28 March 2014

NSW Planning Assessment Commission
GPO Box 3415
Sydney NSW 2001

By email: pac@pac.nsw.gov.au

To the Planning Assessment Commission,

Planning Assessment Commission Review
Wallarah 2 Coal Project (SSD 4974)
Submission of Sean Gordon, CEO, Darkinjung Local Aboriginal Land Council

Darkinjung Local Aboriginal Land Council (Darkinjung) is a body established under the Aboriginal Land Rights Act 1983 (ALRA) to represent and protect the interests of Aboriginal people living within its area in relation to land and cultural heritage matters. There are 12,000 Aboriginal people living on the Central Coast, and it is the fastest growing Aboriginal community in Australia.

Darkinjung is also a private landholder with a charter to generate economic and social benefit for Aboriginal people in its area.

The development application for the Wallarah 2 Coal Project (W2CP) covers land owned by Darkinjung (Lots 193 and 195 DP1032847). Lots 193 and 195 DP1032847 are owned by Darkinjung as a result of a successful land claim under the ALRA. The development application (DA) proposes that a rail spur to transport coal from Wyong to port facilities in Newcastle would be constructed on this land.

Darkinjung is the only private landholder whose surface land will be impacted by the development proposal.

Darkinjung strongly opposes the W2CP for the following reasons:

1. The development application is invalid, as it was not made with the consent of the NSW Aboriginal Land Council (NSWALC) under clause 49(3A) of the Environmental Planning and Assessment Regulation 2000 (NSW) (EPAR);

2. Having regard to the operation of s 89K(1)(c) of the Environmental Planning and Assessment Act 1979 (NSW) (EPAA), it is likely that W2CP will contend that the grant of development consent means that the grant of a mining lease over Darkinjung land cannot be refused. This will amount to the compulsory acquisition of interests in Darkinjung land in a manner that is contrary to the interests of Darkinjung and the Aboriginal people it represents; and
3. The Environmental Impact Statement (EIS), required to accompany the DA pursuant to section 78(8A) of the EPAA, does not adequately fulfill the Director-General's Environmental Assessment Requirements for the W2CP. In particular, the EIS:

- does not demonstrate adequate consultation with affected landowners, particularly Darkinjung; and
- does not demonstrate adequate consideration of the impact of the proposed rail loop on the land owned by Darkinjung in its discussion of alternatives to its current proposal; and

4. The W2CP will limit Darkinjung's ability to pursue alternative uses of the land for its economic development, and thereby undermine its ability to determine for itself how its land will be used.

The reasons identified in 2-4 above and below are without prejudice to Darkinjung’s contention that the DA is invalid and that neither the PAC nor the Minister have jurisdiction to determine it.

Invalidity

It is our view, on the basis of legal advice, that clause 49(3A) of the EPAR requires W2CP to get the consent of the NSWALC to the making of their DA. After initially agreeing with us on this issue, and negotiating with us and the NSWALC on this basis, W2CP has now changed its view.

Darkinjung has commenced proceedings in the Land and Environment Court to resolve this question. Until the proceedings are resolved, PAC should defer consideration of the W2CP.

The grant of development consent will likely amount to the compulsory acquisition of interests in Darkinjung’s land

The W2CP has been designated a "State Significant" project. The consequence of this designation is that if development consent is granted for the W2CP, it is likely that W2CP will contend that a mining lease relating to the project (over Darkinjung's land) cannot be legally refused.

In effect, therefore, the grant of development consent for the W2CP will amount to the compulsory acquisition of certain interests in Darkinjung's land, in circumstances where Darkinjung has not been adequately consulted, let alone given informed consent.

While this would be a concern for any landholder, it is of particular concern in the case of Darkinjung, whose affected land was granted under the ALRA.

The reasons for the enactment of the ALRA, and the protective provisions it contains, clearly indicate the special status of Aboriginal land granted under its provisions.

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1 Environmental Planning and Assessment Act 1979 (NSW) section 89K(1)(c).
In the words of Kirby P in Minister for Natural Resources v NSWALC\(^2\), the ALRA is:

"beneficial and remedial legislation", enacted 'to give important rights in Crown land to the representatives of the Aboriginal people'.\(^3\)

The intention of the legislation to preserve and protect land granted to Aboriginal people pursuant to the ALRA is reflected in the Act's protective provisions and those in related legislation. This includes, for example, the express prohibition in s 42B of the ALRA on appropriation or resumption other than by an Act of Parliament, and the requirement, in cl 49(3A) of the EPAR for the consent of the NSWALC for the making of a Development Application concerning land owned by a Local Aboriginal Land Council.

Clause 49(3A) was inserted into the EPAR by the Aboriginal Land Rights Amendment Bill 2009. On the introduction of the Bill, Government stated that the amendments would: 'allow Aboriginal people, through democratically elected structures, to pursue in ways they choose appropriate economic development'.\(^4\) [emphasis added]

This requirement of Aboriginal participation in decisions that affect their rights and interests is reflected in the provisions of international instruments including the UN Declaration on the Rights of Indigenous Peoples.\(^5\) Article 19 of the Declaration states that:

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

Similarly, Article 10 requires the free, prior and informed consent of the Indigenous persons concerned where there is removal of Indigenous persons from their lands.

The requirement for 'free, prior and informed consent' is repeated throughout other articles in the Declaration, and reflects the important notion that Aboriginal people should be participants in decisions regarding their rights and interests.

In circumstances where it is clear from the EIS submitted as part of the DA that Darkinjung was not adequately consulted over the use of its land, and NSWALC has refused consent for the making of the DA, the grant of consent for the DA and the consequent acquisition of Darkinjung interests by the grant of a mining lease over Darkinjung for the W2CP, offends the principles set out in the ALRA and in international human rights law.

Inadequacy of the Environmental Impact Statement

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\(^2\) Minister for Natural Resources v New South Wales Aboriginal Land Council (1987) 9 NSWLR 154

\(^3\) Ibid., 157.


The Director-General’s Environmental Assessment Requirements and supplementary requirements for the DA require the EIS for W2CP to:

1. justify the particular mine plan;
2. demonstrate adequate consideration of the social and economic impacts of the proposal, and measures considered to minimise such impact; and
3. describe adequate consultation with affected landowners, and describe the issues raised and identify how concerns have been addressed.

Justification and consideration of social and economic impacts

In its justification for the choice of location for the rail loop, no mention is made in the EIS of the social and economic impact of the loop on Darkinjung, and its alternative proposals for the use of its land.

This is despite the fact that the W2CP will prevent Darkinjung from continuing to pursue its planned use of its land. In recent years Darkinjung has commissioned extensive planning studies of its land to better understand its potential, and has started to develop a number of proposals, including by lodging a Part 3A application under the EPAA. More recently, since 2011, Darkinjung has been in discussions with CASAR Park about its plans to develop a family-friendly motoring complex and other associated tourism-based businesses (including theme parks) on the land owned by Darkinjung. CASAR Park estimates it can generate $17 million annually in benefits to the local economy, with approximately 200 jobs and 200 training positions onsite once the facility is fully operational, plus a further 150 indirect jobs.⁶

It is not certain at this stage whether the CASAR proposal and the W2CP’s proposed rail spur could coexist.

No evidence of adequate consultation

The discussions between Darkinjung, as private land holders and the proponents of W2CP regarding the impact of the W2CP on the land owned by Darkinjung, and in particular whether it could co-exist with Darkinjung’s existing proposals for the land, are not referred to in the EIS’s description of stakeholder engagement. The EIS makes reference to consultation with Darkinjung regarding Aboriginal Cultural Heritage issues,⁷ and as part of a ‘Community Reference Group’,⁸ but there is no reference to any consultation with Darkinjung regarding its interests as a landholder.

This is of particular concern given the consequences for Darkinjung, as a private landholder, of the approval of the DA and the likely consequent grant of a mining lease over its land.

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⁸ Ibid 84.
Conclusion

The proposed W2CP is opposed by Darkinjung because the DA, and the EIS submitted as part of the DA, do not demonstrate compliance with the clear requirements of the EPAA and EPAR, and the Director General's Environmental Assessment Requirements.

Darkinjung also submits that approval should be denied because:

a) its likely consequence will be the compulsory acquisition of Darkinjung's rights and interests over its land without its free and informed consent, or adequate compensation, and

b) it will interfere with Darkinjung's existing plans for its land, and in so doing, restrict Darkinjung's rights as a private land holder and Aboriginal Land Council to choose the means by which it pursues economic development. This is clearly contrary to the intention for which the land was granted to Darkinjung under the ALRA.

Regards

Sean Gordon