

October 2015

**Drayton South Coal Mine Project:
Submissions by Beatty Legal on behalf of Hunter Thoroughbred Breeders Association
(HTBA)**

A. Summary

- 1 The Drayton South Coal Mine project now before this Planning and Assessment Commission (**PAC**) is another iteration of a proposal considered in detail by two previous Commissions.
- 2 Those PACs recommended against approval of the project and then determined not to approve it.
- 3 In reaching those conclusions, the previous PACs recognised:
 - a) the acute sensitivity of the Woodlands and Coolmore Studs to the noise, vibration, dust, water and visual impacts of a nearby open cut coal mine;
 - b) the fundamental incompatibility of an open cut coal mine in close proximity to thoroughbred horse studs; and
 - c) the critical importance of these two Studs to the local, regional and State economies (and the consequent implications for NSW if they chose to leave the Hunter region)¹.
- 4 Despite the proposal for a very modest extension of a “buffer” between the mine and the Studs, the factual circumstances previously considered by those earlier PACs are, for the Studs, largely unchanged.
- 5 The clear conclusions reached by the earlier PACs should help frame how this review is undertaken especially because this PAC has been directed by the Minister to pay:

“particular attention to the potential impacts on the operations of the Coolmore and Woodlands horse studs”²

¹ See Appendix A for relevant extracts from prior reports of the Commission

² Extracted from Terms of Reference 13 August 2015, item 1(b)

³ The effect of sections 75R and 75J(3) of the now repealed Part 3A provisions was to make the provisions of State Environmental Planning Policies a matter the decision maker may, but was not required, to take into

- 6 This means that the Review PAC must have a high degree of confidence in the currency, accuracy and adequacy of the material assembled by the mining company in support of this latest iteration of this new mining project, especially where that material is relevant to predicting and assessing potential impacts of that coal mine on the Studs.
- 7 Where that level of confidence is not attained, this PAC must adopt an appropriately precautionary approach.
- 8 The Review PAC will, in our submission, conclude that while many of the adverse environmental impacts of the project on the Studs (and other, non-mining land uses) have still not been properly identified or assessed, the potential adverse commercial impacts on the Studs are immediate and obviously apparent.
- 9 Critically, in performing any balancing exercise between competing land uses, the Review PAC could only conclude that the economic benefits said to flow from this mine are questionable even employing assumptions favourable to their case and that any argument that the public interest is best served by approving this mine next to these Studs entirely misunderstands their business model and is without foundation.

B. Discussion

Regulatory context

- 10 The regulatory environment for this project has changed in two important respects since the earlier assessments of the proposal by the Commission.
- 11 **First**, the project is subject to a stricter statutory assessment regime as it must now to be assessed as “State Significant Development” under Part 4 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.
- 12 Previously, the project was assessed as a “Part 3A Project” under now repealed provisions of the EP&A Act. A consequence of this change to the regulatory framework is that the consent authority is required to take into consideration the provisions of any relevant planning instruments in its assessment³.
- 13 In addition, there is a greater responsibility on the consent authority under Part 4 to ensure that all impacts of the project are fully understood so that matters essential to the consideration of the project are not inappropriately deferred and the terms of any approval do not allow for a significantly different development (with significantly different environmental impacts)⁴.
- 14 **Second**, the weight to be given to the significance of the coal resource is to be afforded less prominence when considered against other factors following the recent repeal of clause 12AA from the State Environmental Planning Policy (Mining, Petroleum Production and Extractive

³ The effect of sections 75R and 75J(3) of the now repealed Part 3A provisions was to make the provisions of State Environmental Planning Policies a matter the decision maker may, but was not required, to take into account.

⁴ See *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737, *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; (2006) 143 LGERA 277 at [24] and *Mid Western Community Action Group Inc v Mid-Western Regional Council & Stockland Development Pty Limited* [2007] NSWLEC 411 at [21].

Industries) 2007 (Mining SEPP)⁵. Relevantly, this amendment was made to address *'community and stakeholder concern that the social and environmental impacts of a proposal are not being adequately considered or given appropriate weighting'*⁶ by the consent authority.

The DPE's Preliminary Assessment Report

- 15 The Review PAC has before it the Secretary's Preliminary Assessment Report. The HTBA notes that this detailed report was published just 8 days after the Commission's Terms of Reference were issued.
- 16 The Review PAC would be aware that the earlier iterations of this new mine, comprehensively rejected by two earlier PACs, were both supported by the Department and said by it to be "in the public interest". The Department has already reached the same conclusion again here.
- 17 The Review PAC is directed, under its terms of reference, to "*assess the merits of the project as a whole having regard to all relevant NSW Government policies*".
- 18 After considering the full range of relevant and current government policies, the regulatory context in which this proposal is to be assessed, and the oral and written submissions put to it before, during and after the public hearing, the HTBA submits that the Review PAC could not ascribe substantial weight to the Department's latest Assessment Report for this mine.

Flawed assessments

- 19 Key assumptions, base data and modelling used by the mining company to predict and assess noise, dust, visual water and other impacts are flawed.
- 20 Despite earlier, detailed reviews of their work, the proponent's experts have still failed to display any real understanding of the sensitivity of the Studs to these impacts. Their work lacks proper, targeted assessments that this PAC must have for this review.
- 21 At this stage:
 - a) some impacts of the proposal have not been assessed at all by the proponent;
 - b) for those impacts that have been assessed, many of the assessments are incomplete and/or have not been undertaken in compliance with the requirements of the SEARs and other, relevant guidelines; and
 - c) as key aspects of the project remain undefined by the mining company, the Department's proposed consent conditions must of necessity apply an extraordinary level of "flexibility" which betrays the fundamental uncertainty surrounding key features of the proposal.

⁵ State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) Amendment (Significance of Resource) 2015 commenced on 2 September 2015. Clause 12AA explicitly required the consent authority to consider the relative significance of the resource and the economic benefits of developing the resource, both to the State and the region in which the development is proposed to be carried out. The clause also provided that the significance of the resource is to be the consent authority's principal consideration under Part 3 of the Mining SEPP.

⁶ Department of Planning, Draft Change to Mining Policy - Frequently Asked Questions July 2015

- 22 Key aspects of project have not been assessed at all by the proponent. For instance, while extraction of 1.4 Mt of ROM coal from the existing Drayton Mine is proposed as part of this project⁷, there has been no assessment of the air quality and noise impacts of the works necessary to extract this material. Unless and until this assessment is undertaken the Commission is in no position to consider the merits of the “*project as a whole*”.
- 23 The serious, long term effects of an open cut coal mine on the landscape, water sources and agricultural productivity of this region require full identification and assessment. Despite this, a number of matters required to be assessed by the SEARs remain un-assessed⁸.
- 24 Experts called by the Studs have raised fundamental concerns about the potential impacts of the mine on water quality and supply, the loss of productive agricultural land, adverse impacts on cultural heritage values and the likelihood that the promised rehabilitation and revegetation will either fail or prove significantly more time consuming and costly than currently contemplated.
- 25 The PAC’s confidence in the proponent’s case is a byproduct of its confidence in the currency, accuracy and adequacy of its underlying predictions. Where that confidence fails, so must the project.

Project uncertainty

- 26 Key aspects of the project remain undefined. The proponent has proposed that these aspects remain to be determined “flexibly” once the project proceeds. This deficiency is compounded when even the attainment of the suggested “performance criteria” proposed is in doubt⁹.
- 27 This lack of definition is manifest in the Department’s proposed conditions of consent which encompass a wide range of possible outcomes, impacts and circumstances. “Flexible” planning controls are, in this case, masking a simple lack of information about potentially serious, long term environmental outcomes.¹⁰

The “economic credibility” of this mine

- 28 In its earlier presentations to previous PACs, and in various public statements, the proponent has consistently put at issue the financial viability of the project and how a mine of the size now proposed would not be viable.

“Further changes to the mine plan and delays to the proposal will make the project financially unviable ...”

Mr Seamus French, CEO (Anglo American – Presentation to Review PAC – October 2013)

⁷ See EIS section 3.2.1

⁸ For instance see expert reports of GML Heritage regarding Aboriginal and Non- Aboriginal cultural heritage.

⁹ See for instance report of OD Hydrology

¹⁰ See for instance, the wide range of outcomes permissible under conditions 43-45 of Schedule 3 regarding rehabilitation. The “flexibility” of this approach is exacerbated by the general power to revise strategies, plans and programs “at any time” under condition 15 of Schedule 2 (without consultation with affected parties). Similarly condition 25 of schedule betrays the lack of information as to the impacts of the project, especially having regard to the four possible alternate mine void options proposed for the project.

“Based on the latest proposal from Coolmore (as stated in their submission to the PAC) suggesting that the Project “exclude the Houston mining area and further reduce the Whynot mining area to remain behind existing natural ridgelines”, it is estimated that an additional reserve loss of more than 23 Mt would be incurred. This option would have material impacts on the viability of the Project and for this reason it is not considered feasible by Anglo American. This view was supported by the RPM Independent Mine Plan Review which was completed for the New South Wales (NSW) Department of Planning and Infrastructure (DP&I). In their review, RPM also investigated this option and concluded that “it would have a material impact on the project economics”.

(Anglo American Supplementary Information to the PAC – November 2013)

Anglo American reviewed the feasibility of removing a greater portion of the Redbank mining area as recommended by the PAC and found that this would make the Project unviable ...
(Anglo American Consequential Environmental Impact Assessment for Retracted Mine Plan – March 2014)

The Redbank operation is completely screened behind the existing ridgeline and it has been confirmed that the removal of this operational area from the mine plan would render the Project unviable.

(Anglo American Consequential Environmental Impact Assessment for Retracted Mine Plan – March 2014, p7)

The Department of Primary Industries also raised this concern following their own review stating that “the effective removal of two of the four pits also brings into question whether changes to the net present value of the deposit and the flow through effects on mine scheduling, equipment usage and the ability to still produce the required products would render this proposal uneconomic”.

Previous independent mining engineer reviews conducted by Runge Pincock Minarco (for DP&I) and R A Jennings & Associates (for PAC) support this finding.”

(Anglo American Consequential Environmental Impact Assessment for Retracted Mine Plan – March 2014, p7)

The Department also notes that Anglo has advised that mining the coal in the Redbank Pit is fundamental to the economic viability of the mine as a whole, and if this pit is removed it is likely that the project would not proceed.

(Secretary’s Environmental Assessment Report – July 2014, p34)

- 29 While *profitability* of a project is clearly a matter for a proponent, any decision maker balancing claims of *nett economic benefit* generated by a mine needs be satisfied that such benefits are based on the project meeting a predicted continuous rate of extraction, that those predicted targets are credible and can be achieved, and that the impacts of a project, if abandoned because it lacks ongoing viability, can be mitigated¹¹.

¹¹ See expert evidence of Mr Michael White. See also the following discussion in the PAC determination report (p18):

“The contention was if the Drayton South mine is not a viable mine, it could be placed in caretaker mode following any approval. If this were to occur, this new consent would allow the proponent to defer its rehabilitation responsibility for virtually the life of the approval being sought, notwithstanding the Department’s recommended conditions which require a Rehabilitation Strategy for the Drayton Complex by

30 These tests are not met here.

“Mine creep”

- 31 The Studs and surrounding viticulture and tourism industries are justifiably concerned about “modification creep”. This has been the pattern followed historically by virtually all open cut coal mines in the Hunter Valley. It has only been with the greatest reluctance that this proponent has, over time, gradually and modestly reduced its original mine plan to that which is now put forward for review.
- 32 Alive to these concerns, the HTBA understands that the proponent has either made or proposes to make promises to the State government about abandoning certain of its mining rights.
- 33 How this would be done or enforced and how successors in title would be bound by these promises, assuming they were made lawfully, is of course unclear. It would be an entirely irrelevant consideration for the PAC to take these matters into account in this review save to acknowledge that the prospect of these “promises” reveals yet another attempt to transform a flawed project into one capable of some form of conditional approval.

Conclusion

- 34 The PAC is required “*to assess the merits of **the project as a whole** having regard to all relevant NSW Government policies, and **paying particular attention to the potential impacts on the operations of the Coolmore and Woodlands horse studs***”.
- 35 The PAC does not have before it sufficient credible information to make an informed assessment of the project’s merits or to be satisfied that it has before it sufficient information to demonstrate that *particular attention* has been paid to the potential impacts of this mine on these two Studs.
- 36 Experts called by the Studs and other stakeholders who presented at the PAC hearing in Denman have raised serious questions as to the as to the economic benefit of the Mine and the adequacy of the assessment of its potential impacts.

June 2015, which must include the details of a timetable for the rehabilitation stages for both the existing Drayton mine and Drayton South. ...

Given the lack of progress with rehabilitation works on the existing mine, the Commission is not confident that the Rehabilitation Strategy will be implemented and the disturbed areas will be progressively rehabilitated regardless of whether the proposed mine goes ahead or is put in caretaker mode.”

- 37 Given the scale and irreversible nature of the potential impacts and the significant uncertainty as to their extent a precautionary approach must be taken and this mine should not be recommended for any form of approval.

Andrew Beatty
Director
Beatty Legal Pty Limited
ABN 44 273 924 764