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TO: NSW Independent Planning Commission (**IPC**)

FROM: Beatty Legal

COPY: Hunter Thoroughbred Breeders' Association (**HTBA**)

RE: MACH Energy – Mt Pleasant Open Cut Coal Mine - MOD 3

DATE: 06 July 2018

Legal Issues

Introduction

The HTBA has asked me to address brief remarks to the Commission constituted to consider an application described as a "modification" of an old planning consent.

The HTBA has already made written submissions to the IPC through its President, Dr Cameron Collins, who is presently overseas.

The enterprises which the HTBA represent operate across most of this Valley and have done so virtually since the start of European settlement. These businesses are substantial employers and the industry of which they form part has been accorded State, National and International significance.

I have **seven [7] main points** to make to you about this application.

1. This application is a misnomer

Commissioners will immediately appreciate that the proponent's description of the application is for an "extension of mine life", whereas it is in fact an application for a new mine. No coal mining has yet been undertaken at Mt Pleasant despite a nearly 20 year hiatus since its approval to do so.

The consent which MACH says it now seeks to "modify" will, if approved, bear no real resemblance to:

> (a) the legal, physical or social environment in which the original consent was granted nearly 20 years ago; or
>
> (b) the land use which that old consent authorised but which was never acted upon save only to prevent its lapse.

If this application is approved, the Commission will be permitting the establishment, in 2018, of a major new, greenfields open cut coal mine – the first in NSW since Mangoola (Anvil Hill) over ten years ago.

2. The Commission has two [2] legal tasks

In our submission, the Commission must apply two tests:

> (a) is the application before you one which is *legally competent* – ie, is this actually a "modification" which s75W might allow to proceed to a merit assessment or is it a new DA in disguise?; and
>
> (b) even if the application is considered legally competent, is the material adduced by MACH in support reliably current, complete and accurate?

We contend that this application fails both tests.

3. This is not a s75W "modification"

The HTBA adopts and endorses the propositions succinctly articulated by BMC in its submissions to the DPE. These are attached as **Appendix 1**. They are reproduced and responded to by MACH in its Response to Submissions: **Appendix 2**.

We note that the same serious legal complaint was made by Muswellbrook Council in its letter of 17 July 2017 to the DPE: **Appendix 3**.

What is now sought to be approved is **materially different in fundamanental ways** from the application which was exhibited, assessed and approved in December 1999 - by way of example:

- the deletion of the whole of the North Pit;
- changes to water management (identified in more detail by OD Hydrology);
- the complete re-arrangement of the Fines Emplacement Area (as already described by Mr Michael White); and
- the substantial reduction in ROM coal with consequent reductions in any potential economic benefit to the State or the local community.

In our view, MACH cannot rely on s75W to avoid the burden of preparing a fresh DA if it wants to mine coal at this site in 2018.

4. The Commission should be aware of "salami development"

The application now before you is no more than a slice of the salami. You cannot yet see the whole picture although you may be able to glimpse parts of it in MACH's Responses to Submissions where it refers to work it already anticipates undertaking after 2026 and out to 2038.

It seems probable that more applications to extend the life of this mine must follow in the near future because, for example:

(a) mining which is fully completed (including rehabilitation) within the short extension period now sought could not possibly justify the capital investment made so recently; and

(b) there will be no means of lawfully transporting coal from site after 2021 in the absence of a further approved modification of the 1999 consent.

To further illustrate this, we draw the Commission's attention to Mr White's presentation and, in particular, his conclusion that MACH's production targets for the (short) extended life of the mine cannot be achieved with the equipment identified.

Either more equipment will be required (reducing profit and generating more dust and noise) or the length of the extension sought is patently too short and a consent authority will be faced with another extension application before this extension expires.

5. Private agreements are no substitute for proper, public environmental assessment

The DPE say that a recent Deed of Agreement which MACH and BMC have entered into has resolved all of BMC's financial concerns. We asked to see this Deed: **Appendix 4**.

Regrettably, it is impossible for you or us to test the DPE's conclusion because, as we are now told, that Deed must remain confidential to its parties: **Appendix 5**.

How, one might ask, is the objective of providing "increased opportunity for community participation in environmental planning and assessment"[1] achieved here?

Regardless of any financial settlement that may have been agreed between these two competitors, the physical and environmental facts remain largely unaltered.

As BMC itself said before reaching an agreement with MACH, the IPC cannot, in determining this application, rely upon "private agreements" which are susceptible to change or non-performance.[2]

6. This application fails its own merit test

The authors of the 1997 EIS underpinning the 1999 consent concluded that:

> "*the project is justified because the social and economic benefits exceed the environmental costs*"[3]

[1] *Environmental Planning and Assessment Act 1979* (NSW), s1.3(j).
[2] See pp12-13 of 14 July 2017 BMC submission to DPE: see Appendix 1.
[3] Coal and Allied Environmental Impact Statement, September 1997, 'Executive Summary', S.8.

In undertaking its own balancing exercise, the Commission must assess the economic and social costs and benefits of the form of mine currently proposed by MACH and not one that might exist in future in reliance upon further as yet unapproved or unmade modifications. You must take this application as it is.

Advanced as a "modification", MACH's application relies heavily on work done in 1997. Apart from the legal, factual and physical staleness of that work, there is no analysis of the key costs and benefits in those old assessments – *they consist instead of mere assertion about royalties and employment.* Tellingly, there was no consideration then (or now) of the other obvious social and economic factors created by a new mine, especially one in proximity to so many others and so close to Muswellbrook itself.

The reviews undertaken at the request of the HTBA by Mr White (mining), Marsden Jacobs (economic issues) and Mr Wright (visual impacts) highlight the deficiencies in the work relied upon by MACH in asserting any overaching socio-economic benefit. They instead throw up serious questions about whether this mine will generate *any* of the benefits claimed by its new owners.

The socio-economic case for the mine is dubious even *before* it is required to be balanced against the wide ranging adverse impacts which will inevitably be suffered by the surrounding environment.

Taken together, the expert reviews of OD Hydrology (water), Stephenson (air quality), GML (heritage) and Arup (noise) describe inadequacies, errors, overstatements and omissions which riddle the work on which MACH and the DPE rely.

The Commission can have little or no confidence in that work. Whilst this may be a common form of criticism levelled by objectors at unpopular or controversial projects, in this case, however, the Commission is also invited to consider how the expert reviews procured by the HTBA identify in broad outline how this new mine will adversely affect the local and regional environment and the non-mining economy it still sustains.

The DPE's EAR simply parrots the proponent's assertions and sweeps aside concerns about unassessed and unacknowledged cumulative impacts with the usual balm of "strict conditions". The EAR offers no analysis and no meaningful assessment for your benefit.

Cumulative impacts

That there has been no attempt by MACH or the DPE to assess the cumulative impacts of this proposal should be of real concern to the Commission. The authors of the 1997 EIS for the original proposal cited the 1997 report, *Upper Hunter Cumulative Impact Study and Action Strategy*, prepared by the Department of Urban Affairs and Planning (now the DPE): **Appendix 6**.

Remarkably, that report was not referred to by the DPE in its EAR. Instead, when the HTBA sought a copy (**Appendix 7**), it was told by the DPE that it would only be given to the Commission if it sought a copy: see **Appendix 5**

Unsurprisingly, the report demonstrates that as long ago as 1997 DUAP (DPE) considered it important to consider environmental and social **impacts other than on a "project by project" basis:**

> *The Upper Hunter Cumulative Impact Study is an important contribution to the practical application and development of cumulative impact assessment techniques and to the understanding of cumulative impacts arising from land use practices and land use change in the Upper Hunter. The study makes an important contribution to the public knowledge of environmental interactions occurring within the area and achieves a substantive first step in what is seen as an ongoing process in regard to planning, environmental assessment, consultation, monitoring, improved data base, land management, educational and research activities within the study area* ***to achieve improved environmental outcomes*****.**[4] **(Emphasis added).**

[4] *Ibid,* p65.

Since 1997 there has of course been very substantial additional development of coal mines in close proximity to Muswellbrook. This fact only reinforces the critical importance of consent authorities having reliable cumulative data available to them in assessing new projects the operation of which will further add to that pre-existing environmental baseline.

In our view, it would be entirely legally unsafe for the Commission to determine this matter (assuming it considers it has a competent application before it) without a reliable cumulative impact assessment.

7. Conclusions

We submit that the Commission should find 5 things:

1.That this is in truth and at law an application for a new, greenfields open cut coal mine disguised as a modification to an old consent granted for a mine *materially different* from the one now proposed. All that remains today is an approval kept in legal formaldahyde for a generation while our laws and our social views have all evolved.

You have been offered no meaningful assessment of the impacts of this new form of mine because MACH ask you to simply accept the studies and reports procured by Coal and Allied over 20 years ago for a very different form of mine.

2. That the mine which approval of this application will permit bears little or no resemblance to the approval issued in 1999 and that, as a consent authority considering such an application, you have no power to allow a “modification” which will produce something so different.

3. That the public interest and the objects of our State’s planning laws are best served by requiring this proponent to lodge a full, new SSD DA, rather than

permitting it to proceed with a small part of a larger development in reliance on the very last rays of light given off by the sunset of Part 3A. To do otherwise would deny any meaning to the attainment of the ESD principal of inter-generational equity.

Any new DA would properly oblige the proponent (and the DPE) to assess the socio-economic costs and benefits of the new mine against contemporary laws[5] and contemporary views about exploiting fossil fuels. (This is, after all, a business now publicly abandoned by the parent of the original beneficiary of the 1999 consent.)

4. That even if the Commission were to decide that this application is somehow legally competent because s75W has been properly invoked (which we submit is not correct), any reasonable analysis of the material on which MACH relies (and which the DPE uncritically endorses) would lead you to conclude that that material is unreliable.

You must have a ***very high degree of confidence*** in that material if you are to undertake a properly calibrated balancing exercise where it is undeniable that this new mine will cause long term harm to the local and regional environment and the sustainable non-mining businesses it supports.

5. That any reasonable examination of the adverse impacts which this new mine will visit on water resources, human health, heritage, and the sustainable rural economy in this region must lead you to reject this application on its merits.

[5] The new or amended NSW and Federal legislation which could apply to a new mine for which consent is sought in 2018 are listed in **Appendix 8**

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Appendix 8

NSW Legislation

Aboriginal Land Rights Act 1983 – subject to *Aboriginal Land Rights Amendment Act 1995; 2001; 2006; 2009; 2013; 2014*
Biodiversity Conservation Act 2016 (NSW)
Biodiversity Conservation (Savings and Transitional) Regulation 2017 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Environmental Planning and Assessment Regulation 2000 (NSW)
Environmental Trust Act 1998 (NSW)
Fisheries Management Act 1994 (NSW)
Forestry Act 2012 (NSW)
Heritage Act 1977 (NSW) – subject to *Heritage Amendment Act 1996*; *1998*; *2001*; *2009*; *2011*
Marine Estate Management Act 2014 (NSW) – (in relation to mining in marine parks and aquatic reserves)
Mining Act 1992 (NSW)
Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Act 2015
National Parks and Wildlife Act 1974 (NSW) – subject to very numerous amendments since 1992
National Parks and Wildlife Regulation 2009 (NSW)
Native Title (New South Wales) Act 1994
Natural Resources Commission Act 2003
Protection of the Environment Operations Act 1997 (NSW)
Protection of the Environment Operations (Clean Air) Regulations 2010 (NSW)
Protection of the Environment Operations (General) Regulation 2009 (NSW)
Protection of the Environment Operations (Noise Control) Regulation 2008 (NSW)
Protection of the Environment Operations (Waste) Regulation 2005 (NSW)
Threatened Species Conservation Act 1995 (NSW)
Water Management Act 2000 (NSW)

Commonwealth Legislation

Australian Heritage Council Act 2003 (Cth)
Environment Protection and Biodiversity Conservation Act 1999 (Cth)
National Greenhouse and Energy Reporting Act 2007 (Cth)
Native Title Act 1993 (Cth)
Natural Heritage Trust of Australia Act 1997 (Cth)
Renewable Energy (Electricity) Act 2000 (Cth)