

15 November 2019

Productivity Commission
NSW Treasury
GPO Box 5469
Sydney NSW 2001

By email:
ProductivityFeedback@treasury.nsw.gov.au

Dear Sir/Madam

Review of the NSW Independent Planning Commission

Australian Pacific Coal Ltd (**AQC**) wishes to make a submission to the Productivity Commission's review of the NSW Independent Planning Commission (**IPC**).

AQC is the owner of the Dartbrook mine (**Dartbrook**). Dartbrook has the benefit of DA 231-7-2000 which was granted December 1991 (**Dartbrook Consent**). Dartbrook has been on 'care and maintenance' since 2006 with the consequence that only a small proportion of the coal authorised for extraction has been extracted. The Dartbrook Consent has been modified a number of times by the mines' previous owner. In January 2018 AQC lodged Modification 7 (**Mod 7**) with the Department of Planning and Environment. A chronology of the Mod 7 application is included at **Attachment A**.

The Mod 7 application proposed to:

- (a) Recommence underground coal mining at the Dartbrook mine using bord and pillar methods;
- (b) Use different coal clearance systems to those approved, including transport for mined coal by trucks using a private haul road to a new coal delivery shaft connecting to an underground conveyor to the existing coal handling and preparation plant; and
- (c) Extend the project duration by five years to 2027.

Mod 7 was supported by a comprehensive Environmental Assessment that was prepared by an experienced environmental consultancy in a manner that was consistent with the many other recent modification applications proposing extensions of time for mining operations. The application was responsive to the NSW planning system as it applied at the time the application was lodged and addressed all issues raised by the Department.

In January 2019 officers from the Department prepared an assessment report (**Assessment Report**) recommending approval of Mod 7 subject to conditions. The conditions recommended by the Department were generally acceptable to AQC.

On 9 August 2019 the IPC, as the delegate of the Minister for Planning and Public Spaces (**Minister**), determined the Mod 7 application by modifying the Consent. The Consent, as modified, contains changes including permitting the use of bord and pillar mining in the Kayuga seam and an adjusted coal clearance system. The determination does not, however, extend the project duration by 5 years until 2027 (which was the primary purpose of the application). Without the 5 year extension, the recommencement of mining at the Dartbrook mine is uneconomic. Further, the Dartbrook Consent, as modified, contains increased obligations associated with planning agreements and land acquisition without AQC receiving any tangible benefit. For that reason, AQC is dissatisfied with the determination of the IPC and has now appealed the decision to the Land and Environment Court.

It is apparent from the Statement of Reason issued as part of refusing the extension that the IPC did not accept the Department's approach to the assessment of the impact of the 5 year extension. The IPC's reasons for refusing the 5 year extension reflects dissatisfaction with the Department's underlying assumption that the impact of the development is not a new impact because the modification involves essentially the same mining over an extended period. The Department assessed the application on the basis that the impact of the mining and the coal to be extracted had largely already been assessed and approved. This is consistent with the Department (and IPC's) approach to similar applications that have been approved. The IPC, in the Dartbrook case, has taken a very different approach. It has effectively taken the view that no mining is authorised by the Consent beyond 5 December 2022 and that all impacts of mining after that date had not been adequately assessed.

There are many approvals where extensions have been granted to mining projects where the assessment and determination has taken place using the approach adopted by the Department. The IPC determined that the Environmental Assessment that AQC has provided, contrary to the position adopted by the Department, was inadequate in material respects. This was after the Department had confirmed to the IPC that the assessment had been done in accordance with all relevant Government policies and guidelines. In AQC's submission it should not be open to the IPC to find that an environmental assessment is inadequate in circumstances where the Department has confirmed compliance with the relevant government policies. To make things worse, the application was determined by the IPC without either AQC or the Department being given an opportunity to address the issues apparently of concern.

AQC was also dissatisfied with the IPC's consideration of public submissions. A time was set for interested parties to lodge a submission. AQC provided a response to the submissions that were lodged during that exhibition period. The Department also provided a response. Notwithstanding that (and as shown in the **attached** chronology), the IPC continued to accept and consider submissions until about 10 weeks after the public meeting and after AQC and the Department had provided their response to the submissions. In AQC's view the IPC should not be entitled to consider late submissions in those circumstances. It is procedurally unfair and does not respect the assessment process the EPA Act puts in place.

The recommendation made by the Department gave AQC the incorrect impression that it had addressed all the issues it needed to address to obtain approval of the whole of Mod 7. The unexpected determination of the IPC to refuse the extension has had negative consequences for AQC, its shareholders and its financiers. The level of unpredictability and uncertainty that the IPC has introduced into the determination of applications for major projects has a serious negative impact on NSW as an investment destination.

The *Environmental Planning and Assessment Act 1979 (EPA Act)* contains a sophisticated system for the assessment and determination of planning applications. It creates a number of different approval pathways that are proportionate to the issues involved. Applications involving coal mines are generally 'State Significant' and the EPA Act makes the Minister the consent authority for such applications. The system also provides the Land and Environment Court with an independent supervisory role as part of the system. Objectors, in certain circumstances, are given rights of appeal to the Land and Environment Court in the event they are dissatisfied with the determination of certain applications. The system balances the rights of all stakeholders in the system.

The IPC, which is a body that was established to assist the Minister with the proper administration of EPA Act is now being used by the Minister to effectively avoid making decisions that the scheme of the EPA Act requires him to make.

The system already contains an independent arbitrator for difficult planning decisions – the Land and Environment Court. The Court is a trusted and truly independent body that applies Government policy consistently – it is not a body that makes inconsistent decisions as it appears the IPC has become. This inconsistency is demonstrated by the way differently constituted IPCs have taken different approaches to determination of applications to extend the operation of coal mines.

The scheme of the EPA Act allows for the consent authority to take advice and have the benefit of an assessment report from a specialist department. It causes unnecessary delay and duplication to have two independent bodies involved in decision making – the IPC and the Land and Environment Court. The IPC has demonstrated that it is incapable of properly performing the Minister's functions under the EPA Act in a way that properly serves the interests of NSW and should be removed from the determination process. If the IPC has power to unilaterally overrule the Department's assessment it effectively makes the Department and the Minister redundant. That cannot have been the intention of the legislation.

To the extent the IPC has the function of conducting public hearings and public meetings, AQC does not consider what has been occurring is constructive. The IPC simply receives information – it does not properly examine issues in a detailed or procedurally fair way. To the extent public hearings remove appeal rights, it is a poor substitute for the partially inquisitional process the Land and Environment Court carries out when considering a merit appeal. In AQC's submission the public meeting and public hearing process adds limited value to the overall system.

In summary, AQC submits:

- (i) The IPC should be abolished, and the assessment and determination process set out in the EPA Act should be implemented as Parliament intended – by the Minister determining the applications. The Department is an independent and appropriately experienced and skilled agency to assess major project applications and advise the Minister. Determination by the Minister will create consistency and the proper consideration of the interests of the people of NSW.
- (ii) If the IPC is to be retained in some form, its delegation should be revoked and it should be advisory only, reporting back to the Department who should be responsible for advising the Minister. It should also be required to follow Government policy and should not have scope to adopt its own policy framework.
- (iii) Where the IPC conducts public hearings or public meetings it should only be entitled to consider submissions lodged during the exhibition period to ensure the assessment process is procedurally fair and efficient.
- (iv) The scope of applications where the IPC has a role should be reduced. Any application that falls within the modification power under the EPA Act should not require high level reassessment by the IPC and more applications should be determined by senior Department staff to improve efficiency in the process and to increase the attractiveness of NSW as an investment destination.

Thank you for the opportunity to make this submission.

[Redacted]

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Director

Annexure A

Date	Event	Reference
27/02/2018	Modification Application No. DA 231-7-2000 MOD 7 lodged (including letter of support)	Major Projects portal; Statement of Reasons
June 2018	Environmental Assessment submitted in support of MOD 7	Major Projects portal; Statement of Reasons
28/06/2018	MOD 7 placed on public exhibition (until 25 July 2018)	Statement of Reasons
07/07/2018	OEH Heritage Division submission	Major Projects portal; Statement of Reasons
09/07/2018	NSW Dam Safety Committee submission	Major Projects portal; Statement of Reasons
16/07/2018	RFS submission	Major Projects portal; Statement of Reasons
16/07/2018	RMS submission	Major Projects portal; Statement of Reasons
18/07/2018	DPI – Lands and Water Division submission	Major Projects portal; Statement of Reasons
18/07/2018	NSW Subsidence Advisory submission	Major Projects portal; Statement of Reasons
20/07/2018	DRG submission	Major Projects portal; Statement of Reasons
27/07/2018	Muswellbrook Shire Council (MSC) submission	Major Projects portal; Statement of Reasons
25/07/2018	EPA submission	Major Projects portal; Statement of Reasons
30/07/2018	Letter from Department to AQC requesting response to submissions	Major Projects portal
31/07/2018	Upper Hunter Shire Council (UHSC) submission	Major Projects portal; Statement of Reasons
16/08/2018	OEH Regional Operations Division submission	Major Projects portal; Statement of Reasons
29/08/2018	Resources Regulator submissions	Major Projects portal
31/08/2018	AQC submitted Response to Submissions (RTS)	Major Projects portal; Statement of Reasons

Date	Event	Reference
13/09/2018	DRG comments on RTS	Major Projects portal; Statement of Reasons
17/09/2018	Resource Regulator comments on RTS	Major Projects portal; Statement of Reasons
18/09/2018	OEH Heritage Division comments on RTS	Major Projects portal; Statement of Reasons
21/09/2018	EPA comments on RTS	Major Projects portal; Statement of Reasons
21/09/2018	RFS comments on RTS	Major Projects portal; Statement of Reasons
21/09/2018	MSC comments on RTS	Major Projects portal; Statement of Reasons
03/10/2018	OEH Regional Operations Division comments on RTS	Major Projects portal; Statement of Reasons
30/10/2018	DPI comments on RTS	Major Projects portal; Statement of Reasons
12/10/2018	AQC submits additional information in response to further comments (prepared by Hansen Bailey)	Major Projects portal; Statement of Reasons
16/10/2018	AQC submits Economic Impact Assessment (prepared by Gillepsie Economics)	Major Projects portal; Statement of Reasons
26/10/2018	AQC submits additional information to Department (prepared by Hansen Bailey)	Major Projects portal; Statement of Reasons
13/11/2018	AQC submits additional information in response to OEH further comments (prepared by Hansen Bailey)	Major Projects portal; Statement of Reasons
23/01/2019	Department Assessment Report	Major Projects portal; Statement of Reasons
27/01/2019	MOD 7 referred to IPC	Major Projects portal; Statement of Reasons
18/02/2019	Meeting between Department and IPC	Statement of Reasons
18/02/2019	Meeting between AQC and IPC	Statement of Reasons
08/04/2019	Site inspection by IPC	Statement of Reasons
	Meeting between Muswellbrook Shire Council and IPC	
	Meeting between Upper Hunter Shire Council and IPC	
09/04/2019	Public meeting held by IPC (Upper Hunter Conservatorium of Music, Muswellbrook)	Statement of Reasons

Date	Event	Reference
	Invitation for public submissions between 9 – 16 April 2019	
18/04/2019	Comments from Friends of the Upper Hunter (FOTUH)	Statement of Reasons
23/04/2019	Applicant's Submission to the IPC	Major Projects portal; Statement of Reasons
26/04/2019	Comments from Hunter Thoroughbred Breeders Association (HTBA) and Godolphin	Statement of Reasons
06/05/2019	Additional comments from FOTHUH	Statement of Reasons
04/06/2019	Department's Response to the IPC	Statement of Reasons
13/06/2019	Additional comments from HTBA on Department's Response to the IPC	Statement of Reasons
20/06/2019	Additional comments from UHSC on the Department's Response to the IPC	Statement of Reasons
09/08/2019	Notice of Modification issued (including Statement of Reasons)	Major Projects portal; Statement of Reasons