



**BYLONG COAL**

**KEPCO BYLONG AUSTRALIA**

Suite 701, 99 Walker St  
North Sydney NSW 2060

13 August 2019

**BY EMAIL:** [samantha.mclean@ipcn.nsw.gov.au](mailto:samantha.mclean@ipcn.nsw.gov.au)

Samantha McLean  
Executive Director  
Independent Planning Commission NSW Secretariat  
Level 3, 201 Elizabeth Street  
Sydney NSW 2000

Dear Ms McLean

**Bylong Coal Project SSD 14\_6367 – Gateway Certificate under clause 17H of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)**

1. We refer to the statement dated 27 July 2019 released by the Independent Planning Commission (**IPC**) which indicated that the IPC would accept comments from interested individuals and/or groups about the Gateway Certificate for the Bylong Coal Project (**Project**) until 5pm on 2 August 2019. It is also noted that the IPC granted an extension to the EDO to provide its comments until 1pm on 5 August 2019.
2. KEPCO has now had the opportunity to review the comments and hereby provides the following comments in respect of some of the public comments for the IPC's consideration.

**Bylong Valley Protection Alliance**

3. The Bylong Valley Protection Alliance provided its comments by way of the following:
  - (a) A letter dated 5 August 2019 from its solicitor, EDO NSW (**EDO Letter**).
  - (b) A memorandum of advice dated 5 August 2019 from its barrister, Tim Robertson SC (**Robertson Advice**).
4. KEPCO responds to these comments as follows:
  - (a) As to paragraph 4(a) of the EDO Letter, it is suggested that it was incumbent on KEPCO to be aware of the period of currency of the Gateway Certificate in response to paragraph 2 of KEPCO's letter dated 23 July 2019 (**KEPCO Letter**):
    - (i) KEPCO was aware of its obligation to hold a current Gateway Certificate as at the date of lodgement of the State significant development (**SSD**) application for the Project and complied with that obligation.
    - (ii) The disappointment expressed in paragraph 2 of the KEPCO Letter arose as a result of the delay between 15 April 2019 (when the Gateway Certificate purportedly 'expired') and 18 July 2019 (when KEPCO was first advised of the IPC's preliminary view) – being some 94 days. For obvious reasons, the timing of the forming and notification of the IPC's preliminary view is completely outside of KEPCO's control. It would be misguided to suggest otherwise.

- (iii) Further, at paragraph 4 of the KEPCO Letter, KEPCO says that the IPC had ample time to determine the SSD application for the Project having regard to the length of time between:
  - (A) The referral of the SSD application for the Project to the IPC for determination on 4 October 2018 to 15 April 2019 – being some 193 days.
  - (B) The public meeting for the Project on 7 November 2018 to 15 April 2019 – being some 156 days.
- (b) As to paragraph 4(b) of the EDO Letter, it is suggested that there is no authority to decide an application as expeditiously as possible:
  - (i) The principle relied on by KEPCO is well established: see *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at [312]-[313].
  - (ii) KEPCO maintains its position that the IPC has a statutory duty to determine the application as expeditiously as possible and, having regard to the matters raised in paragraph 4(a), KEPCO calls into question the IPC's fulfilment of that statutory duty.
- (c) As to the Robertson Advice:
  - (i) The majority of the advice addresses the wrong question because it addresses whether a 'current' certificate remains valid rather than the issue of when there must be a 'current' certificate.
  - (ii) It does not address the unanimous and authoritative NSW Court of Appeal decision on this issue in *Cranky Rock Road Action Group Inc v Cowra Shire Council* (2006) 150 LGERA 81 at [35] (***Cranky Rock Road***) and, therefore, the opinion cannot be accepted when he has not considered the central authority on the point.

#### Comments of Other Groups

5. The Lock the Gate Alliance, the NSW Farmers Association and the Hunter Thoroughbred Breeders Association made comments in relation to the Gateway Certificate for the Project and the KEPCO Letter.
6. KEPCO responds to these comments as follows:
  - (a) The issue before the IPC is the construction of the *Environmental Planning and Assessment Act 1979* (NSW), the *Environmental Planning and Assessment Regulation 2000* (NSW) and *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*.
  - (b) A number of the submissions address matters that cannot possibly be relevant to construction. For example:
    - (i) The Lock the Gate Alliance submission addresses the topics of responsibility for delay, the reasons for adopting a 5 year timeframe in this case and the importance of obtaining a renewed certificate in this case.
    - (ii) The NSW Farmers Association makes submissions as to the effect of the project on farmland.
    - (iii) The Hunter Thoroughbred Breeders Association suggests that KEPCO bears part of the responsibility for delays in the process.

None of those matters can properly bear on the issue of construction which the IPC is considering.
  - (c) None of these submissions address *Cranky Rock Road*.

- (d) The merits issues raised in the submissions are capable of being addressed (and have previously been addressed) as part of the assessment process.

We trust that this letter provides the IPC with the further information required for it to come to the final view that it has the power to proceed with its determination of the SSD application for the Project.

Please do not hesitate to contact me on [REDACTED] if you wish to discuss this matter further.

Yours sincerely



William (Bill) Vatovec  
Chief Operating Officer  
KEPCO Australia Pty Ltd