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Observations on difficulties with Compensatory Water provisions

Marylou Potts Pty Ltd is an incorporated legal practice engaged by CFSH.

As a general comment, we wholeheartedly agree with the observations of the DPE in its determination concerning the compensatory water issues, particularly its comment that this is a project falling within the Aquifer Interference Policy's category where there is, due to the geology and hydrogeology, "*no suitable or practical mitigation or prevention options*" to make good more than minimal harm to water resources.

It is our view that the concept of make good, as Hume envisages it, is fundamentally flawed, legally and practically. We can illustrate that view looking at Hume's proposed "make good strategy" in Appendix M.

Unworkable legally as assumes access private land

The fundamental flaw in Hume's "make good strategy" is that it assumes it will gain access to private property to undertake further field studies², monitoring and assessment. Hume has no legal right to access private land without landholder consent. Landholders have prevented Hume from exploring approximately 1000 acres in the middle of MLA 527 having been successful on appeal to protect their significant improvements³. In the least, these landholders are unlikely to entertain any communication, let alone access to their land by Hume⁴.

There is no provision in the Mining Act which grants Hume access to private land. Landholders can use either s31⁵, if Hume retains its EL, or if not, s81 of the Mining Act, to require their consent to access private land.

¹ p. iv DPE Assessment Report See para 3.2 Aquifer Interference Policy para 3.2. "*As part of the assessment process, there may be no suitable or practical mitigation or prevention options and therefore the proponent may be asked to avoid impacts by modifying the proposed activity.*" We note Hume has not proposed modifying the proposed activity. We also note that no Water Access Licence should be granted, or we say allowed to be transferred to Hume for this project, if adequate arrangements are not in place to ensure no more than minimal harm. Section 63(2) and Chapter 3 Water Management Act 2000 (NSW)

² The Appendix M is riddled with assumptions that Hume will obtain access to landholder's land to undertake further field studies. This assumption is unfounded. Appendix M p.4 further investigations, 11 additional studies required, field assessments required, 12, 23 seek access to complete field assessment, 32, 33, 34, 35

³ Martin & Ors v Hume Coal Pty Ltd [2016] LEC 51. This case concerned section 31 of the Mining Act which provides "*the holder of an exploration licence may not exercise any of the rights conferred by the licence over the surface of the land upon which is situate a significant improvement*". The Court held that significant improvements were effectively "no go zones".

⁴ We note of the 148 letters sent Hume has only managed 9 meetings about make good, see p32 of Appendix M

⁵ Most properties in the project area of MLA 527 are covered in one form or other of significant improvement, or the dwelling house within 200m of the entrance gate, or the entrance gate is part of a garden. This creates "no go zones" preventing access without landholder consent.

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Hume's access issues also raise evidentiary issues⁶ for it in relation to compensatory water.

It appears unclear whether Hume has the necessary water licences to cover make good.⁷

Hume's strategy places the risk and cost burden, which is recognised as very considerable⁸ on the landholder.⁹ Fundamentally, the landholders should be no worse off as a consequence of Hume's activities. Hume's strategy proposes the opposite.¹⁰

Unworkable practically

Hume's strategy is also practically fundamentally flawed where a landholder will not provide access.

Hume's options do not include the worst case scenario where a new bore, increasing the depth of an old bore or increasing pumping or a new dam, or other water infrastructure does not result in the provision of equivalent quality and volume of water. The practical unsuitability of compensatory water is illustrated in Mr Peter Martin's objection to the project. Peter Martin will not provide access to Hume. He anticipates complete bore failure. He has calculated that Hume must replace a minimum of 20 megalitres of water in a three month period of summer just to irrigate his truffiere. This equates to a total of six hundred 30,000 litre semi trailer water tankers in that three months alone. That is 46 x 30,000 litre semi trailer water tankers a week or 7 semi trailers per day. This is for a single property on Golden Vale Road. This may be for 76 years or more until the adverse impact has been resolved.

We note Hume has not dealt with the possibility of ground water contamination due to the coal washery rejects being pumped into the mine voids¹¹. Presumably, this will result not only in bore water contamination but soil contamination.

"Make good" ripe for disputes

We concur with the DPE finding¹² that there would be substantial disruption to the community relating to the difficult and ongoing process of negotiating and implementing make good agreements.¹³

We agree with the DPE¹⁴ that there is more than likely to be considerable disagreement between the Applicant and the landholder in relation to the actual draw down and implementing the make good arrangements. The likelihood of disagreement will rely heavily on dispute resolution, involving substantial legal costs for the landholder, the Department and the Applicant, and it is more than likely that the Department will find itself managing an extremely large number of

⁶ Make good assumes it is possible to show direct adverse impact. We query what evidence would be sufficient? We query whether it has ever been proved that a drop in bore water levels or water pressure has been directly caused by a project. We query whether it is more likely that the loss of water/drop in pressure is an indirect result of the construction of the mine. This is clearly fundamental to the entire concept.

⁷ It is unclear whether Hume's water licenses are intended to cover the minimum 2m drop in water across the adversely impacted area. It would appear, that Hume would require licensing to cover this drop: s60I Water Management Act. Certainly this drop will impact on vegetation with shorter root structures, such as improved pastures and native grasses.

⁸ See *New Acland Coal Pty Ltd v Ashman & Ors* and Chief Executive Department of Environment and Heritage (no.4) [2017] QLC 24 at [1537]

⁹ p.1 Hume Appendix M: "over 400 landholder bores within 9km of the proposed mine". On p7. "94 landholders on 72 properties". DPE at p.iv states "up to 118 privately owned bores"

¹⁰ No offer by Hume to pay for landholder time devoted to its project's adverse impact on landholder, or for the negotiation of any make good agreement, or for its interruption of landholders' business, or to pay for the landholders' expert hydrologists to prove adverse impact directly caused, or to cover landholder legal costs in negotiation of make good, or in disputes about make good, or for damage caused by adverse impact before make good is agreement is settled, etc

¹¹ We note Hume's comments that it believes there is an impermeable layer between the coal seam and the Hawkesbury aquifer. We question these statements particularly over the approximately 1000 acres in the middle of MLA527 which Hume has not been able to explore. Page 37 of Appendix M notes long term compromise and refers this to further negotiation.

¹² p24 DPE Report

¹³ Our experience with make good agreements is that there is a very significant conceptual gap between the landholders view on what is make good and what a proponent is prepared to provide which is generally a new bore, dam or pump, not an equivalent volume and quality of water lost for the period of the adverse impact.

¹⁴ P24 DPE Report

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ongoing disputes, in relation to at least 118 bores, throughout the life of the proposed mine and well beyond that time, at least 76 years.

The risk and as a consequence the cost, in relation to each of these aspects is on the landholder, who is in immediate need of the replacement supply of water. This places the landholder in a preposterous position with the Applicant placed as the conflicted gatekeeper. We do not consider this to be a suitable solution.

Hume states it intends to use the "Land Access Arbitration framework" for dispute resolution of make good agreements. We query whether Division 2 of Part 8 of the Mining Act applies given it only relates to "prospecting"¹⁵ as defined in the Mining Act. That is, the "testing of the mineral bearing qualities of the land". Make good agreements do not relate to prospecting, they relate to mining.

We note that compensatory water conditions are becoming worse for landholders with each development consent

It is noted that draft Bylong Condition 25 is in worse terms, for the landholder, than its equivalent in the Wallarah 2 and the Ulan Project¹⁶. In the Wallarah 2 and Ulan Compensatory Water condition, interim water is to be provided within 24 hours of the loss. In Bylong and Shenhua, "as soon as practicable".

The impact in the Bylong Project has to be proved to be directly caused by the Project. The equivalent Ulan condition does not require the cause to be direct, meaning the cause can be both direct and indirect. As a consequence, Bylong's Condition 25 will not assist landholders where the adverse impact is indirect. This is a significant limitation which I anticipate will result in significant dispute, and place a very significant costs burden on landholders. It will be in KEPCO's interest to ensure these disputes are not resolved. In fact it will always be in the applicant's interest to ensure disputes are not resolved.

We note that shifting the burden of proof onto the proponent/Applicant, although beneficial as a starting point, is of little impact where it automatically shifts back to the landholder when the proponent/Applicant argues, for example, "*the drop in bore water levels is due to the drought*".

Conclusion

We see the concept of compensatory water as problematic in the least, and should not be used to enable project consent. In fact, we see the issues Hume has with compensatory water enable and underpin a refusal of development consent.

¹⁵ s.138 of the Mining Act "*This division applies to prospecting operations under exploration licences*"

¹⁶ MOD 3 Determination The Proponent shall provide a compensatory water supply to any owner of privately-owned land whose **supply is** adversely impacted (other than an impact that is negligible) as a result of the project, in consultation with **DPI Water**, and to the satisfaction of the **Secretary**.