GLENCORE

2 December 2014

Department of Planning and Environment
23-33 Bridge Street
Sydney NSW 2000

Dear Sir/Madam

DRAFT VOLUNTARY LAND ACQUISITION AND MITIGATION POLICY

Glencore welcomes the opportunity to provide comments on the draft Voluntary Land Acquisition and Mitigation Policy (the **Acquisition Policy**) before it is finalised.

Glencore sees the introduction of the Acquisition Policy as a significant step forward in the approvals process for State Significant Development in New South Wales. Glencore has been advocating for the introduction of such a policy for some time since land acquisition is often one of the more contentious issues encountered when seeking new approvals, and it is an issue that can have material financial implications for mining projects.

It is therefore essential that the Acquisition Policy strikes the right balance between addressing mining-related impacts on landholders and imposing requirements which unduly affect the economic viability of mining projects.

On balance, Glencore considers the Acquisition Policy to be a positive development in so far as it provides the community, proponents and decision makers such as the Planning Assessment Commission with greater certainty as to the NSW Government's longstanding policy regarding mining and land acquisition.

However, Glencore is concerned that the following aspects of the Acquisition Policy may have unintended consequences, or otherwise require clarification.

1. Application of the Acquisition Policy to 'workplaces'
2. Application of *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**)
3. Emphasis on land acquisition prior to development application
4. Acquired land becomes 'mining land'
5. Mandatory contents of negotiated agreements
6. Nature of acquisition rights is unclear
7. Landowner has unlimited time to accept acquisition offer after triggering acquisition right
8. No difference in air quality criteria for mitigation and acquisition rights
9. Acquisition rights for vacant land
10. Approach to decision making
11. References to "residual impacts"
12. Assessment criteria applicable to tenants of mine-owned properties

Each of these matters is discussed in detail below.

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1. Application of the Acquisition Policy to 'workplaces'

Contemporary development consents for mining projects in NSW afford acquisition rights to a private landholder where air quality and/or noise impacts are predicted to exceed relevant criteria at their residence. The Acquisition Policy now seeks to extend these voluntary land acquisition rights to business owners if the air quality acquisition criteria will be exceeded at their workplace.

Definition of workplace

The Acquisition Policy defines 'workplace' as:

> *'includes an office, industrial premises or intensive agricultural enterprise where employees are grouped together in a defined location, but does not include broad acre agricultural land.'*

Glencore considers that the extension of the air quality acquisition rights to workplaces is fundamentally flawed as it fails to take into account the following issues.

Issues not considered in extending the air quality acquisition criteria to workplaces	Discussion
Type of workplace	This definition of 'workplace' does not give consideration to the extremely diverse range of workplaces that may be operating in close proximity to a mine. The terms 'office', 'industrial premises' and 'intensive agricultural enterprise' are not defined in the Acquisition Policy nor is there a reference to a definition for these terms in another policy.
Period of exposure (extent of impact)	Application of the air quality acquisition criteria fails to take into account the duration of time that people may be present at the workplace. For example, employees of a business may start and finish their shift at an office building located adjacent to a mine, but the majority of their day may be spent at an alternative location away from the mine. In these circumstances, the air quality criteria will still be applied to the office building and hence the mine may be required to acquire the workplace.
Likely impact from air quality exceedances	Historically, private landholders have been given the right to activate voluntary acquisition of their land in circumstances where dust (or noise) from a mine unacceptably impacts on their amenity. This is evident throughout the Acquisition Policy which focuses on reducing the potential human health and amenity impacts of the mine. It is accepted that people may be present at a residence for up to 24 hours a day, they may have clean washing hanging on clothes lines and may have opened windows to allow fresh air to flow through the residence. It is for such reasons that unacceptably high air quality emissions may impact on their enjoyment of their residence.

Issues not considered in extending the air quality acquisition criteria to workplaces	Discussion
	However, this is in contrast to a workplace where people are normally present for only 8-10 hours of the day. Therefore, the impacts on a workplace are likely to be considerably less than the potential impacts on a residence.
Air quality impacts from workplace itself	A workplace that involves 'industrial premises or intensive agricultural enterprise' may itself generate significant dust as a result of its operations. There is no process under the Acquisition Policy for considering the air quality impacts associated with a workplace that may require acquisition.
Reason why business is located adjacent to the mine in the first place	A business may intentionally locate itself adjacent to a mine in order to provide a service to the mine (e.g. truck maintenance). Under the Acquisition Policy, the owner of such a workplace could seek acquisition of its property despite the fact that it intentionally established its business next to the mine in the first place.
Complexities in determining acquisition compensation if business relocation is required	The principles for determining market value and compensation for acquisition of residences are well-understood and straightforward. However, if a business is required to relocate after exercising acquisition rights, the determination of compensation for disturbance has the potential to be far more complex and uncertain when compared to acquisition of residential premises.

In light of the above factors, Glencore recommends that the voluntary land acquisition rights should not be extended to any workplace.

However, if the Acquisition Policy is to extend to workplaces, Glencore recommends that the following changes are made to the definition and its application:

a. The policy should not apply to brownfield mining projects as any workplace in the vicinity of that mine is already operating in that location with prior knowledge of the mines' potential impacts;
b. The definition of 'workplace' should exclude hazardous or offensive operations that deliberately locate themselves away from residential areas; and
c. There should also be a discretion for the consent authority to elect not to apply or, if relevant, modify the dust criteria to certain types of workplaces that in their opinion are unlikely to require the 'protection' afforded by acquisition.

2. Application of Land Acquisition (Just Terms Compensation) Act

The Acquisition Policy provides that a proponent of a mining project will be compelled to acquire land affected by noise or air quality impacts where the voluntary acquisition criteria are exceeded. This requirement is consistent with contemporary approvals for mining projects in NSW.

However, the Acquisition Policy now indicates that the basis on which the acquisition price is to be determined, must, as a minimum, include:

a. *A sale price no less favourable than market value calculated in accordance with the Just Terms Act as if the land was unaffected by the development; and*
b. *An amount no less favourable than an amount calculated with respect to the matters referred to in section 55 of the Just Terms Act other than market value.*

Glencore considers that the proposed application of the valuation principles in the Just Terms Act has merit. However, in practical terms, the application of the Just Terms Act to land impacted by mining projects in the manner contemplated by the draft policy is not appropriate.

One of the primary objects of the Just Terms Act is to *'ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale'* (i.e. compulsory acquisition when the land is required for public purposes). In contrast, the Acquisition Policy seeks to apply the Just Terms Act when a landowner triggers a voluntary right of acquisition.

Simplistic application of Just Terms Act

It is overly simplistic, particularly from a legal perspective, to seek to apply the provisions of legislation designed for use in one context (ie, compulsory acquisition of land for a public purpose by a public authority) to an altogether different scenario (being voluntary acquisition where the land is used for private purposes). The Just Terms Act contains well-established principles for valuation, and its interpretation is supported by an extensive body of jurisprudence.

Accordingly, to seek to apply these principles and jurisprudence to the acquisition of land (upon request) by a landowner for private purposes would corrupt their application and as such the general references to the Just Terms Act in the Acquisition Policy are fundamentally flawed. For example, there is a clear legal principle that the public purpose should not be considered when conducting a valuation assessment under the Just Terms Act. It is unclear as to whether the 'mining purpose' should also be ignored when conducting a valuation exercise in the context of the Acquisition Policy.

Whilst Glencore agrees that there is a need for certain parameters to be established to assist in determining a reasonable acquisition price, not all of the requirements of section 55 of the Just Terms Act are directly relevant to land acquisition in a mining context.

Section 55 of the Just Terms Act provides the separate heads of compensation under which a landowner may be entitled to compensation, namely:

a. the market value of the land on the date of its acquisition,
b. any special value of the land to the person on the date of its acquisition,
c. any loss attributable to severance,
d. any loss attributable to disturbance,
e. solatium,
f. any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

For the reasons outlined below, Glencore considers that it is inappropriate to apply all of the 'heads of compensation' as set out in section 55 of the Just Terms Act in determining the amount of compensation payable to a landowner in the context of land acquisition by a mining proponent:

a. Compensation should be payable to the landowner based on the landowner's current use of the land, not the highest and best use of the land to which the landowner has not previously availed themselves of;
b. 'Special value' is defined in the Land Acquisition Act *as 'the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the person's use of the land'*. Quantification of 'special value' is subjective and extremely difficult to assess, and therefore 'special value' should not form part of the compensation for acquisition in a mining context; and
c. 'Loss attributable to severance' is not applicable in this context as the Acquisition Policy requires the mining proponent to purchase any contiguous lots of land owned by the same landowner – as such, no land will be severed.

Recommended process for determining acquisition price

In light of the above discussion, Glencore considers that the acquisition price to be paid by a proponent in the event that a landowner triggers the voluntary acquisition rights should be based, in the first instance, on a negotiated outcome between the parties. If a proponent and a landholder are unable to reach a negotiated agreement, the independent valuation process should follow, with final determination by the Secretary in the event of a dispute, in accordance with Figure 3.

We recommend that the Acquisition Policy is revised to include a draft condition which clearly sets out the basis on which the acquisition offer is to be determined. It would be preferable for the relevant principles for determining the acquisition price and associated compensation to be set out as a condition of consent, rather than referring to a piece of legislation that is not designed to apply in these circumstances. The draft condition should not include heads of compensation such as 'special value', severance and market value of adjoining land. However, an appropriate condition would include concepts of market value, disturbance and solatium, and would provide clear guidance as to how each of the identified heads of compensation should be assessed.

Glencore's suggested draft condition is set out in Appendix 1.

3. Emphasis on land acquisition prior to development application

The Acquisition Policy has an emphasis on mining proponents acquiring land that will be potentially impacted by the proposed mining project prior to a development consent even being granted. For the following reasons, Glencore considers that the Policy should be focused on land acquisition only occurring once the predicted impacts have been experienced:

a. There is no guarantee that development consent will be granted to the mining proponent. By entering into an agreement with a landowner prior to consent being granted, it creates a degree of expectation with the landowner that mitigation or acquisition will be forthcoming, irrespective of the actual impacts;
b. It is disruptive to the social and community fabric if land is unnecessarily acquired; and
c. The predicted impacts may not arise for 10-15 years after development consent is granted and hence the land should not be prematurely acquired before the impacts arise.

4. Acquired land becomes 'mining land'

The Acquisition Policy indicates that land should be treated as part of the buffer land of the development in circumstances where it is acquired to mitigate the impacts of that development.

In most cases, it is Glencore's preference not to acquire land unless absolutely necessary to do so in order to avoid potential impacts. Even in circumstances where Glencore is required to acquire land adjacent to a development, Glencore endeavours to ensure that, wherever possible, the acquired land continues to be used for its existing purpose, whether that be residential or farming.

It is inappropriate to refer to land that has been acquired in such circumstances as 'buffer zones' or 'as part of the development'. The acquisition of surrounding land does not have the effect of extending the project boundary and therefore this land should not be treated as part of the mine. This is especially the case in circumstances where the primary use of the land remains unrelated to mining.

Preston CJ made it clear in the recent case of *Peabody Pastoral Holdings Pty Limited v Mid-Western Regional Council [2013] NSWLEC 86* that land which is acquired by a mine due to noise and air quality impacts does not constitute that property as being part of the mine.

Preston CJ stated at [63] that case that:

> *'Virtually all uses of land have external impacts to varying degrees. Use of land for farmland, residential, mining or business can each cause pollution (air, water, land, noise, light or visual), traffic and parking problems, or biodiversity impacts external to the site of the farmland, residential, mining or business use. Such externalities do not result in the land subject to the externalities being used for the purpose of the activity that causes the externalities. The residence affected by air pollution from an adjoining factory is not thereby used for the purpose of factory....So too land that is affected adversely, such as from noise impacts, by an open cut coal mine is not thereby used for the purpose of a coal mine. Affectation of land is to be distinguished from use of land.'*

Classifying acquired land as buffer land may have wide ranging consequences. For example, it may result in local government seeking to treat that land as 'mining land' for rating purposes. This aspect of the Acquisition Policy should be revised to clarify that the status of land must be based on the use of that land, and not its ownership.

5. Mandatory contents of negotiated agreements

The Acquisition Policy indicates that negotiated agreements are the preferred mechanism for managing any exceedances of the relevant assessment criteria as the agreement can be specifically tailored to the individual circumstances and can provide for the implementation of measures such as compensation, building treatments and alternative accommodation (on a temporary basis).

However, the Acquisition Policy provides that any negotiated agreement must satisfy the following minimum standards:

a. Legally enforceable;
b. Valid for the life of the development;

c. Assignable to future landowners;
d. Specify upper limits of any impacts;
e. Provide for ongoing monitoring (if required); and
f. Provide a review mechanism in the event that the upper limits are exceeded.

Glencore considers that these 'minimum standards' are inappropriate and contradict the flexibility required to customise an agreement to match the specific circumstances.

For example, it is not necessary for an agreement to remain valid for the life a development in circumstances where the impact will only occur for a limited duration.

Similarly, it is inappropriate that the Policy require upper limits to be included where the landowner and mining company have negotiated a tailored compensation package to manage any exceedances that may occur.

6. Nature of acquisition rights is unclear

The historical approach to development consents in NSW is to impose conditions that specify particular residences that are predicted to experience exceedances of relevant criteria, and are therefore afforded voluntary acquisition rights, together with a general condition that affords the same rights to residences should impacts be exceeded at other locations not predicted in the EIS.

The general condition affords the mine operator with the opportunity to firstly modify its management measures to reduce the impacts and then, if unsuccessful, it outlines the independent property valuation and compensation determination processes that will apply in the event that acquisition is required.

All noise and air quality impact predictions, including exceedances, are derived from complex 3D numeric modelling processes, and all models are acknowledged to have limitations in terms of their ability to accurately predict these impacts subject to complex interactions between landscape terrain influences and variations in meteorological conditions, along with other factors such as estimated mining material moisture content or mining equipment sound characteristics. Anomalous variations in any of these factors can lead to unpredictable exceedances despite best practice efforts to control the impact at the mine.

The general condition providing acquisition rights where unpredicted exceedances may occur affords a measure of contingency and confidence for nearby residents and provides some certainty as to the criteria and the process that will apply in the event that unpredicted exceedances occur. This certainty of process is also welcomed by Glencore.

The draft Acquisition Policy is unclear as to whether voluntary acquisition rights will be available to the landholder:

a. Immediately upon the grant of the development consent, based on the impacts modelled in the environmental impact statement and predicted exceedances; or
b. After the development has commenced where unpredicted exceedances occur, but only if the acquisition criteria are actually exceeded; or
c. A combination of the above.

Glencore considers that the Acquisition Policy should be clarified to make it clear that the consent authority should continue with the practice of providing acquisition rights to particular

residences if impacts are predicted to exceed the criteria, together with a general condition should predicted impacts be exceeded.

7. **Landowner has unlimited time to accept acquisition offer after triggering acquisition right**

The Acquisition Policy sets out the process for determining the value of the offer that must be made by the mining company when a landowner has made the decision to request acquisition of the land. Figure 3 of the policy states that once the matter has been referred to the independent valuation process and the offer has been made, the landowner may accept the offer at any time and the offer must be adjusted to reflect any change in property value over time.

This could lead to a situation where the offer price is determined after the acquisition process is triggered by the landowner, but the landowner does not accept the offer for several years after it is made and may not ever accept the offer.

Mining companies will face significant difficulty in budgeting for land acquisitions if there is no certainty as to when an offer will be accepted, or if it will be accepted at all. The potential delay between offer and acceptance is also likely to cause complications (and potential disagreement) when it comes to the manner in which the offer is to be adjusted to reflect the change in property value over time. As such, Glencore proposes that offers may be made with an expiry date (which could be for a minimum period, such as three months after the offer), following which the offer will lapse.

8. **No difference in air quality criteria for mitigation and acquisition rights**

The criteria for particulate matter as set out in Tables 2 and 3 of the Acquisition Policy are the same for voluntary mitigation rights and voluntary acquisition rights, and include both health criteria and amenity criteria.

This is a departure from past practice, and suggests that the policy intention is for the landholder to have the choice as to whether mitigation or acquisition is the most appropriate outcome for them. This could clearly lead to the scenario where mitigation is requested and installed, and then the landholder subsequently requests acquisition.

Aside from the unnecessary expense that this would involve, Glencore considers a more sensible approach would be to apply the amenity criteria set out in Tables 2 and 3 to the mitigation rights only, and to apply the health criteria to acquisition rights only.

Glencore supports the application of air quality mitigation measures by agreement with a landholder, but only for residences located outside the area of affectation as determined by reference to predicted exceedances of PM10 health criteria. Further, the following mitigation measures should only apply where rain water is collected from the roof of the affected residence and where no scheme water is available:

- First flush water systems;
- Installation and regular replacement of water filters

Finally, the agreed mitigation measures should only be required to be implemented during the period when the impact continues. For example, long term mining projects may move away from an affected residence after 10 years, and the impact may no longer occur at the residence. Therefore the mine operator should not be responsible for ongoing maintenance or operating cost

of the air quality or noise impact mitigation measures when the impact no longer occurs.

9. Acquisition rights for vacant land

The criteria for vacant land states that it applies to vacant land "on more than 25% of any privately owned land, and a dwelling could be built on that land under existing planning controls." Glencore proposes that this should be further refined by adding the underlined wording as follows: "on more than 25% of any privately owned land, and a dwelling could be built on the affected part of that land under existing planning controls."

This is recommended to account for circumstances where a large portion of land may be partially affected, and that affected portion may not be legally built on through circumstances such as being flood affected, however a residence could still be constructed legally on other non-affected parts of that land portion, where effectively there is no impact. However the proponent could be required to purchase the land even when the project does not represent any restriction on the legal residential use of the land.

10. Approach to decision making

Glencore's over-arching approach to mining project design in NSW ensures that a significant focus is placed on minimising environmental and social impacts from its projects. These processes include consideration of a range of alternative approaches and mine designs to address potential impacts. Whilst the Acquisition Policy alludes to this concept (Page 3, Point 1), Glencore would support greater emphasis on these processes in the policy, in order to minimize potential impacts prior to the exhibition of the project. Glencore suggests the following to replace Point 1 on Page 3 under the "Approach to decision making" heading:

> *The applicant must clearly demonstrate that all viable project alternatives have been considered, and all reasonable and practicable impact management measures and impact reduction design features have been incorporated into the project to minimize environmental and social impacts and ensure compliance with relevant criteria. Adequate consultation must have occurred with potentially affected community members to identify and respond to potential social and environmental impacts during the development of the EIS.*

The diagram in Figure 1 of the Acquisition Policy, in particular the decision as to whether any net benefit exists, is an overly simplistic depiction of the process and suggests that the approach is one dimensional and considers only the economic benefits, whereas the consideration of social and environmental aspects are key to determining what the net balance of benefits might be. The assessment of a project resulting in a decision to approve or refuse the development does include consideration of the cost benefit analysis; however the cost benefit analysis must consider many aspects in addition to whether a negotiated agreement is in place with all landholders.

The option to refuse the project at this point, because of an agreement not being in place with landholders, is misleading and should be removed from the flow chart in Figure 1.

11. References to "residual impacts"

The term "residual impacts" is used throughout the policy. This term implies that the "residual impacts" are those impacts following the reduction of the total impacts, resulting from some impact reduction process or calculated reduction, yet there is no definition to describe the process used to arrive at the residual impact.

12. Assessment criteria applicable to tenants of mine-owned properties

The section of the Acquisition Policy that relates to use of land in buffer zones (page 10) describes how assessment criteria would relate to tenants of mine-owned properties. However, there is no differentiation made between noise and air quality assessment criteria. This aspect of the policy should be clarified

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Glencore appreciates the invitation to provide feedback on the Acquisition Policy and we look forward to further dialogue with the Government regarding other approvals-related policies as they are released for public comment.

If you would like to discuss any aspect of this submission in more detail, please contact me on (02) 4925 6282 or 0419 281 121.

Yours faithfully

Dave O'Brien
General Manager – Environment and Community
Glencore Coal Assets Australia

Appendix 1 – Draft acquisition condition

LAND ACQUISITION

Within 3 months of receiving a written request from a landowner with acquisition rights, the Applicant shall make a binding written offer to purchase the land from the landowner based on:

(a) the current market value of the landowner's interest in the land at the date of this written request (being the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer), as if the land was unaffected by the development, having regard to the:
- existing and permissible use of the land, in accordance with the applicable planning instruments at the date of the written request (and disregarding any potential mining use of the land); and
- presence of improvements on the land and/or any approved building or structure which has been physically commenced on the land at the date of the landowner's written request, and is due to be completed subsequent to that date, but excluding any improvements that have resulted from the implementation of any additional mitigation measures under condition [insert] and have increased the market value of the land;

(b) reasonable compensation for any loss attributable to disturbance caused by the land acquisition process. 'Loss attributable to disturbance' for this purpose is limited to:
- legal costs, accountancy and valuation fees reasonably incurred to determine the acquisition price of the land, and the terms upon which it is to be acquired;
- financial costs reasonably incurred (or that might reasonably be incurred) in connection with the relocation of the landowner within the [insert] local government areas, or to any other local government area determined by the Secretary (including legal costs but not including stamp duty or mortgage costs);
- stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land acquired); and
- financial costs reasonably incurred (or that might reasonably be incurred) in connection with the discharge of a mortgage and the execution of a new mortgage resulting from the relocation (but not exceeding the amount that would be incurred if the new mortgage secured the repayment of the balance owing in respect of the discharged mortgage); and

(c) a reasonable amount for solatium, being compensation to a person for non-financial disadvantage resulting from the necessity of the person to relocate his or her principal place of residence as a result of the acquisition, and calculated in accordance with the principles set out in section 60 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

If the Applicant and landowner cannot agree on the acquisition price of the land and/or the terms upon which the land is to be acquired within one month of the binding written offer being made by the Applicant, then either party may refer the matter to the Secretary for resolution.

Upon receiving such a request, the Secretary will request the President of the NSW Division of the Australian Property Institute to appoint a qualified independent valuer to:

- consider submissions from both parties;
- determine a fair and reasonable acquisition price for the land and/or the terms upon which the land is to be acquired, but only having regard to the heads of compensation referred to in paragraphs (a)-(c) above;

- prepare a detailed report setting out the reasons for any determination; and
- provide a copy of the report to both parties.

Within 14 days of receiving the independent valuer's report, the Applicant shall make a binding written offer to the landowner to purchase the land at a price not less than the independent valuer's determination.

However, if either party disputes the independent valuer's determination, then within 14 days of receiving the independent valuer's report, they may refer the matter to the Secretary for review. Any request for a review must be accompanied by a detailed report setting out the reasons why the party disputes the independent valuer's determination. Following consultation with the independent valuer and both parties, the Secretary will determine a fair and reasonable acquisition price for the land, having regard only to the matters referred to in paragraphs (a)-(c) above, the independent valuer's report, the detailed report of the party that disputes the independent valuer's determination and any other relevant submissions.

Within 14 days of this determination, the Applicant shall make a binding written offer to the landowner to purchase the land at a price not less than the Secretary's determination. If the landowner refuses to accept the Applicant's binding written offer under this condition within 6 months of the offer being made, then the Applicant's obligations to acquire the land shall cease, unless the Secretary determines otherwise.