United Wambo Coal Project

Speaking Notes for IPC Public Meeting, 7 February 2019

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INTRODUCTION

1. I am a Solicitor at EDO NSW and I am instructed to make this submission on behalf of the Hunter Environment Lobby.
2. HEL objects to the Project in toto and considers that consent should be rejected. HEL will make its own submissions to that effect and has engaged expert advice supporting its position, which has been presented to the IPC.
3. My submission focusses on the role of the IPC in assessing and evaluating the recommended conditions of consent, and outlines HEL's concerns in this regard.
4. I will deal with three specific matters:
    a. Firstly, context of the recommended conditions;
    b. Secondly, the proper role of the IPC in assessing and preparing conditions;
    c. Thirdly, comments on the recommended conditions.

CONTEXT OF RECOMMENDED CONDITIONS

5. The recommended conditions of consent are an important part of the matrix of relevant considerations and the weighing of the scales in relation to the likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.
6. Further, conditions are the main protector in reducing and mitigating those impacts.
7. In light of the independent expert evidence on air quality, biodiversity and ecology, climate change, economics, noise and water, the draft conditions have a high bar to clear.

TEST FOR THE IPC AS CONSENT AUTHORITY

8. DPE Final Assessment Report states (p. v): "The Department is satisfied that its recommended conditions provide a comprehensive, contemporary and precautionary approach to the regulation and management of the Project. The conditions would provide a high level of protection for the environment and the health and amenity of

the local community and promote the orderly development of the State's significant coal resources."

9. The role of the IPC is to examine and interrogate that statement:
    a. If the conditions are inadequate to address the concerns of the IPC, and those inadequacies cannot be resolved by way of amendments to the draft conditions, HEL's submission is that the Project should be refused.
    b. One of the key considerations is whether the conditions completely resolve the relevant issues in a sensible and reasonable way. Or, on the other hand, whether the conditions postpone consideration of how to resolve the issues until after consent is granted, thereby creating a situation where the issues may not be satisfactorily resolved. In HEL's submission, if it is the latter case, the Project should be refused.

COMMENTS ON RECOMMENDED CONDITIONS OF CONSENT

10. This presentation focusses on the recommended conditions of consent for SSD 7142. Similar issues arise for the recommended conditions of consent for modifications DA 305-7-2003 MOD 16 and DA 177-8-2004 MOD 3.

General comments

11. At law, one cannot 'condition' away certain matters.
    a. ESD (in particular the precautionary principle) is an objective of the EP&A Act and a necessary component of consideration of the public interest. One cannot condition out 'scientific uncertainty'.
    b. In relation to groundwater:
        i. Conditions will not prevent impacts to surface and groundwater.
        ii. One can include a requirement for compensatory water, but one cannot reinstate the substratum of the land to how it once was (as HEL's groundwater expert, Dr Currell, demonstrates).
    c. In relation to emission of carbon dioxide:
        i. One cannot condition away the release of phase 1, 2 and 3 emissions to prevent the emission or carbon into the atmosphere. As HEL's climate change expert, Professor Will Steffen, demonstrates, any new fossil fuel project that will cause the release of carbon emissions is contrary to the principles of ESD (in particular intergenerational equity), the public interest, and Australia's national international obligations regarding climate change mitigation.

ii. In this regard, I am instructed to draw the IPC's attention to the recent decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, in which Chief Judge Preston of the Land and Environment Court dismissed an appeal against the Rocky Hill Coal Project's refusal and determined the mine's application by refusal. We submit that this judgment requires close scrutiny by the IPC as a number of the circumstances of the Rocky Hill Coal Project and the Project are similar.

iii. In relation to climate change impacts of the Rocky Hill Coal Mine project, the Court accepted Professor Will Steffen's expert opinion and found, that "the direct and indirect GHG emissions of the Rocky Hill Coal Project will contribute cumulatively to the global total GHG emissions".[1] Significantly, Professor Steffen's evidence was not contested by the Minister for Planning in the Rocky Hill case. In this regard, we note that Professor Steffen has provided the same evidence for the consideration of the IPC in relation to the United Wambo Coal Project. Moreover, the Court found that there "is a causal link between the [Rocky Hill Coal] Project's cumulative GHG emissions and climate change and its consequences."[2] Therefore, the cumulative impact of the Rocky Hill Coal Project's direct and indirect GHG emissions on global climate change were relevant considerations to be taken into account in the Court's decision to refuse development consent for the project. Similarly, our client submits that the cumulative impact of the United Wambo Coal Project's direct and indirect GHG emissions on global climate change is a relevant consideration to be taken into account by the IPC when assessing the Project.

iv. In relation to the total quantity of emissions from the Rocky Hill Coal Project, the Air Quality and Health Risk Assessment for the amended Environmental Impact Statement estimated the Scope 1 and Scope 2 emissions to be about 1.8Mt CO2-e over the life of the mine and Scope 3 emissions to be at least 36Mt CO2-e.[3] Notably, the Rocky Hill proposal was for a coking coal, not a thermal coal, mine.[4] In

[1] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [515].
[2] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [525].
[3] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [486].
[4] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [546].

contrast, the United Wambo Coal Project will generate approximately 5.8Mt CO2-e of Scope 1 emissions, 0.8Mt CO2-e of Scope 2 emissions, and 260Mt CO2-e of Scope 3 emissions over the life of the Project.[5] Further, the United Wambo proposal is for a thermal **and** coking coal mine.[6] Accordingly, the Court's findings in relation to climate change impacts in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 have even greater force as the emissions to be emitted by the Project are far greater (over 7 times) than the emissions from the Rocky Hill Coal Project. Moreover, the nature of the Project as both a thermal and coking coal mine render the coal product even more substitutable than if the mine were purely a coking coal mine.[7]

v. In the Rocky Hill decision, the Court did not accept the arguments put forward by the proponent that the Rocky Hill Coal Project should be one of the fossil fuel reserves that should be allowed to be exploited. A selection of the Court's findings in this regard are set out below:

> [487] Although GRL submitted that Scope 3 emissions should not be considered in determining GRL's application for consent for the Rocky Hill Coal Project, I find they are relevant to be considered.
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> [488] At the most basic level, the consent authority must consider and determine the particular development application that has been made to carry out the State significant development of the proposed coal mine (s 4.38(1) of the EPA Act). For State significant development such as the Rocky Hill Coal Project, the development application is required to be accompanied by an environmental impact statement (s 4.12(1) and s 4.39(1)(a) of the EPA Act and cl 50(1)(a) and Sch 1, cl 2(1)(e) of the EPA Regulation). The environmental impact statement must address the environmental assessment requirements of the Secretary as well as the content requirements in Sch 1, cl 7 of the EPA Regulation, including the likely impact on the environment of the development and the reasons justifying the carrying out of the development, having regard to biophysical, economic and social considerations, including the principles of ecologically sustainable development (ESD). The principles of ESD are defined to be the precautionary principle, inter-

[5] Environmental Impact Statement, p. 187.
[6] Environmental Impact Statement, p. 48.
[7] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [546]-[549].

generational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms (cl 7(4) of Sch 1 of the EPA Regulation). As I note below, consideration of the principles of ESD can involve consideration of climate change.

[529] The first reason GRL gave was that the increase in GHG emissions associated with the Project would not necessarily cause the carbon budget to be exceeded, because, as Dr Fisher had argued, reductions in GHG emissions by other sources (such as in the electricity generation and transport sectors) or increases in removals of GHGs by sinks (in the oceans or terrestrial vegetation or soils) could balance the increase in GHG emissions associated with the Project.

[530] I do not accept this reason. It is speculative and hypothetical…

[531] The second reason given by GRL was based on Dr Fisher's argument that "the size of the global abatement task calls for making emissions reductions where they count most and generate the least economic and social harm." (Fisher report [13]). Dr Fisher considered that refusing approval to individual coal mines, such as the Rocky Hill Coal Project, would not achieve this abatement at least cost.

[532] I do not accept this second reason. A consent authority, in determining an application for consent for a coal mine, is not formulating policy as to how best to make emissions reductions to achieve the global abatement task. The consent authority's task is to determine the particular development application and determine whether to grant or refuse consent to the particular development the subject of that development application. Where the development will result in GHG emissions, the consent authority must determine the acceptability of those emissions and the likely impacts on the climate system, the environment and people. The consent authority cannot avoid this task by speculating on how to achieve "meaningful emissions reductions from large sources where it is cost-effective and alternative technologies can be brought to bear" (Fisher Report, [13]). Such emissions reductions from other sources are unrelated to the development that is the subject of the development application that the consent authority is required to determine.

> [534] The third reason GRL advanced for approving the Project was that the GHG emissions of the Project will occur regardless of whether the Project was approved or not, because of market substitution and carbon leakage…
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> [536] I reject this third reason. On carbon leakage, GRL has failed to substantiate, in the evidence before the Court, that this risk of carbon leakage will actually occur if approval for the Rocky Hill Coal Project were not to be granted…
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> [538] The market substitution argument is also flawed. There is no certainty that there will be market substitution by new coking coal mines in India or Indonesia or any other country supplying the coal that would have been produced by the Project…
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> [546] The fourth reason GRL advanced for approving the Project is that the GHG emissions associated with the Project are justifiable. GRL contended that the Project will produce high quality coking coal, not thermal coal, which is needed for the main way of producing steel, by the BOF process; steel is critical to our society; and there are limited substitutes for coking coal in steel production.
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> [547] I find that GRL overstates this argument. It may be true that currently most of the world's steel (around 74%) is produced using the BOF process, which depends on coking coal, and although technological innovations might reduce the proportion of steel produced using the BOF process, for the reasons given by Mr Buckley, there is still likely to be demand for coking coal for steel production during the life of the Project.
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> [548] The current and likely future demand for coking coal for use in steel production can be met, however, by other coking coal mines, both existing and approved, in Australia...

vi. The Court concluded that the Rocky Hill Coal Project's "poor environmental and social performance in relative terms" justified its refusal and that included the "GHG emissions of the [Rocky Hill Coal]

Project and their likely contribution to adverse impacts on the climate system, environment and people".[8]

d. One cannot condition away social impacts. One can impose conditions directing where some economic contributions or support from the proponent must go within a community, but one cannot condition to avoid division within communities, decline of agriculture, and other flow-on effects from mining operations.

e. Even if air quality levels meet relevant development standards, residents' concerns about air quality may have negative social impacts. As the Court found in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7:

> [267] I find that the cumulative air quality level will comply with the development standard in cl 12AB(4) of the Mining SEPP. The mine's cumulative air quality level is not a ground for refusing development application for the Rocky Hill Coal Project.
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> [268] Nevertheless, the residents' concerns about the mine's potential adverse effects on air quality, and the concomitant threat to their health and the health of their family, may have social impacts. Concerned residents may leave Gloucester and not be replaced by people who are put off by the perceived risk of deteriorated air quality and effects on their health. Uses that depend on Gloucester having, and being seen to have, a clean and green environment will also be adversely affected. These lead to negative social impacts, which are discussed in the next section.
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> [269] The negative social impacts caused by residents' concerns about the project-related air quality impacts, including the perceived threat to their health and the health of their families, are not impacts that are the subject of the cumulative air quality level development standard in cl 12AB(4) of the Mining SEPP. That development standard does not prevent a consent authority from refusing consent on grounds relating to, or imposing conditions to regulate, project-related air quality impacts that are not the subject of the development standard or social impacts resulting from project-related air quality impacts.

12. In addition, the recommended conditions of consent use vague and unenforceable language. For example, the use of the terms "reasonable and feasible" in, for example, the obligation to minimise harm to the environment under condition A1, and

[8] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [556].

"generally in accordance with" in conditions A2(c) and (d) will not ensure that Project conditions effectively limit impacts to those considered to be acceptable. These terms are vague and unenforceable, and render those conditions ineffective and inadequate to protect the matters they address.

13. The words "unless otherwise agreed by the Planning Secretary" in, for example, condition B4(f) and clause 3 in Appendix 4 of the recommended conditions, provide no certainty to the community in relation to the level of harm being authorised by any consent for the Project. Moreover, the words "to the satisfaction of the Planning Secretary" in, for example, conditions B5, B21, B29, B40, B46, B59, B70, B87, B95, C10, and E1, provide an extremely broad discretion to the Secretary and effectively defer decision-making on significant matters. This was highlighted in the recent Land and Environment Court case of *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 3)* [2018] NSWLEC 193, in which Robson J said the following (concerning the construction of a condition requiring the preparation of a Rehabilitation Strategy to the satisfaction of the Secretary):

> [229] Reading the Modified Project Approval as a whole, I consider that the requirements following the word "must" in Condition 42 are matters which inform the exercise of the primary obligation imposed by the condition, which is to prepare a Rehabilitation Strategy to the satisfaction of the Secretary. **Whether the matters have been adequately addressed is a question properly left to the Secretary**.
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> …
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> [248] Thus, the fact that the matters in Condition 42(a) to (d) are generally expressed, somewhat indistinct, and in the nature of merits considerations which one would expect to be undertaken by a consent authority, weighs in favour of the conclusion that they are **not intended to be objective facts but rather matters about which the Secretary was to be satisfied**.

14. Accordingly, conditions that defer decision-making "to the satisfaction of the Secretary" provide no certainty that they will adequately address the impacts identified by the IPC. Rather, such conditions give the Secretary an extremely broad discretion to reach a subjective opinion as to whether an impact has been adequately mitigated. The Court does not have the power to review the merits of the Secretary's decision on such conditions. Such conditions are therefore vague and unenforceable, and provide the IPC and the community with no certainty that relevant impacts will be adequately addressed.
15. There are 16 management plans required to be prepared by the recommended conditions. All of these plans (except for the Fire Management Plan and the "Hot Works" Management Plan) are to be prepared after consent has been granted to the satisfaction of the Secretary or the Resources Regulator or RMS or approval given

by the Secretary. Therefore, the recommended conditions allow the details of impact mitigation to be worked out at a later date for all of the following issues:

a. Noise Management Plan
b. Blast Management Plan
    i. Road Closure Management Plan
c. Air Quality Management Plan
d. Water Management Plan
    i. Surface Water Management Plan
    ii. Groundwater Management Plan
e. Biodiversity Management Plan
f. Aboriginal Cultural Heritage Management Plan
g. Historic Heritage Management Plan
h. Fire Management Plan
    i. "Hot Works" Management Plan
i. Rehabilitation Management Plan
j. Social Impact Management Plan
k. Construction Traffic Management Plan
l. Construction Environmental Management Plan

16. At law, the IPC needs to fully consider impacts prior to making the decision, and cannot simply rely on conditions to disavow itself of the requirement to consider impacts. Moreover, the IPC needs to be confident that conditions will properly address impacts. If relevant management plans are not detailed at the time of consent and are left to the satisfaction of the Secretary, there is no way that IPC can be sure the conditions will be effective.
17. I also note that management plans can be a vehicle to amend the Project over time. Environmental assessment documentation becomes less important. Although a positive for proponents' flexibility, it is a negative for consent authorities as they do not necessarily know what they are approving. It is also a negative for the community as they are often not permitted to be involved in the updating of management plans. In addition, all management plans, reports and monitoring data should be provided to the Secretary and be available on the proponent's website within 30 days of being collected and/or finalised.
18. With this in mind, I submit that specific limits and boundaries should be placed around all uses of the terms "unless otherwise agreed by the Planning Secretary" and "to the satisfaction of the Planning Secretary". In particular, I submit that consideration be given to stipulating that requirements in conditions are "objective facts" (also called "jurisdictional facts") that need to objectively exist before the

Secretary can exercise his or her discretion to reach a state of satisfaction. This would ensure certainty and enforceability of the conditions, and would ensure any discretion given to the Secretary is within the reasonable bounds envisaged by the IPC.

19. It is important to note that development consents run with the land, not with the owner. Conditions exist for the entire length of the project. If the mine is sold, these conditions are all the State and the community have to ensure the land will be appropriately remediated. If they fail, the community and taxpayers will foot the bill. Accordingly, it is important that the IPC sets conditions that are certain and enforceable.

Specific comments

20. Definitions:
    a. "Feasible" – As currently worded, this is uncertain and unenforceable. It needs to be clear that it is the Department and not the proponent that determines what is feasible.
    b. "Reasonable" – As currently worded, this is uncertain and unenforceable. It needs to be clear that it is the Department and not the proponent that determines what is reasonable.
    c. "Rehabilitation" – It is unclear what is meant by "good" condition, and therefore this term is uncertain and unenforceable. It should include a requirement to achieve the outcomes described in the EIS.
21. Condition A1 (Obligation to Minimise Harm to the Environment):
    a. Ambiguous drafting could lead to greater impacts than envisaged by the IPC. The words "and if prevention is not reasonable and feasible, minimise" allow the risk of greater impacts because "reasonable and feasible" are very ambiguous terms. If exceptions to conditions are allowed, these need to be clearly drafted and subject to specific parameters. Moreover, the definition of "minimise" is circular – it is defined as "Implement all reasonable and feasible mitigation measures to reduce the impacts of the development". There is a need for clear unambiguous terms defined in all the conditions of any consent.
    b. What happens when reasonable and feasible is not sufficient to reduce the impacts of the development? The current drafting of condition A1 may allow the proponent to cause more environmental harm that envisaged by the conditions. If there are catastrophic impacts, the conditions have no teeth.

Rather than “reasonable and feasible”, a better measure is “best practice”, which should be defined according to specific and accepted standards.

22. Condition A9 (Mining operations):
    a. The Auditor-General has highlighted a significant risk of projects being placed into permanent “care and maintenance” to avoid rehabilitation obligations.[9]
    b. To avoid this situation, condition A9 should be expanded to require the proponent to commence rehabilitation if operations cease for a period of 12 months.
23. Condition A15 (Identification of Approved Disturbance Area):
    a. It is unclear what would happen if the survey plan is different to the area shown in the Appendix. A transparent process should be stipulated to ensure that any discrepancies are rectified in line with the approved area boundaries.
24. Condition A18 (Planning Agreement):
    a. There are no terms specified in Appendix 9. The terms should be disclosed. Further, there is a lack of certainty to this condition as the timeframe for entering into a Planning Agreement can be modified unilaterally by the Secretary.
25. Staging, combining and updating strategies, plans or programs:
    a. Condition A22: There is a very broad discretion given to the Proponent to prepare, update, or combine any strategy plan or program. It should be a requirement that any such change is consistent with the other conditions of consent. Otherwise, the proponent may deviate incrementally from the conditions.
    b. Condition A23: Again, this is a very broad condition – problematic for parties required to be consulted and could result in environmental harm. If such a condition is to be approved, it should be restricted to minor changes to the strategy, plan or program, and “minor change” should be specifically defined.
26. Condition A35 (Crown Land): This condition should include the requirement to do this before starting works on that land. The closure of Crown Roads may be subject to the discretion of the Minister to grant an approval for closure. It cannot be assumed that such approval will be granted. Accordingly, the condition should specify that approval / closure needs to granted and effected prior to commencement of works. Consideration should also be had as to whether it is possible for the Project to fully proceed as proposed if approval to close the Roads is not granted.

[9] Audit Office of New South Wales, ‘Key Findings’, <https://www.audit.nsw.gov.au/publications/latest-reports/performance/mining-rehabilitation-security-deposits/key-findings/4-key-findings>, accessed on 6 February 2019.

27. Condition B1 (Operational Noise Criteria):

a. Table 1 permits night time noise levels that, while consistent with the Noise Policy for Industry, fall above World Health Organisation sleep disturbance levels.

b. Condition B1 allows residents to be exposed to high levels noise because they have been granted acquisition rights (condition D1). However, they have not been granted mitigation on request (condition D2).

c. For residents living in properties R019, R016, R017, R039 and R043 this means they have no choice but to put up with unacceptable noise impacts or sell – there is no ability for them to get assistance to reduce noise to bearable levels or to relocate for periods when the noise is particularly high etc.

d. Further, Condition D17 means these residents only have one opportunity to sell to the mine. The consequence of this is, if early in the life of the project, they consider selling but decide not to proceed based on the offer made, the option to sell later (if they decide they can no longer bear the noise) has been removed.

e. If the Project proceeds, noise conditions should not force community members to sell their homes as the only means of avoiding unacceptable noise impacts.

f. I also note that consideration of the social impact of the mine's intrusiveness noise levels and cumulative amenity noise levels is not precluded by clause 12AB(3) of the Mining SEPP.[10] In *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, the Court found:

> [262] … The development standard for cumulative amenity noise level in cl 12AB(3) of the Mining SEPP does not prevent a consent authority from refusing consent on grounds relating to, or imposing conditions to regulate, project-related noise impacts that are not the subject of that development standard or social impacts resulting from project-related noise impacts. The negative social impacts that are likely to be caused by residents' annoyance reactions to project-related noise are not impacts that are the subject of the development standard in cl 12AB(3) of the Mining SEPP.
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> [263] The noise impacts of the mine, although not a ground in itself to refuse the development application for the Rocky Hill Coal Project, nevertheless do contribute to adverse social impacts that are a ground for refusal...

[10] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [262].

28. Condition B4c) (Noise Operating Conditions): For the sake of transparency, this information should be made publicly available in real time so that community members have access to the data.
29. Condition B4f) (Noise Operating Conditions): As stated above, the wording of "unless otherwise agreed by the Planning Secretary) means there is a lack of certainty and the community cannot know how often the noise monitoring will actually happen. The words "unless otherwise agreed by the Planning Secretary" should be removed.
30. Condition B11 (Blasting Frequency): Averaging blasts per week over a calendar year provides no certainty to the community, which may increase physical and mental effects on the community. Blasts per week should not be averaged.
31. Condition B19 (Blast Operating Conditions):
    a. This condition removes the rights of the landowner to not have blasting within 500m and allows the Secretary to remove this right without any consultation with the landowner.
    b. The relevant infrastructure owner or landowner and resident must be provided with a copy of the request by the Proponent to the Planning Secretary for approval under this condition and be provided with an opportunity to make representations directly to the Planning Secretary on the Proponent's request prior to any approval by the Secretary.
32. Condition B27 (Mine-owned Land): Reasonable notice is undefined and could create significant health risk. One month's notice should suffice. It is also unclear how regularly the tenant will be informed so that they can make informed decisions on the health risks before it's too late. This should be clarified.
33. Conditions B36-B40 (Compensatory Water Supply): These conditions have the effect of allowing the mine to take other users' water rights for unspecified compensation. It must be stipulated that prior to commencement, the proponent must show how it will be able to provide compensatory water. The "Notes" listed under Condition B40 should be made part of the condition to ensure they are enforceable.
34. Condition B45 (Groundwater Dependent Ecosystem Study): In this example the management of an environmental impact is not only deferred, further studies have been required meaning that it is recognised that the IPC currently does not possess sufficient information on groundwater dependent ecosystems to adequately assess or condition project impacts.
35. Condition B50 (Staged Retirement): Staged retirement of credits allows the majority of harm to ecosystems to be undertaken without the proponent demonstrating that

adequate offsets are available or feasible. Offsets should be retired before any clearing can occur.

36. Condition B56 (Rehabilitation Offsets): HEL has presented clear expert evidence that mine rehabilitation will not prevent, minimise, or offset adverse environmental impacts. Therefore this condition cannot achieve its intent of offsetting harm to critically endangered ecological communities.
37. Conditions B90-B92 (Rehabilitation Management Plan): These conditions should be expanded to require that the proponent must not commence mining operations until the Rehabilitation Strategy is approved by the Planning Secretary and the Proponent has lodged a rehabilitation bond that will cover the full life of mine Rehabilitation Strategy with the Department to ensure that the Rehabilitation Strategy may be implemented in accordance with these conditions. This is to ensure that the proponent and the Department give the Rehabilitation Management Plan high significance from a risk management perspective.
38. Condition B93 (Mine Closure):
    a. In 2016, research by Energy & Resource Insights (ERI)[11] identified that in NSW "there are at least 45 voids with a total of 6,050ha of voids either planned or approved". These voids will sterilise significant areas, particularly in the Hunter Valley, and take hundreds, if not thousands, of years to reach a new dynamic equilibrium. During this time the water accumulating in the voids will become increasingly saline, some pit lakes will involve permanent water take, and some will risk overtopping and spills into adjacent waterways. Communities, scientific bodies and decision makers have all expressed concern about the ongoing legacy of pollution that will be left by these final voids.
    b. There is long-standing precedent from other jurisdictions to prohibit the creation of new final voids, including the *Surface Mining Control and Reclamation Act 1977* (USA). While not without its limitations and despite industry arguments that the costs are prohibitive, the fact that this legislation has been in place for many years demonstrates that mining can continue to operate effectively and profitably in such a legislative environment. ERI further argue that if it were an upfront legislative requirement for mines to avoid the creation of final voids, then mine plans would be developed accordingly, which would significantly reduce the cost of achieving the required final landform.

[11] Energy & Resource Insights (2016) The Hole Truth IPC ed by the Hunter Communities Network, p4

c. Requiring such an approach is consistent with the polluter pays principle.

39. Condition D11 (Land Acquisition): Should be expanded to include acquisition pricing that covers the current market value of properties that are of an equivalent standard to the landowner's existing dwelling (including associated facilities such as a pool) in the local government area (whichever is greater).
40. Condition E4: “Management Plan Requirements”: For the sake of transparency and accountability, this condition should include a list of parties to be consulted and a protocol for consulting them.

CONCLUSION

41. The Department states that it is satisfied that its recommended conditions provide a comprehensive, contemporary and precautionary approach to the regulation and management of the Project.
42. The analysis above suggests that this is not the case, as there is significant uncertainty and ambiguity regarding the effect of the recommendations – and significant concern regarding their legal enforceability. Accordingly, far more work is needed before the IPC can be satisfied that the risks and impacts of the Project can be effectively mitigated by the conditions of any consent, such that approval of the Project is in the public interest.