

5 August 2019

Gordon Kirkby  
Chair of Bylong Coal Project IPC Panel  
Independent Planning Commission

**By email: [ipcn@ipcn.nsw.gov.au](mailto:ipcn@ipcn.nsw.gov.au)**

Dear Mr Kirkby

**Bylong Coal Project SSD 14\_6367 (“Project”) – Conditional Gateway Certificate**

1. We act for the Bylong Valley Protection Alliance (**BVPA**).
2. We refer to the letter from Anna Summerhayes, Acting Executive Director – Secretariat, dated 1 August 2019, in which Ms Summerhayes stated that our client had been granted an extension to make a submission, until 1pm today, Monday 5 August 2019, in respect to the expired Gateway Certificate.
3. In this regard, please find **attached** a memorandum of advice prepared by Tim Robertson SC. Our client notes that Mr Robertson has concluded that a current Gateway Certificate is required at the time of the determination of the Project.
4. We are also instructed to respond to the following points raised by the Proponent in its cover letter to the IPC dated 23 July 2019 (**Proponent’s Letter**):
  - a. As to paragraph [2] of the Proponent’s Letter, our client notes that the Gateway Certificate clearly indicates that it will be current for a period of 5 years from 15 April 2014. Accordingly, our client considers that it was incumbent on the Proponent, as the holder of the Gateway Certificate, to be aware of the period of currency of the Gateway Certificate.
  - b. As to paragraph [3] of the Proponent’s Letter, our client is not aware of any duty at law that requires the IPC to determine an SSD application ‘as expeditiously as possible’ or to determine the Project application prior to the expiry of the Gateway Certificate.
5. Please contact me on (02) 9262 6989 if you would like to discuss this letter.

Yours sincerely,  
**EDO NSW**



Brendan Dobbie  
Acting Principal Solicitor.

Enclosure: Memorandum of Advice of Tim Robertson SC  
Our Ref: 1522462

## BYLONG VALLEY COAL PROJECT

### MEMORANDUM OF ADVICE

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1. The Independent Planning Commission (the IPC) is assessing a State Significant Development application for the Bylong Coal Project (the Project). A conditional gateway certificate has been issued for the project. It expired on 15 April 2019. The IPC has raised the question whether it can approve the DA, if it is minded to do so, without a current gateway certificate.
2. I have concluded that the certificate must be current when determining the DA: s 68(1), *Interpretation Act 1987*. Its function is not exhausted upon the lodgement of a DA, but it has a continuing role to play in the process of environmental assessment, public consultation and consideration of the DA.
3. On 15 April 2014, the Gateway Panel issued a conditional gateway certificate for the Bylong Coal Project. The certificate was issued under *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (the Mining SEPP). The SEPP does not impose any obligation on an applicant for development consent to obtain a gateway certificate. Rather, cl 50A of the *Environmental Planning and Assessment Regulation (2000)* (the EPAR) provides that a development application (DA) for mining on land shown on the Strategic Agricultural Land Map (the Map) must be accompanied by a current gateway certificate in respect of the proposed development where the Map shows the land as critical industry cluster land (CIC land): s 50A(2)(a). Where CIC land is not proposed to be developed but the subject land is on the Map, the DA must be accompanied by either a current gateway certificate, or a site verification certificate certifying that the land is not biophysical strategic agricultural land (BSAL): cl 50A(2)(b).
4. There are three concepts involved in this provision. First, the Map has defined strategic agricultural land by adoption under cl 5A of the Mining

SEPP. Large areas of rural land which have been classified as productive to highly productive under the State's rural land classification system have been so mapped. The second concept is "critical industry cluster land". This is a subset of strategic agricultural land within the map and reflects a judgment by the State about the importance of industries wholly or partly dependent on preserving agricultural land (such as horse breeding and vineyards). The mapping of strategic agricultural land or critical industry clusters did not depend upon any statutory criteria: rather, the areas were identified some years ago according to criteria developed within the Departments of Planning and Primary Industries, in consultation with landholders and interest groups. The outcome of that non-statutory process was the creation of the Map, that was then adopted by the Mining SEPP, which now controls the circumstances in which a gateway certificate is necessary for a mining proposal. The third concept is BSAL, which is land identified as such on the map or any other land that is certified by a site verification certificate as being BSAL: cl 3(2), Mining SEPP. A determination whether it is or is not BSAL must be made having regard to criteria set out in the site verification protocol: cl 17D(2) Mining SEPP. The protocol outlines the criteria for identifying BSAL, which it describes as:

*"... land with a rare combination of natural resources highly suitable for agriculture. These lands intrinsically have the best quality land forms, soil and water resources which are naturally capable of sustaining high levels of productivity and require minimal management practices to maintain this high quality. BSAL is able to be used sustainably for intents and purposes such as cultivation. Such land is inherently fertile and generally lacks significant biophysical constraints." (Interim protocol for site verification and mapping of BSAL, 2013, p. 2)*

5. Clause 50A therefore applies to mining DAs that involve land on the Map as follows:
  - a. where CIC land, a current gateway certificate must accompany the DA;  
or

- b. where not on CIC land, a current gateway certificate must accompany the DA unless
  - c. a site verification certificate verifies that the land is not BSAL.
6. It is apparent from the conditional gateway certificate for this project that the proposal involved the removal of almost 200 hectares of BSAL, and almost 2,000 hectares within the project area was equine CIC land: Schedule 2, certificate. In those circumstances cl 50A(2) required the DA to be accompanied by a current gateway certificate.
7. The Gateway Panel comprises members with expertise in any one or more disciplines of agricultural science, hydrogeology or mining and petroleum development: cl 17P(2). Its members are appointed not by the Minister or Department, but by the IPC, as a subcommittee of the Commission: cl 17N(1), 17P(1). It is apparent that the panel is both independent (of the proponent as well as the Government) and expert in the disciplines of significance for assessing the impacts of proposed mining on important agricultural land.
8. It is plainly a purpose of the Mining SEPP to ensure that the recommendations of this expert panel are considered by the consent authority (cl 17B(1)(b)(i) and (iii)) to recognise the importance of agricultural resources and ensure protection of strategic agricultural land and water resources: cl 2(c), (d)(i) and (ii).
9. The gateway certificate is unusual, in that it does not have the characteristics of a consent or approval which may be given or withheld according to statutory criteria, or at the discretion of the panel. If an application is made for a certificate, it must be issued. It can only be rejected for failure to provide information on request: cl 17I(4); cl 17J(3)(a).
10. The gateway process assesses the project according to specified criteria by an expert panel which then reports in the certificate whether the project

meets or fails to meet that criteria. Expert consideration is given to the impact of the proposal upon vitally important State objectives, before the DA process is commenced, so that the panel's decision and recommendations can be considered at five stages of the DA process:

- a. In preparing the environmental assessment requirements (EARs) for State significant development, the Planning Secretary must address any recommendations of the gateway panel set out in the certificate, and if the certificate was issued by force of cl 17I(3) (a deemed certificate), the advice of the panel must be sought about the proposal: EPAR, Schedule 2.3(4A); and if the gateway certificate is issued after the Planning Secretary has issued EARs for the proposal, he or she must have regard to the recommendations of the Gateway Panel set out in the gateway certificate and modify the requirements: EPAR, Schedule 2.3(4B).
- b. In preparing the EIS for State significant development, the EIS must comply with any environmental assessment requirements, including those related to the gateway certificate: EPAR, Schedule 2.3(8); s 4.12(8), EPA Act.
- c. For the purposes of public consultation when the DA and EIS are exhibited: EPAR, cl 85B and if the Planning Secretary prepares an environmental assessment report: cl 85B(d).
- d. When considering submissions made during the submission period: cl 85A(1), cl 85B(c); s 4.15(1)(d), s 4.40, EPA Act.
- e. The consent authority, in determining the DA, must consider any recommendations set out in the gateway certificate, and whether those recommendations have or have not been addressed and, if addressed, the manner in which those recommendations have been addressed: cl 17B(1)(b)(i); (2).

11. The gateway certificate may be issued without conditions, if it meets the relevant criteria in cl 17H(4) of the Mining SEPP, or conditionally, if it does not: cl 17H(2). Importantly, cl 17H(2) provides that the certificate must include the Gateway Panel's reasons for the formation of the opinions stated in the certificate as to whether it meets the relevant criteria, and the reasons for making any recommendations included in the certificate. In other words, the certificate itself comprises not merely the opinion concerning the criteria, but the recommendations (if any) and the reasons for making them. Where a conditional gateway certificate is issued, it must also include recommendations by the Panel to address the development's failure to meet the relevant criteria and it may also include recommendations concerning further studies to be undertaken: cl 17H(3).
12. The gateway certificate is a sophisticated device to ensure that decision makers for mining projects are fully informed of the consequences of the project for important agricultural land and industries. This DA involves both BSAL and CIC land. Several criteria depend upon exogenous events, such as other developments which reduce the area of BSAL or cause changes to groundwater quantity or quality or upon the availability of support services, transport routes and infrastructure: cl 17H(4). In forming its opinion, the Panel must also have regard to the duration of any impact: cl 17H(5)(a).
13. Clause 17K provides that a gateway certificate remains current for a period of five years or any shorter periods specified in the certificate after the date on which it is issued by the Panel. The reason for this provision is not difficult to discern, in light of the matters to which I have just referred. In the space of five years significant changes, by dint of exogenous events, may occur both to the land and waters affected by the project and to surrounding infrastructure. In addition, a recommendation by the Panel to conduct further studies under cl 17H(3) may, if carried out, result in the discovery of facts that change the assumptions on which the Panel evaluated the relevant criteria. Over time, the certificate may become stale, its recommendations

may be misleading or its evaluation of the relevant criteria may be falsified by further studies. Given that the certificate's operation is intended to inform the Planning Secretary, in fixing the environmental requirements for the project, EIS preparation, public consultation as well as evaluation by the consent authority, the purpose of imposing a duration requirement on the certificate was to ensure that it was a reliable indicator of the impact of the proposal and the issues that needed to be addressed in modifying those impacts: see cl 17H(5)(b). The requirement that the panel have regard to the duration of the impacts referred to in the relevant criteria (cl 17H(5)(a)) emphasises the fact that the impacts may change over time, making a re-assessment necessary. The period of five years was no doubt a pragmatic choice by the Governor when making the SEPP to ensure that the certificate remained appropriate, having regard to the knowledge at the time, to the particular project.

14. The answer to the question on which I am asked to advise is not to be found in cl 50A of the EPAR. That provision imposes a precondition on DAs for mining projects involving land of this class: the DA is not complete or effective until the condition is satisfied: *Al Maha Pty Ltd v Hujan Investments Pty Ltd* (2018) 233 LGERA 170 at [95]-[97].
15. However, unlike the position where owner's consent to the making of the DA is not provided, a gateway certificate has a substantive function in processing the DA. The absence of an owner's consent is a technical impediment to the grant of a development consent but it is not otherwise a matter that is to be taken into account in evaluating whether consent should be granted. It has no normative function. On the contrary, a gateway certificate is an important and, indeed, essential concomitant of the environmental assessment, consultation and determination steps. The DA is not complete or effective until the certificate is provided, but that is not the end of the story, only its beginning. The Mining SEPP imposes obligatory considerations on the consent authority, by reference to the certificate. That

must mean a current certificate, not one that has expired. A certificate that has expired is not a certificate at all (see below). It could not possibly enable the carrying out of the obligatory functions of the consent authority under cl 17B(1)(b) and (2) of the Mining SEPP and s 4.15(1)(a) of the EPA Act, which requires consideration of the Mining SEPP.

16. The expiry of a certificate is analogous to the repeal of an Act or Regulation. At common law, the effect of repealing an Act is to obliterate it as if it had never been passed and it must be considered as a law that never existed except for the purpose of actions which were commenced and concluded while it was an existing law: *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73 at 105, 106, per Dixon J. This doctrine was extended to regulations in *South Australian Harbours Board v South Australian Gas Company* (1934) 51 CLR 485:

*“The revocation of a regulation has, in the absence of some statutory provision to the contrary, the same effect as was produced at common law by the repeal of a statute. I right conferred or an obligation imposed by a statute did not survive its repeal.”* (at 498 per Dixon J)

I do not think that a legislative or administrative instrument such as the certificate that exhausts from expiry of time is in any different position to legislation: although matters concluded under it when it was alive may not be disturbed, it has no force or effect once it expires.

17. Accordingly, although the lodgement of the DA for the mining project was lawful because it was accompanied then by a current gateway certificate, the DA is no longer accompanied by such a certificate. More importantly, the DA cannot be determined because the certificate has expired and consideration of its recommendations is obligatory.
18. This conclusion is reinforced by s 68(1) of the *Interpretation Act 1987*, which provides:

*“In any Act or instrument, reference to some other Act or instrument extends to the other Act or instrument, as in force for the time being.”*



“Instrument” is defined to mean an instrument (included a statutory rule or environmental planning instrument) made under an Act, and includes an instrument made under any such instrument: s 3(1), *Interpretation Act 1987*. The gateway certificate is made under an environmental planning instrument and is therefore an instrument within the meaning of s 68(1).

19. The Mining SEPP is thus an instrument which refers to another instrument, the gateway certificate. The EPAR is an instrument, which refers to another instrument, the gateway certificate. In both cases, the reference extends to the gateway certificate “as in force for the time being”. Once the gateway certificate expires, it is no longer in force. The references to the gateway certificate in both the EPAR and the Mining SEPP are to a certificate in force.
20. Section 68(1) resolves a long standing controversy in the law as to whether an Act is always speaking, or ambulatory: *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531. If a provision is to be construed only as applying at the date on which a particular instrument was made and not on the date of its application, then that must usually be expressed: *Hore v Albury Radio Taxis Co-op Society Ltd* (2002) 56 NSWLR 210 at [44]-[45]. There is nothing in the Mining SEPP to suggest a contrary intention. Rather, there are provisions which could only be given sensible operation if the certificate remained in force when its provisions were applied: see e.g. cl 17B.
21. There are numerous cases dealing with consents or approvals that are necessary before an application can be lodged to set in train a decision making process. Many of them are summarised in *Raymond v Northern Territory* (2004) 139 FCR 493. Sir Frederick Jordan said in *New South Wales Trotting Club Ltd v Council of the Municipality of Glebe* (1937) 37 SR(NSW) 288 that once consent was given to a particular process (in that case, the closing of a public road), the entity giving consent would be defunct

unless it had other functions, which he described as “an acting party” (307). If it did not, the consent once given could not be withdrawn. A similar view was taken by the High Court in the trilogy of cases under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which are referred to in *Raymond*. In none of those cases, however, did the consent or approval have any operation beyond opening the gateway to a decision making process. In this case the “gateway” certificate supplies that function, but much more besides.

22. On its literal construction, cl 50A requires a current certificate to accompany a DA and not merely its lodgement. In other words, the DA remains in operation until it is determined by the consent authority. Once the certificate expires, on one view, cl 50A would deprive the consent authority of power to determine the DA, as it is incomplete or ineffective: *Al Maha*. For the reasons I have explained, the certificate has a much wider operation, during which it must be in force to be effective.
23. Finally, I have been briefed with an advice by Mr Lancaster SC and Mr Hume dated 2 June 2019 which reaches a different albeit somewhat tentative conclusion. I disagree with the advice. First, the gateway certificate is not analogous to owner’s consent. Second, when cl 17B of the Mining SEPP is read together with s 68(1) of the *Interpretation Act* (which is not referred to in the advice), it is clear that the gateway certificate must be current during the consideration by the consent authority of the DA. Third, the suggestions that the recommendations of the certificate are not part of the certificate itself are wrong. Fourth, no reference is made to the many provisions of the Mining SEPP where the duration of the certificate is important. Fifth, there is nothing impractical or absurd in requiring a fundamentally important step in the process of assessing an application to reference information which is up to date. Indeed, failure on the part of the decision maker to reference such material may be a ground for invalidity of the decision: *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* (2006) 69 NSWLR 156 at [161]-[173]; *Minister for Aboriginal Affairs*

*v Peko-Wallsend Pty Ltd* (1986) 162 CLR 24 at 43-44. The currency of the certificate should avoid that problem. Nothing in the advice causes me to alter my views.

24. It follows that there is no power to determine the DA in the absence of a current gateway certificate.



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**T F ROBERTSON SC**

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5 August 2019