

Glendell Continued Operations – SSD 9349 and SSD 5850 Mod 4
Written submissions

Heritage: outline

1. The submissions are:
 - a. The Assessment Report lacks a proper analytic framework for heritage assessment – in respect of both Aboriginal and European cultural heritage values.
 - b. Without that proper framework, the Assessment Report has unduly focussed on the values of the *structures* of the Homestead – with no apparent consideration given to the requirements to *conserve the heritage significance of the place* – and there has been a similar unnecessary inquiry into the presence or absence of a particular “massacre” on the Project Site to the detriment of a proper assessment of the historic and heritage values of the *place*.
 - c. When the Commission adopts a proper analytic framework for heritage impacts, including Aboriginal cultural heritage, the impacts of the Project on the undeniably significant Aboriginal and European heritage values of the site are so unreasonable as to warrant refusal.
2. The need for the Commission to adopt a proper analytical framework for heritage assessment arises from:
 - a. The need to take into account principles of ecological sustainable development¹, and particularly intergenerational equity which is “that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations”²; and
 - b. The requirement to take into consideration any “likely impact” of the Project³ – which ought to be done, when possible, by reference to an applicable relevant standard. That is, it is not appropriate for the Commission to set aside or disregard an authoritative standard or to pioneer standards of its own but should apply well known and credible standards.⁴

¹ *Minister for Planning v Walker* (2008) 162 LGERA 423 at [56] per Hodgson JA; *Telstra Corporation Ltd v Hornsby Council* (2006) 67 NSWLR 256 at [124] per Preston CJ of LEC

² s 6(2)(b) Protection of the Environment Administration Act 1997

³ S 4.15(1)(b) Environmental Planning and Assessment Act 1979

⁴ *Telstra* at [98]-[100]

The standard

3. The relevant and applicable standard is “*Australia ICOMOS Burra Charter (2013)*” (**Burra Charter**) – an instrument giving effect to Australia’s ratification of the World Heritage Convention, 1972 (**Convention**).
4. Some initial observations can be made of the context of the Burra Charter and Convention before turning to the text of the Burra Charter:
 - a. Neither the Convention nor the Burra Charter express themselves as having their substantive provisions contingent on and able to be arrogated by an overriding or competing national interest (compare, eg, Art 29(2) *Universal Declaration of Human Rights* or Art 4(1) *International Covenant on Civil and Political Rights*).
 - b. Giving effect to the Burra Charter gives effect to Australia’s international law obligations under the Convention (specifically under Art 5 to “adopt a general policy” to “integrate the protection of that heritage into comprehensive planning programmes”). Failure to adopt or give effect to the terms and provisions of the Charter would, it follows, puts Australia in breach of the ratified obligations under the Convention (being, under Art 4, to identify, protect, conserve, present and transmit to future generations the cultural and natural heritage of monuments and sites).
5. The community would have the legitimate and entirely reasonable expectation that the Commission would adopt the Burra Charter as the relevant framework for assessment of the likely impacts of the Project on the Site as a place of cultural significance and that the Commission would make its decision mindful of the requirements to:
 - a. give effect to intergenerational equity, as a principle of ESD;
 - b. to avoid unreasonable impacts to the environment determined by reference to a relevant and applicable standard; and
 - c. to avoid putting Australia in breach of international law obligations⁵, or at least consider whether the decision would do so⁶.

⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291 and 302; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at [100]

⁶ Compare *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1042; (2016) 251 FCR 308 at 357 [201] per Griffith J

The Burra Charter

6. The purpose, structure and substantive provisions are not referenced in the Assessment Report.
7. The structure of the Burra Charter reveals two substantive parts: the *Conservation Principles* (under Arts 2 – 5) and the *process* provisions, which express themselves to be for the purpose of developing *policy* for places of cultural significance (Arts 6-28).
8. The **Conservation Principles** are expressed in simple, but absolute, terms:
 - Art 2.1: *Places of Cultural Significance* should be *conserved*.
 - Art 2.2: The aim of conservation is to *retain* the cultural significance of a *place*.
 - Art 2.4: Places of cultural significance should be safeguarded and not put at risk or left in a vulnerable state
9. The *process* provisions then provide assistance to decision-makers in the development of *policy* for such *places of cultural significance*. Importantly, for the Burra Charter to make any sense, that policy is one which ensures compliance with the requirements of the Conservation Principles, principally, that the *place* will be conserved under Art 2.1. That is, the policy requirements are:
 - To find a suitable management of the place based on the understanding of its cultural significance: Art 6.2;
 - Finding a compatible *use* for the place: Art 7.2.
 - Ensuring *retention* of the appropriate setting that contributes to the cultural significance of the place: Art 8.
10. This policy framework also recognises that the physical location of the place is part of its cultural significance: Art 9.1. Separately, Art 9.1 also provides that a *building, work or other element* should remain in its historical location: Art 9.1. The next sentence then provides:

Relocation is generally unacceptable unless this is the sole practical means of ensuring its survival.
11. The text and context of Art 9.1 makes it clear that the relocation spoken of is of a “building, work or element”. It makes no sense to talk about the relocation of a *place of cultural significance*. This is made clear in Art 9.2 which is again focussed upon some individual “buildings, works or other elements” of a place – which might be moveable (and so can be *removed*). Art 9.3 then provides:

If any building, work or other element is moved, it should be moved to an appropriate location and given an appropriate use. Such action should not be to the detriment of any place of cultural significance.
(emphasis in original).

Applying this analytical framework

12. Understanding this framework properly means that the removal of a *work* or *element* from the Site (like the Homestead structures) to a different location ought not to be to the detriment of the *place of cultural significance* (even if that is a means to ensure the survival of that *work*). To allow that would be clearly inconsistent with the Charter principles that require conservation of the *place* under Arts 2.1-2.4. And, as a policy *choice*, that removal is inconsistent with the directions of the Charter under Arts 6.2, 8, 9.1 and 9.3.
13. It follows that the conclusions of the Assessment Report (particularly at [296]) is quoting Art 9.1 wildly out of context and without a proper understanding of the context, text and structure of the Burra Charter. The author appears to assume that relocation of a *work* is acceptable as a practical means for *its* survival – but has had no express regard for the cultural heritage significance of the *place* and *its* conservation.
14. The Commission should instead adopt a proper analytical framework, based on the context, text and structure of the Burra Charter to find that removal of the Homestead structures would not be consistent with the Conservation Principles or the policy directions of the Burra Charter.
15. To much greater significance, the clear consequence of the Project would be the complete destruction of the *place of cultural significance* **in its entirety** which is clearly contrary to the Conservation Principles in Arts 2.1-2.4.
16. The Commission would know that the Heritage Council proposes to list the Estate on the State Heritage Register. This would give effect to the Conservation Principles and all of the policy directives of the Burra Charter. That is the proper outcome of the requirement to adopt the Conservation Principles and allows the future policy and management of the place of cultural significance consistent with the policy directions of the Burra Charter. Approval of the Project would obviously prevent this. However, such co-operation between government departments to facilitate an outcome that promotes ESD, prevents an unreasonable impact, accords with international law obligations and promotes harmony in intra-governmental outcomes is a reasonable expectation of the EPA Act, and of the community.

Significant deficiencies in the Assessment Report

17. Aside from the lack of a proper analytic framework for the assessment of the loss of heritage significance, the Assessment Report has other significant deficiencies.
18. Most significantly, the Assessment Report fails to inform the Commission of detail concerning Aboriginal cultural heritage significance of the Site and the potential for catastrophic impacts regarding its loss.
19. Associate Prof Draper has provided some evidence to the Commission as to cultural heritage values in an Anthropology Report on PCWP Cultural Values (2020). This included:
 - Cultural/social significance of the place – being, among other reasons, its location as an “important cultural route along Glennies Creek and its tributaries that form part of the traditional male initiation (Bora) cycle of the Wannarua people”;
 - Historical significance from the “very strong association with the history of early colonial conflict and invasion of the Wonnarua people by the colonists and the military forces that assisted them”;
 - Scientific significance – because of the “potential to yield additional archaeological information”;
 - Aesthetic significance – due to the evocation of “severe dread and anxiety among Wannarua people because of its central associations with the deaths of many of their ancestors and their loss of sovereignty”.
20. A/Prof Draper’s most recent report also includes a significant critique of the Aboriginal cultural assessment asserted as supporting the Project application. He has not had the time or resources that might be needed to complete a full assessment. However, it should not be incumbent upon him to do that. A full assessment of cultural values ought to have been undertaken in the ACHAR and was not.
21. The review over heritage assessment commissioned by the Department as the Abrahams Report itself commented on the Canning (2019) Statement of Aboriginal Heritage Values to mention that the social significance of the place for the PCWP was “well-established” (at [8]). This independent report – specifically commissioned by the Department- is not referenced in the Assessment Report under the heading of Aboriginal Heritage. It’s content, that there is a well-established social significance of the Site to the PCWP, is contrary to the statement made at [270] in the Assessment Report that Aboriginal groups

had not identified any particularly significant cultural values for the Site. If that paragraph is only intended to reproduce the findings of the ACHA it might be accurate as a representation of that report, but in that case, it is startling that there is no mention of any other resources open to the Commission that have been critical of that report - including the Abrahams Report and the reports of A/Prof Draper.

22. The Assessment Report clearly conflates two different concepts at [275] stating that:

The Department acknowledges that some groups identify the area as having high cultural significance, however the disturbance area itself has relatively low tangible archaeological significance.

23. Here, the clear deficiency in the Assessment Report is made manifest. The author fails to grasp how cultural significance can be assessed in ways other than through tangible archaeology. This shows, again, a failure to understand or set out the process set out in the Burra Charter. Art 26.1 states that work on a place should be proceeded by studies to understand the place. Those studies are expressly not limited to archaeological finds but “should include analysis of physical, documentary, oral and other evidence, drawing on appropriate knowledge, skills and disciplines” (emphasis added). The Practice Note on Understanding and assessing cultural significance (Australia ICOMOS, Ver 1: 2013) expressly notes (at p5):

The process of assessing cultural significance should include defining the tangible and intangible attributes that embody each aspect of cultural significance.

24. The same practice note also states (at p7):

In assessing cultural significance, all forms of knowledge should be considered and no one form should be privileged over others. For example, for some places much of the knowledge may not be written down, and consultation with those who hold that knowledge will be essential. Practitioners should think broadly about the likely sources of knowledge about a place and how best to access them.

In some circumstances, protocols may be needed to protect culturally sensitive knowledge and information, and cultural sensitivities may limit the amount of information that may be revealed.

Different cultures may value a place in different ways, and this should be reflected in the assessment of cultural significance. The Code on the ethics of co-existence in conserving significant places (Australia ICOMOS: 1998) provides guidance on how to recognise and respect the rights of different cultural groups.

25. And again (at p8):

In some traditional cultures and in other groups, relevant knowledge may reside in only a limited number of people. They should be identified and consulted. In particular, engagement with relevant knowledge-holders will be essential where cultural significance assessments concern social and spiritual values.

Review of preliminary conclusions by those with significant associations or cultural connections will help ensure that their values have been understood and clearly articulated.

26. The absence of a robust assessment of Aboriginal cultural heritage in the assessment by the Proponent has been substantially critiqued by A/Prof Draper in his reports to the Commission and is supported by the review of Abrahams and the similar criticisms of the Heritage Council. None of this is detailed in the Assessment Report. That is a substantial failure to inform the Commission on relevant mandatory considerations regarding likely adverse impacts on Aboriginal cultural heritage.
27. The Commission should reject that analysis and instead give weight to findings regarding social significance identified by A/Prof Draper (and, importantly, in the Lee Report (2021)). If it wished, the Commission could inform itself further by commissioning its own study consistent with the methodological requirements of the Burra Charter.
28. In the absence of this, the Commission should not be required to act on the incomplete information submitted by the Proponent. The usual course would be to refuse an application unsupported by relevant and required information when there is a risk of real harm to Aboriginal cultural values.
29. In any event, based on what the Commission has, it can and should find:
 - a. There are undeniable traditional cultural values represented in the *place* – which is to say wider concept than the Homestead and any curtilage. These values are embedded in the landscape and surrounds within the Project Site and are independent of the existence of the Homestead structures.
 - b. Nevertheless, putting those values in combination and connection to historical heritage values associated with the Estate, adds further significance to the *place* in the context of frontier *establishment* and frontier *violence*.
 - c. The structures then become a relevant focal point for the *place* – a *work* or *element* that contributes to the significance of the wider *place*. It is entirely irrelevant that the structures were built after the documented period of frontier violence (cf Assessment Report at [191]). The later addition of the structures to the place is not separate from the earlier events. It is that period of violence and dispossession that created the conditions for the structures to be built and the connected agricultural activity to prosper.

d. The *place* represents a unique and important vehicle for future generations to understand and reflect upon both the ancient traditional values represented by the landform and natural features of the Site and the heritage values embedded in the Estate and the structures in terms of all the attributes of assertion of sovereignty at a frontier.

30. The Heritage Council has stressed the state heritage significance of both the Homestead and its surrounding cultural landscape for its aesthetic, historic, scientific and social values. The Council has identified the cultural landscape as having significance for in-situ archaeology, Aboriginal intangible cultural values and cultural landscape planting.

31. The Council has stressed, separately, the high and exceptional significance of the structures in terms of intact fabric, setting, views and meaning.

32. It is only by understanding that the cultural significance of the *place* results from an amalgam of values associated with the landscape and the structures, each having overlapping cultural significance, that full import of the destruction of the place can be assessed. The appropriate finding is that the loss of such a place of cultural significance is, rightly, catastrophic and devastating.

Values retained in removal options?

33. Any heritage values of the structures, as structures, retained by their removal is nominal. The proposed relocation of the structures to the Farm would be in very close proximity to substantial mine infrastructure areas and access roads forming part of the Project (compare Assessment Report Fig 14 at p45 and Fig 30 at p92). As the infrastructure in the area has not been detailed, the Commission could not assess whether there would be any further loss to the minimal values retained in the relocation. It is unclear if Hector Abrahams was aware of this as it is not mentioned in that report or the Assessment Report.

34. The Heritage Council has stated the relocation of the structures would result in irreversible loss of the significance of those structures in terms of the form of *intact fabric, archaeology, Aboriginal and colonial landscape setting, and views*. That is consistent with what the Abrahams Report identifies. The only values found to have potential to be retained by relocation of the structures are:

1. the historical association of the structures with Dr Bowman; and

2. the aesthetic and rarity value of the structure - being a colonial bungalow type.

These are nominal values being retained, and only in respect of the structures. This is not mitigating anything in terms of the level of loss of cultural significance of the *place*.

Are heritage impacts mitigated?

35. The Assessment Report conclusion that such impacts are “mitigated” by imposing an archaeological salvage operation (at [197]) should not be adopted by the Commission.
36. First, archaeological investigations are only necessary as part of continued investigations into the research or other values of the Site. The Burra Charter requires such investigations to *precede* work: Art 26.1. This is another way in which the Assessment Report promotes an outcome inconsistent with the Burra Charter.
37. Second, disturbance of a place of cultural significance should be “minimised” and archaeological investigations “only...undertaken to provide data essential for decisions on the *conservation* of the place, or to obtain important evidence about to be lost or made inaccessible”: Art 28.1 (emphasis in original). The proposed salvage operation is not proposed to provide data for any decision on conservation of the place and so provides nothing mitigating against the loss of that cultural significance.
38. The Land and Environment Court rejected a salvage operation as a suitable option in the Calga Sand Quarry Case: *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465. The observations of the Court from [308]-[310] are significant and apt for the Commission to consider as similarly applicable to the present Project:

The Court has carefully considered the evidence relating to whether enough is known about the cultural significance of the Rocla land to grant approval to the Project. The Court concurs with the argument that at this stage there is insufficient knowledge about the cultural significance of the site to grant development approval. The Court has outlined above reasons for considering that the investigations on Rocla land with respect to Aboriginal cultural heritage are inadequate. The nature of the known Aboriginal cultural heritage has not been analysed in a regional framework, and it has not been demonstrated that more places of significance, or places which might further enhance the significance of the known Aboriginal heritage of the area, will not be found.

Therefore it logically follows, as a majority of the experts agree, that there is insufficient information to determine the cultural significance of the area with certainty. The Burra Charter process mandates that:

Understanding cultural significance comes first, then development of policy and finally management of the place in accordance with the policy. (6.1) and Policy for managing a place must be based on an understanding of its cultural significance (6.2) ...

In the circumstances, the development of a Statement of Significance and a CMP after consent has been granted creates unacceptable uncertainty. There remains the obvious problem that such a Statement of Significance, developed as a result of a conservation management planning process which took place after consent was granted, could not effectively influence major changes in the management regime which might be necessary in light of post consent investigations. There appears to be a real risk that new significant sites and/or information which might enhance the significance of known sites, and hence change or augment the overall cultural significance of the site, will be discovered too late to influence land-use decisions or to conserve other discovered significant sites in the cultural landscape.

(Emphasis added)

39. Consistency in the approach for decision-making under the EPA Act is an important element of public confidence in the planning system. The Commission should adopt a similar approach that an operational condition for a salvage programme comes too late to properly influence managerial approaches to the discovery or conservation of sites in the cultural landscape. That is, the approach adopted in the Assessment Report does not mitigate the impacts on heritage values but exacerbate them.
40. If the Commission would depart from consistency with the Court in its approach then the reasons for the decision would need to carefully explain why a similar approach is not being adopted.

Are the impacts capable of being “balanced” against benefits

41. The Assessment Report presents as an “offset” to or a “balance” against the heritage impacts (which have been understated in the Assessment Report in any event), being a supposed economic benefit of the Project (see [212], [214]).
42. Such a “balance” is not something required by s 4.15(1) of the EPA Act. Indeed, the approach is contrary to the statutory requirement to consider the “likely impacts” of the project and not some abstract “net” outcome. The approach is also not consistent with the terms of the Burra Charter or Convention as neither of those instruments express themselves as giving way or giving weight to any countervailing national or local (economic) interest. The simplistic metaphor of a “balance” in which significant environmental impacts are merely assessed against perceived economic benefits that might be “lost” distracts from the correct legal understanding of the more complex task that the

Commission must undertake; as described by the Chief Judge of the Land and Environment Court in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* [2013] NSWLEC 48; 194 LGERA 347 at [31]-[42], (emphasis added):

Forms of economic analysis, such as cost benefit analysis, which endeavour to balance different factors by use of a common, quantitative unit, such as money, assist but are not a substitute for the intuitive synthesis required of the decision-maker. ...it is sufficient to say that economic analyses are not a substitute because, first, the decision-maker's statutory duty is to apply weight to and balance the relevant matters, and this cannot be subordinated to the process and outcome of economic analyses (such as by cost benefit analysis); secondly, not all relevant matters required to be considered have a market value and are therefore not able to be objectively weighted by the marketplace by assigning a monetary value; and thirdly, the assigning of non-market values to relevant matters that have no market value imperfectly captures and undervalues these matters.

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

The exercise of the power under s 75J to approve or disapprove the carrying out of the Project requires consideration, weighting and balancing of the environmental, social and economic impacts of the Project. The range of interests affected, the complexity of the issues and the interdependence of the issues, means that decision-making involves a polycentric problem. A polycentric problem involves a complex network of relationships, with interacting points of influence. Each decision made communicates itself to other centres of decision, changing the conditions, so that a new basis must be found for the next decision...

...Polycentric problems cannot be resolved by identifying each issue at the start then sequentially resolving each of the originally identified issues. In a polycentric problem, the resolution of one issue will have repercussions on the other issues; the other issues may change in nature and scope depending on how the first issue is resolved.

A decision to approve the carrying out of a project is a polycentric problem. A decision about one issue raised by the carrying out of the project is linked by interacting points of influence to decisions about other issues, necessitating readjustment of the project ...

...The criteria to be considered are numerous, cannot be objectively weighted, and are interdependent. The decision-maker must not only determine what are the relevant matters to be considered in deciding whether or not to approve the carrying out of the project, but also subjectively determine the weight to be given to each matter ...

The process of decision-making under s 75J of the EPA Act therefore involves: first, identification of the relevant matters needing to be considered; secondly, fact

finding for each relevant matter; thirdly, determining how much weight each relevant matter is to receive, and fourthly, balancing the weighted matters to arrive at a managerial decision.

The first step requires analysis of the statutes ... In an application for approval to carry out a project under Part 3A, the relevant matters will include the various impacts on the environment the project is likely to have.

Having identified the relevant matters which must or may be considered, the decision-maker needs, as a second step, to undertake fact finding and inference drawing so as to enable consideration of these matters. ... The process of fact finding and inference drawing to enable consideration of these impacts includes ascertaining the nature and extent of each type of impact and the nature and efficacy of measures proposed in the application for approval, or that could be imposed as conditions of approval, to prevent, mitigate or compensate for each type of impact.

The third step requires ... [determination of] how much weight each relevant matter should receive. ... The assigning of weight is a subjective task. The decision-maker needs to evaluate the relative importance of the relevant matters, each compared to the others. ...

The fourth step requires the weighted matters to be balanced, each against the others. Because all of the matters may not be, or be capable of being, reduced to a common unit of measurement, such as money, balancing of the weighted matters is a qualitative and not quantitative exercise. The ultimate decision involves an intuitive synthesis of the various matters. Forms of economic analysis, such as cost benefit analysis, which endeavour to balance different factors by use of a common, quantitative unit, such as money, assist but are not a substitute for the intuitive synthesis required of the decision-maker. ... it is sufficient to say that economic analyses are not a substitute because, first, the decision-maker's statutory duty is to apply weight to and balance the relevant matters, and this cannot be subordinated to the process and outcome of economic analyses (such as by cost benefit analysis); secondly, not all relevant matters required to be considered have a market value and are therefore not able to be objectively weighted by the marketplace by assigning a monetary value; and thirdly, the assigning of non-market values to relevant matters that have no market value imperfectly captures and undervalues these matters.

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

43. The Commission must assess for itself the weight to be given to the significant, indeed catastrophic, loss of heritage values represented by an approval of the Project taken in its own right and not as part of any balancing exercise. It is submitted that weight given to those impacts would, of necessity, be considerable. This alone would justify the Commission concluding that the Project site was unsuitable for the project under s

4.15(1)(c); as giving rise to unacceptable adverse impacts under s 4.15(1)(b); and hence against the public interest for the purpose of s 4.15(1)(e).

44. The Commission could also, separately, but as part of its process of assessment consider what public interest is involved in approval of the Project given consistency with planning instruments (under s 4.15(1)(a)) and the public interest involved promotion of “the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources” referencing s 1.3(a). That deserves its own separate consideration in terms of what can be determined as part of the fact findings open to the Commission on those topics based on the conflicting economic evidence. Given the dramatic differences in outcome from experts engaged to prepare such reports, the Commission might either apply a tool like the precautionary principle in aid to resolve such differences (and be sceptical of economic benefits that have not been adequately demonstrated) or give little weight to the economic benefits given that reasonable minds can so easily differ on what can be achieved. But, however resolved, that matter deserves its own assessment.

[Assessable economic benefits?](#)

45. In this respect it is necessary for the Commission to have regard to the opinions of Dr Alistair Davey who has reviewed the economic analysis said to support the Project application and found that it “was not possible to conduct a full replication because other elements of the CBA are shrouded in mystery”. On that basis, Dr Davey demonstrates to the Commission that the Ernst and Young (**EY**) analysis “fails to meet the requirements of the current *Guidelines for the economic assessment of mining and coal seam gas proposals*”. That failure should ordinarily mean that the Commission would not have any significant regard for that analysis.

46. Most significantly, Dr Davey provides a compelling basis to further doubt the EY analysis being that the likely price of coal will fall from their current record high levels in the near term – a view supported by both KPMG and the World Bank forecasts (which were reviewed by Dr Davey for their relative worth as forecasts and found to be robust). Based upon long term forecasts from reliable sources, Dr Davey’s assessment of the economic viability of the Project. On the most reliable forecasts from the World Bank, the Project is clearly unviable (even when taking into account the accepted residual cost of capital, operating costs, closure costs, biodiversity costs and depreciation which was reported in EY but “shrouded in mystery”).

47. The Commission should have no confidence that significant economic benefits to the State are possible from the Project.

Outcome for assessment on economic benefit of Project

48. Again, in terms of consistency of decision-making under the EPA Act, the Commission should approach the issue of the final intuitive synthesis mindful of the approach of the Chief Judge in *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257 at [286]:

The benefits of the mine will be received for the life of the Project only, while the disbenefits of the mine may persist for longer. Even after mining operations have finished, the damage to the clean and green environment of the Gloucester area, and the image of such an environment, may endure.

And at [414]-[416]:

The result is inequity in the distribution of the environmental, social and economic burdens and benefits of the Project within the current generation (intra-generational inequity).

There is also inequity in the distribution between current and future generations. The economic and social benefits of the Project will last only for the life of the Project (less than two decades), but the environmental, social and economic burdens of the Project will endure not only for the life of the Project but some will continue for long after. The visual impact of the Project, even after mining rehabilitation, will continue. The natural scenery and landscape will be altered forever, replaced by an artificial topography and landscape. The social impacts on culture and community, especially for the Aboriginal people whose Country has been mined, will persist. A sacred cultural land created by the Ancestors of the Aboriginal people cannot be recreated by mine rehabilitation. As discussed below, the Project will emit greenhouse gases and contribute to climate change, the consequences of which will burden future generations.

The benefits of the Project are therefore distributed to the current generation but the burdens are distributed to the current as well as future generations (inter-generational inequity).

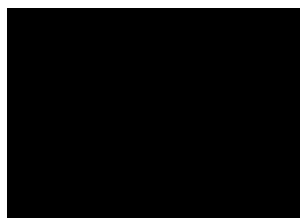
49. But it is not correct as a matter of fact or law to describe any economic outcomes from the Project as “lost” if the assessment that is undertaken does not support approval (contrary to the findings of the Assessment Report at [212]-[214]). If the proper assessment of the

Project results in the conclusion that there be no approval then such “benefits” were never achievable (or only achievable at the cost of significant, unreasonable impacts).

The intuitive synthesis of a polycentric decision

50. In terms of the polycentric nature of the decision-making, having proper regard to the unacceptable heritage impacts of the Project gives additional weight to other, also unreasonable, impacts generated by the Project.
51. The proposed conditions relating to the final landform of the Project demonstrate that there will be no recovery of any heritage values of the site. The Project clearly only could be undertaken at the cost of:
 - significant new GHG emissions;
 - detrimental air quality impacts;
 - uncertain water-table impacts; and
 - social impacts in the hindering of appropriate transition timeframes.
52. Again, consistency in the decision-making allows the Commission to consider the approach of the Chief Judge in *Gloucester* (at [515]) as useful:

Other things being equal, it would be rational to refuse fossil fuel developments with greater environmental, social and economic impacts than fossil fuel developments with lesser environmental, social and economic impacts. To do so not only achieves the goal of not increasing GHG emissions by source, but also achieves the collateral benefit of preventing those greater environmental, social and economic impacts.



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