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Submission:

VOLUNTARY LAND ACQUISITION AND MITIGATION POLICY

For State Significant Mining, Petroleum and Extractive Industry Developments

January 2018

The Better Planning Network Inc. (BPN) is an incorporated, volunteer-based, not-for-profit association established in 2012 in response to the then O'Farrell Government's proposed overhaul of NSW planning legislation. Our aim is to advocate for a robust and visionary NSW planning system designed to achieve Ecologically Sustainable Development as defined in the *Protection of the Environment Administration Act 1991 (NSW).*

Cover images:

1. and 2. Whitehaven Coal's Tarrawonga mine on 21st August, 2017, graphically show the kind of dust emanating from the open cut coal mine north of the town of Boggabri. Impacts from such dust events are experienced frequently by neighbouring properties.

The NSW EPA tells complaining community members to talk to the Department of Planning.

The Department of Planning blames the Department of Resources and Energy, claiming that the latter has approved poor mine design.

3. An altercation involving an APA Pipeline group representative and a Coonamble farmer, over trespass to conduct pipeline surveys.

INTRODUCTION

The Environment Protection Authority (EPA) has revised its policies for noise and air quality impacts including changes to the air quality assessment criteria for fine particles (PM_{10}) from 30 µg/m^3 to 25 µg/m^3; the introduction of new regulation of very fine particles ($PM_{2.5}$) at 25 µg/m^3 (24 hour) and 8 µg/m^3 (annual); and changes to the noise assessment criteria.

These changes have resulted in a consequential review of the Voluntary Land Acquisition and Mitigation Policy (VLAMP) to establish thresholds for the grant of voluntary acquisition and mitigation rights that are consistent with the EPA's policies.

As a consequence of the changes to the VLAMP, it is proposed to the amend the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (the Mining SEPP) as follows:

- Clause 12AB of the Mining SEPP will be revised to align with the EPA's revised policies for air and noise; and
- Clause 12A of the Mining SEPP will be revised to refer to the revised VLAMP to require the consent authority to give consideration to the VLAMP before determining an application.

RECOMMENDATIONS

Following a review of the proposed changes, the BPN makes the following recommendations:

1. The proposed amendments to the Mining SEPP are incomplete due to the absence of adequate rules or guidelines concerning the valuation of farming land for resumption by the resources industry. **The draft VLAMP is thus incomplete as it lacks the valuation guidance foreshadowed to be included in 2018**.

2. The Noise Policy for Industry is not based on proven, relevant science. Before being applied to any land acquisition, the assessment criteria must be the subject of validation under NSW conditions, in greenfields rural areas. **Independent, robust field studies must immediately be initiated by the NSW Government to ascertain the effect of the new low frequency third octave scale on noise compliance of mines**.

3. The role of the NSW Health must be re-evaluated and restored as the pre-eminent Government Department responsible for public health, with particular attention to the epidemiology of chronic illness in open cut mine areas, including bronchial problems, sleep disorder and depression, all of which are believed to be high in mining communities. **NSW Health must play an active role, not just consultative by-stander** as has occurred in the development of the new Noise Policy for Industry.

4. The Social Impact Guideline fails to ensure that many impacts, which are widely known to exist, will be assessed adequately, or at all. It is therefore recommended that the draft VLAMP is amended to incorporate an explicit requirement for applicants (i.e. resource project proponents) to act in 'good faith'.

5. The NSW Government must initiate an enquiry into the land acquisition behaviour of the resources industries, since the inception of the VLAMP to :

    - Identify how many properties have been purchased for the purpose of developing a resource project (mine) using the VLAMP;

- Compare this with number of properties purchased by private negotiation without triggering the VLAMP; and
- Compare the price per hectare for acquisitions for the same project purchased via private negotiation with and without triggering the VLAMP.

This should be done as part of the process of developing Valuation Guidelines under the VLAMP.

6. A fair compensation package should be available to all property owners impacted by mining approvals and operation, including acquisition rights, that includes:
    - Value of property based on comparable nearby centres unaffected by mining
    - Plus relocation and disturbance costs, including all legal and valuation fee
    - Plus a premium for replacement costs to landowners forced to move through no choice of their own

1. Context of Voluntary Land Acquisition and Mitigation Policy

Coal mining has a long history in New South Wales, throughout most of which the industry has had a peaceful coexistence with agriculture. The Hunter Valley is a perfect example, having risen to economic prominence as a wine growing region, while at the same time, a home to thriving coal mining industry. This peaceful coexistence no longer exists, because of the transformation of the coal mining industry from a predominantly underground mining operation to open cut, of a scale hitherto unimaginable.

The expansion of above ground coal mining has necessitated the displacement of farmers, and in some cases entire villages and communities. The Voluntary Land Acquisition and Mitigation Policy (VALMP) purports to mitigate the impacts of mining, petroleum and extractive industries, However, in reality it appears to serve the interests of the coal mining industry and communities are oppressed.

Onshore gas extraction does not rely on a property purchasing model, on the whole relying on a royalty system and easement payments as reward to landowners. Coal mining is by far the dominant driver of the VLAMP due to its present size and ambitions to dramatically expand into the Gunnedah Basin and Namoi Valley of North West NSW. Therefore, the focus in this Submission on the application of the VLAMP to coal mining expansion is appropriate.

The VLAMP was reviewed relatively recently, in 2015, and still the largesse afforded to the coal industry by the NSW government has not been sufficient to appease the demands of the NSW Minerals Council on behalf of coal mines seeking to further reduce environmental protections for communities under siege from mine expansion.

The present revised Policy is designed to coordinate with changes to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* and *Noise Policy for Industry 2017*.

There is no evidence that the VLAMP is mitigating the impact of resources projects, other than to mitigate the cost of operating coal mines in rural greenfield areas in proximity to farms and farming communities and towns. This has been achieved by imposing an unfair advantage of "Applicant" over affected landowners and ignoring the broader context in which the owners of coal mines negotiate the purchase of land.

Some of these contextual factors are referred to in this Submission and include:

- Farms are often held intergenerationally and as a consequence, farming families have a tendency to remain in a same region with familial proximity, and are not as geographically mobile as city people;
- There is a decline in the availability of farmland in New South Wales not currently or potentially affected by a coal lease or coal exploration licence; and
- The land acquisition behaviour of coal mining companies is such that communities are damaged by artificially inflated property sale prices in order to initiate the project, leaving landowners left behind to suffer largely unregulated or poorly regulated pollution impacts from dust, blasting fumes, noise and potential damage to their groundwater.

The VLAMP was intended to make acquisitions smooth, but that has not happened. In effect, this Policy takes all the incentive away from a proponent to reach an agreement prior to project approval. It places confidence in the 'good faith' of a proponent company, a false confidence as demonstrated on observable reality to date.

On the contrary, farmers are forced to negotiate with multibillion dollar companies on an unequal playing field with unequal access to information or resources to defend their interests, and a distinct lack of 'good faith' on the part of some proponents.

An agreement prior to approval means the impacted landowner voluntarily accepts the impacts, whereas under the current scheme a project neighbour has to compulsorily carry the impacts while going through the often prolonged process of negotiating the sale of property. The landowner could be simultaneously facing offensive noise problem as well as blasting problems throughout.

2. Changes to *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* and Industrial Noise Policy

Why are the amendments proposed? [1]

The motivation to amend the VLAMP so soon after the previous amendment, and with the knowledge that it lacks adequate guidance on conflict resolution and negotiated agreements (which are proposed to be addressed in 2018); is to urgently rush in new provisions to allow higher levels of polluting in new coal mines, such as the proposed Vickery coal mine near Boggabri. Changes are proposed to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* to accommodate for the watering down of air and noise pollution regulation.

Changes to Air Pollution Regulation

Although the annual assessment criteria for air impacts has been tightened in line with the National Standards agreed by COAG[2], in practice there is a low level of confidence in the resolve of the NSW EPA to assiduously apply them. For example, the revised criteria for PM2.5 fine particles changed from 30 µg/m^3 to 25 µg/m^3. On the face of it, this looks like a step forward if not for the fact that the monitoring of these particles has been strongly criticised by community groups. If there is no confidence in the ability of the regulator to ensure compliance with the standard, obviously confidence in the criteria also fails.

Community awareness of the health risks of PM 2.5 fine particles has grown considerably along with research that has revealed the danger they pose to bronchial health. There appears to be no doubt from the available science, that while not visible, the fine particles have a greater ability to penetrate deep into the human lung. The 2016 COAG changes reflect these epidemiological concerns.

However, communities in the Gunnedah Basin throughout 2016-2017 became aware of a perceived failure of the existing Namoi Air Pollution Monitoring Scheme due to very high levels of negative readings and the NSW EPA's, refusal to regard the negative readings as invalid. The perverse position of the NSW EPA has not changed, meaning that confidence in the current system remains low, or non-existent.

Further compounding the community's lack of confidence, is the unfulfilled promise by the Minister for the Environment[3], Gabrielle Upton MP, that by Christmas 2017, a publicly available, government run scheme of air pollution monitoring for the Namoi Valley would be up and running. Unfortunately, the Minister's promise has not been delivered. Out of three companies involved in the proposed scheme, Idemitsu Resources, Shenhua and Whitehaven Coal, the latter has lobbied for years to prevent the scheme being established. It appears that the objecting company is also coincidentally proposing to appeal against the relegation of its Maules Creek Environmental Protection Licence to a Level 3 risk (i.e. the highest risk licence shared with only 2 other coal mines our of 48 in NSW). The company has foreshadowed an appeal against the Level 3 risk rating, but as the months have passed, this has not eventuated. Still, Whitehaven Coal appears to have succeeded in derailing the Minister's intentions.

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[1] *Proposed Mining SEPP amendments: Air and noise impacts. Explanation of intended effect,* Dept of Planning, November 2017 at p.4

[2] National Environment Protection (Ambient Air Quality) Measure

[3] Ministerial announcement, NSW Clean Air Summit, June 2017

Criticisms that the air pollution monitoring schemes are using equipment that is not fit for purpose also abound, with criticisms that the network of TEOMs – "Tapered element oscillating microbalance".

Particulate monitors are malfunctioning under extreme environmental conditions due to large swings in temperature and humidity due to their remote locations and inadequate maintenance. High profile revelations by the environmental group Enviro Justice Australia alleging false and misleading reporting of a pollution near some coal mines were rejected by the NSW EPA.

The NSW EPA continues to defend itself against persistent evidence that air pollution monitoring in coal mining areas is unsatisfactory.

Changes to Noise Pollution Regulation

Criticisms of the oversight of dust regulation pales in comparison with the unrelenting opposition to the recent industrial noise regulation changes. The Department of Planning's Frequently Asked Questions for the Review of the VLAMP states that the criteria for noise impacts have been 'slightly modified' but fails to admit that an entirely new formula has been introduced for the calculation of low frequency noise effects. The *Policy for Industrial Noise* introduced the controversial new formula for assessing the impact of low frequency noise after a 2.5 year consultation period, in which the Department of Health was a member of the Steering Committee but failed to make its own submission despite low frequency noise being increasingly acknowledged as a public health problem around the world and in Australia. None of the submissions were published.

Based on changes to industrial noise policy contained in the new *Noise Policy for Industry 2017*, the new regime is more complex and not based on relevant science. It has been released without any guidelines for the reporting of noise monitoring by mines, and the NSW EPA's response to the community has been to 'tell them to negotiate this individually with the mines'.This was the comment of NSW EPA's representative at a coal mine Community Consultative Committee. This is not only unhelpful to expect the community to do so, but a dereliction of its own duty.

The NSW EPA and the Minister for the Environment was heavily criticised for introducing the low frequency noise scheme adapted from a United Kingdom system that has no bearing on open cut coal mines. Despite community pressure to validate the system in NSW rural greenfields locations subjected to open cut megamines, the NSW Government has refused to do so.

As a result of the above problems and deficiencies, the changes to the Mining SEPP, industrial noise regulation and air pollution standards do not constitute advantages or offer mitigation for affected communities.

Further eroding confidence in the new Noise Policy for Industry, is the manner in which it has been introduced. It does not include any guidelines for industry as to how to report on the new, more complex formula for assessing low frequency noise. The Noise Policy for Industry is a highly contested new instrument with a significant impact on the public health of rural communities up to 20km from a large open cut mine, such as Maules Creek mine which has consent for the extraction of 13 million tonnes of coal per annum and operates 24 hours a day.

On a final note, it is clear that the intention of the Noise Policy for Industry has been to lower the protections afforded to affected communities. It will open the floodgates to increased noise pollution. The speed with which Whitehaven Coal has initiated a Modification to its Maules Creek Project Approval is testimony to the fact that the company had a vested interest in the weakening of noise protections, not to mention the company's proposed Vickery coal mine which it is feared to severely will adversely impact on the health and amenity of the town of Boggabri and nearby communities.

The NSW Department of Health played a bystander role in relation to the Industrial Noise Policy review. Although there was a delegate on the Steering Committee, the delegate made a minimal contribution and the deoartment made no submission, despite noise levels and resulting sleep disturbance being recognised widely as a serious public health concern.

3. The VLAMP to be further amended in 2018

The Department is "considering the development of new guidance on negotiated agreements", commencing in 2018. The indication that the November 2017 draft VLAMP is an interim solution, and that the Government recognises that a deficiency in guidance exists for mining companies negotiating with individual landowners does not provide confidence that this version of the VLAMP will successfully achieve its desired outcomes.

There is a glaring need for guidance on negotiated agreements. However, in the *Proposed Mining SEPP amendments: Air and noise impacts. Explanation of intended effect* document, published alongside the draft VLAMP, the Department states that it is "considering" stand-alone guidance on negotiated agreements, indicating that it is uncertain whether this would be of value to industry and the community.

This position reveals an unacceptable lack of awareness of how the vacuum in policy and guidelines is harming affected communities, and an apparent wilful blindness to the consequential social impacts which are pressing and require immediate and serious attention from the government.

The situation demonstrates a lack of urgency on the part of the NSW Government to address the serious problems occurring in rural communities being displaced by the resources industry.

The Department states that will be consulting "stakeholders across a range of sectors on the potential to provide more policy guidance on negotiated agreements and dispute resolutions". It is hoped that consultation on negotiated agreements will be conducted in a more balanced way than at present.

Although the *Social Impact Assessment Guideline for State Significant Mining, Petroleum Production and Extractive Industry Development* appears in theory to be a positive step, the absence of valuation guidelines is a serious deficiency in the scheme. See Section 4.

4. Amendment of Clauses 12A & 12AB - Mining SEPP

As a part of the scheme of regulation and Guidelines proposed, the Mining SEPP is to be amended in two ways. It is proposed that, following the completion of the VLAMP review, Clause 12A of the Mining SEPP will be revised to refer to the revised VLAMP. This clause requires the consent authority to give consideration to the VLAMP before determining an application. This is a positive requirement which imposes an obligation on the consent authority.

However, Clause 12AB of the Mining SEPP, is extremely controversial and for good reason. The Mining SEPP will be revised to update the non-discretionary standards to align with the EPA's revised, weaker, policies for air and noise. The non-discretionary standards mean that a consent authority cannot require more onerous air and noise standards than the revised assessment criteria.

The revised assessment criteria are a means of ratcheting down noise and air pollution limits to the satisfaction of the mining industry which seeks to limit its costs of compliance. One of the costs is the requirement to purchase properties polluted over the threshold of the assessment criteria.

This change will most certainly result in distinct disempowerment, disadvantage and harm to affected communities.

It disadvantages greenfields and lesser developed regions.

Noise pollution, especially low frequency noise, are already causing stress and health problems in the Upper Hunter Valley where open cut mines are at an advanced stage and threaten the existence of a number of towns and communities. Rural communities currently impacted by mine noise include Bulga, Wollar, Ulan, Camberwell, Maison Dieu, Wybong and Maules Creek. Residents in these localities experience sleep-deprivation, anxiety and ill-health as a result of mine-noise and have little to no recourse for help from the Government or mining companies.

Additional rural communities threatened by noise from mine proposals are Bylong, Boggabri, Craven, Stratford and Aberdeen. The Rocky Hill coal project at Gloucester has recently been declined by the Planning Assessment commission and recommended not proceed by the Dept of Planning due to the proximity of the mine to the township, but the Exploration Licence has not been withdrawn, and thus it remains a possibility that the project could be revived in some form. Current planning frameworks are not up to the job of preventing these communities from suffering the same fate as those listed above.

For example, the objective of the Upper Hunter and New England North West Strategic Regional Land Use Plan (2012) in regard to community health and amenity is to:

'*Ensure that the growth of the mining and coal seam gas industries does not significantly impact on community health and amenity*.'

Actions to achieve this objective include:

> Action 7.1 : Develop a cumulative impact assessment methodology to manage the cumulative health and amenity impacts of mining and coal seam gas proposals. This methodology will consider whether cumulative impact thresholds or tipping points can be adequately described and predicted. It will also address cumulative impacts on agricultural lands and water resources.

There is a strong resistance within the NSW Government to developing cumulative impact threshholds, as one senior NSW Health officer has told a community representative seeking answers as to why the Section 7.1 of the previous

New England and North West Strategic Land Use Plan (concerning cumulative dust threshholds) was ignored for 5 years by the NSW Government then officially dropped.

> Action 7.5 : Commence review of the Industrial Noise Policy, including consultation with all key stakeholders, and consider a wide range of options for addressing noise impacts from emerging mining precincts within rural areas.

This was done, but faces continuing opposition from community groups which have exposed deficiencies in the scientific integrity of the new Noise Policy for Industry.

5. Negotiated Agreements - Regulation of Land Valuation

As defined by the VLAMP, under "Policy-General", negotiated agreements are private contracts between resource proponents and landowners. There are no government guidelines as to how, negotiated agreements should be done or the valuation formula that should be used. This approach is based on the premise that flexibility is paramount.

This is too great an onus to place on individual landholders, because a negotiated agreement under the VLAMP can only be commenced once all reasonable and feasible avoidance and mitigation measures have been incorporated into the project to minimise environmental and social impacts. In practice, it is extremely difficult to prove that a resource proponent has not implemented "all reasonable and feasible avoidance measures" to mitigate the noise, dust or blasting impacts.

It ignores the great disparity in bargaining power between resources companies who are aided and supported by the Government on the one hand, and individual farmers. It ignores the huge disparity in access to information.

In such a context, freedom to contract is subservient to the need to provide guidance to industry, or regulation. These are some key areas which require regulatory attention to prevent ongoing injustice to affected communities. They include:

- The voluntary acquisition process under the VLAMP bases its valuation methodology on the hypothetical situation that the mine does not exist;
- The VLAMP does not specify a valuation methodology, resulting in lengthy disputes over valuations where a methodology cannot be agreed upon;
- Valuations should be based on recent sales in green fields areas, not areas subject to coal or gas exploration licences or active projects;
- Sales used in the valuation process should not be forced sales where the price might be unnaturally low; and
- Proponents should be required to acquire all necessary properties i.e. all properties affected by pollution above the permissible limits, before Project Approval is granted, to prevent a situation where the mine commences, and subsequently approval creep occurs or agreement cannot be reached after commencement of a mine.

The market for rural land continues to tighten as farms are replaced by mines and the heavy resources industry. This should be recognised by the Government and the proponents, in the form of VLAMP valuation rules.

It is concerning that despite the existence of the valuers' mandatory professional standards and Code of Ethics, that negotiations between resource companies are marked by an extremely wide divergence of valuations. Much of this arises from the broad and undefined terminology in the scope and criteria. This is a result of the actions of the Department of Planning in imposing consent conditions stipulating valuation as if a mine did not exist.

For example, what is "non mine-affected country"? Is it immediately adjacent or is it within a 20km radius of all existing Coal Exploration Licences?

Also, there should be some recognition in the property value, of the value of potential biodiversity offset land.

The private contract approach has failed on many levels to reflect the social and economic context in which resources companies are taking over ownership, or in the case of coal seam gas and gas pipelines control via easements and access agreements etc.

The valuation must expedite resolutions that do not impact on the innocent party i.e. the incumbent landowner who is targeted for acquisition. Currently this is not the case, and without guidance on valuations, more pain can be expected by such innocent parties. To cite a relevant judgement which goes to the heart of need for more specificity, *".... two able bodied and experienced men, each confronted with the same task, might come to different conclusions without anyone being justified in saying that either of them lacked competence and reasonable care, still less integrity, in doing his work..... Valuation is an art, not a science****....****"* (*Singer & Friedlander Ltd v John D Wood* {1977} 2 LGERA 84, per Watkins J).

A fair compensation package available to all property owners impacted by mining approvals and operation, including acquisition rights, that includes:

(a) Value of property based on comparable nearby centres unaffected by mining
(b) Plus relocation and disturbance costs, including all legal and valuation fees
(c) Plus a premium for replacement costs to landowners forced to move through no choice of their own

"Unaffected by mining" should include:

- Not adjoining a resource project
- Not adjoining a coal or gas exploration licence
- Not adversely affected by pollution by a coal, gas or pipeline project
- Not surrounded by resource-company owned land associated with a resource project

It is unlikely that a property within 20km of a major resources project is "unaffected by mining".

6. What is “Reasonable and feasible” Mitigation

Resources companies and landowner must together agree on the “reasonable and feasible” measures that should be employed to mitigate the pollution impacts of resources developments (p.10 draft VLAMP). However, it is evident that there is a gaping hole in the Policy because the VLAMP appears to limit these reasonable and feasible mitigation measures to those undertaken at the receiving end of the pollution, not at the source.

It would appear that the intention behind this is to rely wholly on the Project Approval conditions to ensure that pollution is controlled at the source.

However, the Government also needs to take responsibility for ensuring that all reasonable and feasible avoidance measures are undertaken at the source of pollution. Currently this is not the case, as demonstrated in a Case Study of the Maules Creek Mine, Coal Handling and Processing Plant.

A Mandatory Noise Audit of the Maules Creek mine in 2016 found that the Coal Handing and Preparation Plant (CHPP) was unable to stay within its promised noise limits. On 10 March 2011, resource sector services company, Sedgman Ltd announced it had been awarded an $118.5 million design contract for a CHPP at Whitehaven Coal’s Maules Creek Mine, to handle 13 million tonnes per annum of coal. Construction of the CHPP was reported to cost $100M, awarded in February 2014 to Downer EDI, totalling a cost of $118.5M. On 16 September 2013, the Thiess Sedgman Joint Venture was awarded a $186 million contract to design and construct a CHPP for the nearby Boggabri Coal Pty Ltd, for a capacity 8 million tonnes per annum mine.

In other words, Whitehaven Coal spent a total of just $118.5M on a mine 1.6 times larger than Boggabri mine. Yet, Boggabri mine spent $186M, - $67.50M more than the much bigger mine. It is clear from this comparison that is reasonable and feasible for Whitehaven Coal to have invested in a better-built CHPP, avoiding the problem that the Maules Creek mine is unable to remain within its source noise limits, and unable to retrofit the CHPP because it has been built to a standard unable to withstand the weight of noise-reducing cladding.

The NSW Department of Planning has refused to answer questions as to when it became aware that the Maules Creek CHPP was not the same indicative design as that on which the noise modelling was based. The Department appears to believe Whitehaven Coal has applied reasonable and feasible endeavours, despite the facts cited. These questions have been posed repeatedly by Mehreen Faruqi MLC (Greens) to the Minister for the Environment, without answer.

It is clear the Department of Planning is not taking seriously its obligations to properly assess whether a proponent is seriously implementing reasonable and feasible measures. In these circumstances, the VLAMP should, independently of the Project Approval conditions, contain some reference to mitigation of pollution at source as being a prerequisite and first line of mitigation.

7. Social Impact Assessment Guideline

Under the proposed cross-referenced Mining SEPP, Noise Policy for Industry and new draft VLAMP, full responsibility for assessing the social impacts of resource industry expansion is the recently published *Social Impact Assessment Guideline for State Significant Mining, Petroleum Production and Extractive Industry Development (Social Impact Guideline)*, will rest with The NSW Deparment of Planning

The Social Impact Guideline released in 2017 purports to satisfy the need for improved social impact assessment in order to avoid many grave impacts that are being observed in the front line regions faced with the rapid mine expansion.

Just as there is no evidence that the VLAMP achieves its goal of mitigating the impacts of the resources industry, similarly the social impacts of resource mining expansion will not be assessed properly under the Social Impact Guideline. In particular, the social impacts of coal mine expansion into rural NSW, have not been properly discussed at any level of public discourse, including government and the media.

The need for a Social Impact Guideline is driven by the *Environmental Planning and Assessment Act 1979* under which the resource developments are assessed. The Objects of the Act include the encouragement of "increased opportunity for public involvement and participation in environmental planning and assessment" and to encourage "ecologically sustainable development", the latter which is required to include ecological, economic and social considerations – the so-called "3 pillars" as defined in the 1992 Rio Convention.

The Social Impact Guideline is intended to address consequences experienced by "people", which includes individuals, households, groups, communities, organisations and the NSW population generally. However, in practice there is much evidence that the consequences given consideration are very much limited and actively avoid addressing this broad definition of "people".

The Guideline states that Social Impact Assessment must be meaningful, respectful and include effective community and stakeholder engagement on social impacts across each Environmental Impact Assessment phase, from scoping to post-approval. In practice, there is a tendency by the NSW Government and proponents to give landowners priority, not because of the social impacts, but because the landowners' property rights give rise to potential legal impediments. Next in line for consideration are community groups, and the interests of households, individuals and communities are given little consideration.

Whether in future there will be any change to this is doubtful based on the observed behaviour of the Government and proponents. For example:

- A NSW EPA representatives discrediting the representations of an environmental group on the grounds that "you just want to shut the mine down"; and
- The repeated refusals by state politicians to meet with representatives of the Bulga community, while industry representativess were afforded the privilege of private meetings with senior Ministers[4].

The Social Impact Guideline fails to ensure that many impacts, which are widely known to exist, will be assessed adequately, or at all. They include:

- The impact of the planning approval process itself is an acute source of mental health problems related to the sudden and ongoing escalation of uncertainty about the future;

[4] Amanda Kennedy (2017) *Environmental Justice and Land Use Conflict*, Routledge, Ch. 3

- Remnant landowners or pockets of communities are not addressed, and no solution is posed for the responsible treatment of landowners and residents who may be surrounded or isolated by coal mines;
- A range of non-disclosure terms are used when proponents enter into negotiated agreements with land owners. These not only prevent a signatory from revealing the terms of the agreement, but from ever complaining about the company in the future, silencing them from reporting pollution. Some agreements even require the signatory to be called upon to promote the company. Signatories should never be suppressed from reporting to the authorities or speaking to the media about pollution of the environment, whether they have entered into an agreement or not;
- The behaviour and tactics of land access managers, despite the existence of codes of practice[5], is an aggravating factor in resource expansion due to their lack of openness, frequent absence of good faith dealing, and for spreading rumours about one neighbour's intentions to another to obtain a bargaining advantage over landowners; and
- Information to communities about health impacts of living near a mine is inadequate. The NSW Health Fact Sheet "Mine Dust and You" – is unreliable and insufficient information for tenants residing in buffer zones. It must also be recognised that public confidence in the reporting of pollution data is low, due to a variety of factors.

The development of the Social Impact Guideline included two rounds of consultation during 2017. In the Gunnedah region, a Boggabri meeting was followed by one in Gunnedah, both of which were contentious and in Gunnedah became so heated that the Department of Planning representative had to take over from the facilitator. The Social Impact Guideline has certainly not been met with confidence by the community.

Reliance on the Social Impact Guideline is thus unwarranted and the regulatory scheme currently proposed is unreliable.

The long-term implications of the current system of selling land for coal mines is another social impact. Long-term implications (the life of a mine could be 30-50 years) of selling vast farming lands to foreign owned mining companies have not been considered, and are left to the Foreign Investment Review Board.

However, respectful engagement should require the proponent to act in accordance with the doctrine of 'good faith' and fair dealing.

Due to the serious lack of 'good faith' in evidence in dealings between resources proponents and the NSW Government on the one hand, and community members and groups on the other, the VLAMP scheme must now introduce an explicit requirement to act in 'good faith.'

This requirement should apply to proponents and Government alike. Such a requirement would serve an educative purpose and attempt to raise the standard of conduct towards the community, and all stakeholders. This includes local government, who are often nominally consulted but in practice this consultation is without substance due to the short time frames of some consultation periods, and the lack of resources of local government to properly assess resource proposals.

[5] Exploration Code of Practice: petroleum land access, NSW Department of Industry, Skills and Regional Development, Division of Resources and Energy
https://www.resourcesandenergy.nsw.gov.au/__data/assets/pdf_file/0005/688595/PUB16-428-FINAL-Exploration-code-of-practice-petroleum-land-access.pdf

A requirement of acting in 'good faith' should include the following elements, reflecting the 'Doctrine of Good Faith' which exists in some overseas legal jurisdictions in contract law where it is perceived that the implied obligations of honesty and cooperation are not enough to ensure fair dealing:

- HONESTY. The provision of false or misleading information in any aspect of property acquisition, project approval or social impact assessment, being regularly alleged by affected communities, needs to be addressed by a positive requirement to act with honesty.
- COOPERATION. Blocking, delays, and use of procedural defences against cooperating with communities in relation to information that is held only by the proponents and government, under the guise of commercial confidentiality, needs serious attention by regulators. The umbrella of "commercial-in-confidence" has expanded so far as to now include matters of primarily environmental, not economic, nature.

Whatever the position of the Australian law on 'good faith' in contract, this is no bar to the legislative introduction of a much-needed requirement of 'good faith' in the acquisition of land by resources companies in their dealings with landowners.

In the context of many examples where resources industry may be seen to act in 'bad faith', a positive requirement of acting in 'good faith' is not an unreasonable addition to the VLAMP, nor the Social Impact Guideline.

The most recent example of proponent and Government acting in concert, by all evidence not in 'good faith', concerns attempts by the APA Pipeline Group to survey for a gas pipeline to service the yet-to-be-approved Narrabri Coal Seam Gas Project.

Case study: APA Gas Pipeline for Narrabri Gas Project

In November 2017, the APA group wrote to landowners along a proposed route from Narrabri to Dubbo via Coonamble, announcing that it proposed to enter their properties to survey. The company's typical *modus operandi* was, following a letter and no direct contact with the landowner other than a phone message at 7:30pm, to enter upon those properties. Instead of reporting to the landowner via the gate, the company chose to jump fences, deliberately avoiding the biosecurity requirements. The community successfully blockaded the APA personnel and their contractors and alleged, convincingly, that the 'Authority to Survey' was unlawful. Consequently, APA abandoned their ground surveys and are relying on satellite surveys and material provided by the NSW Government.

A link to video is attached (below) which exposes a number of alleged acts of the company, which would appear to be not in 'good faith', lacking in honesty or at least misleading. Subsequently, a delegation visited the Minister for Resources Harwin, with its lawyer and a written legal opinion that the 'Authority to Survey' was unlawful. The delegation offered the written legal opinion to Liz Develin of the Department of Resources, who rejected it stating that the Department had its own legal opinion and that it differed, but refused to share it with the community. Some weeks later Ms Develin again met with the affected Coonamble community. On this occasion, she told them that the Department was in the process of obtaining legal opinion.

APA refused to attend a community meeting to respond to questions about its plans and provide validation of the legality of their 'Authority to Survey'.

The events have raised alarm along the pipeline route, with fears that the impacts on farms are understated and a clear demonstration of a lack of transparency. Here, 'good faith' is not in evidence in the dealings of either the APA nor the Government.

See link to confrontation between Coonamble land owners

https://www.facebook.com/simon.fagan.33/videos/10157354900373312/

Left: APA STAFF AND CONTRACTORS BEING EVICTED FROM A COONAMBLE FARM BY THE LANDOWNER

Below: COONAMBLE COMMUNITY BLOCKADES FARMS AGAINST APA & CONTRACTORS

The social impact of the mining approval process is demonstrated in the case of the town of **Bulga**.

In 2010, Rio Tinto applied to expand the Mt Thorley-Warkworth coal mine, which would exterminate the habitat zone known as Saddleback Ridge which separates two open cut coal mines, and which was a biodiversity offset for the Mt Thorley-Warkworth project. It was protected by a long-term Deed of Agreement. When expansion was nevertheless approved by the NSW Government, the Bulga Milbrodale Protection Association challenged the Government's decision and in 2012 won an appeal in the Land and Environment Court. A subsequent appeal by the NSW Government and Rio Tinto of the Land and Environment Court decision in the NSW Supreme Court failed. Finally, the NSW Government stepped in to change the law to allow the expansion to go ahead despite repeated judicial rejection.

The step by step dismantling of the town's amenity, history and infrastructure has since proceeded with tragic consequences to the community and the environment of Bulga.

The proposed changes to the Mining SEPP are in direct conflict with the Objectives of the NSW Environmental Protection Authority, which include "setting mandatory targets for environmental improvement". This sets up a dangerous disharmony between the Objectives of the NSW EPA and the requirements imposed on resources proponents, exacerbating existing problems when the NSW EPA is seeing to enforce environmental protections in conflict with lenient and vague laissez-faire conditions of consent.

In practice, the NSW EPA is also constrained from fulfilling its obligations under the *Protection of the Environment Administration Act 1991*, of "ensuring the community has access to relevant information about hazardous substances arising from, or stored, used or sold by, any industry or public authority". In practice, the NSW EPA is obstructed from achieving this by the actions of the Department of Planning due to the latter's unwillingness to impose transparent reporting requirements on proponents.

With ongoing noise complaints and no end in sight, the company instigated a system of noise monitoring requiring mine personnel, not even experts, to stake out peoples' homes measuring the noise levels. One can only imagine the intrusion this would have on a community already exhausted after ongoing legal challenges, disrespect from authorities and the company and its contractors. This culminated one night with a physical altercation in which the resident was found blameworthy, adding to the punishment of a community already tormented by night time noise disturbance including harmful low frequency noise.

A similar situation exists in Maules Creek, where mine security are deployed in surrounding country roads to supposedly do "noise monitoring". They do this without any training or equipment. The intrusion and stress of having mine vehicles posted for lengthy periods in inappropriate locations – such as outside the school – has prompted vehement complaints about the practice.

The inability of resources-affected communities to obtain information on an ongoing basis is another major stress, consuming time and resources on the part of the community and also the NSW Government itself.

The Social Impact Guideline should recognise the ongoing of time, resources and study demanded of average community members is equivalent to a Bachelors degree at university, or more – but without the reward or recognition

for all of the sacrifice.

This experience is set to be repeated by the town of **Gloucester** which is now defending itself against an open cut coal mine despite the project being recommended against and rejected by the Dept of Planning and also the NSW Planning Assessment Commission, due to the proponent's merit appeal.

8. Approach to decision-making – "5 Essential Steps"

The Mining SEPP includes the following steps to decision making.

"1. Clearly demonstrate that all viable project alternatives have been considered, and all reasonable and feasible avoidance and mitigation measures have been incorporated into the project designed to minimise environmental and social impacts and comply with relevant assessment criteria. Adequate consultation must have occurred with potentially affected community members to identify and respond to potential social and environmental impacts during the preparation of the environmental impact statement."

> **As cited above, the Department of Planning's ability or willingness to properly assess whether all reasonable and feasible avoidance and mitigation measures have been incorporated is deficient.**

2. if the applicant cannot comply with the relevant assessment criteria, with the acquisition or mitigation criteria are likely to be exceeded, and the applicant should consider a negotiated agreement with the affected landowner, or acquisition of the affected land. If the applicant acquires the land, or enters a negotiated agreement with the landowner, then that land is not subject to the assessment, mitigation or acquisition criteria set out in this policy, with the exception of the provisions contained under the heading "use of acquired land".

> **No. The applicant should not merely "consider a negotiated agreement". This is entirely deficient a solution. It results in the initiation of the project without acquisition of the necessary properties and then leaves the landowner in the powerless position of having to sell an affected property but with a valuation stipulated to be unaffected by mining.**

3. If the applicant has not acquired the land or injured a negotiated agreement with the landowner, then it is up to the consent authority to weigh up the relevant economic, social and environmental impacts of the development, in accordance with the requirements of section 79C of the *Environmental Planning and Assessment Act 1979*, and to decide whether the development should be approved or not.

> **NSW consent authorities have shown time and time again that they are either incapable or unwilling to weigh up the relevant economic, social and environmental impacts. This has led to great detriment to many towns and communities, not to mention individuals and families. The Social Impact Guideline in its current form does not address the harms inherent in the approval process itself.**

4. if the consent authority decides to approve the development, then appropriate conditions need to be imposed on the approval, including the application of voluntary mitigation and land acquisition rights to some landowners as required. The application of voluntary acquisition rights through a development consent should be seen as a mitigation measure of last resort to ensure landowners have the option to avoid noise or particular matter in impact without personally incurring financial costs.

> **One of the biggest concerns is the lax standards required of proponents and the vague performance criteria, including the often inserted "to the Secretary's General satisfaction" , which can never be proven nor disproven, and the Department's frequent "see you in Court" attitude whenever the vague conditions are raised.**

5. The applicant must comply with the terms of any negotiated agreement and the conditions of approval.

> **Enforcement is one of the problems, in part due to 4. Above.**