

9 August 2019

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

**By email: [ipcn@ipcn.nsw.gov.au](mailto: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):  
Submission regarding Export Management Plan condition**

1. We confirm we act for Hunter Environment Lobby (**HEL**) in relation to the Project.
2. We refer to the statement by the IPC dated 2 August 2019 (**IPC Statement**), in which the IPC states that it is considering a condition in relation to an Export Management Plan (**EMP**) and will accept comments on the EMP condition until 9 August 2019.
3. In response to the IPC Statement, HEL:
  - a. Confirms that it opposes the Project in toto and submits that consent should be refused because of the Project's poor environmental performance and outcomes in both absolute and relative terms, including its failure to overcome the "wrong time" basis for refusal as set out in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill case**);
  - b. Submits that, in the alternative, if the IPC determines that consent to the Project should be granted:
    - i. The proposed EMP condition is inappropriate because it is based on the fundamentally flawed assumption that export of the Project's coal to Paris Agreement signatory countries will comprise "all practicable measures" to minimise Scope 3 greenhouse (**GHG**) emissions, and therefore it will fail to achieve its stated purpose; and
    - ii. The only appropriate condition in relation to the Project's GHG emissions would be to require the Project's total GHG emissions to be permanently offset so that the Project is carbon neutral.

4. These submissions are discussed below.

### **HEL opposes the Project in toto**

5. HEL confirms that it opposes the grant of consent to the Project in toto because of the Project's poor environmental performance and outcomes in both absolute and relative terms.
6. In this regard, HEL refers to its Supplementary Submission dated 6 May 2019 (**HEL Supplementary Submission**), which states, relevantly:

[14] If the *Rocky Hill* case is considered to be a form of persuasive guidance (and HEL submits it should be considered highly persuasive),<sup>1</sup> 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 Hill coal mine, the aggregate greenhouse gas emissions of which Preston CJ found to be "sizeable".<sup>2</sup> 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.

7. Moreover, HEL submits that consent to the Project should be refused because the proponent has not overcome the hurdle of the "wrong time" basis for refusal, established in the *Rocky Hill* case. As stated in the HEL Supplementary Submission:

[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.<sup>3</sup>

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[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

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<sup>1</sup> Linda Pearson, 'Policy, principles and guidance: Tribunal rule-making' (2012) 23 Public Law Review 16, pp. 32.

<sup>2</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [556].

<sup>3</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [527], [697], [699].

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.

8. The "wrong time" basis for refusal is particularly relevant for the IPC's consideration of the Project, given evidence that predicted GHG emissions from existing (including approved but not yet constructed) fossil fuel developments will already set us on course to exceed the carbon budget required to meet the Paris Agreement temperature targets.<sup>4</sup>
9. As the Court stated in the *Rocky Hill* case:

[526] The approval of the Project (which will be a new source of GHG emissions) is also likely to run counter to the actions that are required to achieve peaking of global GHG emissions as soon as possible and to undertake rapid reductions thereafter in order to achieve net zero emissions (a balance between anthropogenic emissions by sources and removals by sinks) in the second half of this century. This is the globally agreed goal of the Paris Agreement (in Article 4(1)). The NSW government has endorsed the Paris Agreement and set itself the goal of achieving net zero emissions by 2050. It is true that the Paris Agreement, Australia's NDC of reducing GHG emissions in Australia by 26 to 28% below 2005 levels by 2030 or NSW's Climate Change Policy Framework do not prescribe the mechanisms by which these reductions in GHG emissions to achieve zero net emissions by 2050 are to occur. In particular, there is no proscription on approval of new sources of GHG emissions, such as new coal mines.

[527] Nevertheless, the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (Article 4(1) of the Paris Agreement) or the long term temperature goal of limiting the increase in global average temperature to between 1.5°C and 2°C above pre-industrial levels (Article 2 of the Paris Agreement). As Professor Steffen explained, achieving these goals implies phasing out fossil fuel use within that time frame. He contended that one of the implications of the carbon budget approach is that most fossil fuel reserves will need to be left in the ground, unburned, to remain within the carbon budget and achieve the long term temperature goal. The phase out of fossil fuel use by the second half of this century might permit a minority of fossil fuel reserves to be burned in the short term. From a scientific perspective, it matters not which fossil fuel reserves are burned or not burned, only that, in total, most of the fossil fuel reserves are not burned. Professor Steffen explained, however, that the existing and already approved but not yet operational mines/wells will more than account for the fossil fuel reserves that can be exploited and burned and still remain within the carbon budget. This is the reason he considered that no new fossil fuel developments should be allowed.

10. 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.<sup>5</sup> In this regard, HEL relies upon the following independent expert reports in full:

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<sup>4</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [527], [697], [699].

<sup>5</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [697], [699].

- a. The independent expert report (dated 11 December 2018) (**Steffen Report**) and supplementary independent expert report (dated 1 May 2019) (**Steffen Supplementary Report**) 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, noting that Mr Buckley acknowledges the Project will release 265.9Mt of carbon emissions over its life-of-mine to 2041.

**The EMP condition is inappropriate and will not achieve its stated purpose**

11. If the IPC is minded to approve the Project, HEL submits that the EMP condition is inappropriate because it is based on a fundamentally flawed assumption. In this regard, we note that clause 1 of the EMP condition states, *“The purpose of the Export Management Plan is to ensure that all practicable measures are adopted by the Applicant to minimise greenhouse gas emissions identified as identified in the EIS.”* The assumption underlying the EMP condition is, therefore, that if the Project’s coal is exported to countries that are signatories to the Paris Agreement, or countries with GHG emissions policies similar to that which would have been required had those countries been signatories, “all practicable measures” will have been adopted by the proponent to minimise Scope 3 emissions.
12. This assumption is fundamentally flawed for three principal reasons:
  - a. First, Nationally Determined Contributions (**NDCs**), which are the emissions reduction targets published by the signatories to the Paris Agreement to reduce GHG emissions, are currently insufficient to keep within the global temperature limits prescribed in the Paris Agreement;
  - b. Second, the proposed EMP would be of little practical effect as all 197 Parties to the UN Framework Convention on Climate Change (**UNFCCC**) (which includes all UN member states) are signatories to the Paris Agreement; and
  - c. Thirdly, the EMP condition is inadequate, as it would fail to ensure that the purpose of the condition would be met, and is ambiguously drafted.
13. Accordingly, the EMP condition would fail to ensure that all practicable measures are adopted to minimise the Project’s Scope 3 GHG emissions and is therefore inappropriate.
14. These reasons are discussed below.

***NDCs are currently insufficient to keep within the global temperature limits***

15. Local decision making about fossil fuel developments, including the IPC’s consideration of the Project, occurs in the context of the global commitment to

respond to the threat of climate change. Australia is a signatory to the Paris Agreement, which has at its heart a pledge of:

Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.<sup>6</sup>

16. As at August 2019, all Parties to the UNFCCC (which includes all UN member states) are signatories to the Paris Agreement. 185 of 197 signatories, including Australia, have ratified the Paris Agreement.<sup>7</sup>
17. Each signatory articulates its commitment to achieving the Agreement through NDCs. Signatories are then expected to implement domestic mitigation measures that will achieve the objectives of their NDCs.<sup>8</sup> Australia's NDC is to "implement an economy-wide target to reduce greenhouse gas emissions by 26 to 28 per cent below 2005 levels by 2030".<sup>9</sup>
18. Achieving the Paris Agreement targets means meeting the goal of limiting global warming to 1.5-2°C above pre-industrial levels. However, it is important to note that meeting current NDCs will not achieve the Paris Agreement targets. Carbon Action Tracker<sup>10</sup> has calculated that if all Paris Agreement signatories meet their current NDCs, and governments around the world implement their current unconditional pledges and targets to reduce emissions, globally we are on track to reach warming levels of 2.7-3.0°C above pre-industrial levels.<sup>11</sup> Locally, the Climate Change Authority has identified that Australia's current NDC does not commit Australia to achieving its fair share of global emission reductions.<sup>12</sup> Accordingly, there is a disconnect between the current NDCs and the carbon budget required to meet the Paris Agreement temperature targets.<sup>13</sup>
19. As the Steffen Supplementary Report states:

National NDCs, such as Australia's, are influenced by a number of factors, and are not necessarily consistent with the scientific requirements to meet the Paris targets.

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<sup>6</sup> *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) art 2(1)(a).

<sup>7</sup> United Nations, 'Paris Agreement - Status of Ratification,' *United Nations Climate Change* (Web Page) <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>>.

<sup>8</sup> United Nations, 'Nationally Determined Contributions (NDCs),' *United Nations Climate Change* (Web Page) <<https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs>>.

<sup>9</sup> Australia, 'Australia's Intended Nationally Determined Contribution to a new Climate Change Agreement – August 2015,' *UN Framework Convention on Climate Change INDC* (Web Page) <<https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Australia/1/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf>>.

<sup>10</sup> Climate Action Tracker, 'Temperatures,' *Climate Action Tracker* (Web Page) <<https://climateactiontracker.org/global/temperatures/>>.

<sup>11</sup> Based on a 66% probability of success.

<sup>12</sup> Climate Change Authority, *Final Report on Australia's Future Emissions Reduction Targets*, 2 July 2015 (Final Report, July 2015) available at <<http://climatechangeauthority.gov.au/sites/prod.climatechangeauthority.gov.au/files/Final-report-Australias-future-emissions-reduction-targets.pdf>>.

<sup>13</sup> Steffen Report, pp. 11-17; Steffen Supplementary Report, p. 1.

In fact, the Climate Change Authority, based on the carbon budget framework, has determined that Australia's NDC is significantly weaker than what is required for Australia to do its fair share of emission reductions in meeting the Paris targets (CCA 2015).<sup>14</sup>

20. Therefore, it would be wrong for the IPC to assume that the local and global environmental harm caused by burning Australian-mined fossil fuels in other countries, which are signatories to the Paris Agreement, will be appropriately mitigated by those countries' current NDCs. Instead, the IPC should consider the harm to NSW and Australia caused by increasing global GHG emissions, wherever those emissions are generated, under current commitments to curb GHG emissions.
21. Given that current NDCs will not avoid dangerous climate change, the only way that decision makers can be sure that the climate impacts of local fossil fuel extraction projects will be avoided, consistent with meeting the Paris Agreement targets, is to prevent or offset GHG emissions from those fossil fuel developments that will contribute to driving warming beyond 1.5-2°C above pre-industrial levels.
22. This approach is consistent with the *Rocky Hill* case, in which the Court found that, in circumstances where there was no specific proposal to offset the Rocky Hill coal mine's emissions:

A consent authority cannot rationally approve a development that is likely to have some identified environmental impact on the theoretical possibility that the environmental impact will be mitigated or offset by some unspecified and uncertain action at some unspecified and uncertain time in the future.<sup>15</sup>

23. In the present case, the Project's environmental impacts, including GHG emission impacts, have been identified. However, there is no specific proposal to offset the Project's emissions. While signatories to the Paris Agreement have specified their current NDCs, the effectiveness of the current NDCs remains highly uncertain as they will not achieve the global temperature limits set in the Paris Agreement. Moreover, all future NDCs under the 5-yearly "ratchet" or "ambition" mechanism<sup>16</sup> remain unspecified and uncertain.
24. Accordingly, as the NDCs are currently insufficient to keep within the global temperature limits set by the Paris Agreement, and future NDCs are unspecified and uncertain, if the IPC approves the Project it should impose a condition requiring that the Project's total GHG emissions be offset, as discussed below in paragraphs [31] to [57].

***The proposed EMP would be of little practical effect***

25. HEL submits that the proposed EMP would be of little practical effect as all UN member states are signatories to the Paris Agreement. Accordingly, it is virtually certain that any Project coal exported to another country will be

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<sup>14</sup> Steffen Supplementary Report, 1.

<sup>15</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [530].

<sup>16</sup> *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) art 4(9).

exported to a signatory to the Paris Agreement. Without further provisions, the proposed EMP condition is practically meaningless and does nothing to change the “business as usual” approach to the mitigation of Scope 3 GHG emissions.

26. Moreover, the fact of a Party’s signing or ratification of the Paris Agreement has no impact on that Party’s contribution to keeping within the global temperature limits. Rather, it is the Party’s implementation of the commitments under the Paris Agreement (including the NDCs, which have already been demonstrated as inadequate) that is material to whether or not the global temperature limits are exceeded. The EMP condition fails to grapple with these nuances and would therefore be ineffective in achieving its specified purpose.

***EMP condition as drafted is inadequate and ambiguous***

27. The EMP condition as drafted has a number of components that fail to ensure that the purpose of the condition will be achieved. HEL provides the following observations in this regard.
28. As previously outlined by EDO NSW in speaking to the IPC at the IPC Public Meeting on behalf of HEL, the words “to the satisfaction of the Planning Secretary” provide an extremely broad discretion to the Secretary and effectively defer decision-making on this significant issue. 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...**

[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.**

[Emphasis added.]

29. 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 or achieve the conditions’ intended purposes. Rather, such conditions give the Secretary an extremely broad discretion to reach an 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. Any condition that proposes to use the term “to the satisfaction of the Secretary” must provide clear guidance as to the framework

within which the Secretary is to exercise his or her discretion and stipulate the minimum environmental outcome that is to be achieved by the condition.

30. Similarly, the use of the phrases “best endeavours” and “all practicable measures” are highly ambiguous and can provide no certainty to the IPC or the community on what the proposed EMP will actually deliver in terms of the management and mitigation of the Project’s GHG emissions.

**The only appropriate condition regarding the Project’s GHG emissions is that the Project be carbon neutral**

31. HEL submits that if the IPC is minded to approve the Project, the only appropriate condition regarding the Project’s GHG emissions is that the Project be carbon neutral.
32. The following paragraphs discuss the case law regarding the imposition of conditions for offsetting of GHG emissions, the difficulties with “land carbon” offsets, and HEL’s proposed offset condition.

***Case law regarding offsetting of GHG emissions***

33. Contrary to the Ashurst submission on climate change and GHG emissions dated 14 April 2019 (**Ashurst Submission**), there is no legal or policy reason as to why the IPC should not seek to impose any conditions of development consent requiring offset of the Project’s GHG emissions.<sup>17</sup>
34. In *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 (**HEL v Minister**), the Court held, in relation to the tests for determining the validity of a planning condition imposed under the former Part 3A regime (which was subsequently replaced with the State significant development and State significant infrastructure regime):

[87] What emerges from this consideration of the authorities is that the power to impose conditions on an approval under Pt 3A is wide, and includes imposing a condition that retains practical flexibility leaving a choice of the means by which an outcome or objective is to be met for the proponent: *Ulan*, at [79]. The approach in *Newbury* as a test of the validity of a condition on a Pt 3A project approval has not been expressly endorsed, or rejected, by the Court of Appeal or the High Court: *Botany Bay City Council v Saab* at [67]-[68]. The decision of the High Court in *Allen Commercial Constructions*, and the comments by Basten JA in *Botany Bay City Council v Saab*, confirm that the **starting point for consideration of a condition sought to be imposed on an approval is that it must be assessed by reference to the scope and purpose of the statutory power under which it is imposed**. In contrast to development consents granted under Pt 4 of the Act, the only applicable provision is s 75J(4). The scope of the power conferred by that provision is broad, but not unlimited. **A condition must be reasonably capable of being regarded as related to the purpose for which the approval function is being exercised**: *Allen Commercial Constructions* at 499. In the context of that case, that purpose was to be ascertained from a consideration of the relevant planning scheme and the *Local Government Act 1919*, and was, as held by Walsh J, “the implementation of planning policy” which was to be ascertained from the Act and the planning scheme and not from “some preconceived general notion of what constitutes planning”. In the context

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<sup>17</sup> Ashurst Submission, p. 12.

of s 75J(4) the relevant purpose must be ascertained by reference to the scope and purpose of the power conferred under Pt 3A, in the context of the scope and purpose of the Act as a whole which is to be derived from its objects.

[88] Alternatively, to the extent that it is relevant to apply the *Newbury* approach, any general statement of principle that can be derived from the differing discussions in *Newbury* is reflected in the discussion by McHugh J in *Temwood* at [57], quoted above at par 84. The first element of that statement of principle is consistent with the analysis above, namely that a **condition must be imposed for a purpose, described in *Temwood* (and *Allen Commercial Constructions*) as being for a "planning purpose"**, but better described in this context more broadly as being a purpose **consistent with the scope and purpose of the power conferred by Pt 3A** in its context of the Act as a whole. It is consistent with that requirement that a **condition imposed for an ulterior or improper purpose will be invalid**: *Botany Bay City Council v Saab* at [13] per Basten JA. The second element requires that **the condition "reasonably and fairly" relate to the development**, and in this context, a condition framed to address impacts of the proposed development would satisfy that requirement. The third element requires that **the condition not be so unreasonable that no reasonable planning authority could have imposed it**. As noted by Basten JA in *Botany Bay City Council* at [15], any exercise of discretionary power is capable of challenge as manifestly unreasonable in the *Wednesbury* sense; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680 . If a condition satisfies the fundamental requirement that it be reasonably related to the purposes for which the power may be exercised, it may be that this third element becomes relevant where the severity of the burden imposed on the applicant is disproportionate to the consequences attributable to the proposed development.<sup>18</sup>

[Emphasis added.]

35. The Court found that the proposed conditions requiring the offset of Scope 1 GHG emissions were lawful.<sup>19</sup> Those conditions stipulated that the Director-General could waive compliance with the offset requirement if another law imposing financial or regulatory liability was imposed that would cover those emissions.<sup>20</sup>
36. After the decision in *HEL v Minister* was handed down, the Commonwealth Parliament passed the *Clean Energy Act 2011* (Cth) (**CE Act**). The CE Act purported to regulate GHG emissions as part of a fixed price per carbon unit market.<sup>21</sup>
37. Subsequently, in the decision of *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40 (***HEL v Minister (No 2)***), the Court held:

[15] **The emission of GHG by Ulan at the mine near Mudgee contributes to a global problem which is now addressed in Australia through a national scheme passed by the Commonwealth Government, where that scheme does address emissions from individual large emitters of GHG.** The scheme commences shortly on 1 July 2012. The experts' reports of Mr Blyth and Mr Macintosh identify the scope and purpose of the Commonwealth scheme and confirm that **Ulan is subject to the**

<sup>18</sup> NSW Government, 'Part 3A Development', < <https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/Part-3a-Development>>.

<sup>19</sup> *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, [100].

<sup>20</sup> *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, [37].

<sup>21</sup> The fixed price per carbon unit market was proposed to transition to a cap-and-trade emissions trading scheme in July 2015: *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40, [5].

**Commonwealth scheme for most of its activities which result in scope 1 GHG emissions.**

[16] Accepting their evidence, I am satisfied that the scheme as represented in the CE Act, together with related legislation ( *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth); *National Greenhouse and Energy Reporting Act 2007* (Cth)), **meets at a practical level the purpose of imposing a condition requiring the offsetting of Scope 1 GHG emissions.**

[17] **I therefore agree with the submissions of Ulan that the Applicant's proposed conditions 18A - 18E are unnecessary** in light of the expert evidence outlined above concerning the practical aspects of applying the CE Act and related legislation to Ulan's operations near Mudgee. **The scheme as presently conceived will not cover Ulan's scope 1 GHG emissions to a de minimis level only**, particularly if Table 3 of Mr Blyth is considered as outlined above in par 7. I also consider there is an unsatisfactory level of uncertainty in relation to the development of the ACCUs market. Applying a practical outcomes approach to the assessment of the merits of the proposed GHG conditions of the Applicant in light of this evidence, I consider that the conditions are not warranted.

[Emphasis added.]

38. Although the Court in *HEL v Minister (No 2)* decided that conditions requiring the offset of Scope 1 GHG emissions were unnecessary in light of the passage of CE Act, the Court's decision did not otherwise affect the lawfulness of such a condition. However, importantly for the present purposes, the CE Act was repealed in July 2014. This means that there is currently no regulatory scheme in Australia that "meets at a practical level the purpose of imposing a condition requiring the offsetting of Scope 1 GHG emissions".<sup>22</sup>
39. In relation to Scope 2 GHG emissions, the Court in *HEL v Minister* did not impose a condition requiring their offset because, among other things:

A condition framed to require offsetting of scope 2 emissions would be open to criticism that to the extent that those emissions are under the control of others, the requirement would not fairly relate to the development. It was not clear from the evidence how identifiable those parts of the scope 2 emissions are which Ulan has the ability to minimise or of any other form of control. The incentive for the electricity generator to reduce the production of GHG will also be removed if Ulan has to offset these, a poor policy outcome as identified in the Respondent's submissions.<sup>23</sup>
40. As the Court did not intend to impose a condition in relation to Scope 2 GHG emissions, it did not consider it necessary to determine "whether offsets in relation to Scope 2 GHG emissions are lawful".<sup>24</sup>
41. In relation to Scope 3 GHG emissions, the Court did not determine whether a condition requiring the offset of those emissions was lawful because ultimately no such condition was sought.<sup>25</sup>
42. HEL makes the following submissions in relation to *HEL v Minister* and *HEL v Minister (No 2)*:

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<sup>22</sup> *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40, [16].

<sup>23</sup> *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, [94].

<sup>24</sup> *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, [94].

<sup>25</sup> *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, [34].

- a. First, it is clear that a condition requiring the offset of Scope 1 GHG emissions is lawful, as determined in *HEL v Minister* (and not disturbed by *HEL v Minister (No 2)*).
- b. Second, a condition requiring the offset of Scope 2 GHG emissions can be lawful, particularly where the condition fairly relates to the development. In this regard, Appendix 8 to the Project EIS, the Greenhouse Gas and Energy Assessment (**GHGE Assessment**) states on page 2:

Open cut mining and associated activities as part of the Project are forecast to consume approximately 149,000 GJ of electricity per annum, which will generate approximately 35,000 t CO<sub>2</sub>-e of Scope 2 emissions. **United can influence reductions in Scope 2 emissions by pursuing electricity reduction and efficiency initiatives.**

[Emphasis added.]

From this extract, it can be seen that the proponent can, by its own admission, “pursue electricity reduction and efficiency initiatives” that can influence Scope 2 GHG emissions. This could be achieved, for example, through commercial agreements with the electricity generator to facilitate the offset of such emissions.

- c. Third, a condition requiring the offset of Scope 3 GHG emissions can be lawful. Although Scope 3 GHG emissions, like Scope 2 GHG emissions, cannot entirely be controlled by the proponent, they will almost certainly result from the Project.
43. HEL notes that Scope 3 GHG emissions are required to be taken into account under clause 14(2) of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*, section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)*,<sup>26</sup> and existing case law,<sup>27</sup> including the *Rocky Hill* case. Moreover, the issue of Scope 3 GHG emissions is part of the proponent’s own EIS.<sup>28</sup>
  44. In the *Rocky Hill* case, which considered up-to-date scientific evidence and is the most recent persuasive authority for the IPC to consider, the Court confirmed that all of the “direct and indirect GHG emissions [i.e. Scope 1, 2 and 3 GHG emissions] of the ... Project will contribute cumulatively to the global total GHG emissions.”<sup>29</sup> The Court found that, in line with existing case law,<sup>30</sup> it

<sup>26</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [491]-[492].

<sup>27</sup> Cases cited by Preston CJ include *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100; [2004] VCAT 2029; *Gray v Minister for Planning* (2006) 152 LGERA 258; *Coast and Country Association Queensland Inc v Smith* [2016] QCA 242; *Wollar Property Progress Association Inc v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92; *Mid States Coalition for Progress v Surface Transportation Board* 345 F 3d 520 (8th Cir, 2003); *Montana Environmental Information Centre v US Office of Mining* 274 F. Supp 3d 1074 (D Mont, 2017); *Sierra Club v Federal Energy Regulatory Commission* 867 F 3d 1357 (DC Cir, 2017); *San Juan Citizens Alliance v United States Bureau of Land Management* 326 F Supp 3d 1227 (D N M, 2018).

<sup>28</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [490].

<sup>29</sup> *GRL v Minister*, [515].

“matters not that this aggregate of the Project’s GHG emissions may represent a small fraction of the global total of GHG emissions.”<sup>31</sup>

45. Significantly, drawing on the science in Prof Steffen’s carbon budget approach, the Court found a “causal link” existed between the Rocky Hill coal mine’s cumulative GHG emissions and global climate change.<sup>32</sup> The Court found that “approval of the Project ... is ... likely to run counter to the actions that are required to achieve peaking of global GHG emissions as soon as possible and to undertake rapid reductions thereafter in order to achieve net zero emissions”.<sup>33</sup>

46. In the *Rocky Hill* case, the Court also identified ways in which new fossil fuel developments could address their carbon emissions:

This is not a case where the applicant for development consent commits to taking specific and certain action to mitigate and offset the environmental impact of the proposed development. In the climate change context, for example, an applicant for development consent could commit to reducing the GHG emissions of the development by deploying emission reduction technologies, such as carbon capture and storage, or offsetting the GHG emissions of the development by increasing the removal of GHGs in the atmosphere by establishing sinks, such as by reforestation or afforestation of land. The Rocky Hill Coal Project, however, is not proposed to be carbon neutral. GRL has not proposed to balance the emissions by sources with removals by sinks.<sup>34</sup>

47. In the present case, the Project is not proposed to be carbon neutral. Therefore, if the IPC is minded to approve the Project, HEL submits that the IPC should impose a condition requiring it to become so, in order to properly mitigate the impacts of the Project’s GHG emissions.

48. The *Rocky Hill* case identified two key options for offsetting GHG emissions, namely emissions reduction technologies or establishing sinks such as by reforestation. However, in HEL’s submission, and for the reasons described below, the IPC could only be confident that the Project could achieve carbon neutrality if the proponent was required to implement appropriate emissions reduction mechanisms or technologies for the permanent offset of the equivalent of all Scope 1, 2 and 3 GHG emissions that will be produced as a consequence of the Project.

49. Referring back to the Court’s analysis of the general tests for planning condition validity in *HEL v Minister*, HEL submits:

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<sup>30</sup> Cases cited by Preston CJ include *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100; [2004] VCAT 2029; *Gray v Minister for Planning* (2006) 152 LGERA 258; *Massachusetts v Environmental Protection Agency* 549 US 497 (2007); *Urgenda Foundation v The State of the Netherlands* (C/09/456689/HA ZA 13-1396, 24 June 2015); *The State of the Netherlands v Urgenda Foundation* 200.178.245/01, 9 October 2018.

<sup>31</sup> *GRL v Minister*, [515].

<sup>32</sup> *Ibid* [525].

<sup>33</sup> *Ibid* [526].

<sup>34</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [530].

- a. A condition proposing the offset of the equivalent of all GHG emissions resulting from the Project would be consistent with the statutory framework set by the EP&A Act and the Mining SEPP;
  - b. The condition would reasonably be capable of being regarded as related to the purpose of the approval functions being exercised; and
  - c. Importantly, the purpose of the relevant approval functions includes the promotion of the public interest and the principles of ecologically sustainable development, such as the precautionary principle and intergenerational equity.
50. Moreover, if the *Newbury* test for planning condition validity is applied, HEL submits:
- a. The condition would be consistent with the scope and purpose of the power exercised by the consent authority for the Project;
  - b. The condition would “reasonably and fairly” relate to the development; and
  - c. The condition would not be so unreasonable that no reasonable planning authority could have imposed it.
51. Before HEL’s proposed condition is outlined, several observations follow regarding the technical practicability of “land carbon” offsets.

***Difficulties with “land carbon” offsets***

52. The Climate Council report *Land Carbon: No Substitute for Action on Fossil Fuels*<sup>35</sup> identified significant concerns with offsetting carbon emissions produced by fossil fuels with what they call “land carbon” offsets, i.e. activities such as reforestation or afforestation of land. Land carbon offsets operate within the “active” carbon cycle – this is carbon that moves between the land, ocean and atmosphere. While land carbon can be increased, it is vulnerable to loss from activities such as bushfires, droughts, insect attacks and heatwaves, all of which can release significant amounts of land carbon into the atmosphere, returning it to the “active” carbon cycle.<sup>36</sup>
53. In contrast, carbon in fossil fuels has been locked away for millions of years. Therefore, burning fossil fuels and releasing carbon dioxide to the atmosphere introduces a store of carbon that is additional to the current “active” carbon cycle. While the land and ocean will absorb some of this extra carbon, almost half of the carbon dioxide emitted from fossil fuel combustion remains in the atmosphere, driving global warming.<sup>37</sup>

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<sup>35</sup> Steffen, W., Fenwick, J. and Rice, M. (2016) *Land carbon: no substitute for action on fossil fuels* Climate Council of Australia. Available at: <https://www.climatecouncil.org.au/resources/land-carbon-report/>.

<sup>36</sup> *Land carbon: no substitute for action on fossil fuels*, p. 12-15.

<sup>37</sup> *Land carbon: no substitute for action on fossil fuels*, p 11

54. In light of this information, GHG emissions, their likely contribution to climate change, and the ability to meaningfully store or offset them become key relevant considerations in any assessment of a fossil fuel development. Any technical difficulties in establishing meaningful offsets must be balanced against an overriding need for offsets to be mandated so that GHG emission levels, and associated impacts on global climate and the environment, can be mitigated.

***HEL's proposed condition***

55. In setting a condition regarding the offset of the Project's GHG emissions, it is important to note clause 14 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*, which states, relevantly:

(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:

...

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

(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**.

[Emphasis added.]

56. Accordingly, the condition must be aimed at ensuring that the development is undertaken in an environmentally responsible manner, minimising GHG emissions to the greatest extent practicable. Having regard to the discussion above, in HEL's submission, it is clear that the proposed EMP condition does not achieve this aim.
57. Rather than the proposed EMP condition, HEL submits that a condition such as the following would be valid, reasonable and effective for the Project:
1. The Applicant must prepare a Greenhouse Gas (GHG) Emissions Offset Plan for the development, to the reasonable satisfaction of the Planning Secretary. The GHG Emissions Offset Plan must set out protocols that require the Applicant, at the end of each year following commencement of Phase 1B, to secure or establish permanent offsets of GHG emissions in the equivalent amount to the development's Scope 1, 2 and 3 GHG emissions emitted during the preceding year.
  2. The purpose of the GHG Emissions Offset Plan is to ensure that the Applicant adopts measures to ensure that the development's GHG emissions are minimised to the greatest extent practicable.

3. The Applicant must submit the GHG Emissions Offset Plan to the Planning Secretary at least 6 months before the commencement of Phase 1B.
4. The Applicant must not commence Phase 1B until the GHG Emissions Offset Plan is approved by the Planning Secretary.
5. After the GHG Emissions Offset Plan is approved by the Planning Secretary, the Applicant must provide sufficient evidence to the Planning Secretary of the necessary offsets having been secured in accordance with the GHG Emissions Offset Plan as approved by the Planning Secretary within 6 months of the end of each year following commencement of Phase 1B.
6. The Applicant must implement the GHG Emissions Offset Plan as approved by the Planning Secretary for the life of the development.

58. If you have any queries, please contact us on [REDACTED] [REDACTED] [REDACTED] or at [REDACTED]

Yours sincerely  
**EDO NSW**



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