireland, 'Planning merits review and the doctrine of precedent' (2006) 27 Australian Bar Review 231.

[10] Senior Commissioner John Roseth, 'Planning Principles and Consistency of Decisions', Talk delivered by Dr John Roseth, Senior Commissioner, Land and Environment Court of New South Wales to the Law Society's Local Government and Planning Law Seminar, 15 February 2005,

planning principles was endorsed by the NSW Court of Appeal in *Segal v Waverley Council* (2005) 64 NSWLR 177; [2005] NSWCA 310 (***Segal***), in which the Court stated that although planning principles do not bind the LEC to reach the same outcome on similar cases, "consistency in the application of planning principles is, clearly, a desirable objective."[11] Planning principles have been applied by Councils and the Department of Planning in development assessments.[12]

13. While the *Rocky Hill* case does not expressly set out a "planning principle", it remains of high persuasive value. In particular, Preston CJ sets out an approach for the assessment of the environmental impacts of a fossil fuel development in "absolute" or "relative" terms:[13]

> [553] I consider the better approach is to evaluate the merits of the particular fossil fuel development that is the subject of the development application to be determined. Should this fossil fuel development be approved or refused? Answering this question involves consideration of the GHG emissions of the development and their likely contribution to climate change and its consequences, as well as the other impacts of the development. The consideration can be in absolute terms or relative terms.
>
> [554] In absolute terms, a particular fossil fuel development may itself be a sufficiently large source of GHG emissions that refusal of the development could be seen to make a meaningful contribution to remaining within the carbon budget and achieving the long term temperature goal. In short, refusing larger fossil fuel developments prevents greater increases in GHG emissions than refusing smaller fossil fuel developments.
>
> [555] In relative terms, similar size fossil fuel developments, with similar GHG emissions, may have different environmental, social and economic impacts. Other things being equal, it would be rational to refuse fossil fuel developments with greater environmental, social and economic impacts than fossil fuel developments with lesser environmental, social and economic impacts. To do so not only achieves the goal of not increasing GHG emissions by source, but also achieves the collateral benefit of preventing those greater environmental, social and economic impacts.

14. If the *Rocky Hill* case is considered to be a form of persuasive guidance (and HEL submits it should be considered highly persuasive),[14] HEL submits that it can reasonably be considered that the environmental impacts of the Project are sufficiently adverse in **both absolute and relative terms**.

15. In absolute terms, the Project, at 150 million tonnes (Mt) of run-of-mine (ROM) coal over a period of 23 years, is more than seven times larger than the Rocky

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<http://www.lec.justice.nsw.gov.au/Documents/speech_15feb05_roseth.pdf>, p. 2, viewed on 1 May 2019.

[11] *Segal v Waverley Council* (2005) 64 NSWLR 177; [2005] NSWCA 310; [96].

[12] Senior Commissioner Tim Moore, 'The Relevance of the Court's Planning Principles to the DA Process', <http://www.lec.justice.nsw.gov.au/Documents/neerg_21_may_2009_paper.pdf>, pp. 7-8, viewed on 1 May 2019.

[13] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [553]-[555].

[14] Linda Pearson, 'Policy, principles and guidance: Tribunal rule-making' (2012) 23 Public Law Review 16, pp. 32.

Hill coal mine, the aggregate greenhouse gas emissions of which Preston CJ found to be "sizeable".[15] On this basis, HEL submits that the environmental impacts arising from the greenhouse gas emissions that are an inevitable consequence of the Project warrant rejection in absolute terms.

16. In relative terms, HEL has commissioned extensive independent expert advice that has identified adverse impacts on and risks to biodiversity, groundwater and groundwater/surface water interactions, air quality, and noise. The purported economic benefits of the Project have also been shown to be significantly overstated. HEL further relies on **the supplementary independent expert report** (dated May 2019) produced by Mr Roderick Campbell, economics expert, in full. On this basis, the Project also warrants rejection in relative terms.

17. It must be considered that the context for Preston CJ's "absolute or relative impact" approach was his Honour's acceptance of expert scientific evidence about the carbon budget approach and the importance of an urgent, rapid and deep decrease in global GHG emissions. This led his Honour to the so-called "wrong time" basis for refusal. As his Honour stated:[16]

> In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.

18. The "wrong time" basis for refusal, and its application to the Project, is discussed further below in paragraphs [19]-[23].

b. The *Wallarah 2* case demonstrates the Court's tacit approval of the "wrong time" basis for refusal for the assessment of fossil fuel developments

19. HEL submits that statements made by Moore J in the *Wallarah 2* case demonstrate the LEC's tacit approval of the "wrong time" basis for refusal for the assessment of fossil fuel developments, as set out by Preston CJ in the *Rocky Hill* case. The "wrong time" basis for refusal effectively requires proponents to demonstrate why the fossil fuel reserves relevant to their project should be allowed to be exploited and burned, over and above other projects, at a time when a rapid and deep reduction in GHG emissions is needed to stay within the global carbon budget, and avoid dangerous climate change. This is particularly so given evidence that predicted GHG emissions from existing (including approved but not yet constructed) fossil fuel projects will already set us on course to exceed the carbon budget.[17]

[15] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [556].
[16] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [699].
[17] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [527], [697], [699].

20. We refer the IPC to the following observations made by Moore J, in that regard:

a. First, Moore J set out the "wrong time" basis for refusal in his judgment[18] and noted the "lucid" nature of Preston CJ's reasoning in applying that test, which formed one of the bases for the Court's refusal of the proposed Rocky Hill mine;[19]

b. Second, his Honour pointed out that the task of the LEC in its class 4 jurisdiction was entirely different to the task of the LEC in its class 1 jurisdiction in the *Rocky Hill* case. His Honour stated, importantly:[20]

> These are Class 4 judicial review proceedings in which I am examining the decision-making process for (**and not the decision merits of**) the consideration by the PAC of this proposed coal mine and its determination to approve it.
>
> **The greenhouse gas emission merit issues, which led to the conclusion by the PAC that these did not warrant refusal of this project, are not ones which I am considering**. To do so would be a fundamental error in my exercise of the Class 4 judicial review jurisdiction of this Court.
>
> That the PAC, in this case, and Preston CJ in the Gloucester Resources case, reached differing conclusions on these merit matters does not arise as a factor for my consideration in these proceedings. The Chief Judge determined the Gloucester Resources case on the basis of the evidence presented to him, whilst the PAC dealt with this proposed mine on the material presented to it.
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> [Emphasis added.]

Accordingly, it is unambiguous that his Honour did **not** consider the merits of the PAC's "laconic"[21] approach to addressing the scope 3 GHG emissions of the Wallarah 2 coal project. Contrary to the assertions in the Ashurst Submission, the *Wallarah 2* case **cannot** be taken as binding precedent for the merits of the PAC's approach to the Wallarah 2 coal project.

c. Third, his Honour recognised that a merits assessment will turn on the particular facts and circumstances of a proposal being considered and the evidence brought before the decision maker in respect to that proposal – which in the *Rocky Hill* case included evidence of the carbon budget approach underpinning the "wrong time" basis for refusal;[22]

d. Finally, Moore J expressly stated that although he found no **legal** error in the PAC's processes, he did **not** endorse the merits of the PAC's approach to addressing the scope 3 GHG emissions of the Wallarah 2 coal

[18] *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [34]-[35].
[19] *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [40].
[20] *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [36]-[38].
[21] *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [84].
[22] *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [39].

project[23] – in that instance the PAC determined (contrary to Preston CJ in the *Rocky Hill* case) that the impacts of GHG emissions from the downstream use of coal needed to be accounted for at the (unspecified) time and location where that coal is ultimately burnt, and not as part of the assessment of the impacts of the project itself.[24]

21. Further, it is important to note that the PAC did not have the benefit of evidence regarding the carbon budget when considering the impacts of scope 3 GHG emissions from the Wallarah 2 coal project. However, carbon budget evidence was before the Court in the *Rocky Hill* case and formed a basis for refusal of development consent to the Rocky Hill coal mine.

22. Significantly, equivalent carbon budget evidence to that which was before the Court in Rocky Hill is before the IPC in relation to the Project. Accordingly, and given the above, HEL submits that the correct approach to assessing the environmental impacts of the Project's scope 3 GHG emissions, in light of the evidence of the carbon budget, is to consider and apply the "wrong time" basis for refusal as developed by Preston CJ in the *Rocky Hill* case. This is because the task before the IPC, that is, determining the merits of a development, is the same as the task before the LEC in the *Rocky Hill* case.

23. Contrary to the assertions in the Ashurst Submission, HEL submits that the Proponent has **not** sufficiently demonstrated why the Project, over other existing and approved coal mine projects, should be permitted to facilitate the exploitation and burning of significant new fossil fuel reserves in light of the global carbon budget and the urgent need to significantly reduce GHG emissions to avoid dangerous climate change.[25] In this regard, HEL relies upon the following **independent expert reports** in full:

    a. the independent expert report (dated 11 December 2018) and supplementary independent expert report (dated 1 May 2019) produced by Emeritus Professor Will Steffen, climate science expert; and
    b. the independent expert report (dated 1 May 2019) produced by Mr Tim Buckley, carbon finance and coal demand expert.

c. GHG emissions and their likely contribution to climate change were a key reason in the Court's "intuitive synthesis" of relevant factors leading to the refusal of development consent in the *Rocky Hill* case

24. Contrary to the assertions in the Ashurst Submission, it cannot be denied that GHG emissions and their likely contribution to climate change were a key reason in the Court's "intuitive synthesis" of relevant factors leading to the refusal of development in the *Rocky Hill* case. So much is evident through the "134 lucidly explained paragraphs"[26] of Preston CJ's reasoning.

25. It can be acknowledged that GHG emissions and their likely contribution to climate change added a "further reason" to refusal based on "significant and

[23] *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [41].
[24] *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [41].
[25] *Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7* [697], [699].
[26] *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [40].

unacceptable planning, visual and social impacts".[27] However, to assert, as the Ashurst Submission does, that GHG emissions and climate change impacts were "certainly not the key reasons why the Rocky Hill Coal Project was refused"[28] is to ignore the "intuitive synthesis" of relevant factors by Preston CJ. "Intuitive synthesis" in a merits appeal context is a qualitative, balancing exercise – one which, for Preston CJ, did involve consideration of GHG emissions and climate change impacts. As his Honour stated:

> The Rocky Hill Coal Project will yield public benefits, including economic benefits, but it will also have significant negative impacts, including visual, amenity, social **and climate change impacts** and impacts on the existing, approved and likely preferred uses of land in the vicinity of the Project, which are all costs of the Project. Balancing the benefits and costs of the Project is, in the end, a **qualitative and not quantitative exercise**. I have previously likened it to a process of **intuitive synthesis** of the relevant factors: *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* at [141]. Forms of economic assessment such as cost benefit analysis, which quantify, monetise and aggregate different factors, assist but are not a substitute for the intuitive synthesis required of the consent authority in determining the development application.
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> [Emphasis added.]

26. The process of "intuitive synthesis" was utilised by the LEC in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347 (***Bulga LEC case***), which involved an application for extension of an existing open cut coal mine. In the *Bulga LEC* case, the exercise of a similar power under the former Part 3A of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) was described by Preston CJ as involving a "**polycentric**" problem:[29]

> The range of interests affected, the complexity of the issues and the **interdependence** of the issues, means that decision-making involves a polycentric problem. A polycentric problem involves a **complex network of relationships**, with interacting points of influence. Each decision made communicates itself to other centres of decision, changing the conditions, so that a new basis must be found for the next decision: Jowell J, "The Legal Control of Administrative Discretion" [1973] *Public Law* 178 at p 213.
>
> [Emphasis added.]

27. Preston CJ stated that issues concerning a polycentric problem are interlinked:[30]

[27] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [556].
[28] Ashurst Submission, [4.41].
[29] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347, [31].
[30] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347, [33].

> A decision about one issue raised by the carrying out of the project is linked by interacting points of influence to decisions about other issues, necessitating readjustment of the project (Jowell at p 214).

28. Therefore, the approach to determining a polycentric problem involved:[31]

> … 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**.
>
> [Emphasis added.]

29. The Court of Appeal dismissed a challenge to this approach in *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375.[32]

30. Accordingly, to deny that GHG emissions and their likely contribution to climate change were a key reason for refusal of development consent in the *Rocky Hill* case is to ignore Preston CJ's "intuitive synthesis" of relevant factors, which expressly included climate change impacts. It also ignores the interdependence of issues and the complex network of relationships in merits decision-making for polycentric problems, which were evident in the *Bulga LEC* case and are also present in the application for the Project before the IPC. Coincidentally, both the *Bulga LEC* case and the application for the Project before the IPC concern applications for the extension of existing open cut coal mines.

31. Importantly, to deny that GHG emissions and their likely contribution to climate change were a key reason for refusal of development consent in the *Rocky Hill* case is to ignore Preston CJ's "absolute or relative impact" approach, as discussed above in paragraph [13]. In expressly refusing development consent to the Rocky Hill coal mine, his Honour stated:[33]

> However, the **better reason for refusal is the Project's poor environmental and social performance in relative terms**. As I have found elsewhere in the judgment, the Project will have significant and unacceptable planning, visual and social impacts, which cannot be satisfactorily mitigated. The Project should be refused for these reasons alone. The GHG emissions of the Project and their likely contribution to adverse impacts on the climate system, environment and people adds a further reason for refusal. Refusal of the Project **will not only prevent the unacceptable planning, visual and social impacts, it will also prevent a new source of GHG emissions**. I do not consider the justifications advanced by GRL for approving the Project, **notwithstanding its GHG emissions**, are made out for the reasons I have given earlier.
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> [Emphasis added.]

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[31] *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347, [36].
[32] *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375 at [147]-[174].
[33] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [556].

32. Therefore, GHG emissions and their likely contribution to climate change were a key reason in Preston CJ's consideration of the environmental impacts of the Rocky Hill coal mine in relative terms. For the reasons provided above in paragraphs [15] and [16], HEL submits that the IPC can be reasonably satisfied that the Project can be refused development consent when considering its environmental impacts in **both** absolute and relative terms.

d. The IPC, as a primary decision-maker determining the development application for the Project on its own merits, should consider the reasoning in the *Rocky Hill* case highly persuasive and is not constrained by the *Wallarah 2* case in doing so

33. HEL submits that the IPC, as a primary decision-maker determining the development application for the Project on its own merits, should consider the reasoning in the *Rocky Hill* case highly persuasive.

34. The IPC's relevant functions are those of a consent authority for the purposes of Part 4 of the EP&A Act in the case of State significant development for which it is declared the consent authority by a relevant planning instrument.[34] The IPC is accordingly a primary administrative decision-maker, essentially acting as the Minister's delegate for relevant development applications requiring assessment under Part 4 of the EP&A Act.

35. The extent to which the IPC is bound by, or ought to consider, court decisions relevant to its determinations is therefore the extent to which any primary decision-maker is bound to do so.

36. In terms of the *Wallarah* 2 case, it is acknowledged that decisions made by a court in the exercise of its judicial power are binding in accordance with the established system of legal precedent. However, what is important to bear in mind is exactly what such decisions are authority **for**. A judicial review decision by a court involves a finding concerning the presence or absence of legal/jurisdictional error. Such decisions are authority establishing the legal bounds within which administrative decisions may be made.

37. Accordingly, the IPC is bound by any such judicial review decisions to the extent that they set out the limits of an administrative decision-maker's decision-making power. Judicial review decisions stand as authority for what will or will not constitute legal error. As Brennan J stated in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1:[35]

> 'The duty and jurisdiction of the court to review administrative actions do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. … [T]he scope of judicial review must be defined … in terms of the extent of power and the legality of its exercise … **the court's jurisdiction in judicial review goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of power**'.

[34] *Environmental Planning and Assessment Act 1979*, s 2.9(1)(a), s 4.5(a).
[35] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, [36].

[Emphasis added.]

38. The *Wallarah 2* case, for example, simply applies established principles concerning what amounts to a failure to have regard to a relevant consideration and determines, on the facts of that case, that the PAC (primary decision-maker) did in fact have regard to all relevant considerations (being those considerations to which it was bound to have regard) based on both its written reasons and the materials which it had before it and to which it had referred.

39. Moreover, as discussed above in paragraphs [19]-[20], the *Wallarah* 2 case did not disavow Preston CJ's approach to refusing development consent in the *Rocky Hill* case; in fact, it could reasonably be argued that the *Wallarah 2* case demonstrated tacit approval of Preston CJ's approach.

40. Essentially, the significance of judicial review decisions to primary decision-makers is as authoritative statements of the procedural framework within which such decision-makers must operate – they set out procedural requirements that must be complied with in order for a decision to be made within jurisdiction and according to law. Accordingly, judicial review cases cannot be thought of as providing "substantial" or "merits" guidance to a primary decision-maker in reaching a decision, which is an error of interpretation the Ashurst Submission appears to make.[36]

41. In contrast, the *Rocky Hill* case is far more relevant to the IPC's determination of the Project as the *Rocky Hill* case is a merits decision that considers similar issues regarding fossil fuel developments as those presently before the IPC, particularly in terms of GHG emissions and their likely contribution to climate change. The principle of consistency in administrative decision-making, although not of itself legally binding, means that justice not only involves an individual case being decided on its merits, but like cases being treated alike. This is particularly the case for "true administrative decision-making at the level of executive or local government",[37] which includes the IPC as a delegate of the Minister. Further, it can be reasonably postulated that "consistency is central to the idea of administrative justice, at least to the extent that it is widely recognised as an administrative law 'value'."[38]

42. The desire for consistency in administrative decision-making, not just on review but also by primary decision-makers such as the IPC, is a significant justification for the merits review process – what has been described as its "normative goal".[39] In order for the normative goal to be achieved, primary decision-makers (such as the IPC) should be able to take into account decisions of merits review bodies (such as the LEC in its class 1 jurisdiction)

[36] Ashurst Submission, [4.37]-[4.40].
[37] *Segal v Waverley Council* (2005) 64 NSWLR 177; [2005] NSWCA 310, [95].
[38] Emily Johnson, "Should 'Inconsistency' of Administrative Decisions Give Rise to Judicial Review?' (2013) 72 AIAL Forum 50, pp. 50-51.
[39] See, for e.g. Gabriel Fleming, 'Administrative Review and the "Normative" Goal – Is there anybody out there?' (2000) 28 *Federal Law Review* 61*;* Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' (1995), Chapter 6.

and apply them where possible so as to achieve consistent decision-making.[40] This, of course, does not detract from considering cases on their merits, but encourages treating like cases alike, particularly at the primary decision-making level, which is where the IPC is located.

43. Accordingly, the *Rocky Hill* case, for the foregoing reasons, can be appropriately considered a highly persuasive case for the IPC to take into account in its determination of the Project.

44. Moreover, the *Rocky Hill* case should be considered significantly more persuasive than the Queensland Land Court (**QLC**) cases cited in the Ashurst Submission.[41] Those cases should be regarded as far less persuasive, given that:

    a. those cases proceeded within a completely different statutory and jurisdictional (i.e. Queensland) context;
    b. those cases were decided in light of expert evidence presented at the time they were brought, rather than the latest expert evidence;
    c. the QLC does not make binding decisions in relation to the grant of mining tenures and environmental authorities, but rather merely makes non-binding recommendations to the Minister. It does not determine existing or future rights or obligations;[42] and
    d. the QLC is not a superior court of record.[43]

45. In contrast, the *Rocky Hill* case should be considered significantly more persuasive because:

    a. the *Rocky Hill* case proceeded within the same statutory and jurisdictional context as the present application before the IPC;
    b. the *Rocky Hill* case involves the latest scientific expert evidence;
    c. the *Rocky Hill* case is a "binding" decision on the parties involved in that case; and
    d. the LEC is a superior court of record[44] whose judges have the same status as judges of the NSW Supreme Court.[45]

46. Accordingly, HEL submits that the IPC should consider the reasoning in the Rocky Hill case highly persuasive and is not constrained by the *Wallarah 2* case (or the Queensland cases referred to in the Ashurst Submission) in doing so.

[40] Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' (1995), Chapter 6.
[41] The Ashurst Submission also refers to several QLC decisions that were appealed to the Queensland Court of Appeal, but appeals to the Queensland Court of Appeal are only on judicial review grounds.
[42] *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107.
[43] *Land Court Act 2000* (Qld), s 4(2).
[44] *Land and Environment Court Act 1979*, s 5(1).
[45] *Land and Environment Court Act 1979*, s 9(2).

Response to Umwelt Submission

47. HEL submits that the Umwelt Submission does not change its position already expressed nor its reliance on the expert reports already submitted by EDO NSW on behalf of HEL.

Response to Wills Letter

48. HEL submits that any correspondence or report that is provided to the IPC should be made publicly available in its entirety, and that such correspondence or report should not be withheld from the public on a confidential or commercial-in-confidence basis. HEL submits this is in line with the IPC's stated mission and values for transparent assessment and determination of State significant development applications.[46]

49. If you have any queries, please contact us on (02) 9262 6989 or at matthew.floro@edonsw.org.au.

Yours sincerely
EDO NSW

Matt Floro
Solicitor

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[46] IPC, 'About us', <https://www.ipcn.nsw.gov.au/about-us>, viewed on 6 May 2019.