

UNITED WAMBO

JOINT VENTURE

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Independent Planning Commission NSW
Level 3, 201 Elizabeth Street
SYDNEY NSW 2000
Email: ipcn@ipcn.nsw.gov.au

UNITED WAMBO OPEN CUT COAL MINE PROJECT – SUBMISSION REGARDING PROPOSED EXPORT MANAGEMENT PLAN CONDITION

1. BACKGROUND AND PURPOSE OF THIS SUBMISSION

- 1.1 The Independent Planning Commission (IPC) currently has before it, for determination, a development application for the United Wambo Open Cut Coal Mine Project (SSD 7142) (**Project**) and associated modification applications (DA 305-7-2003 MOD 16 and DA 177-8-2004 MOD 3).
- 1.2 The development application for the Project was made in August 2016 by United Collieries Pty Ltd, on behalf of the United Wambo joint venture (the **Proponent**).
- 1.3 On 2 August 2019, the IPC published, on its website, a statement which noted the following:

The Panel is continuing its deliberations on the merits of the SSD and associated modifications but is considering a condition along the following lines:

1. The Applicant must prepare an Export Management Plan for the development to the satisfaction of the Planning Secretary. This plan must set out protocols that require the Applicant to use its best endeavours to ensure that any coal extracted from the Site that is to be exported from Australia is only exported to countries that are:

(a) signatories to the Paris Agreement within the United Nations Framework Convention on Climate Change; or

(b) countries that the Planning Secretary considers have policies for reducing greenhouse gas emissions that would otherwise be similar to policies that would be required of that country if it were a signatory to the Agreement at (a) above;

as at the date of export. 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 Scope 3 emissions in the EIS.

2. The Applicant must not commence Phase 1B until the Export Management Plan is approved by the Planning Secretary.

3. The Applicant must implement the Export Management Plan as approved by the Planning Secretary for the life of the development.

- 1.4 For convenience, we refer to the above condition in this submission as the **Proposed Condition**.
- 1.5 The purpose of this submission is for the Proponent to provide its response to, and comments on, the Proposed Condition.

2. **OVERVIEW**

2.1 This submission consists of two main sections:

- (a) **Part A:** the reasons why the Proponent considers that, as a matter of policy, the Proposed Condition should not be imposed; and
- (b) **Part B:** the Proponent's comments on the impracticalities and problems with the Proposed Condition as currently drafted.

2.2 Before addressing each of these matters, the Proponent and its respective shareholders wish to clarify that they, like many other companies and individuals, take the issue of climate change and GHG emissions seriously and appreciate that the IPC is also conscious of these issues.

2.3 As discussed in the Proponent's submission of 14 April 2019 titled, "Response to the findings in the Rocky Hill and Wallarah 2 cases on climate change and greenhouse gas emissions" (**April Submission**), the Proponent and its respective shareholders are already taking action to reduce GHG emissions and promote the development and deployment of low-carbon technologies by conserving energy and reducing GHG emissions at their operations and advocating for research and key initiatives in low-emissions projects and partnerships.

2.4 The Proponent supports and invests in advanced coal technologies (including high-efficiency, low-emissions (**HELE**) and carbon capture, use and storage (**CCUS**) technologies) in Australia and other countries around the world, aimed at achieving significant and material reduction of emissions from coal consumption.

2.5 The Proponent is committed to the responsible and sustainable development of coal resources, which make a material contribution to the global energy mix and provide secure and reliable access to energy in many countries, thereby supporting those countries in undertaking the development necessary to achieve the United Nations Sustainable Development Goals. The Proponent is proud that their operations in Australia greatly benefit regional communities and make an important contribution to New South Wales and, more broadly, the Australian economy.

3. **PART A: POLICY REASONS AGAINST THE IMPOSITION OF THE PROPOSED CONDITION**

3.1 The Proponent considers that there are important policy reasons as to why the Proposed Condition should not be imposed.

3.2 Aside from the direct impact that the Proposed Condition will have on the Proponent, the Proposed Condition would likely be perceived by other investors as creating sovereign risk in investing in mining and other significant projects in NSW, which may serve to undermine the achievement of the aims of the Mining SEPP to "promote the development of significant mineral resources" (see clause 2(b1) of the Mining SEPP).

3.3 The Proposed Condition, in effect, creates new public policy. The apparent objective of the Proposed Condition is to ensure that the Project's coal is only transported to countries which have committed, through being signatories to the *Paris Agreement* or some other equivalent policy

measures, to take action to reduce GHG emissions. Any policy decision that seeks to regulate or constrain the export of goods from Australia is one for the Commonwealth Government to make.

- 3.4 The Proponent considers that the Proposed Condition discriminates unfairly against one particular project in one particular industry and is not an appropriate mechanism by which to achieve the objective of reducing GHG emissions on a global level. Such a regime is inequitable because a condition of this kind would only be imposed on the Project, which would result in inconsistent regulation between the Project and the other 50 odd coal mines in NSW, not to mention other industrial developments that may produce Scope 3 emissions. If countries leave the *Paris Agreement* or otherwise adjust their policy settings in a manner that may be considered inconsistent with the objectives of the *Paris Agreement*, this may mean that the market for the Project's coal will diminish.
- 3.5 The Proposed Condition would apply to the Project despite the fact that the Proponent has no control over:
- (a) the policy actions of countries to which the Project's coal is exported; or
 - (b) the manner in which the coal is ultimately consumed by the end customer, or the Scope 3 emissions that result from that consumption.
- 3.6 This outcome is manifestly unreasonable and unfair, particularly having regard to the fact that the Project would be the only mine in Australia that is subject to this type of constraint.
- 3.7 As explained in the April Submission, the Project's coal is a high energy, low ash product compared with many other sources of coal worldwide. The Proposed Condition would mean that certain countries could be denied the benefits of this coal, which may actually result in higher global GHG emissions as those countries would be forced to consume a greater volume of lower quality coal to achieve an equivalent energy output. There is therefore a material risk that the Proposed Condition will result in an outcome that is contrary to the objective that the IPC is seeking to achieve.

4. **PART B: THE IMPRACTICALITIES AND PROBLEMS ARISING FROM THE PROPOSED CONDITION AS DRAFTED**

- 4.1 Irrespective of whether the IPC accepts the views expressed in this submission that the imposition of the Proposed Condition is inappropriate and represents a shift in public policy for New South Wales, the Proponent considers that the following impracticalities and problems exist with the Proposed Condition as currently drafted:
- (a) The Proposed Condition does not recognise the fact that coal sales are not just made directly to end user customers, but also to traders and other producers and third parties. Even with direct sales to end user customers, the destination country of the coal is not always known as some customers operate in multiple jurisdictions and desire the flexibility to determine the end location for the coal they have purchased. In addition, sales are often effected via brokers or online trading platforms where the identity of the buyer (and the end destination) is not always known at the time of sale. In the event of a sale to a coal trader, the ownership of the coal passes to the trader at the point the coal is loaded onto a vessel. From that point, an individual cargo of coal might be on-sold, and also blended, multiple times before it reaches the ultimate destination. The Proponent does not have control over what happens to coal from the Project that is on-sold, making compliance with the condition impossible to achieve.

- (b) In addition, coal from the Project may be blended with coal from other mines, at various points in the delivery chain, after which point the Proponent often has no control over the coal. As such, it is unclear how the Proposed Condition – as drafted by the IPC – would apply in respect of Project coal that is blended with coal from other mines.
- (c) Coal sales are often forward sold (including coal sales that would occur as part of the Project). With this in mind, in a scenario where a country to which the Project's coal is exported leaves the Paris Agreement but a customer that is resident in that country has forward sold contracts still in place, the continued existence of such contractual arrangements may either render the Project non-compliant with the development consent or cause the Proponent to be in a position where it is unable to perform its obligations under those contracts.
- (d) The Proposed Condition is static in its reference to the *Paris Agreement* and "policies that would be required of that country if it were a signatory to the Agreement". As development consents can only be modified at the request of the proponent and cannot be unilaterally amended, any condition of this nature would need to contain sufficient flexibility to allow for replacement of, and changes to, international or domestic climate change policy over time. This is especially so having regard to the evolving nature of climate change policies in NSW, nationally and internationally.
- (e) The reference to "best endeavours" in Paragraph 1 of the Proposed Condition is inappropriate, as such language is not used in development consents for SSD projects. Use of language such as "reasonable and feasible measures" would be more appropriate. Those adjectives are defined expressions in almost all development consents for SSD projects.
- (f) The tying of the obligation to use best endeavours to only export the Project's coal to the countries referred to in paragraph 1(a) and (b) "as at the date of export" is also problematic, as it would be difficult for the Proponent to accommodate movements of countries entering or departing the *Paris Agreement* (e.g. the United States), which is a real possibility given the life of the development is anticipated to be 23 years, and bearing in mind that the coal is sold before the date of export (often many months or even years in advance).
- (g) The reference to Phase 1B in Paragraph 2 of the Proposed Condition is inappropriate, as Phase 1B is an earlier phase of the Project which involves preliminary construction and mining activities but does not involve any coal being sold to customers from the Project's development application area. Insertion of a reference to Phase 2 would be more appropriate, as this would be the first time when coal from the Project will be ready for sale to end customers.
- (h) The reference in Paragraph 3 of the Proposed Condition to requiring the Proponent to implement the Export Management Plan "for the life of the development" is inappropriate in circumstances where the objective of the Proposed Condition and the Export Management Plan is capable of being achieved through other State or Federal legal mechanisms introduced, at some point during the Project's life, to regulate GHG emissions generally.

4.2 To confirm, the Proponent is opposed to the imposition of the Proposed Condition for the reasons outlined above, but it is also noted that there are numerous drafting deficiencies in the Proposed Condition. These deficiencies could be ameliorated to an extent if the following amendments were made:

1. The Applicant must prepare an Export Management Plan for the development to the satisfaction of the Planning Secretary. This plan must set out protocols that require the Applicant to **take reasonable and feasible measures use its best endeavours** to ensure that any coal extracted from the **developmentSite** that:

- (a) **is to be exported from Australia directly to customers that consume the coal; and**
- (b) **is not sold via a broker; and**
- (c) **is not blended with coal extracted from mines other than the development,**

is only exported to countries that are:

- (d) ~~(a)~~ **signatories to the *Paris Agreement* within the *United Nations Framework Convention on Climate Change*, as at the date the relevant coal sales contract is entered into; or**
- (e) **signatories to any similar or replacement international convention addressing the same subject matter, as at the date the relevant coal sales contract is entered into; or**
- (f) **approved, at any time, by the Planning Secretary for the purposes of this condition as countries to which coal extracted from the development may be exported, having regard to any known climate change policies of the country in question.**

~~(b) countries that the Planning Secretary considers have policies for reducing greenhouse gas emissions that would otherwise be similar to policies that would be required of that country if it were a signatory to the Agreement at (a) above;~~

~~as at the date of export. 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 Scope 3 emissions in the EIS.~~

2. The Applicant must not commence Phase ~~2 1B~~ until the Export Management Plan is approved by the Planning Secretary.

3. **Subject to paragraph 4 below, the Applicant** must implement the Export Management Plan as approved by the Planning Secretary **(including revisions to that plan as approved by the Planning Secretary)** for the life of the development.

4. The Planning Secretary may, upon request by the Applicant at any time, determine that the Applicant is no longer required to implement the Export Management Plan if the Planning Secretary is satisfied that, due to the existence of other State or Federal legal mechanisms introduced by the NSW or Commonwealth Government regulating the subject matter of the Export Management Plan, there is no longer any need for the Export Management Plan to be implemented by the Applicant.

Note: This condition is not intended to apply to coal sales in circumstances where the Applicant does not control the destination of ultimate consumption of the coal (ie, sales effected through traders, brokers or where coal from the development is blended with coal from other mines).

5. CONCLUSION

5.1 The Proponent submits that:

- (a) the imposition of the Proposed Condition would be, in effect, creating new public policy; and
- (b) there are impracticalities with the Proposed Condition as currently drafted.

- 5.2 In addition, the Proponent has concerns as to whether the Proposed Condition could be lawfully imposed by the IPC.
- 5.3 For the reasons given in this submission, the Proponent respectfully suggests that the IPC should not proceed to impose the Proposed Condition.
- 5.4 If, however, the IPC is minded to impose the condition, the Proponent requests that the IPC adopts the amendments proposed in paragraph 4.2 of this letter.

Yours faithfully



Gary Wills
Operations Manager
United Wambo Joint Venture

Direct: [REDACTED]

Email: [REDACTED]