GLENCORE

15 November 2019

REVIEW OF THE INDEPENDENT PLANNING COMMISSION

SUBMISSION OF GLENCORE AUSTRALIA

1. EXECUTIVE SUMMARY

1.1 Glencore Australia Holdings Pty Ltd (**Glencore**) is a key stakeholder in the design, operation and performance efficiency of the environmental assessment regime for State significant development (**SSD**) under the Environmental Planning and Assessment Act 1979 (**EP&A Act**).

1.2 It is Glencore's position that:

(a) the EP&A Act regime should be amended to make the Minister, rather than the IPC, the decision-maker responsible for determining development applications and modification applications for SSD (except in the limited circumstance where a particular application is associated with a reportable political donation);

(b) there are serious deficiencies in the way in which the IPC has been assessing and determining applications for SSD mining projects. That is, the IPC has carried out its functions in a demonstrably inefficient and inconsistent manner;

(c) the IPC's role under the EP&A Act should be substantially changed so that the IPC only performs an advisory function with respect to development applications for SSD. That is, the purpose of the IPC would be to:

(i) provide an independent "check" that the scope and depth of DPIE's environmental assessment will be adequate for the Minister to make a properly informed decision on the SSD application; and

(ii) make recommendations to the Minister as to whether or not an SSD application should be approved or refused; and

(d) the IPC should have no function in respect of modification applications for SSD (except where a particular application is associated with a reportable political donation).

1.3 The failings of the IPC are highlighted by the four significant mining project applications it has determined in 2019, as identified in the following table.

Project	DPIE Recommendation	IPC Determination	Issues
Dartbrook Coal Mine – Modification 7	Recommence underground mining and extend project duration by 5 years to 2027	Recommence underground mining but no extension. Approval expires in 2022, which the IPC acknowledged would make the project uneconomic	It appears that the applicant was not provided with an opportunity to address IPC's concerns regarding project extension

Project	DPIE Recommendation	IPC Determination	Issues
United Wambo Project	Approve project with no condition restricting sales of coal to certain export destinations	Project approved with condition restricting coal sales to Paris Agreement signatory countries	Imposed condition contrary to stated government policy Approval delayed by several months by this issue alone The IPC determination phase took almost one year
Bylong Coal Project	Approve project, having regard to extensive assessment by 14 government agencies over many years	Refuse project on a range of grounds, including impacts on groundwater, heritage, agriculture and greenhouse gas emissions	DPIE's conclusions on environmental impacts were not accepted. It appears that the applicant was not provided with an opportunity to supply information to address IPC's concerns IPC determination phase took almost one year
Rix's Creek Continuation of Mining Project	Approve continuation project	Approve continuation project	Administrative error in manner of approval No condition restricting coal sales to Paris Agreement signatory countries, despite there being common panel members with United Wambo project.

1.3 In this submission Glencore has provided recommendations as to how the role of the IPC should be reformed to achieve the outcomes described above (refer to sections 8 and 9).

1.4 In section 10 of this submission we have provided additional recommendations for reform of the IPC in response to the Productivity Commissioner's terms of reference. . Those recommendations apply irrespective of whether the IPC continues to have a decision-making function or is limited to an advisory function.

1.5 Glencore has had the opportunity to review the submission made by the NSW Minerals Council. Glencore supports that submission and considers that this submission supplements it.

2. GLENCORE IS A KEY STAKEHOLDER IN THE SSD ASSESSMENT REGIME

2.1 Glencore is a natural resources company with significant interests in a range of commodity industries across Australia. Glencore employs approximately 18,000 in Australia people working across industries that include coal, copper, cotton, grain and oilseeds, nickel, oil and zinc.

2.2 Glencore is one of Australia's largest coal producers, producing over 103 million tonnes of saleable thermal and coking coal in 2018. The vast majority of this coal, which is produced by 16 operational open cut and underground mines, is exported to overseas markets.

2.3 In NSW Glencore has 10 operational coal mines, employing approximately 5,200 people. These mines, which include the Bulga Coal Mine, Mangoola Open Cut Mine and Ulan Coal Mine, collectively produced more than 59 million tonnes of saleable thermal and coking coal in 2018. Glencore is the largest producer of coal in NSW and one of the largest economic contributors in the Hunter Region.

2.4 In 2018, across Australia Glencore paid $2 billion in wages and salaries ($647m of which was in New South Wales), and spent just over $10 billion on goods and services ($3 billion of which was in New South Wales). In the Hunter region alone, Glencore's business is supported by over 3600 local suppliers.

2.5 Also in 2018, Glencore Australia paid $2.2 billion to State and Federal Governments in taxes and royalties.

2.6 In addition to its substantial coal interests, Glencore owns the CSA Mine, which is an underground copper mine in Cobar, Central Western NSW.

2.7 Given this significant portfolio of mining projects within NSW, Glencore is, and will continue to be, a major user of the SSD assessment regime under the EP&A Act.

2.8 This is demonstrated by the fact that, in the past decade:

(a) 7 applications seeking SSD Consent or Part 3A Approval under the EP&A Act, and

(b) 57 applications seeking to modify an SSD Consent or Part 3A Approval under the EP&A Act

have been lodged with respect to current Glencore mining projects.[1]

2.9 Many of the applications referred to in paragraph 2.7 above were determined by the former Planning Assessment Commission (**PAC**) (as delegate of the Minister) or, more recently, the IPC. This level of activity in the planning system has coincided with a period of substantial growth in the scale of Glencore's business in NSW.

2.10 Glencore currently has pending applications for SSD and, in order to optimise the recovery of mineral resources associated with its existing mines, will make many more applications for SSD in the years to come. For example, the SSD application for the Mangoola Coal Continued Operations Project is currently being assessed and the SSD application for the Glendell Continued Operations Project is being prepared.

2.11 Most recently, the United Wambo Open Cut Coal Project (**United Wambo Project**), which will be developed as a joint venture with Peabody Energy Australia Pty Ltd, was granted SSD Consent by the IPC on 29 August 2019.

2.12 As such, Glencore will continue to be a major user of the NSW planning system and is therefore a key stakeholder in the design, operation and performance efficiency of the environmental assessment regime for SSD under the EP&A Act.

3. THE MINISTER SHOULD DETERMINE APPLICATIONS FOR SSD RATHER THAN THE IPC

3.1 Under environmental and planning legislation in many jurisdictions, it is conventional for complex decisions which will have significant consequences for the economy, communities and the environment to be made by a senior member of the relevant government, such as a Minister. For example, under the principal environmental statute in Australia, the *Environment Protection and Biodiversity Conservation Act 1999*, the Minister for the Environment is responsible for determining whether or not to grant a controlled activity approval.

3.2 Consistent with this convention, the NSW Minister for Planning has had the power to determine applications under the EP&A Act for major developments, including major mining projects, for most of the life of the EP&A Act (i.e. since 1 September 1980). However, on 1 March 2018, the

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[1] These figures include applications made for projects which were not Glencore Australia projects at the time of lodgement (but are now Glencore Australia projects).

power to determine a considerable proportion of applications under the EP&A Act was transferred from the Minister to the newly established IPC.

3.3 While the Minister had, since 2011, delegated the ministerial power under the EP&A Act to determine a considerable proportion of SSD and Part 3A Project related applications to the PAC, the transfer of the ministerial power to the IPC in 2018 was unprecedented. In fact, NSW is currently the only State in Australia where the consent authority function is performed by an independent body who is not under the direction or control of the relevant Minister.

3.4 Glencore submits that the power to determine SSD applications and SSD modification applications under the EP&A Act should be exercised by the Minister rather than the IPC (whether in its own right or as a delegate of the Minister). The IPC should only be given this decision-making function in the limited circumstance where an application is associated with a "reportable political donation".[2]

3.5 Without being exhaustive, the Minister should be the decision-maker for SSD applications and SSD modification applications because:

(a) unlike the IPC, the Minister is clearly accountable to the government, parliament and people of NSW for decisions on SSD applications and SSD modification applications. The importance of the decision-maker being properly accountable is not only relevant to the merits of decisions to approve or refuse applications, accountability also ensures that the decision-maker is personally invested in ensuring the efficiency of decision-making and delivery of a competent, consistent and reasonable determination process;

(b) as a senior member of cabinet and the government, the Minister is better placed to understand and weigh the various relevant considerations associated with determining a development proposal of significance to the State's economy, workforce, communities and environment;

(c) in this respect, the Minister will likely have a better understanding of the consequences of a decision to approve or reject a major mining proposal on the government's suite of strategic policy priorities and objectives, across different ministerial portfolios, for NSW and the relevant region and local communities;

(d) under the EP&A Act, the Minister is responsible for approving State significant infrastructure (**SSI**). Given that SSD and SSI are very similar in nature (development/infrastructure of significance to the State), it makes sense that both SSI and SSD are determined by the Minister; and

(e) as a single decision-maker, the Minister is more likely to deliver consistency of decision-making on SSD proposals, in comparison to rotating panels of three part-time IPC members. Further, as a member of the government, the Minister is more likely to consistently and competently implement the government's key policies in accordance with the government's intentions.

4. GENERAL CHARACTERISTICS OF SSD MINING PROJECTS

4.1 The capital expenditure for establishing an SSD[3] mining project could range from $100M to $2B.

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[2] Under s 10.4 of the EP&A Act, "reportable political donation" is defined to mean "a reportable political donation within the meaning of the *Electoral Funding Act 2018* that is required to be disclosed under that Act".

[3] SSD is a special category of development under the EP&A Act. SSD is intended to capture those categories of development which are significant to NSW as a result of their size, economic value or potential environmental impacts. For example, development for the purpose of mining that has a capital investment value of more than $30 million is designated as SSD under the EP&A Act. Under the EP&A Act, SSD is subject to a considerably more rigorous environmental assessment process than other forms of development.

4.2 There is a long lead time and significant capital investment by a proponent prior to an environmental impact statement (**EIS**) being lodged for an SSD mining project. That lead time will involve:

(a) exploration drilling over several years;

(b) the development of a conceptual mine plan and feasibility studies;

(c) acquisition of critical land;

(d) consultation with local stakeholders and government; and

(e) preparation of baseline and impact assessment studies which will inform the EIS and which involve expertise in agronomy, biodiversity, hydrology, geology, archaeology, air quality, noise, traffic and transport assessment, and visual impact assessment.

4.3 The time involved from procuring the grant of an exploration licence to lodgement of an EIS and SSD development application (**SSD DA**) could range from 5 to 10 years. It follows that there is a very significant investment in SSD mining projects even before the SSD DA is lodged.

5. THE COMMISSIONERS OF INQUIRY – A CONFINED ADVISORY ROLE

5.1 The confinement of the IPC's role under the EP&A Act to performing an advisory function with respect to applications for SSD would be consistent with the historical role performed by the Commissioners of Inquiry for Environment and Planning under the EP&A Act between 1980 and late 2008.[4] The role of the Commissioners of Inquiry in the assessment of major mining projects can be summarised as follows:

(a) the Commissioners were qualified persons appointed by the Governor to serve in a full-time capacity for a fixed term;

(b) in practice, there was a maximum of four appointed Commissioners, including one appointed Chairperson and one appointed Deputy Chairperson;

(c) the assessment process for proposed major mining projects would routinely involve the appointment of an independent Commission of Inquiry, comprising one to three Commissioners (depending on complexity), to hold a public inquiry into the proposal;

(d) the Minister provided the Commissioners of Inquiry with a Terms of Reference that was specific to each inquiry;

(e) once appointed, a Commission of Inquiry for a major mining project would undertake a consultation process in a public forum in which oral submissions were heard from the public and objectors, the Department of Planning and other key government agencies, and the applicant. This process enabled all parties to provide detailed information to the Commissioners in a manner that was transparent and efficient for the Commissioners;

(f) the Commissioners would then provide a public report to the responsible Minister setting out the process, the participants, its findings and recommendations for consideration by the Minister in determining the application;

(g) whilst this was an intensive process, it provided for rigorous and transparent review and consideration of the technical merits of the project, including relevant stakeholder concerns and issues. This more efficient process also reduced the period of uncertainty

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[4] It is noted that the role of the Commissioners of Inquiry overlapped with the role of Independent Hearing and Assessment Panels (**IHAPs**) for applications relating to major mining projects between 2005 and 2008. However, it is not necessary to consider the role of IHAPs for the purpose of this submission.

and anxiety for community stakeholders, with the process generally completed within 3 to 6 months from the commencement of the First Session;

(h) importantly, Commissions of Inquiry only performed an independent advisory role under the EP&A Act. The decision-making function for major mining project proposals was exercised by the responsible Minister; and

(i) a consequence of the holding of a public inquiry by a Commission of Inquiry was that there was no right to appeal the final decision made by the Minister in merits review legal proceedings.

5.2 In contrast to the Commissioners of Inquiry, the IPC's immediate predecessor, the PAC, was similar to the IPC in having the function of determining many applications for SSD (albeit as delegate of the Minister), rather than being confined to an independent advisory function.

5.3 For the reasons given in this submission, Glencore submits that it is critical for the Minister to be the decision-maker for applications for SSD rather than the IPC (whether in its own right or as the delegate of the Minister).

6. SOME KEY ATTRIBUTES OF ANY DECISION-MAKER FOR SSD PROJECTS

6.1 An applicant for any SSD project should be entitled to expect that the decision-maker:

(a) will understand the NSW environmental legislation, take a coherent, balanced approach to evaluating and weighting the relevant considerations contained in s 4.15[5] of the EP&A Act, and will make decisions that are consistent with the environmental assessment requirements issued by DPIE, relevant government policy and technical guidelines;

(b) will observe the principles of procedural fairness; and

(c) will discharge its decision-making function in an efficient manner.

6.2 The attributes in paragraph 6.1 are basic features which should be present in the approvals regime for all SSD projects. Regrettably, the IPC's performance is sub-standard in each of these three dimensions.

6.3 The IPC has determined four significant mining project applications in 2019 (as an aside, we note that no applications for new mining-related SSD projects were determined by the IPC in 2018 following its establishment in March 2018). The 2019 determinations are identified in the following table, together with high level comments regarding each of those projects:

Project	DPIE Recommendation	IPC Determination	Issues
Dartbrook Coal Mine – Modification 7	Recommence underground mining and extend project duration by 5 years to 2027	Recommence underground mining but no extension. Approval expires in 2022, which the IPC acknowledged would make the project uneconomic	It appears that the applicant was not provided with an opportunity to address IPC's concerns regarding project extension

[5] Section 4.15 is the provision in the EP&A Act which prescribes the various matters the consent authority is required to consider prior to determining a development application. The consent authority's determination process 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 determination.

United Wambo Project	Approve project with no condition restricting sales of coal to certain export destinations	Project approved with condition restricting coal sales to Paris Agreement signatory countries	Imposed condition contrary to stated government policy Approval delayed by several months by this issue alone The IPC determination phase took almost one year
Bylong Coal Project	Approve project, having regard to extensive assessment by 14 government agencies over many years	Refuse project on a range of grounds, including impacts on groundwater, heritage, agriculture and greenhouse gas emissions	DPIE's conclusions on environmental impacts were not accepted. It appears that the applicant was not provided with an opportunity to supply information to address IPC's concerns IPC determination phase took almost one year
Rix's Creek Continuation of Mining Project	Approve continuation project	Approve continuation project	Administrative error in manner of approval No condition restricting coal sales to Paris Agreement signatory countries, despite there being common panel members with United Wambo project.

6.4 In Annexures A, B and C of this submission, we illustrate the IPC's failings by reference to these four projects.

6.5 **Annexure A** to this submission explains why the IPC's determination process for significant mining project applications in 2019 demonstrates that the IPC has failed to:

(a) understand the NSW environmental legislation;

(b) take a coherent, balanced approach to evaluating relevant considerations; and

(c) make decisions that are consistent with the environmental assessment requirements issued by DPIE, relevant government policy and technical guidelines.

6.6 **Annexure B** to this submission explains why the IPC's determination process for significant mining project applications in 2019 demonstrates that the IPC has failed to observe principles of procedural fairness.

6.7 **Annexure C** to this submission explains why the IPC's determination process for significant mining project applications in 2019 demonstrates that the IPC has failed to make decisions efficiently.

7. THE IPC HAS NOT DETERMINED APPLICATIONS FOR SSD MINING PROJECTS EFFICIENTLY, EFFECTIVELY AND CONSISTENTLY

7.1 Glencore submits that the IPC has proven itself incapable of assessing and determining applications for SSD mining projects efficiently, effectively and consistently.

7.2 In support of this submission, the following points are made:

(a) the IPC's most recent error in prematurely granting approval for the Rix's Creek Continuation of Mining Project is an example of less than adequate administrative procedures;

(b) similarly, the administrative errors of two of three members of the IPC Assessment Panel for the Vickery Extension Project and two of three members of the IPC Determination Panel for the United Wambo Project resigning, as a result of inadequate conflict of interest vetting, was also below the standard expected by proponents and the community and unnecessarily delayed the assessment of these major projects;

(c) differently constituted IPC panels for SSD mining project applications have considered important matters, such as GHG emissions, in a materially inconsistent manner and without engaging with the relevant reasoning of other panels. For example, the consideration of Scope 3 GHG emissions by the different IPC panels for the United Wambo Project, Bylong Coal Project and Rix's Creek Continuation of Mining Project was materially inconsistent, and no satisfactory explanation for this inconsistency has been provided by the IPC. The inconsistency of IPC Panel decisions is likely a consequence of the IPC having a large pool of 29 part-time Commissioners with disparate backgrounds and qualifications.[6] It is unacceptable for applicants of major SSD projects and their shareholders that the outcome of an application for a major mining proposal could depend on the "pot luck" as to who constitutes the IPC Panel;

(d) contrary to the Minister's stated position to make the assessment and determination process more efficient, approval timeframes for SSD mining project applications have dramatically extended in recent years. This is demonstrated by Figure 1 which is set out below;

(e) in this regard, the introduction of a multi-stage public hearing process by the IPC and policy of accepting additional material "after the deadline for public comment has elapsed ... where the [IPC] determines that additional material contains new information upon which the [IPC] would be assisted by public comment",[7] is likely to result in further delays. Additionally, there is a general perception among relevant stakeholders that the IPC's focus on avoiding any litigation risk, particularly since it became a consent authority in its own right in March 2018, has contributed to lengthy delays in decision-making;

(f) some IPC members appointed to IPC Determination Panels for particular SSD mining project applications have not had suitable experience or qualifications;

(g) rather than being guided by the extensive assessment undertaken by Department of Planning, Industry and Environment (DPIE) and other government agencies, the IPC has become increasingly inclined to undertake its own assessment of the predicted impacts of a project. This has led to a duplication of assessment effort for little to no environmental benefit;

(h) the important relationship between the IPC and DPIE appears to be dysfunctional. Glencore's observation is that project assessment by DPIE has become lengthier since the IPC has become a consent authority. Our perception is that this is due to the fact that, since the IPC has increasingly demonstrated a desire to undertake its own detailed assessment of environmental impacts, DPIE is attempting to anticipate all issues which

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6 In contrast, the PAC was only permitted to have between 4 and 9 members, and some of these members were full time members, and the Commission of Inquiry comprised of a maximum of 4 full time appointees.

7 In this regard, the IPC has been derelict in enforcing deadlines for making submissions, which has been exploited by objectors. For example, in the assessment process for Mount Pleasant Coal Mine's Modification 3 in 2018, an objector group was permitted by the IPC (without explanation) to submit detailed expert reports almost 2 weeks after the deadline for making submissions.

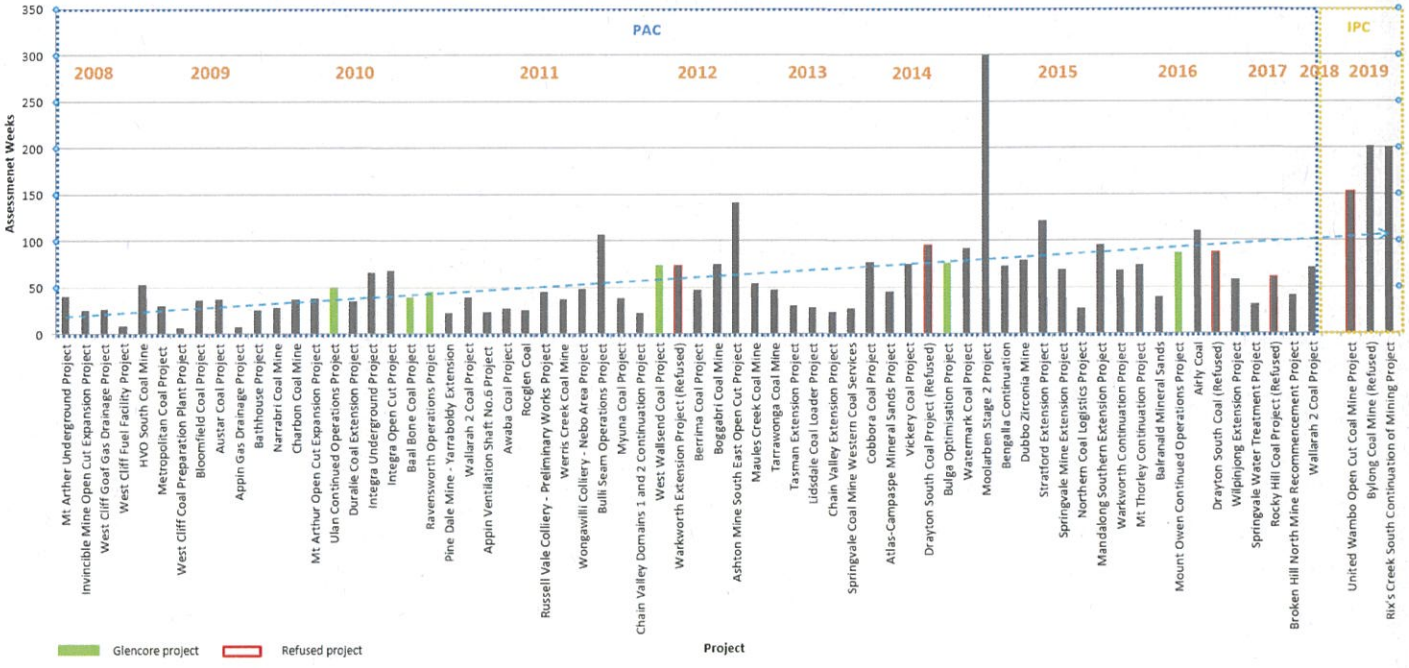
the IPC may potentially raise for further environmental assessment. This has led to extensive delays;

(i) DPIE is the government department that is charged with assessing and balancing environmental impact considerations, and providing the relevant policy and legislative advice to the IPC, the community and proponents. This role seems to have been largely subrogated by, on one hand, the IPC secretariat who do not have the same knowledge and experience in major project planning considerations as the DPIE and, on the other hand, the casual IPC members, many of whom have no relevant experience in assessment of mining projects comprising State Significant Development. This has led to the situation where the IPC has not been willing to adopt DPIE's interpretation of relevant government policies, such as the *NSW Climate Change Policy Framework* and *NSW Aquifer Interference Policy*;

(j) similarly, the IPC's approach to transparency has led the IPC to adopt an extremely conservative approach to communication with applicants of projects worth hundreds of millions of dollars, to the extent that it is very difficult for applicants to communicate with the IPC regarding matters that affect the application. For example, the IPC's lawyers will not meet with an applicant's lawyers to discuss identified legal risks and applicants are effectively not permitted to discuss the project with the IPC, even to receive an update on the delays in the IPC's assessment or determination process;

(k) inconsistently with well-established practice in NSW and other jurisdictions, the IPC does not accept that an applicant should have a fair opportunity to consider and comment on the proposed conditions of consent before they are imposed.

Figure 1: Assessment Period for Applications for SSD Consents or Part 3A Approvals 2008 - 2019



7.3 In order to illustrate some of these concerns by way of a case study, the IPC's assessment and determination process for the United Wambo Project is instructive.

7.4 For context of the significance of the United Wambo Project, the IPC Panel accepted that the United Wambo Project would provide $414 million (net present value) of economic benefits to

NSW (including royalties of $369 million) and would allow for the ongoing employment of 250 employees and additional employment for another 250 employees over the life of the Project.

7.5 Before the SSD application for the United Wambo Project was referred to the IPC for determination, the SSD application had already been subject to 2 years and 3 months of assessment. From the date of referral to the IPC, the IPC took a further 290 days (or almost 10 months) to determine the SSD application, granting consent on 29 August 2019.

7.6 Glencore makes the following observations about the IPC's assessment and determination process for the United Wambo Project (see also Annexures A, B and C):

(a) as stated above, the process was unnecessarily delayed due to the resignations of two Commissioners appointed to the IPC Panel. Those resignations occurred on consecutive days, the second of which was on the morning of 12 December 2019, which was the day on which the IPC public meeting was due to occur. This led to the public meeting being postponed at the last minute, at great inconvenience to the community members who had travelled some distance to attend.[8] The public meeting was not rescheduled until 7 February 2019. This delay ensured that the determination of the United Wambo development application did not occur until after the Rocky Hill judgment was handed down by the NSW Land and Environment Court on 8 February 2019, which itself caused several months of additional delay to the United Wambo Project;

(b) following a protracted process of the IPC seeking further information and inviting public submissions on multiple issues, the IPC published a notice on 7 June 2019 advising that a decision was imminent, and that it would not receive any further comments from any stakeholder;

(c) following this notice, the applicant became aware that the IPC was considering imposing an unprecedented and uncontemplated condition of consent requiring the proponent to prepare and implement a GHG emissions related export management plan;

(d) after the applicant unsuccessfully sought to obtain the draft condition of consent being considered by the IPC, the IPC ultimately published a draft condition on its website on the evening of Friday 2 August 2019 (without notifying the applicant) allowing all stakeholders 5 business days to make a submission;

(e) the submissions objecting to the draft condition included, extraordinarily, a submission by the Secretary of DPIE, which warned the IPC that the draft condition would be inconsistent with NSW Government policy; and

(f) nevertheless, the IPC ultimately imposed a variation of the export management plan condition on the SSD Consent granted on 29 August 2019, with the consequence that the NSW Government has been forced to introduce special legislation to address the jurisdictional overreach of the IPC.

7.7 Glencore's view is that the IPC's approach to the assessment and determination of the United Wambo Project was inefficient and unsatisfactory.

7.8 It would be extremely concerning if the IPC's approach to the United Wambo Project is the precedent which the IPC intends to follow for future applications for SSD associated with Glencore's business. In this regard, it is emphasised that the delays associated with the IPC's process for major SSD mining project applications result in considerable financial costs (direct costs and opportunity costs). For the United Wambo Project, the one year delay experienced as a result of the IPC's deliberations is estimated to have cost approximately $10.1 million. In

[8] Singleton Argus, 12 December 2019: https://www.singletonargus.com.au/story/5807541/anger-at-cancellation-of-wambo-united-meeting/

addition, the State of NSW will be receiving $43.6 million less in royalties in 2020 as a result of this delay.[9]

8. THE CONFINED ADVISORY ROLE THAT THE IPC SHOULD PERFORM WITH RESPECT TO SSD APPLICATIONS

8.1 For SSD applications for mining projects, the IPC's involvement in the assessment and determination of the application is as part of a multi-stage public hearing and public meeting process. This can be summarised as follows:

(a) after the public exhibition of the EIS and an initial assessment of the project by DPIE, the Minister will request the IPC to establish a panel to assess the project ('Assessment IPC Panel'), which will:

(i) conduct an initial stage public hearing into the proposal,

(ii) consider the EIS, submissions, relevant expert advice and any other relevant information; and

(iii) publish an issues report that:

(A) sets out the actions taken by the IPC in conducting the initial stage of the public hearing;

(B) summarises the relevant submissions and any other relevant information; and

(C) identifies the key issues required to be considered by DPIE in evaluating the merits of the proposal. For the United Wambo Project, the IPC assessment panel was disbanded at the end of this step with no opportunity for any clarification of the 47 recommendations made by the IPC for further assessment;

(b) after DPIE publishes its final assessment report, the Minister will request the IPC to establish a separate panel to conduct a final stage public meeting into the proposal and to determine the application. This 'Determination IPC Panel' will be a newly formed IPC panel with different members to the Assessment IPC Panel. For the United Wambo Project, the Determination IPC Panel essentially re-assessed the Project, requiring new and different information from that required by the Assessment IPC Panel;

(c) the Determination IPC Panel will hold the second public meeting; and

(d) the IPC, as the designated consent authority, completes its assessment of the proposal and determines whether to approve or refuse the SSD application.

8.2 In terms of the IPC's decision-making function, it is noted that under the current legislation the IPC will invariably be the designated consent authority for a major mining project SSD application or SSD modification application. This is because cl 8A of the *State Environmental Planning Policy (State and Regional Development) 2011* most relevantly provides that the IPC is the declared consent authority where at least 25 persons (other than the council) have objected to an SSD application or SSD modification application. Opponents of the mining

[9] Royalties payable to the NSW government throughout 2020 were originally anticipated to be $47.3 million. However, due to the one year delay in receiving the development consent, royalties payable to the NSW government in 2020 are now expected to be $3.7 million.

industry exploit this objections "trigger" to ensure that the IPC is almost always the "consent authority" for an SSD application or SSD modification application.

8.3 With respect to the IPC's current role under the EP&A Act, the holding of a public hearing by the IPC under the EP&A Act is critical for an efficient approvals process. This is because the holding of a public hearing extinguishes merit appeal rights, both those of the proponent and objectors: EP&A Act, s 8.6.

8.4 In contrast to the current position outlined above, Glencore submits that the EP&A Act regime needs be reformed to remove the IPC's decision-making function under the EP&A Act and confine the IPC to performing an appropriate hearing and advisory role with respect to SSD applications.[10]

8.5 More specifically, it is submitted that the IPC's role under the EP&A Act with respect to SSD applications should be as follows (except in circumstances involving a reportable political donation):

(a) after the public exhibition of the EIS, the Minister requests the IPC to:

(i) conduct a public hearing into the proposal (in accordance with a strict deadline),

(ii) consider the EIS, submissions and any other relevant information; and

(iii) publish an issues report (in accordance with a strict deadline) that:

(A) reports on the public hearing held by the IPC;

(B) considers the EIS, submissions and any other relevant information; and

(C) advises on the key issues which should be considered by DPIE in evaluating the merits of the proposal;

(b) DPIE would then produce a Final Assessment Report containing its concluded assessment of the proposal, its recommendation for approval or refusal and, in the case of a recommendation for approval, draft conditions of consent; and

(c) after the Final Assessment Report is produced, the Minister requests the IPC to conduct a final independent review of the project and produce a report which makes a recommendation to the Minister for approval or refusal, including as to any conditions which should be imposed.

8.6 Importantly, in recognition of the substantial expertise of DPIE and the other government agencies that have contributed to the project assessment, as well as the IPC's own involvement in the assessment process, the IPC should be required to give substantial weight to the conclusions reached in DPIE's Final Assessment Report when providing its recommendation to the Minister.

8.7 As such, the IPC's role would be to use its expertise to:

(a) provide an independent "check" that the scope and depth of DPIE's environmental assessment will be adequate for the Minister to make a properly informed decision on the SSD application; and

(b) make recommendations to the Minister as to whether or not an SSD application should be approved or refused.

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10 This reform would require numerous amendments to the EP&A Act and the *State Environmental Planning Policy (State and Regional Development) 2011*.

8.8 Under this model, there would be a single public hearing, which would logically occur shortly after the public exhibition of the EIS and the receipt of written submissions from interested stakeholders. This adjustment to the process would eliminate many of the significant delays that currently result from the existing multi-stage public hearing process.

8.9 Finally, if these reforms were implemented, it would be necessary to make minor amendments to section 8.6 of the EP&A Act to ensure that the holding of the public hearing by the IPC continues to prevent both the proponent and an objector from being entitled to appeal the decision of the consent authority (i.e. the Minister) to grant SSD Consent in merits review proceedings.

8.10 Glencore submits that this proposed reform of the EP&A Act regime would have the following key benefits:

(a) the proposed reform would result in the Minister rather than the IPC determining SSD applications (see section 3 above);

(b) confining the IPC to having an advisory role for SSD applications would almost certainly result in significant efficiency improvements and, therefore, reduce protracted delays in the assessment and determination of SSD applications;

(c) the current duplication and delays arising from the current overlapping environmental assessment functions of DPIE and the IPC with respect to SSD applications would be addressed. The IPC would retain a useful independent advisory function on the scope and depth of the environmental assessment but DPIE would be responsible for coordinating and undertaking out the environmental assessment of SSD applications. This would also have the collateral benefit of ensuring that DPIE's considerable experience and expertise in major project assessment is utilised to a greater extent in achieving planning outcomes that are consistent with existing legislation and government policy;

(d) the current strain on the IPC's limited resources would be alleviated and the IPC would be more efficient; and

(e) there would be improvement in the consistency of decision-making on SSD applications.

8.11 Importantly, Glencore's proposed reform of the EP&A Act would be consistent with the key objectives of DPIE's current "Environmental Impact Assessment Improvement Project", which is aimed at reviewing and improving the way NSW approaches environmental impact assessment (**EIA**) for SSD (**EIAI Project**).

8.12 Most relevantly, the EIAI Project recognises that:

(a) the areas for improvement of the SSD EIA process include "complex processes with long and uncertain timeframes" and "lack of confidence in the project assessment process";

(b) there is a need for "reduced EIA assessment and approval timeframes by providing proponents with greater clarity about what information is needed by the Department to make project approval decisions"[11]; and

(c) the SSD EIA process can be made significantly more efficient by settling the scope and depth of the environmental assessment at an early stage, front-loading public participation and streamlining the environmental assessment process.

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11 In this regard, under the current regime, the IPC routinely requests further information or raises new issues late in the environmental assessment process. This issue has been raised by the NSW mining industry in its response to the EIAI Project.

8.13 Glencore submits that the proposed reform of the IPC's role under the EP&A Act would facilitate the key objectives and initiatives of the EIAI Project. Conversely, there is a clear tension and inconsistency between the current role of the IPC in the assessment and determination of SSD projects and the key objectives and initiatives of the EIAI Project. In particular, the IPC has made the SSD EIA process more complex, increased uncertainty and increased assessment and approval timeframes.

9. THE IPC SHOULD HAVE NO ROLE WITH RESPECT TO MODIFICATION APPLICATIONS

9.1 As explained in section 8 above, the IPC under the current law will almost always be the designated consent authority responsible for determining whether or not to approve a modification application relating to an SSD mining project. This is because opponents of the mining industry regularly exploit the 25 objections "trigger" to ensure that the IPC is the consent authority. In Glencore's view, an increase in the number of objections for this "trigger" is not a feasible response as it is likely that mining opponents would simply ensure that the relevant number of objections are lodged for all mining projects.

9.2 As such, the current role of the IPC with respect to almost all significant modification applications for mining projects can be summarised as follows:

(a) after the publication of DPIE's assessment report, the IPC holds a public meeting (rather than a public hearing) on the modification application; and

(b) the IPC, as the designated consent authority, completes its assessment of the proposal and determines whether to approve or refuse the modification application.

9.3 Under the EP&A Act, there is no objector right to appeal a decision with respect to an SSD modification application in merits review proceedings.

9.4 Glencore submits that the EP&A Act needs to be reformed to ensure that the IPC has no role with respect to modification applications for SSD (except in circumstances involving a reportable political donation).

9.5 The reason for this is that modification applications for SSD, by their very nature, do not involve the same degree of environmental impacts when compared with an application for a new SSD approval. In a mining context, they are typically associated with minor adjustments to the mine plan or infrastructure layout within the original approved project footprint.

9.6 In this regard, it is critical to recognise that an SSD modification application can only be lawfully approved under s 4.55(2) of the EP&A Act if the consent authority is satisfied that the proposed development will be "substantially the same development as the development for which consent was originally granted" (or as last modified under s 75W of the EP&A Act).

9.7 This significant limitation on the scope of the power to modify an SSD Consent means that it unnecessary and unwarranted for the IPC to have any advisory role or decision-making role with respect to SSD modification applications. Instead, it is appropriate for all SSD modification applications to be dealt with by the Secretary of DPIE or his delegate.

9.8 This approach would enable the IPC to focus its attention and resources on applications that involve environmental considerations that are far more material than is the case with applications to modify existing approvals.

9.9 Glencore submits that the removal of the IPC from having involvement with SSD modification applications under the EP&A Act is a common sense reform which would significantly improve the efficiency and effectiveness of the environmental assessment and determination process under the EP&A Act.

10. RECOMMENDATIONS FOR REFORM OF THE IPC NOT DEPENDANT ON THE IPC'S FUTURE ROLE UNDER THE EP&A ACT

10.1 The terms of reference for the review of the IPC seek recommendations in relation to the IPC's operations and assessment process under the EP&A Act.

10.2 Regardless of whether the IPC continues to have a decision-making function or is confined to an advisory function under the EP&A Act with respect to SSD applications, Glencore makes the following recommendations:

(a) the appointment of 29 part-time IPC Commissioners with disparate backgrounds and qualifications was inappropriate. It has contributed to unpredictability and inconsistency in the assessment of major mining projects. The IPC should have a smaller group of mostly full-time commissioners with experience in major project assessment, planning law and relevant government policy;

(b) IPC Panels should be given detailed terms of reference which include, for example, clear tailored deadlines (and the IPC Panel should be held accountable if these deadlines are not met) and the requirement to assess the development applications in a manner that is consistent with relevant federal and state policy and legislation;

(c) the IPC Chair should take personal, managerial responsibility for overseeing IPC Panels and ensuring that the IPC discharges its functions consistently and efficiently and in dealing with issues raised by applicants. For example, the Chair of the IPC should have a role in ensuring that IPC Panels consistently apply relevant Government policies and the power to manage or direct IPC Panels where appropriate. In this regard, clear key performance indicators for the performance of the IPC must be established and monitored;

(d) the IPC's internal process and procedures must be subject to a review to meet the reasonable expectations of applicants and DPIE, and to avoid administrative errors;

(e) the IPC Secretariat should not be an independent office, the IPC should instead rely on appropriately experienced permanent staff (including lawyers) seconded from DPIE. This would have the ancillary benefit of improving the interaction between the IPC and DPIE;

(f) the IPC Chair should consult with DPIE prior to appointing an IPC Panel to ensure that the commissioners have appropriate experience and qualifications. Further, commissioners with no relevant professional qualifications and experience should not be appointed on IPC Panels for major mining projects;

(g) the IPC should apply greater emphasis to adhering to time limits (eg, in the context of public submissions, late submissions from objectors should not be accepted);

(h) in exercising its assessment functions, the IPC should avoid duplicating assessment work done by DPIE and other government agencies and generally rely on DPIE's environmental assessment report;

(i) there should only be a single public hearing convened by the IPC, and that public hearing should occur shortly after the end of the formal EIS public exhibition period;

(j) there should be a forum in which the IPC briefs the applicant, DPIE and other relevant government agencies on the areas in which the IPC may have uncertainty. This would ensure that all participants in the approvals process have a proper appreciation of any concerns that the IPC may have, the context for those concerns and an opportunity to address them. It would also foster more open dialogue between the IPC, DPIE and other government agencies. This forum could be managed in a way that there is an appropriate level of transparency for all stakeholders (eg, minutes of meetings could be made public);

(k) the Terms of Reference for the IPC should require it to discharge its functions in a manner that is consistent with relevant legislation, the Secretary's Environmental Impact Requirements for the project (which set the parameters for the environmental assessment to be undertaken by the applicant) and all relevant government policy and technical guidelines; and

(l) if the IPC is unclear as to what the government's policy is with respect to any particular matter, it should be required to consult with the government and clarify the position (rather than devising its own policy without consultation).

11. CONCLUSION

11.1 Glencore is a major user of the planning regime as it applies to State significant development. State significant mining projects have the potential to deliver extensive benefits to the national, state, regional and local economies. However, based on our first-hand experience and our observations of the experiences of other mining companies, there are significant flaws in the current planning system, particularly with respect to the IPC.

11.2 There is extensive evidence (including the examples provided in this submission) to warrant significant changes to the role and operation of the IPC. Glencore submits that:

(a) the power to determine SSD applications and SSD modification applications under the EP&A Act should be exercised by the Minister rather than the IPC (whether in its own right or as a delegate of the Minister). The IPC should only be given this decision-making function in the limited circumstance where an application is associated with a reportable political donation;

(b) the IPC's role should be limited to conducting an independent review of the assessment undertaken in respect of new SSD projects, and making recommendations to the Minister as to whether those projects should be approved or refused. In performing this function, the IPC should be required to:

(i) operate in a manner consistent with relevant legislation, environmental assessment requirements, government policy and technical guidelines;

(ii) give due regard to the extensive and lengthy assessment process undertaken by DPIE and any recommendations and conditions proposed by DPIE;

(c) the IPC should not have any involvement in modification applications for SSD (except in circumstances involving a reportable political donation); and

(d) the makeup, operational processes and governance of the IPC should be reformed in the manner outlined in section 10 of this submission.

11.3 Glencore appreciates the opportunity to express its views in relation to this review, which we consider to be very important for the future of the mining sector in New South Wales.

11.4 We would be pleased to meet with the Productivity Commissioner to elaborate on any aspects of this submission. Please do not hesitate to contact me on [redacted] if you would like to arrange a meeting.

Yours sincerely

[redacted]

Group Executive – HSEC and Industry Relations

ANNEXURE A - THE IPC'S FAILURE TO UNDERSTAND THE NSW ENVIRONMENTAL LEGISLATION, TAKE A COHERENT, BALANCED APPROACH TO EVALUATING SECTION 4.15 CONSIDERATIONS, AND BE CONSISTENT WITH GOVERNMENT POLICY

United Wambo

One of the members of this IPC Panel also sat on the IPC Panel for the Rixs Creek project.

When granting the SSD Consent for this mining project, the IPC, of its own volition, decided that the SSD Consent should be subject to conditions which control the countries to which the applicant's coal could be exported.

The conditions (known as B32-B36 inclusive):

(a) had no precedent in any earlier SSD Consent granted for a NSW coal mine, or for that matter, any mine which has been approved in Australia;

(b) were not proposed or supported by any NSW Government Department;

(c) were not supported by any NSW Government policy;

(d) were opposed by the Department of Planning, Industry and Environment (**DPIE**) in a letter signed by its Secretary which cautioned the IPC that:

(i) There is no policy at either the State or Commonwealth level that would support the imposition of conditions on an applicant to minimise the scope 3 emissions of its development proposal.

(ii) Any such policy is likely to result in significant implications for the NSW and Australian economy and it is not clear it would have any effect on reducing the global GHG emissions generated by parties in other jurisdictions outside Australia.

(iii) Even if such a policy was made, it is likely to be more efficient and equitable to apply it across the board through legislation rather waiting for individual companies to apply for development consent under the planning system in NSW.

(iv) Finally, I wish to confirm that it is not this State Government's policy that greenhouse gas policies, or planning conditions, should seek to regulate, directly or indirectly, matters of international trade. Matters of international trade are properly regulated by the Commonwealth Government and conditions on NSW should address the impact of the subject development rather than trade matters.

(e) were opposed by the applicant on multiple grounds, which included:

(i) 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.

(ii) 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.

(f) are currently the subject of a remedial Bill before the NSW Parliament. The Bill is the *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019.* The Minister's second reading speech makes it clear that the Bill is necessary to address the jurisdictional over-reach of the IPC in imposing conditions B32-B36 on the United Wambo SSD Consent. In the second reading speech, the Minister explained the need for the remedial Bill as follows:

> The bill principally clarifies that development consent conditions can only be imposed if they relate to impacts occurring within Australia or its external territories. It does so by inserting a new section 4.17A of the *Environmental Planning and Assessment Act 1979* that identifies prohibited conditions which have no effect if they are part of a development consent granted under Part 4 of the Act. This includes consent

> for State significant development. The prohibited conditions will include those imposed for the purpose of achieving outcomes or objectives relating to the impacts occurring outside Australia or an external territory as a result of the development, as well as the impacts occurring within the State as a result of any development carried outside Australia or one of its territories. This will prevent consent authorities from imposing conditions seeking to control, for example, downstream greenhouse gas emissions or other climate change impacts occurring outside Australia as a consequence of development that is carried out outside Australia.
>
> It provides certainty to all players in the planning system about how extraterritorial impacts can be dealt with in New South Wales planning approvals. It makes the basic point that while consent conditions can quite appropriately relate to matters within Australia's territorial limits, there is clearly an enforcement issue with development conditions that purport to control impacts outside the jurisdiction of Australia. The legislation is consistent with the well-defined Newbury test for conditions of consent and the development of case law in line with the Newbury principles. It simply codifies how planning conditions can be created.

Bylong

In the *Bylong Coal Project Final Assessment Report* (4 October 2018), the Department of Planning and Environment (**DP&E**) (now DPIE) stated that the Bylong Coal Project would result in a range of social and economic benefits for the local government area, region and State including: direct employment of up to 450 persons, direct capital investment of around $1.3B and $301M in net social benefits to NSW. Further, DP&E considered that the predicted residual impacts of the Project could be "effectively minimised, mitigated and/or compensated". As such, DP&E concluded that:

> Based on its assessment of the project, the Department of Planning and Environment considers that the project is approvable, subject to the stringent conditions of consent outlined in **Appendix H**.

While acknowledging that the IPC is independent of Government and is not required to simply adopt the approach taken by senior DPIE executives to assessing a SSD mining project, it is important to recognise that the Resource Assessment branch of DPIE is led by very experienced executives who have specialist knowledge of the NSW resources sector and the assessment of the impacts of mining and other projects under the EP&A Act.

As such, a proponent of a SSD mining project should be entitled to expect that the approach taken by DPIE and the IPC will be generally consistent with respect to the evaluation of key matters for assessment. As shown in the below table, Glencore submits that the inconsistency of approach between DP&E and IPC for the Bylong Coal Project on key matters for assessment indicates that the IPC is failing to take a coherent, balanced approach to the evaluation of SSD mining projects. This may be explained, at least in part, by the fact that the IPC panellists do not have the same specialist knowledge of the NSW resources sector and the assessment of the impacts of mining projects under the EP&A Act as the Resource Assessment branch of DPIE.

Key matter for assessment	***Did the IPC accept DP&E's view?***
Compatibility with agricultural land uses	**No.** The IPC did not accept DP&E's view that the Recommended Revised Project was consistent with applicable strategic land use objectives and was a good example of resolving land use conflicts: IPC *Statement of Reasons for Decision* (**SoR**) at [376].
Groundwater impacts	**No.** The IPC did not accept DP&E's conclusion that the applicant had designed the Project to avoid significant groundwater impacts: SoR at [294].

Impacts to biophysical strategic agricultural land (**BSAL**)	**No.** The IPC did not accept DP&E's conclusion that there were examples showing that the Mine site had reasonable prospects of being returned to BSAL-equivalent land: SoR at [403] and [406].
GHG emissions	**No.** The IPC did not accept: 1. DP&E's assessment that refusal of the Project would not reduce GHG emissions due to market substitution; 2. the DP&E's view that the *NSW Climate Change Policy Framework* had no direct bearing on the IPC's determination; or 3. DP&E's interpretation of the *NSW Climate Change Policy Framework*. SoR at [693] and [695].

In order to illustrate this issue in more detail, it is useful to focus on the inconsistency between the approaches taken by DP&E and IPC on the matter of the Bylong Coal Project's GHG emissions. In this respect, the following is noted:

(a) in DP&E's *Preliminary Assessment Report*, DP&E stated that:

> refusing the project would not reduce global greenhouse emissions, as the gap in supply would almost certainly be filled by another coal resource locally or overseas.

(b) the applicant for the Bylong Coal Project is a subsidiary of Korea Electric Power Corporation (**KEPCO**), which is the largest electricity utility in South Korea. KEPCO is majority owned by the Government of South Korea. The applicant's objective in seeking approval for the Project was to secure stable, long term, high quality fuel supplies in response to the ongoing expansion of its business;

(c) a letter to the IPC from the President and CEO of KEPCO Australia Pty Ltd stated the following:

> I write to you to clarify several matters in relation to the Bylong Coal Project. I want to assure you that this project is economically viable as KEPCO's vertically integrated model means that the coal resources will be fully allocated over the life of the project. In Australian terms, KEPCO is an energy generator, distributor and retailer. Its primary business is the provision of electricity within the Republic of Korea (ROK) with the company's market share being approximately 80 per cent. With the Bylong Coal Project, KEPCO is seeking to secure high quality coal for our High-Efficiency Low Emissions (HELE) coal-fired power plants.
>
> As you may be aware, ROK is not blessed with natural coal resources. Our demand for electricity has led to ROK becoming one of the largest coal importers in the world. In 2017, KEPCO imported approximately 93 million tonnes of coal of which approximately 29 million tonnes was sourced from Australia, including 19 million tonnes from New South Wales alone. KEPCO projects that its thermal coal consumption will increase to approximately 110 million tonnes by 2020. Australian coal is highly sought due to its superior quality, low ash and sulphur content, thereby complying with strict parameters required for South Korea's HELE coal-fired power plants. HELE power plants have been vitally important in ensuring a reliable and affordable energy supply for the people of South Korea. Since 2005, KEPCO generation companies have constructed 8 power stations.
>
> ...

> In addition to this, there are a number of new coal-fired power stations under construction including Shin-Seocheon project (1000MW), Gosung Hai project (2080MW) and Gangneung An-in project (2080MW). Each of these power stations are designed and constructed for an operational life of around 40 years, which demonstrates KEPCO's ongoing demand for thermal coal for years to come.
>
> In 2011, KEPCO made the decision to establish its largest overseas greenfield resources project in Bylong due to the suitability of the coal resource to KEPCO's modern coal power infrastructure. The project is important to and will ensure the stability of supply for the KEPCO owned power stations. If KEPCO is required to obtain substituted coal supplies, it is likely to have a higher ash and sulphur content and will be sourced from countries such as Indonesia. This will have an adverse effect on the Australian and New South Wales economies and the Korean environment.

(d) the IPC did not accept DP&E's assessment that refusal of the Project would not reduce GHG emissions due to market substitution, "as no evidence to support this argument was provided to the Commission": SoR at [693]. Further, the IPC stated that it did not have evidence to determine whether the applicant would need to secure an alternative supply of coal and that this coal may be of inferior quality: SoR at [694]; and

(e) in assessing the issue of GHG emissions in this manner and concluding that there would be no market substitution of coal if the Project was refused, the IPC implicitly rejected that KEPCO was a credible source of information as to its own future business needs (i.e. coal consumption). The IPC's conclusion is extraordinary and perverse.

Rix's Creek

This IPC Panel comprised one member who also sat on the IPC Panel for the United Wambo Project. It also comprised the Chair of the IPC, who was appraised of the Export Management Plan condition imposed on the United Wambo Project, and the specific public exhibition period that preceded the imposition of that condition.

The IPC granted SSD Consent for the Rix's Creek Continuation of Mining Project on 12 October 2019, less than 2 months after the IPC granted SSD Consent for the United Wambo Project.

Similarly to the United Wambo Project, coal produced at the Rix's Creek Mine will be exported overseas. In particular, the applicant submitted that coal would be exported to Japan, Taiwan and South Korea.

Inconsistently with the determination of the United Wambo IPC Panel (Mr Pearson, Ms Kruk and Dr Williams), the Rix's Creek IPC Panel did not impose conditions on the SSD Consent regulating the countries to which the applicant's coal could be exported (i.e. conditions B32-B36 of the United Wambo Consent).

In this regard, the Rix's Creek IPC Panel accepted that Scope 3 GHG emissions were the responsibility of the end customer for coal export and found that DPIE's:

> recommended conditions of consent are adequate to require the applicant to reduce and report on how the Application is minimising Scope 1 and (relevant) Scope 2 emissions that are reasonably controlled by the Applicant, to the greatest extent practicable. The Commission finds that these conditions are adequate and reasonable for a project of this size and nature given the current national and state policies.

The Rix's Creek IPC Panel did not refer to the United Wambo IPC Panel's reasoning as to why conditions should be imposed on the SSD Consent to regulate the countries to which the applicant's coal could be exported. As such, the reasons for the clear inconsistency of the United Wambo and Rix's Creek decisions are unclear.

It is noted that the remedial *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019* referred to above had not been tabled in Parliament when the Rix's Creek IPC Panel granted SSD Consent for the Rix's Creek Continuation of Mining Project.

ANNEXURE B - THE IPC'S FAILURE TO OBSERVE PRINCIPLES OF PROCEDURAL FAIRNESS

Dartbrook

The Dartbrook Mine is in the Hunter Valley. The equivalent of an SSD consent had been granted in 2001 for a longwall underground mining operation. The mine has been in care and maintenance since 2006.

The mine was recently acquired by a subsidiary of Australian Pacific Coal Limited.

The 2001 SSD consent remains the current planning approval and authorises mining operations to continue until 5 December 2022.

The new owner of the mine lodged an application under s 75W of the EP&A Act to modify the 2001 SSD consent. The modification proposed to:

(a) recommence underground coal mining on the site using bord and pillar methods;

(b) use a varied coal clearance system, including transport of mined coal by trucks using a private haul road to a new coal delivery shaft connecting to an existing underground conveyor to the existing coal handling and preparation plant; and

(c) extend the project duration by 5 years to 2027.

The IPC granted the s 75W modification, but did so in a manner which, for practical purposes, is a constructive refusal of the application. Its approval for the modification did not extend the duration of the project, such that mining operations are only authorised up until 5 December 2022.

In the executive summary of its Statement of Reasons, the IPC stated at pages 1-2, that it had declined to extend the duration of mining for the following reasons:

> However, the Commission has determined to refuse the Applicant's proposal to extend DA 231-7-2000 by 5 years to 5 December 2027. While the Commission acknowledges that the proposed Project has the potential to create positive economic and social impacts, the Commission remains unconvinced of the extent of the Project's economic benefits and has concluded that the costs of the Project have not been properly accounted for in the economic analysis and assessment. The Commission has found there were inconsistencies in the assessment, in that some aspects of the assessment referred to impacts of the proposed Project against the existing Project Approval and others referred to impacts compared with the existing mine in "care and maintenance". The Commission has concluded that the social and environmental costs of the Project were not adequately assessed and quantified in the context of the range of possible operational configurations that might arise from the combination of the existing approved operations and the proposed modification operations. Additionally, the Commission was not provided with a contemporary assessment of the potential impacts of the existing approved longwall mining and coal handling operations to support a 5 year extension of this approval (DA 231-7-2000), in the context of the significant increase in mining activity and other changes in the area since the original approval was granted in 1991. This gives rise to uncertainty about the Application's future impacts, and the veracity of mitigation available, should some aspects of the currently approved Project, such as longwall mining or coal washery operations continue or restart after 2022. The Application does not deal adequately with these impacts, either alone or in combination with the proposed modification operations. Accordingly, the Commission remains unconvinced that the Application to extend the Project duration by five years to 2027 has been adequately assessed and is in the public interest.

Glencore is not in an informed position to take issue with the IPC's reasons for not extending the project duration by 5 years. However, we make the following two points:

(a) DPIE in its executive summary of its Assessment Report at page iii, concluded:

> The Department concludes that the impacts of the modification can be managed to achieve an acceptable level of environmental performance and the proposal is approvable, subject to the proposed recommended conditions of consent.

(b) our review of the relevant documents and transcripts available on the IPC's website does not indicate that the IPC, at any stage, informed the applicant of its concerns with the

adequacy of the assessment documents. As a consequence, the applicant was denied the opportunity to address the IPC's concerns either by way of submissions or by providing supplementary assessment reports.

United Wambo

It has been, for at least the last 20 years, a convention for the consent authority for SSD projects in the mining sector in NSW to share draft conditions of development consent, on a "without prejudice" basis, with the proponent of a project prior to the determination of the SSD DA.

For example, when the Minister for Planning acted as the consent authority, his or her officers in the predecessor to DPIE would, as matter of convention, share draft conditions of development consent with a proponent in order for the proponent to:

(a) consider the commercial, practical and legal implications of the draft conditions for its proposed development;

(b) identify any errors or misdescriptions in the draft conditions of development consent; and

(c) provide informed comments to the consent authority on any draft conditions that are considered to be problematic as a result of (a) and (b) above.

This practice is mutually beneficial, in that it permits the consent authority to make informed decisions based on the implications of the draft conditions of consent and avoid conditions which are impracticable and/or unenforceable.

Glencore submits that the practice described above is both sensible and uncontroversial, affords procedural fairness and promotes informed decision-making.

Further, this historic convention in NSW is actually embodied in the Federal *Environment Protection and Biodiversity Conservation Act 1999.* Section 131AA imposes a duty on the Federal Minister for the Environment to inform a proponent of the decision the Minister proposes to make, and if he or she proposes to approve a project, imposes a duty to inform the proponent of any conditions the Minister proposes to attach to the approval (and a period 10 business days for that person to provide any comments on the proposed decision and conditions).

In Annexure B, we discussed the novel conditions regulating the export of coal (conditions B32-B36), which the IPC imposed on the SSD Consent for the United Wambo Project.

In a statement published by the IPC on 7 June 2019, it stated that:

> As a decision is imminent, the Commission will not receive any further comments from any stakeholder.

It transpired that the IPC was contemplating the imposition of export control conditions on the SSD Consent, and had no intention of sharing draft conditions B32-B36 with United Wambo. Ultimately, United Wambo was provided with the opportunity to review and comment on conditions B32-B36, but this only occurred after a letter was sent to the chair of the IPC making reference to procedural fairness.

Bylong

The IPC's SoR for the Bylong Coal Project (18 September 2019) repeatedly confirm that the IPC made key adverse findings based on a lack of sufficient information or evidence.

For example, the IPC found that there was uncertainty and insufficient information as to whether the "make good" requirements under the *Aquifer Interference Policy* were met with respect to the drawdown impacts on bores *owned by the applicant* because "there has been no information provided by the Applicant in relation to proposed 'make good' measures".

As set out above, the IPC rejected the DP&E's finding that the refusal of the Project would not reduce global GHG emissions due to market substitution, on the basis that "no evidence to support this argument was provided to the [IPC]".

Glencore submits that the approach taken by the IPC was not consistent with procedural fairness. Before the IPC makes key adverse findings based on a lack of information or evidence, it should give the applicant a reasonable opportunity to provide this missing information or evidence. This is especially important in the circumstances of a major mining project proposal which has been subject to an extensive, costly and lengthy environmental assessment process.

ANNEXURE C - THE IPC'S FAILURE TO DISCHARGE ITS FUNCTIONS IN AN EFFICIENT MANNER

United Wambo

The SSD DA for the United Wambo Project was lodged on 8 August 2016. After a detailed assessment process extending over more than 2 years, DP&E published its *Final Assessment Report* on 7 October 2018 and referred the SSD DA to the IPC for determination on 12 October 2018.

The IPC Panel granted SSD Consent on 29 August 2019.

Glencore submits that a decision-making period of over ten months, and overall assessment period of 2 years and 11 months, is clearly not efficient.

Most notably, the conduct of the IPC in exercising its decision-making function which contributed to an inefficient process include:

(a) the resignation of IPC Panel member Professor Clark on 10 December 2018 and the resignation of her successor Mr Sharrock on 12 December 2018 due to inadequate conflict of interest vetting, which delayed the holding of the IPC's public meeting from 12 December 2018 (being the same day as Mr Sharrock's resignation) until 14 February 2019; and

(b) the delay between the IPC's statement of 7 June 2019 that it would not receive any further comments and its final decision of 29 August 2019.

Bylong

The SSD DA for the Bylong Coal Project was lodged on 22 July 2015. After a detailed environmental assessment process extending over more than 3 years, DP&E published its *Final Assessment Report* and referred the SSD DA to the IPC for determination on 4 October 2018. The letter of referral stated that:

> On balance, the Department considers that the benefits of the project outweigh its costs, and that the project is approvable subject to stringent conditions.

The IPC Panel refused consent on 18 September 2019.

Glencore submits that a decision-making period of almost one year is clearly not efficient.

While acknowledging that the delay was not entirely a result of the IPC's conduct, the following actions of the IPC materially contributed to an inefficient process:

(a) the IPC seeking: further information from DP&E in relation to potential groundwater impacts (23 November 2018); an independent review of the groundwater assessment (28 November 2018); and an updated independent review of the economic assessment (5 December 2018);

(b) after issuing a public statement on 1 May 2019 that the IPC would not accept any further comments from stakeholders because a determination was pending, the IPC "reopened" public comments on 28 June 2019 in response to independent expert advice on heritage matters (this expert advice was requested by the IPC on 30 May 2019 and received on 11 June 2019);

(c) nine months after receiving the referral, the IPC belatedly issued a public statement on 22 July 2019 advising that it had formed the preliminary view that it could not determine the SSD DA in the absence of a current gateway certificate (this certificate "expired" on 14 April 2019); and

(d) on 27 July 2019, the IPC issued a public statement advising that it would accept public comments regarding the gateway certificate issue. The legal issue raised by the IPC was ultimately resolved by the Government amending the Mining SEPP to resolve the legal dispute between the applicant and the IPC as to whether the SSD DA could be determined.

Rix's Creek

The SSD DA for the Rix's Creek Continuation of Mining Project was lodged on 2 November 2015. After a detailed environmental assessment process extending over close to 4 years, the IPC purported to grant SSD Consent on 4 October 2019.

However, as referred to above, the IPC was forced to withdraw this purported decision on the same day because SSD Consent had been granted before the deadline for public submissions on additional information provided by DPIE.

Consequently, the IPC extended the period for public consultation and ultimately granted SSD Consent on 12 October 2019.

Although this administrative error did not result in a significant period of delay in the overall context of the assessment period, Glencore submits that this a further example of how the IPC's conduct has contributed to the increasing delay in approval timeframes.