



Environmental Defenders Office

Our Ref: SR:JC:s3862

22 August 2022

Professor Alice Clark
Chair
Independent Planning Commission of NSW

By email: [REDACTED]

CONFIDENTIAL AND PRIVILEGED

Dear Professor Clark

Re: Mount Pleasant Optimisation Project (SSD 10418) biodiversity impacts

1. As you are aware, we act for act for Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc (**DAMS HEG**), a local community organisation concerned about the environmental, social and economic impacts of continuing and prolonging coal mining in the Upper Hunter. DAMS HEG was formed to provide community voice to industry and all levels of government in defence of our natural environment in the interests of human health and wellbeing, and the protection of biodiversity.
2. On behalf of our client, we write to the Commission in respect of the Department of Planning and Environment's (**DPE**) correspondence dated 12 August 2022, regarding an update to its recommended biodiversity offset condition of consent for the Mount Pleasant Optimisation project (SSD 1-418). The DPE correspondence to the Commission was triggered by the Applicant bringing to its attention a new species of Legless Lizard (*Delma Vescolineata*) that it failed to identify in the Mount Pleasant Optimisation Project Baseline Fauna Survey Report 2020.
3. Being uploaded to the IPCN website 18 August 2022, our client has only just become aware of this newly discovered species and the Commission's statement dated 19 August in which it considers that "the correspondence does not contain any additional information that is material to the determination of the SSD application."
4. As the Commission is aware, on behalf of our client we engaged a terrestrial ecologist who provided their independent expert opinion on the Project's impact on biodiversity. In the interests of procedural fairness, our client should be provided with an opportunity to formally respond to this new information.

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5. In our opinion, the Commission cannot discharge its legal duty as the consent authority for the Project under s 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979 (NSW)*(**EP&A Act**) to properly assess the Project's likely impact on the environment without seeking a comprehensive report from the Proponent in respect of the Project's impact on this new species.
6. Section 4.15 is the statutory successor of former s 79C(1) and, before then, s 90(1) of the EP&A Act. Moffitt P when considering s 90(1) in *Parramatta City Council v Hale* (1982) 47 LGRA 319 said at [340]:

The obligation is to take into consideration (a) to (s) matters which are in fact relevant, and not those which the authority or its officers considers relevant. By remaining ignorant of relevant environmental matters, an authority could not avoid its obligation to consider and, in its ignorance, give a valid consent without considering harm (not de minimis) to the environment which in fact fell within (b). Accordingly, despite the absence of a direct obligation to do so, the requirement of s. 90(1) to consider carries with it an indirect obligation, which rests upon the authority to acquaint itself with such material as will permit it to consider such s. 90(1) matters as are in fact material. Thus, if it is to consider the impact of the development upon the environment, if is to consider whether it is likely to cause harm, if it is to consider the ways the environment may be protected or, if it is to consider the ways likely harm may be mitigated, it must be aware of each of these matters, namely, what is the impact, the likely harm and the ways to protect or mitigate.

7. As such, the Commission is obliged to acquaint itself with materials that enable it to consider the likely impacts of the development on the Stripped Legless Lizard (*Delma Vescolineata*). This necessitates that the Commission should reopen the assessment of the biodiversity impacts of this mine while this new species is studied.
8. At present, the Commission does not have before it any evidence as to the likely impact of the Project on this newly discovered species. Nor is there any evidence before the Commission that DPE's recommended condition of consent can mitigate the Project's impact on the species, given there is no information about the species distribution or vulnerability to the Project including via the Project's unacceptable impact on the climate crisis.
9. We are now in a time where climate change is the greatest contributor to species extinction and approval of this Project in the circumstances is illogical, unreasonable, and irrational.
10. As such, the Commission should refuse the Project and the Proponent must be required to undertake a comprehensive study as to the likely impact of the Project on the Stripped Legless Lizard (*Delma Vescolineata*) species.

Yours faithfully

Environmental Defenders Office



Jayme Cooper
Solicitor