

7 March 2019

The Chair
Independent Planning Commission of New South Wales
Level 3, 201 Elizabeth Street
Sydney NSW 2000

By email to: ipcn@ipcn.nsw.gov.au

Dear Chair

Bylong Coal Project (SSD 6367)

1. We act for the Lock the Gate Alliance in relation to this matter.
2. We refer to our letters to you of 7 December 2018 and 13 February 2019, and to our client's letter to you of 22 November 2018. We note that we are yet to receive any acknowledgment from the IPCN regarding our 13 February 2019 letter.

Significant new information about the Project's impacts

3. In the meantime, it has come to our client's attention that significant new information from KEPCO about the impacts of the Bylong Coal Project has recently been published on the IPCN website. This includes in particular information from KEPCO about:
 - (a) potential impacts on the Greater Blue Mountains World Heritage Area ("GBMWhA").
 - (b) Scope 3 greenhouse gas emissions.
 - (c) the application of the Aquifer Interference Policy, and water issues more generally.

We make further comments about each of these matters below.

4. We also note that the IPCN itself has requested additional information, namely
 - (a) a review of groundwater assessment documentation.

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- (b) a revised peer review of the economic assessment and cost benefit analysis of the revised Project.
- (c) a request to the Department of Planning and Environment for additional information in relation to groundwater modelling and potential groundwater impacts from the project.

As of today, only the revised peer review has been published on the IPCN website.

- 5. To the best of our client's knowledge, stakeholders have not been advised of the fact that the new information was submitted to the IPCN or requested from the Department; nor have they been invited to comment upon it. The new information was not available to be addressed in the Department's Final Assessment report, by the participants in public meetings or by those who provided written submission.
- 6. Given the absence of a merit appeal process, our client is particularly concerned that this new information and its assessment by the Department will not be able to be scrutinised by the community. This would in turn significantly undermine confidence in the decision-making process.¹
- 7. Our client requests that all parties who have already made a submission or appeared at the public meeting be given an opportunity to make further written submissions in relation to this new information.
- 8. Our client instructs us that it would be able to make further submissions within 14 days of receiving an invitation from the IPCN to do so, but we do not know whether other stakeholders are in the same position.
- 9. In the interim, our client has instructed us to provide you with the following preliminary comments on the new information.

GBMWA

- 10. KEPCO's new information in relation to the GBMWA is incomplete. Consideration is only given to *"the flora biodiversity values within the area"*, on the basis that other values *"were not recognised at the time of listing by UNESCO as contributing to world heritage significance."*
- 11. The statement of Outstanding Universal Value for the GBMWA² recognises many other values beyond *"flora biodiversity"*.
- 12. These include the *"geology and geomorphology of the property"* as providing *"the physical conditions and visual backdrop to support these outstanding biological values"* and also refers to habitats supporting *"more than 400 vertebrate taxa"*, as well as *"large areas of accessible wilderness"*. It points out that the site's biodiversity values are complemented by others including *"indigenous and post-European settlement cultural values, geodiversity, water production, recreation and natural beauty"*.

¹ In the case of the IPCN, this role is outlined in general terms as follows: *"The Commission plays an important role in strengthening transparency and independence in the decision-making processes for major development and land use planning in NSW. It provides an additional level of scrutiny in the provision of independent expert advice or determination of major development applications, particularly where: • There is a high level of community interest; • A political donation has been made; • A potential or perceived conflict of interest exists; or • Complex environmental issues arise."* (IPCN Public meeting guidelines, page 1)

² <https://whc.unesco.org/en/list/917/>

13. KEPCO has also failed to consider Tarwyn Park and its setting in the context of the contribution that it makes to the scenic values of the GBMWA.³ Despite the finding by the Commission in its July 2017 review of the project that "further investigation of Aboriginal cultural heritage matters is required"⁴ this investigation has not been undertaken either.
14. Our client says that a thorough and detailed assessment of the impacts of the Project on the full range of GBMWA's Outstanding Heritage Values is still required.
15. Our client also requests that a determination of the Project not be made until the Commonwealth has finalised its reconsideration under section 78A of the *Environment Protection and Biodiversity Conservation Act* and determined whether World Heritage will be listed as a controlling provision for this development for the purposes of that Act.

Scope 3 Greenhouse Gas Emissions

16. KEPCO's new submission on this topic is dated 5 March 2019, and was said to have been volunteered in light of the *Gloucester Resources* judgment.⁵ The significance of that judgment in the context of the determination of this Project is addressed in our 13 February 2019 letter.
17. KEPCO appears to take a view of the relevance of the *NSW Climate Change Policy Framework 2016* which is at odds with Chief Justice Preston.⁶ Instead, the policy is effectively dismissed in the new submission on the basis that the CCPF "is not directed at private enterprises and does not provide any guidance on how development is to be undertaken" (p5).
18. The information in the new submission also fails to address a critical element of Chief Justice Preston's analysis and approach, in that no effort is made to evaluate the GHG emissions of the project within the context of a carbon budget.
19. There are two mitigation elements to the Paris Agreement: the global temperature goals (Article 2.1a) to which all countries have committed, and the national determined commitments each country submits and revises on a five-yearly basis (Article 4). The material provided by KEPCO addresses the contribution of the Bylong coal mine to only one of these elements, the nationally determined commitments, and fails to assess its contribution to a carbon budget consistent with the temperature goals.
20. This in turn precludes the IPCN from assessing the Project in the terms set out in our earlier letter in relation to the *Gloucester Resources* judgment, namely:

After receiving further information, it would then be incumbent upon the IPC to:

7.1 consider whether "the refusal of the project could be seen to make a meaningful contribution to remaining

³ See Hector Abrahams' expert heritage report as provided to IPCN by the Heritage Council of NSW
⁴ Planning Assessment Commission. 25 July 2017. Bylong Coal Project Review Report.
⁵ *Gloucester Resources Ltd v Minister for Planning* [2019] LEC 7.
⁶ See paragraph 4 of our 13 February 2019 letter

within the carbon budget and achieving the long term temperature goal”⁷.

7.2 *otherwise “recommend appropriate measures to avoid, minimise and/or manage significant impacts of the project” in light of the CCPF and the Paris Agreement goals.*

21. Our client has also previously suggested that the IPCN should obtain independent advice in order to assess the Project against the principles of ecologically sustainable development, since this information has not been provided by the Department in either of its assessment reports.

Aquifer Interference Policy (AIP)

22. We refer to our 7 December 2018 letter to you in relation to the lawful application of this policy. KEPCO's new submission is put on this basis:

[I]f there is doubt as to the scope of the AIP, the IPC may wish to assess the Project on the assumption that the minimal impact considerations in the AIP do apply to water supply works, even if they are owned by KEPCO.⁸

23. The new information provided by KEPCO⁹ clarifies that there are in fact:
- (a) 35 registered bores within the alluvium on KEPCO's land which are predicted to be affected by drawdown greater than 2 metres at some time; and
 - (b) a further 17 unregistered bores and 5 bores for the proposed borefield which are predicted to be affected by drawdown greater than 2 metres at some time.
22. Because this exceeds the minimal impact considerations in Table 1 and section 3.2.2 of the AIP, the next level of assessment by the NSW Office of Water is triggered.¹⁰ Ordinarily this would have occurred at a much earlier phase of the assessment of the Project.¹¹ However, and so far as our client is aware:
- (a) KEPCO's 2019 submission is the first time the impact on these water supply works has been considered. It would follow logically that the additional studies and assessment by the NSW Office of Water required by the AIP cannot have been done.
 - (b) neither the new information nor the previous material provided by the proponent or the Department considers the “long-term viability” of these water supply works.
 - (c) although the 2019 submission identifies an expectation on the proponent's part that “any drawdown in water levels will not be permanent and that

⁷ Gloucester Resources at [554]-[555]

⁸ Hansen Bailey “Bylong Response to Submissions in relation to Water” page 12

⁹ Hansen Bailey “Bylong Response to Submissions in relation to Water” page 14

¹⁰ AIP at page 13

¹¹ AIP at page 13 - “Before the Minister provides advice to either the gateway process, the Planning Assessment Commission of the Minister for Planning...”

there will be no adverse impacts post-mining and after the borefield pumps are turned off¹², there is no additional study or body of data to substantiate this.

We would appreciate your early response to the matters raised in this letter, prior to any determination of the Project.

Please also confirm receipt of this letter.

Yours faithfully,
CHALK & BEHRENDT



James Walkley
Director

¹²

Hansen Bailey "Bylong Response to Submissions in relation to Water" page 14