



MARYLOU POTTS PTY LTD  
ACN 074 696 263

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## Comments on draft condition 25 Compensatory Water and the KEPCO Bylong Compensatory Water Agreement<sup>1</sup>

Marylou Potts Pty Ltd objects to the KEPCO Bylong Coal project.

A review of KEPCO's draft Bylong Compensatory Water Agreement (Agreement) has led me to wish to share these observations on the proposed draft condition 25 on Compensatory Water with the IPC.

As a general observation, we see compensatory water conditions to be problematic in the least, and should not be used to enable project consent.

### **Bylong condition worse than Ulan and Wallarah 2 conditions**

It is noted that draft Condition 25 is in worse terms than its equivalent in the Wallarah 2 and the Ulan Project<sup>2</sup>. In the Wallarah 2 and Ulan Compensatory Water condition, interim water is to be provided within 24 hours of the loss. In Bylong and Shenhua, "as soon as practicable".

The impact in the Bylong Project has to be proved to be directly caused by the Project. The equivalent Ulan condition does not require the cause to be direct, meaning the cause can be both direct and indirect. As a consequence, Bylong's Condition 25 will not assist landholders where the adverse impact is indirect. This is a significant limitation which I anticipate will result in much dispute, and place a very significant costs burden on landholders. It will be in KEPCO's interest to ensure these disputes are not resolved.

### **General comments and recommendations on draft Condition 25**

- Insert a condition that KEPCO has sufficient water licenses available to supply water for all adversely impacted landholders before commencing Project construction. It is unclear to me whether Recommended Conditions 23 and 24 ensure water licensing includes water for make good to impacted landholders.
- Insert a condition of the Development Consent that KEPCO has the capability, throughout the term of the impact, to carry out all the potential Compensatory Water Measures for impacted landholders.
- The cause of the adverse impact should cover both direct and indirect adverse impact, as in Ulan mod 3. The parameters of what evidence covers "caused by the Project" need to be clearly set out.

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<sup>1</sup> Comments made on 18 January 2019.

<sup>2</sup> MOD 3 Determination The Proponent shall provide a compensatory water supply to any owner of privately-owned land whose **supply is** adversely impacted (other than an impact that is negligible) as a result of the project, in consultation with **DPI Water**, and to the satisfaction of the **Secretary**.

- Interim Water Supply must be provided within 24 hours of identification of the loss not as “soon as practicable” as this puts a landholder at the mercy of KEPCO’s discretion of what is practicable.
- Insert a condition that the “landholder and the environment should be no worse off as a consequence of the Project”.
- Amend the compensation condition to ensure it is the landholder’s choice, not the proponent’s, to choose compensation, and the interim supply is to be provided until the compensation is agreed. This is ripe for dispute, particularly given the discrepancy on what each party considers to be sufficient “make good”.
- The costs burden on the landholder will be considerable. All related reasonable costs: legal, landholder, experts, for proof of causation, adverse impact, baseline assessment, monitoring, determination of measures, disputes, compensation must be borne, on presentation of invoice, by KEPCO. Any dispute as to costs goes to Costs Assessment at the Supreme Court. Otherwise there is an unacceptable costs burden on landholders.
- Access to the security, under s261B of the Mining Act, should be made, via the Secretary, available to Landholders for purchase of compensatory water, as a minimum, if KEPCO surrenders the development consent, goes into voluntary liquidation or fails to provide interim water supply within 24 hours of loss, or, discontinues interim water supply without compensatory water measures in place or discontinues or fails to provide adequate compensatory water measures.
- The “make good” obligation should be a condition of the Mining Lease: see s261B(1) Mining Act. The security deposit should be sufficient to cover the risk of the need to supply the equivalent quality and volume of water to adversely impacted landholders on a per annum basis and held until the adverse impact has been resolved. Alternatively, the secretary be given the power to demand access to the miner’s water licence water to provide make good water to landholders. We recommend the security be in place before commencement of Project construction and be available immediately upon breach by KEPCO of Condition 25 or a water supply term of a Compensatory Water Agreement, that is available by showing loss to the Secretary.
- There is a clear discrepancy in what is interpreted as “make good” between the proponent and the landholder. The proponent considers “make good” to be satisfied if the bore is deepened, the pump increased, a new dam or a new bore constructed. The landholder considers make good to mean the supply of the equivalent quality and quantity of water.
- There appears to be an assumption that landholders will allow miners access to their land for make good. There is no legislative right of the miner to access landholders’ land. At common law and under the Mining Act, consent is required. Some landholders have a very poor relationship with their respective miner and will not allow access. This should not impact on the ability of the landholder to receive make good water if their water has been adversely impacted by the Project.

### **KEPCO’s Agreement less favourable than Condition 25**

The terms of KEPCO’s Compensatory Water Agreement are less advantageous than those provided in the DPE Recommended Condition 25 for Bylong<sup>3</sup> (**Condition 25**). Contrary to Condition 25, the burden of proof

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<sup>3</sup> [http://www.majorprojects.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=6367](http://www.majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6367)

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in this Agreement is on the landholder to prove that the adverse impact<sup>4</sup> is caused directly by the Project. As a consequence, all cost and risk is on the landholder.

### **Landholder should be no worse off**

The below comments are made in an attempt to ensure the landholder is no worse off under this Agreement than under recommended Condition 25. However, in many instances I have adopted the *Shaw Principle* in the drafting in an attempt to ensure that *“the landholder and the environment are no worse off as a consequence of the Project”*.

### **“Make good” ripe for disputes**

Even if it is proved that the adverse impact is a direct result of the Project, which is a significant hurdle, recommended Condition 25 is open to dispute on a variety of other levels, from ensuring interim supply within 24 hours, to determining and agreeing volume of interim supply, to agreeing how it will be provided, agreeing compensatory measures, and how these will be made, agreeing compensation, agreeing ongoing liability. The risk and as a consequence the cost, in relation to each of these aspects is on the landholder, who is in immediate need of the replacement supply of water. This places the landholder in a preposterous position. To shift and balance this risk, water needs to be available directly to the landholders, without having the agreement of KEPCO, who acts here, as the conflicted gatekeeper. One possible solution would be to require KEPCO to provide a security available to the landholder providing funds for the immediate purchase of water when the landholder is adversely impacted and KEPCO fails to act in accordance with the Agreement or Condition 25. There is an assumption here that there will be water available to purchase.

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<sup>4</sup> Query how an adverse impact directly related to the Project will be proved? The cost of establishing this must be on KEPCO and should be undertaken by an independent party. Is a blast which causes a fault which results in a slow drain, a direct result? Is the cutting through the aquifer in an open cut or underground mine some kilometres away which results in the flow of water into the mine and a lowering of bores a direct result? And, even if the burden is on KEPCO, could it not simply say “its the drought”. Then the burden shifts back to the landholder to prove that the adverse impact is not the drought. It is in this conundrum that the make good concept is flawed.

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