

Drayton South Open Cut Coal Mine

Remarks to the Planning Assessment Commission (DPAC)

Muswellbrook, 17 November 2016

I have been asked by the HTBA to offer some observations to the Commission about the decision making task before it on this application and to do so in the context of the available evidence and applicable law.

I suggest you have three main tasks in this case:

First, before undertaking any balancing exercise, you will consider what information you have (and what you do not have) to enable you make a decision.

Second, you will weigh up the evidence before you and decide what is relevant, reliable and persuasive, then balance that against material which does not fit that description.

Third, you will make a decision conformably with the protection and advancement of the public interest and in furtherance of the objectives of the **Environmental Planning and Assessment Act 1979**.

1. You have enough information to enable you to make a decision.

Where important information which a proponent ought to have put before a decision maker is either lacking or obviously inadequate, this fact often tells its own story about the impacts which a project will have on its neighbours.

You should ask yourselves why this proponent has chosen not to properly assess certain key impacts of its project.

Is it because, with *mine water* as one example, that it simply cannot reconcile its models? Or is it because, with *heritage impacts* and *BSAL characterization* as other examples, that it recognises that such assessments, if carried out competently, would constrain the project?

In the face of the clear findings and recommendations of the Review PAC, Anglo has chosen not to deal with these inadequacies. The project application before you is *unchanged* from the one which the Review PAC recommended be rejected. It is the same application which properly prompted the Review PAC to make *long overdue and welcome suggestions* for reform of key elements of the assessment of mining projects in this State.

Before embarking on your balancing exercise you are reminded that, having now left the field of play entirely after previously saying that a mine this small would never be economic, Anglo now asks you to accept that it will be economic, but only for someone else who might buy it.

You will also bear in mind that the current application for a new mine is based on the continued operation of the old Drayton mine, a mine which Anglo has now closed but for which it has an outstanding rehabilitation obligation.

2. *The best evidence does not include the DPE's FAR*

In our submission, the best evidence before you consists of three things:

- the Review PAC report (based as it was on similar material to that now before you including, importantly, the observations of three other independent and expert Commissioners);
- your own site inspections and your discussions with, and your hearing first hand from, people and groups who will be affected by your decision; and
- reports from experts who speak authoritatively to you about what constitutes contemporary best practice in their respective fields.

We do not include the DPE's Final Assessment Report in this group.

This is because the FAR does not, as it should, provide you with a fair, balanced and complete assessment to assist you in your task nor does it address the recommendations of the Review PAC.

It is instead an undisguised submission in favour of the proponent's project complete with what we assume are carefully negotiated consent conditions with the proponent. Sadly, it reveals just how profoundly the DPE misunderstands the objectives of the **Planning Act** which inform its duty to the economy, the environment and the people of this State.

Those two key objectives are found at the very start of s5 – proper management of resources so as to promote social and economic welfare and a better environment and, second, the orderly and economic use of land.¹

The proponent chose to attack those of your colleagues comprising the Review PAC for allegedly having acted beyond power by making recommendations for obviously needed planning policy

¹ **5 Objects**

The objects of this Act are:

- (a) to encourage:
 - (i) the **proper management**, development and conservation of natural and artificial **resources**, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
 - (ii) **the promotion and co-ordination of the orderly and economic use and development of land**,



reform. Anglo can hardly be blamed for doing so because they are partial and self interested.

The DPE's response was more insidious – it chose not to address your colleague's recommendations at all. In the face of a clash between *patently incompatible land uses*, its response to the RPAC has been:

(a) to assert the primacy of “co-existence” (including through a bizarre form of “enforced consultation” by committee); and

(b) to promote the curing of unmeritorious applications through the balm of “strict” conditions.

Everyone here can see just how well the DPE's policy responses are working.

3. The public interest can only be served by a refusal of this application

The identification, advancement and protection of the public interest will vary from case to case.

What does the public interest look like in this case?

In simple terms, we submit that *the future* of the two major studs that operate closest to the proposed mine *depend on that mine not proceeding*.

Those who say that this is not the case and that the studs either won't leave, won't go far away or even if they do, won't diminish those that stay behind in the “cluster” – they differ from those that say the opposite in one of three ways.

They are either not themselves players in this market, they do not understand this market or they have not even spoken with players in this market.

You have an advantage over Messrs Houston and Bennett in that you have heard first hand from these market players.

Even if you were persuaded that this proposal had merit, a review of the proposed consent conditions advanced by the DPE should sound a very loud alarm.

Recognising the sensitivity of the studs as receptors of noise, dust, vibration and light spillage, the DPE invites you to impose what it calls “strict” conditions. I read these conditions as the only means by which the DPE can reconcile two fundamentally incompatible land uses. And when I see conditions being advanced to sustain this proposition, I see abdication. Conditions cannot ever change an inherently unmeritorious application into a meritorious one.

Even ignoring the lack of environmental or economic merit of the project, instead of determining to recommend to you refusal of a development application which would pit irreconcilable land uses against each other, the DPE has ducked its duty.

Much has been said and written about the precautionary principle. Having acted for *Telstra*² in the leading case on this concept in Australia I can say pretty confidently that if ever there was a case for

² **Telstra Corporation v Hornsby Shire Council** (2006) 67 NSWLR 256

its application, this is it.

You need only ask yourself one question: what are the consequences of approving a development which, if any of the proponent's own flawed predictions fall short, will devastate another industry?

In our submission:

- if the mine proceeds, the industry which these two studs underpin in this State will be imperiled;
- if Drayton South is not approved, the coal mining industry in this State will not be imperiled and
- the public interest and key objects of the Planning Act can only be served and protected by refusing approval to this mine.

No decision maker acting reasonably could conclude otherwise.

Andrew Beatty

17.11.16