



2nd May 2013

Ms Gabrielle Kibble
Chairperson
Planning Assessment Commission
GPO Box 3415
Sydney NSW 2001



Dear Ms Kibble

Advice on Coalpac Consolidation Project

1. We act for the Blue Mountains Conservation Society ("BMCS"). We are writing on their behalf about the Coalpac Consolidation project ("project"). We understand that the PAC merits review recommended refusal of this project, and as a result there has been an amended proposal submitted by Coalpac that is currently being assessed¹.
2. One of the main concerns outlined in the PAC review was the inadequacy of the offset proposal. In particular Coalpac proposed an off set of fragmented areas requiring extensive rehabilitation work for a single area of high-quality habitat that is part of an area of high quality habitat proposed for reservation by the Office of Environment and Heritage. The PAC also was concerned about the impacts of the mine on Cullen Bullen. In particular, "NSW Health provided the Commission with unequivocal advice that the predicted significant increases in PM10 levels from the project will lead to increased morbidity and mortality in the Cullen Bullen community from respiratory and cardiovascular disease". It decided on balance that the impact of the project outweighed the economic benefit.
3. The issues raised in the PAC review are similar to those examined by the Court in *Bulga Milbrodale Progress Association v Minister for Planning & Ors* [2013] NSWLEC 48. We therefore draw to your attention the important parts of the judgment which could be of considerable assistance. We are concerned that Coalpac has submitted that it is not the role of the PAC to weigh up the impacts and find that the economic benefits are outweighed by the negative impacts. The Court has given clear guidance as to how this exercise should be undertaken in the Bulga case. Preston CJ said:

"The overall conclusion, therefore, is that Warkworth's offset package of direct offsets and other compensatory measures would not adequately compensate for the significant impacts that the Project would have on the extant EECs in the

¹ http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=4332

disturbance area. This is a fundamental matter to be considered in the decision-making process, to which significant weight should be assigned”.

Biodiversity

4. In *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, Preston CJ explained the way in which avoidance, mitigation and offset measures should interact in order to manage the potential adverse impacts of a project:

‘Avoidance and mitigation measures should be the primary strategies for managing the potential adverse impacts of a project. Avoidance and mitigation measures directly reduce the scale and intensity of the potential impacts of a project. Offsets are then used to address the impacts that remain after avoidance and mitigation measures have been put in place...’²

5. This passage makes clear the fact that avoidance and mitigation of adverse impact should take place before a proponent relies on offsets to counter the damage that will be done as a result of the action taking place.
6. The Coalpac Consolidation Project Response to PAC Review Report for Coalpac Pty Ltd³ amends the amount of protection offered for the Significant Pagoda Landform. However, the changes made do not alter the assessment contained in the PAC Review which states:

“The pagodas are considered to be internationally significant geological features some 250 million years old and worthy of total protection. No mining induced damage should be permitted to these features. The Commission recommends that highwall mining in the vicinity of the pagodas be prohibited”⁴.

7. Despite minor changes the open-cut mining will destroy some pagodas, and highwall mining will undercut the majority of pagodas in the Coalpac area and affect the principal gullies in the vicinity of the Significant Pagoda Landform.

Offset strategy

8. In *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48 (Bulga), Preston CJ explained that risk in representing offsets in this manner, having regard to the lack of the species that were actually present on the offset properties.⁵ That case was concerned with an Endangered Ecological Community (EEC) rather than a particular pagoda landscape complex and threatened species, as is the case at hand; however the principle should apply in the same manner regardless. The problem in that case was that although the proponent had asserted that their offset package resulted in an offset ratio of 3.14:1, on actual inspection of the offset properties it was found that very little of the EEC was present on the offset properties, yet the ratio was formulated by looking at the area of land in total

² *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, at [147].

rather than just the land that contained the EEC, when that was done it was found that the offset ratio was in fact 1.2:1.

9. Preston CJ in *Bulga* also noted that an offset which actually contains a certain set of species immediately delivers conservation gains or benefits, but offsets which need to be rehabilitated not only take time to deliver the same degree of benefits as an immediate offset, but also that there are risks that the rehabilitation may not be successful, or if it is, that it may be of a quality which would not deliver the same degree of benefits.⁶

10. Recommendation 55 of the PAC sets out similar concerns in relation to the Coalpac proposal:

"Recommendation 55: The Commission recommends that, until the baseline biodiversity characteristics of the site have been resolved to the satisfaction of OEH, assessment of the adequacy or otherwise of the revised offset package should not proceed. The Commission also recommends that particular attention be given in the assessment to the essential nature of the trade-off being proposed, i.e. it is a proposal designed to exchange a number of fragmented areas that generally require extensive rehabilitation work and are currently not considered suitable for reservation, for a single area of high quality habitat that adjoins other areas of high quality habitat and is already proposed for reservation"

11. The PAC Review also acknowledges that there is strong criticism of offsets in submissions on the EA:

"It is fair to say that submissions on the EA were negative about the offsets package. This included both State and Commonwealth government agencies, special interest groups and individuals. The range of reasons given can be broadly classified as follows: objection to the offset concept in general and its applicability to this project in particular. The argument is essentially that allowing an area of high quality native habitat to be destroyed in exchange for 'protection' of areas of vegetation that are themselves not under threat makes little sense. The Commission would also note that there have been several recent applications to mine areas previously committed as offsets, one of which is currently the subject of proceedings in the NSW Land and Environment Court. Until this issue is settled, 'protection' of offsets must be viewed as a flexible concept."⁷

12. BMCS remains concerned that the revised project has not adequately addressed the biodiversity impacts of the project. While it has proposed some areas to be

³ Coalpac Consolidation Project Response to PAC Review Report for Coalpac Pty Ltd 8 Mar 2013 Pages 11, 16

⁴ NSW Planning Assessment Commission Coalpac Consolidation Project Review: Main Report 14 Dec 2012, Page 154

⁵ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, at [233]-[237].

⁶ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, at [210].

⁷ NSW Planning Assessment Commission Coalpac Consolidation Project Review: Main Report 14 Dec 2012, Page 102.

avoided, there are still major issues associated with the biodiversity impacts of the project.

13. The Coalpac Consolidation Project Response to PAC Review Report for Coalpac Pty Ltd contains a Revised Biodiversity Offset Package in Table 8⁸. This package proposes 8 properties to be used as offsets with varying amounts of cleared land, overall size, proximity to National Parks, similarity of vegetation types, conservation value and proximity to the project area. This would need to be examined carefully and independently to assess whether the new package meets the concerns of the PAC report. On face value it appears to suffer from the same problem which is that of "exchanging fragmented areas requiring extensive rehabilitation work for a single area of high quality habitat adjoining areas of high quality habitat proposed for reservation".
14. More specifically an additional problem with the revised offset plan is the removal of the 1,097 ha Hillcroft Biodiversity Offset Area which was the only Offset containing vegetation classes and threatened flora species corresponding to the threatened vegetation classes that will be lost, including critically endangered Grassy Box Woodland, *Eucalyptus cannonii* (Vulnerable) and *Persoonia marginate* (Vulnerable).
15. In summary, any loss of a Critically Endangered community is a substantial loss, and cannot be "offset" because there is simply not enough Grassy Box EEC (or Tablelands Frost Hollow Grassy Woodlands EEC) left to replace it. By allowing this projects and others to rely on offsets to preserve biodiversity there will be a substantial cumulative impact upon Endangered EEC's which according to law require the highest possible level of protection.

Social impacts of the project

16. The Bulga judgment also deals at length with a number of concerns the local residents had about an existing mine operation and the noise, dust and social impacts of the continued mining. It may also be of considerable use in providing guidance about whether the noise and dust impacts of the Coalpac proposal are such that the project cannot be appropriately conditioned and therefore ought to be refused. Again in this case, the town of Cullen Bullen is very close to the proposed open cut mine. We are of the view that the comments made by the Court on social impacts are important considerations in this case. These health matters have not been addressed.

Economic benefits

17. BMCS are also concerned about the comments in Coalpac's response to the PAC about the economic issues associated with the coal to be mined, and the provision of coal to the electricity industry. In particular the Treasury has made comments about the impact of the lack of approval of Coalpac on the price of electricity. It is important to note that the cost of electricity and the relationship

⁸ Coalpac Consolidation Project Response to PAC Review Report for Coalpac Pty Ltd 8 Mar 2013 Page 59

with coal is a complex issue and determined by a competitive coal market as well as other regulatory structures. The cost of alternatives to coal fired electricity are fast changing and renewables are now competing with the cost of coal fired electricity. Demand for electricity is also fast declining due to the uptake of solar panels in the residential sector. We are of the view that the PAC should also carefully consider the comments of the Chief Justice in the Bulga case in determining how the economic benefits of coal projects and in particular the job impacts have been miscalculated. It is not appropriate to ignore the environmental and social impacts of a project merely because there is some economic benefit of a project.

18. If you have any further questions please do not hesitate to contact us.

Yours sincerely,
EDO NSW



Kirsty Ruddock
Principal Solicitor