# Voluntary Land Acquisition and Mitigation Policy

## NSW Minerals Council Submission

December 2014

NSW MINERALS COUNCIL

# Executive summary

The NSW Minerals Council (NSWMC) welcomes the opportunity to comment on the draft Voluntary Land Acquisition and Mitigation Policy (draft Policy).

The NSW Government's initiative to establish a clear policy framework for the regulation of mining is commendable. The draft Policy states that it *"documents current NSW Government practice"*, which is a sound basis on which to quickly establish this first land acquisition and mitigation policy, particularly if it is intended to apply the draft Policy to projects already in the assessment process.

However, there are several aspects of the draft Policy that do not reflect existing NSW Government practice, have questionable justification and could have significant implications for the viability of mining projects. NSWMC does not support changes with such major potential implications being rapidly adopted as government policy. Such major changes will require a much more thorough consultation process before adopting them.

The issues with the draft Policy discussed in this submission are summarised below:

- **Application of particulate matter acquisition criteria to 'workplaces'** – Previously and under current approvals, acquisition criteria applied to any residence on privately owned land. The draft Policy now applies the particulate matter acquisition criteria to *"any residence or workplace on privately owned land"*. The nature of workplaces is diverse and they are vastly different to residences. Workplaces include enclosed, air conditioned offices and industrial facilities that may only be occupied for a limited number of hours each day. They do not warrant the same criteria as residences and are more suited to a case-by-case assessment of impacts.

- **Application of the *Land Acquisition (Just Terms Compensation) Act 1991* (Land Acquisition Act)** - The draft Policy requires the application of the Land Acquisition Act to determine property value and compensation to be paid, as opposed to the established approach conditioned in most approvals. This has the potential to add significant cost to mining projects, particularly if applied to workplaces, and is not an appropriate use of the legislation, which has been specifically designed for compulsory acquisitions of land by public authorities when such land is required for a public purpose, rather than a voluntary acquisition right for temporary impacts that may not occur.

- **The incorporation of buffer land as part of the development** – The draft Policy provides that land that is acquired to mitigate the impacts of a development should be treated as buffer land and *"as part of the development"* (p3). This has a number of presumably unintended consequences, including potential sterilisation of the land for other purposes and implications for council rates, and requires deletion or at least clarification.

- **Allowable exceedences of PM10 24 hour air quality criteria** – The criteria for PM10 24 hour mitigation and acquisition criteria provide no allowable exceedences. Assessments as to whether the criteria are exceeded are made based on air quality models, which are typically conservative. Where models predict 5 or less exceedences of the PM10 24 hour criteria in a year, rather than require acquisition based on predicted exceedences there should be a mechanism to allow proponents to commit to real time monitoring and air quality management strategies to ensure those exceedences do not occur in practice (subject to factors outside the proponents control such as bushfires and dust storms).

- **The minimum requirements for negotiated agreements are inappropriate** – The minimum standards for negotiated agreements outlined in the draft Policy are inappropriate, such as the requirement for the agreement to remain in force for the life of the development; the transfer of obligations to new landowners; and limits on the impacts covered by the agreement. The contents of such an agreement should be a private matter between the proponent and the landowner.

- **The payment of dispute resolution costs is unlimited** – The requirement for an applicant to pay for costs associated with resolving a dispute about appropriate mitigation measures appears to be a new obligation for proponents and has the potential to add considerable expense to the cost of complying with mitigation measure conditions and time in resolving disputes. There should be a cap on how much the applicant should have to pay or at a minimum a 'reasonableness' requirement on the amount that may be payable under such a condition.

- **The payment of costs to move a tenant are broader than current requirements** – The requirement to pay for relocation costs of a tenant goes further than current conditions, which commonly require proponents to 'use their best endeavours to provide assistance with relocation and sourcing of alternative accommodation.' Moving costs are not defined and could potentially be significant if for example, the tenant is conducting a business on the premises and may make a claim for the costs of setting up a business elsewhere.

- **The requirement to pay operating costs associated with voluntary mitigation measures is inappropriate** – The draft Policy requires proponents to pay the operating costs associated with mitigation measures (such as electricity costs for air-conditioning units). This should be a matter that may be considered for inclusion in privately negotiated agreements.

- **The proposed process for securing acquisition has no endpoint** – The draft Policy provides that a landowner can accept an offer for acquisition at any point in time and the offer must be adjusted to reflect any change in property value over time. This will have significant implications as it may require the proponent to obtain multiple valuations throughout the acquisition process, thereby adding an additional financial cost and significant uncertainty for the proponent. The draft Policy should be revised to retain the current position reflected in development consents whereby the acquisition price is determined at the date of the landowner's request for acquisition and obligations to acquire the land cease after six months.

- **Time periods for the right to trigger mitigation and acquisition provisions should be specified –** The draft Policy should provide the ability to specify limited timeframes which the voluntary mitigation and acquisition criteria can be triggered, such as before or during the period when impacts exceed the criteria but not after the period of impacts has passed.

- **Clarification around the application of voluntary acquisition rights to vacant land** – NSWMC understands the intent behind the policy to provide landowners of vacant land with acquisition rights if a dwelling could be built on the land under existing planning controls. However, the Policy should clarify that this requirement will only apply where the relevant criteria are exceeded over 25% of the areas where a dwelling could be lawfully constructed. Consideration should also be given to other constraints on developing the land, such as flooding.

- **Requirement to extend acquisition to contiguous lots –** The application of acquisition rights to contiguous lots is valid in circumstances where the relevant criteria is predicted to be exceeded at the dwelling. However, this policy should not be extended to vacant land where the primary dwelling is not impacted.

- **Specify the health information provided to landowners and tenants** – NSWMC believes that the provision of the latest version of the NSW Health Fact Sheet 'Mine Dust and You' is sufficient information for tenants residing in buffer areas as opposed to the information requirements set out in the draft Policy, and that it can only be reasonably provided to the landowner and not the tenant.

- **Clarify the land that the voluntary mitigation criteria apply to** – The draft Policy does not state which land the voluntary mitigation criteria apply to. It should only apply to residences on privately owned land. Workplaces are diverse and require a case-by-case assessment.

- **Clarify whether acquisition criteria will be included in development consents** – The draft Policy is focused on the predictive modelling of noise and air quality impacts against the mitigation and acquisition criteria. The criteria should also be included in development consents to provide a certain process in case of any impacts exceeding those predicted.

- **Include a definition of residence** – Given the focus on residences in the draft Policy, it would benefit from a definition. NSWMC recommends the definition '*Land on which a dwelling is located which is either permanently occupied or occupied for an extended period of time and not on a temporary or short term basis. Residence does not include tourist or visitor accommodation or a caravan park.*

Finally, the draft Policy states that revisions will be made to the Policy subsequent to separate policy reviews that are underway and due to be completed in 2015, such as the Industrial Noise Policy and the National Environment Protection (Ambient Air Quality) Measure (Ambient Air NEPM). The NSW Government must recognise that the standards set in other policies such as the Ambient Air NEPM are for different applications and are not directly transferrable to mitigation and acquisition policy. They should not be automatically applied to mitigation and acquisition criteria in future revisions of the draft Policy.

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# Introduction

The NSW Minerals Council (NSWMC) is the peak industry association representing the NSW minerals industry. Our membership includes around 100 members, ranging from junior exploration companies to international mining companies, as well as associated service providers. Please contact David Frith, Director Industry and Environment, on 9274 1400, if you would like any further information regarding this submission.

The NSW Government's initiative to establish a clear policy framework for the regulation of mining through the development of the Integrated Mining Policy is commendable. In terms of mitigation and acquisition policy, there have been several different interpretations of the criteria that trigger mitigation and acquisition rights in recent years, leading to significant uncertainty about which criteria will apply in each project assessment.

Given the implications that mitigation and acquisition rights can have on project viability, it is critical that there is clear policy at the pre-feasibility stage of project planning.

The draft Policy states that it *"documents current NSW Government practice"*. This is a sound basis on which to establish this first documented mitigation and acquisition policy, particularly if it is intended to be implemented quickly and apply to projects already in the assessment process. The draft Policy notes that it will be reviewed following separate but related policy reviews that are ongoing and expected to be complete in 2015. This will provide an opportunity to consider any fundamental changes to existing practice, should they be required.

However, there are several aspects of the draft Policy that, to the mining industry's knowledge, do not reflect existing NSW Government practice and could have significant implications for the viability of mining projects. NSWMC does not support changes with such major potential implications being rapidly adopted in the initial document policy.

In general, the draft Policy largely reflects existing practice, which NSWMC supports. This submission focuses on the aspects of the draft Policy that NSWMC believes require revision or clarification.

## Application of acquisition criteria to 'workplaces'

The draft Policy indicates that the voluntary particulate matter land acquisition criteria should be extended to 'workplaces'. This is a significant shift from existing government practice, which provides voluntary land acquisition rights to residences only.

There are several reasons why the extension of the acquisition criteria to workplaces is inappropriate.

**Workplaces are fundamentally different to residences**

'Workplace' is defined in the Policy 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.*'

This definition is very broad and gives no consideration to the *type* of workplace being affected or the extent of any impact. Applying the same criteria to workplaces that are applied to residences does not recognise some important differences:

- The acquisition criteria have previously been applied to residences and are therefore based on health and amenity considerations for a residence that is potentially occupied 24 hours per day. Exposure periods in workplaces are generally significantly less than 24 hours, yet the draft Policy applies the same acquisition criteria to workplaces as to residences. Different occupational health and safety standards exist for exposure to inhalable particulate matter based on likely period of exposure (typically 8-hour averages due to standard work periods).

- Many workplaces are enclosed and air conditioned and the outside air quality is of little relevance to the air quality experienced by employees during their time at work.

- Ambient air quality criteria are designed with a broad spectrum of people in mind, including different ages and sensitivities to particulate matter. People of working age are typically fitter and less likely to be in the category of people particularly prone to respiratory or cardiovascular problems that may be exacerbated by particulate matter. This is particularly the case for workers who may work outside.

**Some businesses are deliberately located close to mine sites**

In many cases, businesses may intentionally locate themselves adjacent to a mine for reasons such as:

a) providing a service to the mine and therefore being in close proximity to its customer; or

b) due to the hazardous nature of the business and the need to be located in an industrial setting and away from residential areas.

The draft Policy provides that in both of the above circumstances, the owner of that workplace could seek acquisition of its property despite the fact that it intentionally established its business next to the mine in the first place. For example, many industrial areas in the Hunter (such as Muswellbrook Industrial Estate and the Mt Thorley Industrial Estate) are deliberately located adjacent to mining areas in order to be in close proximity to the surrounding mines.

These businesses could engage the voluntary acquisition clause for reasons entirely unrelated to dust impacts. For example, given the current downturn in the mining industry, a business located in such an industrial area could attempt to trigger voluntary land acquisition rights if available as opposed to closing the business in the event that the business is not in a strong financial position.

**There will be significant acquisition costs associated with workplaces**

If the draft Policy applies the acquisition criteria to workplaces this could add considerable expense to a mining project and potentially make some projects unviable depending on the nature of the workplace/s affected by a project.

In particular, the inclusion of workplaces is significant given the nature of the heads of compensation that could be claimed under the Land Acquisition Act (discussed in the next section).

Furthermore, the inclusion of 'workplaces' as having acquisition rights around industrial areas may create unreasonable financial costs where the landowner has rights under more than one consent and opts to trigger those rights with all project proponents such that valuation costs are born by numerous companies and the landowner can choose which valuation to accept.

**NSWMC recommendations**

The voluntary land acquisition criteria for particulate matter should not be extended to workplaces given that in many cases there will be little likelihood of any significant health impacts to employees. In these circumstances, the proposals in the draft Policy would create unnecessary requirements to acquire workplaces, with the consequence of unnecessarily threatening a project's viability.

The draft Policy should outline that the consent authority has discretion to assess a project's potential impacts on workplaces on a case-by-case basis and principles on which that assessment is made.

Appropriate health and amenity standards should be determined for any potentially impacted workplace based on the nature of the workplace, potential exposure of workers to elevated levels of particulate matter (e.g. are they located indoors in an air conditioned environment or are they outdoor workers), health and safety measures already employed by workers (e.g. enclosed, air-conditioned cabs on vehicles or PPE already worn due to materials handled on site), likely period of exposure to elevated dust levels (e.g. duration spent outside or standard working hours), and whether air quality has any particular implications for the type of business activity undertaken.

The draft Policy should state that the acquisition criteria for workplaces should only apply to legally established and operated businesses with the relevant approvals. It should also exclude heavy, hazardous and offensive industry as well as workplaces that are intentionally located in close proximity to the mining industry or away from residential areas for commercial or operational reasons.

It should also be noted that the valuation process for workplaces will typically be a much more complex process than that for a residence, and the relevant development consent conditions will need to be tailored accordingly. For example, the standard timeframe of 3 months to prepare a written offer would more realistically need to be 6 months. If the Land Acquisition Act were applied, this timeframe would need to be extended further.

## Application of the Just Terms Compensation Act

The existing process for land acquisition contained in development consents for mining projects requires payment of the market value of the land, including consideration of both the existing and permissible use of the land, reasonable relocation costs (confined to a Local Government Area (**LGA**) or to any other LGA determined by the Secretary) and reasonable disturbance costs.

The draft Policy now provides that the acquisition price to be paid by a proponent of a development must include, as a minimum:

a) Sale price no less favourable than market value 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 Land Acquisition Act other than market value.

Under section 55 of the Land Acquisition Act landowners could be entitled to payments under the following heads of compensation:

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.

Application of the Land Acquisition Act in these circumstances could have substantial implications for the viability of a project. Further it is not appropriate to apply legislation designed for use in **compulsory** acquisitions of land when that land is required for a **public purpose** to completely different circumstances, being a private acquisition of land at an undefined point in time. The complexities in calculating acquisition prices under the Land Acquisition Act will also mean that the existing standard requirement for a proponent to make a written offer within 3 months of the landowner's request would require review.

The appropriateness of applying the Land Acquisition Act and each of the above criteria under the Land Acquisition Act is considered below.

**Appropriateness of applying the Land Acquisition Act**

The Land Acquisition Act is a piece of legislation relating to the assessment of compensation owed to a dispossessed landowner by an acquiring authority such as a Government Department.

The Act is applied when an authority of the State **compulsorily** acquires land for a public purpose. The primary reason for this Act is to protect landowners where their land is compulsorily acquired, often against their wish. This is in contrast to when a landowner elects to activate a voluntary right of acquisition and the election can be made at any point they choose over an extended period of time, when impacts may be temporary or may not even eventuate.

In those circumstances it remains appropriate for the parties to negotiate an agreed price for the land in question at the time of acquisition. This would include an assessment of market value of the land and any other *reasonable* 'out of pocket expenses' incurred by the landowner as a direct result of the acquisition.

**Market value of the land on the date of its acquisition**

The '*market value'* of the land under the Land Acquisition Act is determined based on the 'highest and best use of the land', which may or may not be the existing use of the land. If, for example, the land is zoned employment but is being used as a rural property, the market value of the land would be based on the use of the land as employment land.

NSWMC believes that it is a complicated approach and has the potential to overcompensate a landowner. Acquisition under mining approvals would be at the election of the landowner and therefore could be triggered at a time that was most financially beneficial to the landowner. In this respect a landowner could also rezone their property at any time during the life of a project, which could add considerable unforseen cost to the mining company if an acquisition right is subsequently exercised.

Additionally, the 'highest and best use' valuation method is often very complex and requires extensive assessment by a valuer and often also a town planner and other environmental consultants. This complexity has the potential to add significant cost to mining projects.

Finally, the market value of the property could change throughout the acquisition process and the requirement to assess market value at the date of acquisition will require the proponent to obtain multiple valuations.

NSWMC also believes that the existing condition relating to market value based on existing or permissible use should be refined. Permissible use is not the only determiner of potential land use and there are other constraints that need to be considered (e.g. flooding). Existing or approved use is a more certain and relevant way on which to base market value.

NSWMC recommends that the market value should be assessed against existing or approved uses of the land at the date that the landowner requests acquisition.

**Special value of the land to the person on the date of its acquisition**

The real potential for significant additional costs to be incurred by mining companies under the Land Acquisition Act is through the ability for landowners to make a claim for *'special value'*, particularly if the acquisition criteria extend to workplaces.

*'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'.*

*'Special value'* may arise in circumstances in which there is a combination of some special factor relating to the land and a capacity on the part of the owner exclusively or perhaps almost exclusively to exploit it. The special quality must be a quality that has an economic significance to the owner. The calculation of 'special value' is highly subjective and uncertain and therefore is inappropriate for inclusion in the draft Policy and conditions of consent for mining projects.

Whilst it unlikely that any owners of residences would make a claim for special value, it is quite possible that owners of workplaces could. For example a waste disposal facility may be able to establish a claim for special value if it can establish that the land on which it is located provides it with some special value given its location (e.g. a location away from residential areas and/or topography that provides it with visual screening) and/or a particular land size or shape that is rare.

In circumstances where acquisition can be voluntarily exercised by landowners for extended periods throughout a project, it is unreasonable that a landowner may then make a claim of *'special value'*, which may far exceed the market value of the land.

Additionally, the *'special value'* head of compensation under the Land Acquisition Act has been the subject of extensive case law due to the difficulty in the interpretation of the term and how it is to be applied. This complexity is likely to add considerable cost and delay to the assessment of compensation under a mining approval. In the case of *Bligh v Minister Administering Environmental Planning and Assessment Act* [2011] NSWLEC 220 Biscoe J discussed the issue of special value. In recognition of the difficulties in assessing 'special value' and the subjective nature of such an assessment his Honour stated:

> *'The quantification of the financial advantage* [being a component of the special value consideration in this case] *is a matter of judgment and is difficult to assess. I have come to the conclusion that having regard to the market value of the business, which I have already determined, the financial advantage should be assessed at 25 per cent of market value.'*

The Policy indicates that in the event of a disagreement between the parties as to the amount of compensation payable, the matter will be referred to the Secretary for dispute resolution. The applicant is then to make an offer in accordance with the Secretary's determination. Given the challenges in the interpretation and application of the compensation provisions of the Land Acquisition Act (as evidenced by the significant amount of case law in this area since the Act's inception), it is likely that the Department will be required to spend considerable time and resources in determining compensation claims which under the Policy may often require extensive assessment of expert reports. Given the delays already faced by the mining industry in obtaining decisions on state significant development applications due to the limited resources of the Department, any further demands on such limited resources should be avoided as it creates another significant disincentive to carrying out mining projects in the state of NSW.

**Loss attributable to severance**

*'Severance'* under the Land Acquisition Act means '*the amount of any reduction in the market value of any other land of the person entitled to compensation which is caused by that other land being severed from other land of that person'*.

Where the majority of land acquisitions in a mining context would be of rural land, this head of compensation is unlikely to be commonly utilised and therefore it is considered inappropriate and unnecessary that this head of compensation be included in conditions of approval for mining projects.

Furthermore, this head of compensation is not applicable in this context of this Policy, which requires the mining proponent to purchase any contiguous lots of land owned by the same landowner. If all contiguous parcels are to be purchased, the severance of land will not arise.

**Loss attributable to disturbance**

**'***Disturbance'* is defined in section 59 of the Land Acquisition Act as any of the following:

> *(a) legal costs reasonably incurred by the persons entitled to compensation in connection with the compulsory acquisition of the land,*
>
> *(b) valuation fees reasonably incurred by those persons in connection with the compulsory acquisition of the land,*
>
> *(c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs),*
>
> *(d) 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 compulsorily acquired),*
>
> *(e) financial costs reasonably incurred (or that might reasonably be incurred) by those persons 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),*
>
> *(f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition*.

Whilst this term is commonly used in existing project approvals in the schedule relating to acquisition procedures, it is not defined and is open to interpretation as to whether or not it in fact includes all the matters identified in section 59 of the Land Acquisition Act. In particular sub-section (f) has been interpreted broadly by the courts and includes loss of forgone income as a consequence of relocation necessitated by the acquisition.

Given that the particulate matter criteria in the draft Policy apply to workplaces, any acquisition of a workplace has the potential that a claim could be made for 'income forgone' during the relocation period which (depending on the business) could be significant. In addition, if a business needs to pay an additional amount in order to find a suitable alternative property from which to operate, then this will be assessed as *'loss attributable to disturbance*' under section 59(f) of the Land Acquisition Act. Similarly, the cost of relocating a business and associated infrastructure to a new property from which the business will operate is likely to be assessed as a component of disturbance. In the event that a

business is required to 'close down' as result of acquisition two possible alternative assessment processes of 'acquisition price' may apply:

a) The 'acquisition price' could be assessed on a 'going concern basis' (*Director of Building and Lands v Shun Fung Iron Works Ltd* [1995] 1 All ER 846 at 852); or

b) It will be assessed on the basis of capitalisation of estimated future maintainable earnings per annum (*Bligh v Minister Administering Environmental Planning and Assessment Act* [2011] NSWLEC 220). Such an assessment requires a detailed analysis of multiple business factors including rent, wages and multipliers.

Again due to the voluntary nature of acquisition under mining approvals, this head of compensation as defined in the Land Acquisition Act and interpreted by the Courts is considered inappropriate. It is unreasonable to require proponents to pay such costs, particularly when a business may activate the voluntary acquisition rights for reasons completely unrelated to the noise or dust impacts that gave the rights in the first place.

**Solatium**

*'Solatium'* means 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.

The maximum amount of solatium was increased to $24,244 effective from 1 March 2011. There may be further increases to the maximum amount of solatium from time to time. This head of compensation expressly refers to the 'necessity' of the person relocating his or her principal place of residence as a result of the acquisition. In the case of mining approvals, this 'necessity' may not ever arise, however a landowner for a number of reasons may choose to activate the acquisition process. Accordingly it is inappropriate to include this head of compensation in mining approval conditions.

**NSWMC recommendations**

NSWMC does not believe that the valuation process under the Land Acquisition Act is appropriate to be applied in the voluntary acquisition scenario that is the subject of the draft Policy.

NSWMC believes the existing conditions applied in mining development consents remain relevant and suitable and should be reflected as the existing practice in the final version of the Policy, with the exception that market value should be assessed against existing or *approved* use.

## Use of land in buffer zone

The draft Policy indicates that land which is acquired to mitigate the impacts of a development should be treated as part of the buffer land of the development and in fact is to be *"treated as part of the development"* (p3). This could have several presumably unintended consequences and requires clarification in the draft Policy.

**Sterilisation of land**

Treating buffer land as part of the development is inconsistent with existing practices. Buffer land has not previously been considered to be part of the development and has not been included in the 'schedule of land' in development consents.

Whilst in many circumstances a mine may elect to acquire surrounding properties due to potential noise or air quality impacts, the mine and the existing land uses (such as viticulture, agriculture and even thoroughbred breeding) are able to successfully co-exist. The classification of this surrounding land as 'buffer land' will potentially sterilise the land from other uses.

**Council rating implications**

Treating buffer land as part of the development could have implications for Council rating purposes, as Councils may attempt to categorise all mine owned 'buffer land' as 'mining' land.

As held by Preston CJ in the recent case of *Peabody Pastoral Holdings Pty Limited v Mid-Western Regional Council [2013] NSWLEC 86*, such a categorisation would be inappropriate. In that case the three properties in question were not physically used by Peabody for a coal mine. Preston CJ held in that the mere noise affectation of a property by a mine is insufficient to constitute that property as being part of the mine.

By comparison, Preston CJ stated at [63] 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.'*

Similarly the categorization of this land as 'buffer land' may have land tax implications.

**NSWMC recommendations**

NSWMC understands that the intent of the draft Policy is to treat buffer land as part of the development for air quality and noise assessment purposes only. This should be clarified in the draft Policy.

## Allowable exceedences of particulate matter criteria

The 24 hour PM10 voluntary mitigation and acquisition criteria are based on modelling alone and contain no allowance for mitigation and management to avoid what is identified by modelling to be a potential exceedence. This means that if a dust dispersion model predicts a single day throughout the project life to exceed the criteria this triggers up front acquisition rights.

There are two aspects of this approach that warrant the draft Policy to be refined:

1. Mining operations can be managed to avoid exceedences that are predicted in air quality models, which are conservative. Even when air quality criteria are predicted to be exceeded, mines can often manage their operations to ensure these exceedences do not eventuate through the use of real time air quality management strategies.

2. Existing government practice is to include allowable exceedences of the mitigation and acquisition criteria – different approvals include different approaches, such as excluding natural events and/or requiring 98.6 percent of days to meet the criteria each year (which has been applied to incremental criteria).

**NSWMC recommendations**

The policy should include a number of allowable exceedences of the PM10 24 hour air quality criteria per year, such as requiring 98.6 percent compliance.

Where air quality models predict up to 5 additional exceedences of the PM10 24 hour air quality criteria per year, mines should be given the option to establish monitoring programs that allow them to demonstrate that they are managing their operations to avoid the exceedences.

## Other issues to address in the final Policy

**Minimum requirements in negotiated agreements**

The draft Policy outlines a range of 'minimum requirements' for negotiated agreements (p5).

Requiring minimum standards for private agreements between the proponent and the landholder is inappropriate. For example:

- The requirement for the agreement to remain in force for the life of the development – Negotiated agreements could also relate to the period of predicted and approved impacts above relevant criteria and should not be mandated to be in force for the life of the development.

- The requirement to provide for the transfer of obligations to new landowners – This should not be required and new landowners should only have the ability to negotiate their own agreement.

- Limits on the impacts covered by the agreement – Amenity agreements commonly negotiated with landowners do not contain limits on the impacts covered by the agreement. It is inappropriate that the government require such upper limits to be included and the contents of such an agreement should be a private matter between the proponent and the landowner.

The contents of negotiated agreements should be a private matter between the proponent and the landowner and the minimum requirements should be removed from the draft Policy.

**Operating costs associated with voluntary mitigation measures**

The draft Policy states that *"the applicant must bear all the costs associated with the provision of the voluntary mitigation measures [which]…may include…operating the measures over time"* (page 6 of draft Policy).

The suggested mitigation measures include air conditioning units and clothes dryers (page 16 of draft policy). It is inappropriate to oblige applicants to bear ongoing costs such as electricity, maintenance and cleaning costs, which may be difficult to separate from a landholder's other costs and may also only be necessary to mitigate impacts for part of the time that the project operates.

There should not be a prescribed requirement that the proponent bear all operating costs associated with mitigation measures but rather this matter is something that may be considered for inclusion in a privately negotiated agreement.

**Process of securing acquisition**

In Figure 3 of the draft Policy, the final step in the acquisition process is described as: *"Landowner can accept offer at any time. If offer is subsequently accepted, the offer must be adjusted to reflect any change in property value over time".*

Under current standard consent conditions, an offer is open to a landowner to be accepted until 6 months after the offer is made, e.g. *"If the landowner refuses to accept the Proponent's binding written offer under this condition within 6 months of the offer being made, then the Proponent's obligations to acquire the land shall cease, unless the Director-General determines otherwise."*

By introducing the right of the landowner to refuse an offer and then exercise the right to request acquisition at a later date, at a newly adjusted price, the costs involved in having the land value assessed and re-assessed have the potential to place an unreasonable financial cost on the project proponent if landowners were to request acquisition on numerous occasions throughout the life of the project.

There is a need for the draft Policy to limit this potential and the existing Government practice reflected in previous development consents should be retained.

If this new landowner right is to be included in future, it should only be made available where the land ownership changes during the course of the project (i.e. a new landowner can request acquisition despite a previous owner declining an offer) and/or where the costs associated with having the property re-valued is covered by the landowner for every reassessment undertaken after the initial valuation and offer.

**Payment of dispute resolution costs is unlimited**

The requirement for an applicant to pay for costs associated with dispute resolution in the resolution of appropriate mitigation measures appears to be a new obligation for proponents and has the potential to add considerable expense to the cost of complying with mitigation measure conditions.

There should be a cap on how much the applicant should have to pay or at a minimum a 'reasonableness' requirement on the amount that may be payable under such a condition.

**Payment of costs to move a tenant**

The requirement to pay for relocation costs of a tenant goes further than current conditions, which commonly require proponents to *"use their best endeavours to provide assistance with relocation and sourcing of alternative accommodation"*.

Moving costs are not defined and could potentially be significant if for example, the tenant is conducting a business on the premises and may make a claim for the costs of setting up a business elsewhere.

The existing standard practice around using 'best endeavours' should be reflected in the draft Policy, along with guidance as to what this means, such as facilitating contact with managing agents and paying for relocation costs within the Local Government Area.

Furthermore, there should be limits on the times at which tenants can trigger the relocation so that it is related to the impacts of the mine as opposed to some other factor. For example, a tenant may wish to relocate for reasons unrelated to the mine and should not be able to require the mine to pay for relocation costs in these circumstances.

**Time periods for the right to trigger mitigation and acquisition provisions**

The draft Policy should provide the ability to specify limited timeframes in which voluntary mitigation and acquisition criteria can be triggered.

A project's impacts can change over time. For example, a property may receive impacts above the mitigation or acquisition criteria during the early stages but not the later stages. Where this is predicted to occur, mitigation and acquisition rights should be removed after actual impacts cease to be above the relevant criteria. It is unreasonable to require a mine owner to purchase a property or implement mitigation measures when the project will no longer have an impact above the relevant criteria. Additionally, it is unreasonable to require a mine operator to continue to maintain mitigation measures after a point in which they are no longer required due to the actual level of impact.

**Clarification around the application of voluntary acquisition rights to vacant land**

The voluntary acquisition requirements apply where noise or particulate matter emissions exceed or are predicted to exceed the relevant criteria over more than 25% of privately-owned land. 'Privately-owned land' and 'land' is defined in the policy as:

> ***privately-owned land*** *means land that is not owned by a public agency or a mining, petroleum or extractive industry company (or its subsidiary).*
>
> ***land*** means the whole of a lot, including contiguous lots owned by the same landowner.

The acquisition right is limited by the requirement that a dwelling could be built on the land under existing planning controls. The policy intent behind the provision is to ensure that property owners are not unnecessarily constrained in the development of their land by dust or noise impacts and have the ability to require the mining company to buy their land if the impacts on the property effectively prevent them from building on a significant part of their property.

The following clarifications should be made to the policy:

- The 25% area should be calculated based on areas where a dwelling could be constructed under existing planning and environmental constraints. To require the voluntary acquisition of a property when 30% of a property is predicted to experience impacts over the relevant criteria but a dwelling would not be permitted on much of that potentially impacted land would be contrary to the policy intent.

- The impacts of the existing land use should be considered. Where the existing land use itself generates air quality or noise impacts, the mine may not have any material impact despite exceeding the criteria.

- The rule should only apply to vacant lots. A lot on which a dwelling is already constructed should not be the subject of voluntary acquisition requirements unless the dwelling itself will be subjected to impacts above relevant criteria.

- Any right to acquisition is lost if a dwelling is erected on land outside the area predicted to receive impacts above the relevant criteria (provided actual impacts do not also exceed criteria).

- The 25% rule should apply to the entirety of land suitable for development across all contiguous lots, rather than 25% of an single lot within a larger contiguous landholding.

A further issue to consider in future reviews of the policy is whether there should be different thresholds based on land size. The 25% threshold is arbitrary and 25% of a 400 $m^2$ lot being impacted is significantly more constraining than 25% of a 1000 hectare property.

**Requirement to extend acquisition to contiguous lots**

The requirement for voluntary acquisition rights to extend to contiguous land under the same ownership is reasonable in circumstances where the primary dwelling on the contiguous land is predicted to, or does, receive impacts above the relevant acquisition criteria. The justification is based on the premise that the viability of the remainder of the land holding depends on the presence of a dwelling and its associated lot.

However, the rationale does not hold true where only vacant land is impacted but the primary dwelling is not. While it is reasonable for a landholder to sell off part of their land, the decision to do so is a commercial one and considerations such as the viability of the remainder of the land form part of that commercial decision. The ability to erect a dwelling on that land does not affect the commercial viability of a property other than in a real estate sense when a decision is made to sell. It is reasonable that vacant lots within a contiguous holding have a voluntary acquisition right due to predicted impacts however if there is a dwelling on an unaffected part of an adjoining lot, there is no policy rationale that the potential constraints on building a dwelling on the vacant lot also necessitate the sale of adjoining lots. Such a right should only extend to any lots that are necessary to give rise to the dwelling entitlement (for example, minimum allotment size restrictions).

There may be circumstances where a particular landholding does warrant the imposition of a voluntary acquisition clause over part or all of a holding due to a predicted impact on vacant lots within the holding (e.g. a significant impact on an approved but undeveloped residential subdivision), however, such circumstances are unlikely to be common and the default approach in the policy should be that the requirement to purchase contiguous land only applies where the primary dwelling on the land is predicted to receive impacts above the relevant criteria.

**Health information provided to landowners and tenants**

The draft Policy requires tenants who reside in buffer areas where assessment criteria are likely to be exceed to be *"fully informed of … the health risks, if any, of being exposed to such impacts"*.

The draft Policy requires greater prescription as to what this requirement entails. NSWMC believes that the provision of the latest version of the NSW Health Fact Sheet 'Mine Dust and You' should be sufficient to satisfy this requirement, and this should be stated in the draft Policy.

The standard consent condition which requires this information be given direct to tenants where the land is not owned by the proponent also needs refining so that the proponent is only obliged to pass on that information (and any associated right) to the landowner, not tenant. Unless the tenancy is pursuant to a registered lease on the title to the land (which for residential tenancy agreements is not the case), there is no means by which the proponent of a project can know who the tenant of a

particular property is and if a new tenant occupies. It is therefore only reasonable that the proponent be required to provide the information to the landowner and request the landowner to pass it on to its tenant and any other tenant who occupies the property for the life of the project.

**Inclusion of acquisition criteria in development consents**

The draft Policy is focused on predicted noise and air quality impacts, as opposed to those impacts that eventuate during the operation of the mine.

The draft Policy does not indicate whether the acquisition criteria will be included in a mine's development consent to address the unlikely situation where actual impacts at a residence exceed those predicted in the environmental assessment to a level that would have triggered the acquisition criteria.

In these circumstances, it is beneficial to have the acquisition criteria included in the development consent to provide a certain process for unexpected impacts.

The Policy should be refined to only require the proponent to acquire a property if and when the impacts actually arise. This would assist in preventing early and unnecessary acquisition of land which may have consequential impacts on the fabric of a community.

**Land that particulate matter voluntary mitigation rights apply to**

The draft Policy does not state what land the particulate matter voluntary mitigation criteria apply to.

The particulate matter voluntary mitigation criteria should only apply to residences on privately owned land. For the reasons detailed previously in this submission, the nature of workplaces is extremely varied and applying the same criteria to workplaces as are applied to residences is inappropriate.

Voluntary mitigation criteria for workplaces should be determined on a case-by-case basis to ensure the specific nature of the workplace can be considered.

**Definition of 'residence'**

The draft Policy should include a definition of 'residence', such as:

> '*Land on which a dwelling is located which is either permanently occupied or occupied for an extended period of time and not on a temporary or short term basis. Residence does not include tourist or visitor accommodation or a caravan park.*

**Air quality mitigation measures**

Cleaning of rainwater tanks should be added to the air quality mitigation measures on Page 16 of the draft Policy.

## Future reviews of the Policy

The draft Policy states that revisions will be made to the Policy subsequent to separate policy reviews that are underway and due to be completed in 2015, such as the Industrial Noise Policy and the National Environment Protection (Ambient Air Quality) Measure (Ambient Air NEPM).

While these policies are related, there are in some cases fundamental differences between their objective and that of the Voluntary Land Acquisition and Mitigation Policy.

For example, the criteria set by the Ambient Air NEPM are based on the predicted health impacts of particulate matter exposure on large urban populations, as well as the economic costs and benefits of achieving the standards. There are much greater health and economic benefits from achieving the standards in large populations. The standards are not intended to be applied to individual residences or to the boundaries of major industry or infrastructure such as mines or roads.

The criteria from these related polices should not be directly applied to mitigation and acquisition criteria.

**NSWMC Recommendation**

The NSW Government must recognise that the assessment standards set in other policies such as the Ambient Air NEPM are not directly transferrable to mitigation and acquisition policy. They should not be automatically applied to mitigation and acquisition criteria in future revisions of the draft Policy.