

Timnath Pty Limited

9 April 2019

The Principal Planning Officer  
NSW Independent Planning Commission  
Level 3, 201 Elizabeth Street  
SYDNEY NSW 2000

By e-mail: [diana.mitchell@ipcn.nsw.gov.au](mailto:diana.mitchell@ipcn.nsw.gov.au)

Attention: Ms. Diana Mitchell

**RE: PROPOSED BYLONG COAL PROJECT  
SUBMISSIONS ON "REVIEW OF GROUNDWATER ISSUES" WRITTEN  
BY DR. LLOYD TOWNLEY AND DATED 5 MARCH 2019**

Dear Ms. Mitchell,

**Enclosed** is a copy of a document titled "*Review of Groundwater Issues Associated with the Bylong Project prepared for: Independent Planning Commission NSW by: Dr. Lloyd Townley and dated 5 March 2019*" and, of which, you are no doubt aware ("the report of Dr. Townley").

We have read the report of Dr. Townley in the context of the Proposed Bylong Coal Project and considered the applicable jurisprudence at some length.

**We urge the NSW Independent Planning Commission ("the IPC") to give the report by Dr. Townley no weight in determining the Proposed Bylong Coal Project, as a matter of law.**

Our argument is as follows.

#### **RELEVANT FACTS**

Timnath Pty Limited is the Registered Proprietor of rural land known as "BUDDEN" and located on the Bylong Valley Way, BYLONG NSW 2849 ("Budden").

For over 40 years, Timnath has operated "Budden" as a commercial beef cattle property. Over the last 40 years, we have developed a breeding herd of Angus beef cattle which is well formed, easy to handle and quiet; characteristics which are highly sought after by cattle buyers.

On 11 May 2017 a Public Hearing was held in Mudgee regarding the Proposed Bylong Coal Project ("the hearing"). At the hearing I spoke and was accompanied by Mr. Rick Cook, Manager of "Budden". Mr. Cook is aged 57, has lived in the valley most of his life and has worked on Budden, each working day, for the last 30 years.

At the hearing, each Member of the Commission in attendance was provided with a video, on USB, which contained an interview with Mr. Cook on "Budden" explaining his experience with the water on "Budden" from the Growee River for over 30 years ("the video").

**Enclosed** is a copy of the video.

The video speaks for itself.

In our view, having guaranteed access to water from the Growee River on “Budden” is an issue that requires “...proper, genuine and realistic consideration...” by the IPC<sup>1</sup>.

Our breeding herd is entirely dependent on the groundwater supplied by the Growee River but, without water, cattle start to die in as little as two (2) days.

Compensatory water is no solution if we lose our water from the Growee River. The size and location of “Budden” and the spread of our cattle makes supplying water from a source, other than the Growee River, impractical.

In two (2) days without water our cattle will start to die.

Money is no remedy if our cattle start to die.

Money cannot replace 40 years of careful selective breeding.

**Guaranteed access to water from the Growee River is essential to maintaining our cattle; a herd developed over 40 years of selective breeding.**

Indeed, guaranteed access to water from the Growee River on “Budden” has been an important and relevant issue throughout this Review.

For example, on 27 October 2016, Timnath wrote to Mr. Stephen O’Donoghue, Planning Assessment Commission (as it was then), in response to the submissions made by Hansen Bailey dated 1 July 2016:

At page 2 of 3:

*“...A recurring theme of the Hansen Bailey response is that if, contrary to the assertions by the proponent, the projects groundwater modelling proves not to be accurate the ‘...mitigation measures will be discussed with the landholders...’ which may include ‘...the implementation of ‘mark good provisions’ to compensate for any adverse impacts on neighbouring landholder bores...’ it is patently obvious that such promises are meaningless, at worst, and utterly unenforceable legally, at best.*

*More concerning is the repeated suggesting that, notwithstanding that it is ‘...highly unlikely...’ that such impacts will be experienced, **the proponent refuses to offer any meaningful and enforceable safeguards.** This implies that, notwithstanding the rhetoric, the proponent itself has reservations about the reliability of its groundwater modelling...”*

*(emphasis added)*

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<sup>1</sup> *Khan v Minister for Immigration and Citizenship* (1970) 14 ALD 291 per Gummow J; *Pacific Resources Pty Limited v Wilkinson* (20130 NSWCA 33 per Basten J at [9].

Further at page 3 of 3:

*“...In those circumstances, the Bylong Coal Project should not be further considered or evaluated, **unless and until, the proponent demonstrates the practical effect on surrounding landholders of maximum water use pursuant to the proponent’s water licenses.**”*

***The Company (Timnath) restates the fact that the proponent does not explain from where or by how the proposed additional water will be supplied. The proponent remains silent on this issue despite the Company raising the issue in its earlier submission.***

*It appears that the proponent does intend to pump groundwater in **excess of the modelling as and when required. It is patently obvious that the proponent drawing the maximum water permitted by the proponent’s licenses presents a real risk to the surrounding landholders, which the proponent intends to resolve after the license is granted by ‘make good agreements’. With respect, such ‘make good agreements’ are, at this time, patently uncertain, legally unenforceable and meaningless...**”*  
(emphasis added)

And further (at page 3 of 3):

*“...the response by Hansen Bailey raises **serious concerns with respect to the bona fides of the proponent.** As noted above, notwithstanding the repeated assertions that the risks to water supplies are minimal **Kepeco will not make any commitment to make good agreement which could be conditions of consent approval...**”* (emphasis added)

On 9 January 2017, the then Minister for Planning made a request of the Planning Assessment Commission (now known as the Independent Planning Commission) to: *Planning Assessment Commission, BYLONG PROJECT SSD 6367 REVIEW REPORT, 25 July 2017 at page 35*

*“...1. Carry out a review of the Bylong Coal Project, and:*

- a) **Consider the EIS for the project, additional information provided to the Department, all issues raised in public and agency submissions, and any relevant information provided during the course of the review;***
- b) Assess the merits of the project as a whole having regard to all relevant NSW Government policies and paying particular attention to:*
  - **all impacts on the water and agricultural resources of the Bylong Valley;***
  - the impacts on the Bylong Valley and surrounds;*
  - impacts on heritage values associated with the Tarwyn Park property, including the natural sequence farming; and*
  - the justification for the open cut stage of the project; and, if necessary;*
- c) recommend appropriate measures to avoid, minimise and / or manage significant impacts of the project...”* (emphasis added)

On 25 July 2017, the Planning Assessment Commission released the “Review Report” on the Bylong Coal Project (“the Review Report”).

The Review Report held at page i:

*“...The Commission concluded that, for a **greenfield proposal** in a location recognised for its agricultural capacity, exceptional scenic value and heritage importance, **great care will be required in weighing the benefits** and costs of the project, in order to arrive at a balance decision about competing land uses and interests in the Bylong Valley.*

*The commission found that the assessment of groundwater highlighted persistent uncertainty about the availability of water resources for the project, and for agriculture and other land uses. **The Commission also found uncertainty in the agricultural mitigation strategies, particularly in relation to...the provision of makeup water to potentially affected properties...**” (emphasis added)*

At page 1 the Review Report noted:

*“...The valley floor is characterised by alluvial flats associated with the Bylong River and its tributary, **the Growee River...**” (emphasis added)*

At page 5 the Review Report noted:

*“...The submissions highlighted **the degree of uncertainty around the availability of water in the alluvium...** There was frustrations with the absence of certain, specific and enforceable arrangements to prevent impacts on the availability of water supply for agriculture.*

*The submissions noted that the Department appeared to rely on post approval management plans to finalise the expected groundwater impacts, make-up water supply for the mine, and make good arrangements for water supply to other landholders, instead of resolving these matter before any decision about the project. Submissions argued that this was an inadequate response to **the risk acknowledged in the various peer reviews to the groundwater assessment** and they expressed a lack of confidence that this approach would provide the certainty required by local landholders that future impacts would be promptly and effectively addressed...” (emphasis added)*

Finally, the Draft Development Consent submitted for approval by three (3) Members of the Commission dated 2018 for the Proposed Bylong Coal Project (“the Proposed Development Consent”) requires at Clause 27 (on page 21) that:

<b>Feature</b>	<b>Performance Measure</b>
Bylong River, Lee Creek, Dry Creek and <b>Growee River</b>	<b>Negligible environmental consequences to surface water resources beyond those predicted in the EIS, including:</b> <ul style="list-style-type: none"><li>• negligible change in surface water flows beyond those predicted;</li><li>• negligible change in surface water quality beyond those predicted;</li><li>• <b>negligible impact to other surface water users beyond those predicted.</b></li></ul>

## LEGAL ISSUES

The legal issues for determination, based on the relevant facts, are:

1. Is ongoing access to water from the Growee River on "Budden" a fact in issue?
2. If so, has the report of Dr. Townley considered all evidence relevant to the issue of ongoing access to water from the Growee River on "Budden"?
3. If not, what weight should be given to the Report of Dr. Townley by the IPC in determining the Proposed Bylong Coal Project.

## DETERMINATION

### Is ongoing access to water from the Growee River on "Budden" a fact in issue?

A "fact in issue" should be understood to mean a "fact" which must be proved, or disproved, in order to make a judgment on the claim by a party. Further, there must be some logical connection between the asserted "fact in issue" and "ultimate issue" for determination. If there is no such connection the evidence is not relevant and need not be considered; *Papakosmas v The Queen* (1999) 186 CLR 297 73 ALJR 1274 per McHugh J at [81]; *Smith v The Queen* (2001) 206 CLR 650; 75 ALJR 1398 per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [6].

In the *Planning Assessment Commission, BYLONG PROJECT SSD 6367 REVIEW REPORT, 25 July 2017* at page 35 ("the Report") the Minister made a request of the IPC (as it is known now) to:

- "...1. Carry out a review of the Bylong Coal Project, and:
- a) **Consider the EIS for the project, additional information provided to the Department, all issues raised in public and agency submissions, and any relevant information provided during the course of the review;**

Further, on 25 July 2017, the Planning Assessment Commission released the "Review Report" on the Bylong Coal Project held at page 1 ("the Review Report"):

*"...The Commission concluded that, for a **greenfield proposal** in a location recognised for its agricultural capacity, exceptional scenic value and heritage importance, **great care will be required in weighing the benefits** and costs of the project, in order to arrive at a balance decision about competing land uses and interests in the Bylong Valley.*

*The commission found that the assessment of groundwater **highlighted persistent uncertainty about the availability of water resources** for the project, and for agriculture and other land uses. **The Commission also found uncertainty in the agricultural mitigation strategies, particularly in relation to...the provision of makeup water to potentially affected properties...**" (emphasis added)*

And further, at page 1 the Review Report noted:

*"...The valley floor is characterised by alluvial flats associated with the Bylong River and its tributary, **the Growee River...**" (emphasis added)*

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There can be no doubt, based the words of the various Reports cited above, that the ongoing access to water from the Growee River is an issue which must be determined in this application.

Therefore, as the water from the Growee River is necessary to maintain our cattle on “Budden”, ongoing access to existing water from the Growee River on “Budden” is a fact in issue.

**If so, has the report of Dr. Townley appropriately considered all the relevant evidence to “fact in issue” of ongoing access to water from the Growee River on “Budden”?**

As the High Court of Australia has made clear “...evidence is either relevant or it is not...” *Smith v The Queen* (2001) 206 CLR 650; 75 ALJR 1398 per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [6].

Given that the water from the Growee River is a “fact in issue”, ongoing access to the existing water from the Growee River for all landholders is relevant in determining this application.

**Yet, surprisingly, at no point in the report of Dr. Townley is any consideration given to the Growee River. The report by Dr. Townley is silent as to the Growee River. The issue is simply ignored.**

Therefore, Dr. Townley has NOT considered all the relevant evidence to a “fact in issue”; the “fact in issue” being the effect of the proposed mine on the ongoing access to the existing water from the Growee River.

**If not, what weight should be given to the Report of Dr. Townley by the IPC in determining the Proposed Bylong Coal Project.**

At common law, an “adverse inference” may be drawn from the failure to adduce evidence where such evidence would have been reasonably expected; *Jones v Dunkel* (1959) 101 CLR 298; *Cadwallader v Bajco Pty Limited* [2002] NSWCA 328 at [95] – [100]. For example, where evidence is called from an expert, the expert gives evidence, but the expert fails to give evidence on a specific “fact in issue” and that failure is not satisfactorily explained; *Cadwallader v Bajco Pty Limited* [2002] NSWCA 328 at [95] – [100]. *Cadwallader v Bajco Pty Limited* [2002] NSWCA 328 per Heydon JA at [97] – [98]; *Adler v ASIC* [2003] NSWCA 131 per Giles JA at [649] – [668].

As a general rule, the adverse inference that may be drawn is that failure to adduce evidence arises from the fact that the evidence, if adduced, would not have assisted the party’s case;

Jones v Dunkel (1959) 101 CLR 298 per Kitto at 308; Brandi v Mingot (1976) 12 ALR 551 at 559 – 560.

The case advanced by Dr. Townley is stated at page 37 of the Report in these terms (“Dr. Townley’s finding”);

**“9. Summary of Review of Groundwater Issues**

*...The assessment of potential groundwater impacts is defensible and consistent with other similar projects...”*

Given that the Growee River is not even mentioned in the Report by Dr. Townley, let alone considered, the IPC must draw an adverse inference against Dr. Townley’s finding that the “...potential groundwater impacts is defensible and consistent with other similar projects...”

Further, in making such a finding, Dr. Townley has ignored the Growee River, entirely, despite the Growee River being a “fact in issue”. The Report by Dr. Townley fails to consider relevant evidence, being the likely effect of the proposed mine on the Growee River.

Evidence from an expert may be excluded where the probative value of that evidence is outweighed by the risk that the tribunal of fact may be misled by that evidence. For example, where the evidence that was presented was only part of the relevant picture thereby distorting the true situation; Hughes Aircraft Systems International v Airservices Australia \*No. 3) (1997) FCR 151.

The report by Dr. Townley should be given no weight because the probative value of Dr. Townley’s finding is outweighed by the risk that the finding may mislead the IPC to conclude that the “...potential groundwater impacts...” **to the Growee River** “...are defensible...”.

There is simply no evidence in the Report by Dr. Townley that the “...potential groundwater impacts...” to the Growee River “...are defensible...”.

Therefore, the Report by Dr. Townley should be given no weight with regard to ongoing availability of existing water in the Growee River.

**CONCLUSION**

Throughout this application, Timnath has maintained that the risk of losing ongoing access to the existing water from the Growee River on “Budden” is a “fact in issue”. We have produced cogent evidence to support this fact in the video of Mr. Rick Cook, Manager, “Budden” which is **enclosed** (“the evidence of Mr. Rick Cook”).

The video speaks for itself.

The proponent of the Bylong Coal Project, Kepco, has produced no evidence to contradict nor diminish the evidence of Mr. Rick Cook.

Kepco have carefully avoided the issue.

The ongoing access to the existing water on “Budden” from the Growee River is a “fact in issue”, as conceded by the Minister for Planning and various reports and recommendations by the Department of Planning.

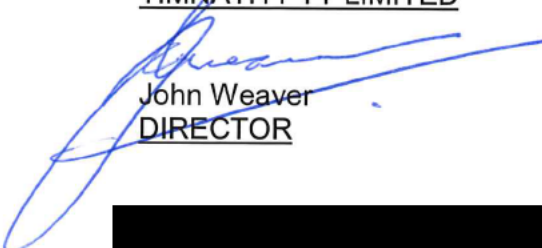
However, it is a “fact in issue” which has not been addressed in the Report by Dr. Townley, nor any other independent evidence currently before the IPC.

Therefore, we urge the NSW Independent Planning Commission ("the IPC") to give the report by Dr. Townley no weight in determining the Proposed Bylong Coal Project, as a matter of law.

Specifically, we urge the IPC to require "independent evidence" that the proposed Bylong Coal Project shall have no effect on the ongoing access to the existing water on Budden from the Growee River before this application is further considered.

If not, the mine must not be approved.

Yours faithfully,  
TIMNATH PTY LIMITED

  
John Weaver  
DIRECTOR

