Drayton South Coal Mine Project:

Summary of submissions to Decision PAC on behalf of Hunter Thoroughbred Breeders Association (*HTBA*) at a public meeting: Denman, 21 August 2014

The decision maker in this matter (*Decision PAC*) is directed by s75J of the Environmental Planning and Assessment Act (*EP and A Act*) to have regard to both the Environmental Assessment Report (*SEAR*) issued by the Secretary of the Department of Planning and Environment (*DPE*) and the report published in December 2013 by the Planning Assessment Commission acting as a review body (*Review PAC*).

The Review PAC had the benefit of all of the material comprising the assessment of the Preferred Project Report including Anglo's responses to detailed, project-specific Director General requirements (*DGRs*), detailed comments from all key State agencies and comprehensive advices from various experts before and after the public hearing in October 2013 (including, notably, the Runge Pincock Minarco report of July 2013 commissioned by the DPE itself).

The Review PAC was well placed to assess and reach conclusions on the impacts which the mine would have on the whole equine industry – their findings were both carefully drawn and unequivocal.

Substantial weight should be accorded to the findings of the Review PAC and in particular (Review PAC report, p25) its conclusion that if a new mine proposal *was "either technically and/or financially unviable ...the Commission considers that the project cannot proceed."* This is the clearest and most relevant advice from the Review PAC to the Decision PAC: advice which in the present circumstances (especially having regard to the analysis of Marsden Jacob Associates) the HTBA says the Decision PAC should accept and implement.

The SEAR and the Review PAC report reach opposite conclusions – the Decision PAC must reconcile these stark differences in coming to its decision. In particular, it will need to:

(a) consider whether, and to what extent, the proponent, and the DPE in its SEAR, adequately respond to the recommendations of the Review PAC; and

(b) assess what planning outcome best serves the public interest.

Despite acknowledging that the proponent's Retracted Mine Plan (*RMP*) does not, in several important respects, adhere to the minimum physical changes which the Review PAC spelled out, the authors of the SEAR find that the project warrants approval "in the public interest". The inadequacy of the proponent's assessment of the impacts and supposed benefits of the new mine amplify the implausibility of the SEAR recommendation for approval and the proposed conditions of consent which flow from the SEAR.

The public interest is a consideration which the Courts recognise should be taken into account in cases like this. A good description of the task before the Decision PAC follows:

> *Where there are competing and feasible claims whether a proposal contributes to or detracts from the public interest, there is no option for the decision-maker but to make a subjective choice between them.*
>
> *The final and most difficult step is the ranking of the various interests. This may require weighing one public interest against another or balancing the public interest against private interests.*

Against the background of the Review PAC report, the Decision PAC's consideration of the public interest will be informed by its assessment of the reliability of the materials produced to date by the proponent as well as its public statements as to what is, and is not, an economically viable mine and whether and when, like virtually all other major coal mines in the Hunter Valley, this mine, if approved in this form, will be sought to be expanded again in future.

Any analysis should start by recognising the *prima facie* incompatibility between established thoroughbred horse studs and an open cut coal mine. There can never be any harmonious "co-existence" of the kind the DPE posits.

To test this, one should ask whether any new stud would seek to establish itself in close proximity to an open cut coal mine. Second, what is the likelihood of planning approval being granted to that new stud over the objections of the established coal mine? No sensible town planner would countenance this arrangement let alone encourage it.

Ultimately, the Decision PAC can give little or no weight to the SEAR (or the proponent's assessment reports supporting the RMP which the SEAR uncritically adopts) as it fails to assess many of the expected impacts of the mine and does it offer up any sound or reliable data upon which to make judgments about the economic contribution which the mine may make to the State's economy.

Given the risks posed by this mine to these businesses - studs which together support the State's entire Equine Critical Industry Cluster (*ECIC*), the Decision PAC will need to look carefully at the precautionary principle and in particular, the need to "*avoid, wherever practicable, serious or irreversible damage to the*

environment" where, as we know, the *"environment" is* defined to include *"all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings"*

In balancing competing elements of the public interest, the only safe and reasonable decision is one which does not jeopardise an entire industry for the sake of a single, short term component of another industry.

Beatty Legal Pty Limited
27 August 2014

Supporting notes

What is the statutory framework within which the Decision PAC should determine this application?

I. Mandatory considerations

As the RMP is a "transitional Part 3A" project, the Minister or, in this case, her delegate, is instructed by s75J (and, in particular, s75J(2)(a) and (c)) of the EP and A Act:

> ***75J Giving of approval by Minister to carry out project***
>
> *(1) If:*
> *(a) the proponent makes an application for the approval of the Minister under this Part to carry out a project, and*
> *(b) the Director-General has given his or her report on the project to the Minister,*
> *the Minister may approve or disapprove of the carrying out of the project.*
> ***(2) The Minister, when deciding whether or not to approve the carrying out of a project, is to consider:***
> ***(a) the Director-General's report on the project and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report, and***
> *(b) if the proponent is a public authority—any advice provided by the Minister having portfolio responsibility for the proponent, and*
> ***(c) any findings or recommendations of the Planning Assessment Commission following a review in respect of the project.***
> *(3) In deciding whether or not to approve the carrying out of a project, the Minister may (but is not required to) take into account the provisions of any environmental planning instrument that would not (because of section 75R) apply to the project if approved. However, the regulations may preclude approval for the carrying out of a class of project (other than a critical infrastructure project) that such an instrument would otherwise prohibit.*
> *(4) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine.*
> *(5) The conditions of approval for the carrying out of a project may require the proponent to comply with any obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F). **[emphasis added]***

In addition to s75J, cl 8B of the EP and A Regulation informs the contents of the SEAR:

8B Matters for environmental assessment and Ministerial consideration

The Director-General's report under section 75I of the Act in relation to a project is to include the following matters (to the extent that those matters are not otherwise included in that report in accordance with the requirements of that section):
(a) an assessment of the environmental impact of the project,
(b) any aspect of the public interest that the Director-General considers relevant to the project,
(c) the suitability of the site for the project,
(d) copies of submissions received by the Director-General in connection with public consultation under section 75H or a summary of the issues raised in those submissions.
Note. *Section 75J (2) of the Act requires the Minister to consider the Director-General's report (and the reports, advice and recommendations contained in it) when deciding whether or not to approve the carrying out of a project.**[emphasis added]***

II. Reconciling the Review PAC's Report and the SEAR

The principal conclusion of the SEAR is that the project before the Decision PAC (ie, the RMP) ought to be conditionally approved as to do so would be "in the public interest" [see SEAR pp (v) and 34].

The SEAR (s75J(a)) of course deals with a different form of the project to that considered by the Review PAC's recommendations (s75J(c)).

In exercising the decision making power delegated to it by the Minister, the Decision PAC must form its own view of the RMP *considering* both the SEAR and the Review PAC Report.

In considering the Review PAC's report, the Decision PAC will note that the PPR was not recommended for approval (as, *inter alia*, it would jeopardise the viability of the studs) and that any smaller mine must, at the minimum, be contained behind certain natural features, be reduced in scale and be subjected to further rigorous assessment. Moreover, the Review PAC gave clear advice to the ultimate decision maker:

> (Review PAC report, p25) if a new mine proposal *was "either technically and/or financially unviable ...the Commission considers that the project cannot proceed."*

In considering the RMP, the Decision PAC will note that that project plan does not accord with the Review PAC's basic scale reduction stipulation and it will be told that there has been inadequate and unreliable assessment of the impacts of the RMP on the studs and generally.

To reconcile the competing recommendations in relation to the PPR (now abandoned by Anglo) and the RMP, the Decision PAC must itself determine whether the RMP is, or is not, *in the public interest.*

III. The "public interest"

Although, by reason of s75R, section 79C (and the consideration of the "public interest" in s79C(1)(e) in particular) does not, in terms, apply to the assessment and determination exercise to be performed by the Decision PAC, the transitional Part 3A project decision maker:

- must consider the SEAR (s75J(a)) which, in this case, deals squarely with the notion of the public interest and in fact bases its recommendation as to conditional project approval upon an assessment of what is, and is not, in the public interest; and
- cannot *bona fide* exercise its power if "it did not have regard to the public interest" (per Hodgson JA, *Minister for Planning v Walker* [2008] 161 LGERA 423 at 450).

In *Double Bay Marina v Woollahra Council* [2009] NSWLEC 1001, Roseth SC made the following well known observations about "the public interest":

> *Where there are competing and feasible claims whether a proposal contributes to or detracts from the public interest, there is no option for the decision-maker but to make a subjective choice between them*
>
> *The final and most difficult step is the ranking of the various interests. This may require weighing one public interest against another or balancing the public interest against private interests*

In *BGP Properties v Lake Macquarie City Council* [2004] NSWLEC 399 at para 102, McLellan CJ noted:

> *In Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) 129 LGERA 195 the Court of Appeal was required to consider the breadth of matters which could be considered under s 79(C). Mason P, with whom Spigelman CJ and Ipp JA agreed, said (at LGERA 209-210):*
>
> > *"In any event,* ***matters relevant to the public interest touching a particular application are not confined to those appearing in published environmental planning instruments, draft or final.*** *Obviously such instruments carry great and at times determinative weight, but they are not the only source of information concerning the public interest in planning matters. The process of making such instruments is described by Beazley JA in Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning (1997) 95 LGERA 33 at 42-44. Nothing in the Environmental Planning and Assessment Act stipulates that environmental planning*

> *instruments are the only means of discerning planning policies or the 'public interest'.* ***For one thing, the government is not the only source of wisdom in this area. A consent authority may range widely in the search for material as to the public interest*** *(see generally Shoalhaven City Council v Lovell (1996) 136 FLR 58 at 63; Patra Holdings Pty Ltd v Minister for Land & Water Conservation (2001) 119 LGERA 231 at 235."* ***[emphasis added]***

His Honour then found , insofar as the EP and A Act is concerned:

> *113 In my opinion, by requiring a consent authority (including the Court) to have regard to the public interest, s 79(C)(e) of theEP&A Act obliges the decision-****maker to have regard to the principles of ecologically sustainable development*** *in cases where issues relevant to those principles arise. This will have the consequence that, amongst other matters, consideration must be given to matters of inter-generational equity, conservation of biological diversity and ecological integrity. Furthermore, where there is a lack of scientific certainty, the precautionary principle must be utilised. As Stein J said in* **Leatch**, *this will mean that* ***the decision-maker must approach the matter with caution but will also require the decision-maker to avoid, where practicable, serious or irreversible damage to the environment.***
>
> *114 Consideration of these principles does not preclude a decision to approve an application in any cases where the overall benefits of the project outweigh the likely environmental harm. However, care needs to be taken to determine whether appropriate and adequate measures have been incorporated into such a project to confine any likely harm to the environment.* ***[emphasis added]***

Although the "public interest consideration operates at a very high level of generality" (Preston CJ in *Bulga Milbrodale Progres Association Inc v Minister for Planning and Warkworth Mining,* NSWLEC 48, 15 April 2013 at para 54ff) it will apply with specificity depending on the facts of each case.

On appeal from Preston CJ's decision in *Warkworth*, the Court of Appeal (*Warkworth Mining v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375) noted:

> *In order to understand whether his Honour erred in the manner alleged, it is necessary to have regard to the structure of his Honours judgment. It was divided into seven sections: an introduction, a statement of the nature of the judicial task he was undertaking, sections dealing with the* ***impacts on biological diversity, noise and dust impacts, social impacts, economic issues*** *and the final section in which his Honour balanced relevant matters and came to his determination.*
>
> *Each of those matters was relevant to the public interest. Some of the matters involved a focus on local issues. Noise and dust impacts is an*

example. Other matters, such as biological impacts and economic issues, involved wider regional, state and national issues. ***The determination as to whether the Project was in the public interest required an overall assessment of these relevant matters****. That was the* ***balancing exercise*** *that his Honour undertook in the end. The evaluation of the public interest was an integral part of that assessment.* ***[emphasis added]***

IV. The public interest and ESD

An important the object of the *EP and A Act* is the encouragement of "ecologically sustainable development" (*ESD*) (s5(a)(vii)).

The principles of ESD (defined in s6(2) of the *Protection of the Environment Administration Act* (NSW) 1991) include, relevantly:

(a) *the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*

In the application of the precautionary principle, public and private decisions should be guided by:

(i) *careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and*
(ii) *an assessment of the risk-weighted consequences of various options*

In the leading Australian decision on the precautionary principle, *Telstra Corporation v Hornsby Shire Council* (2006) 67 NSWLR 256, Preston CJ held (at 268) that consent authorities obliged by s79C(1)(e) to "have regard to the public interest" must likewise "have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise."

V. Conclusion

The Decision PAC should examine whether the project warrants approval having regard to the identification of, and performance of the balancing exercise required by the service of, the public interest.

It should do this, in particular, by critically assessing two factors:

- likely environmental impacts (water, visual and heritage landscape in particular); and
- claimed economic benefits and likely economic harm.

In determining this application, the Decision PAC should be fully satisfied that:

(a) the claims made by Anglo as to :
- the projected economic benefits which the RMP offer are reliable (despite the serious and sustained criticism of the form of economic modelling upon which it relies); and
- the size of mine that is, and is not, economically viable for it are now accurate (unlike its earlier unequivocal public statements which plainly were not accurate) and whether, *unlike virtually all other major open cut coal mines in the Hunter,* it will not be seek to expand Drayton South in the near future [see following table]; and

(b) in balancing competing elements of the public interest, it does not make a decision which jeopardise an entire industry for the sake of a small, single short term component of another industry.

If Anglo cannot adequately satisfy the Decision PAC of these matters **and** that there will be no "*serious or irreversible damage to the environment*", recalling that the "environment" is defined under the EP and A Act to include (s4(1)):

> *all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings*

the Decision PAC should refuse approval.

Examples of coal mine expansions in the Hunter Valley

Development Application/Modification	Date Approved	Detail
Bengalla Mine		
DA 211/93	7 August 1995	Original consent for a surface coal mine. ROM of 8.7 Mtpa
DA 211/93 Modification 2	6 December 2007	Extension of open cut mining operations – Wantana Extension
DA 211/93 Modification 4	7 October 2011	Acceleration of mining operations in the Wantana Extension
Bulga Coal Complex		
Historical mining since 1982		
DA 41-03-1999	1999	Consent for open cut mining
DA 43-03-1999 Modification 7	March 2013	Western expansion to mining in the Bulga Pit
Mount Arthur North Coal Mine		
Historical mining since the 1960s		
DA 144-05-2000	1 May 2001	Consent for Mount Arthur North open cut mine. ROM of 15 Mtpa
DA 06-0108	9 January 2008	Extension of the Mt Arthur North South Pit.
DA 09-0062	24 January 2010	Extension of open cut operations. Increase of ROM by 8 Mtpa to 36 Mtpa.
DA 09-0062 Modification 1	Under Review (Application submitted 7 February 2012)	Extension of open cut mining to allow for further 4 years of mining at approved 32 Mtpa (above ground).
Warkworth		
Historical mining operations commenced in April 1981		
DA 300-9-2002-i	19 May 2003	Extension of existing pits (North and West pits), extraction of 160 Mt of coal at 18 Mtpa

DA 09-0202	PAC approval 3 February 2012 – LEC/NSWCA refusal	Extension westwards of the North and West pits
DA 300-9-2002-I Modification 6	29 January 2014	Small extension of the mine to maintain production
SSD 6464 (Warkworth Continuation Project)	Under Review (Application submitted 2014)	Revised extension of the mine following refusal of DA 09-0202
Hunter Valley Operations (North)		
Historical mining for over 50 years		
DA 450-10-2003	12 June 2004	Extension of open cut mining to the east. Consolidation of historical consents/approvals.
DA 450-10-2003 Modification 2	25 June 2006	Extension of open cut mining to the south and east of Carrington Pit.
Hunter Valley Operations (South)		
Historical mining has occurred since 1971		
DA 79/48	17 June 1980	Extension of Lemington open cut mine
DA 80/71	24 November 1980	Further extension of Lemington
DA 80/961	19 August 1985	Northern extension of Lemington operations
DA 84/115	19 August 1985	North west extension of Lemington
DA 87/42	18 December 1987 (lapsed)	Establish a new mine within Lemington
DA 144/96	24 January 1997	Extension to the south west of South Mine
DA 215/97	17 July 1998	Establish mining in South Lemington
DA 114-12-98	15 March 2000	Development of Cheshunt Pit, extending south west through Riverview Pit
DA 181-8-05	31 March 2006	Extension of open cut mining in Chesthunt Pit
DA 114-12-98 Modification 4	11 May 2006	Extension of open cut mining to south west of Riverview Pit