Airly Mine Extension Proposal

Capertee Valley Alliance ("CVA") submission to Planning Assessment Commission ("PAC") Public Hearing- 27 October 2016

1. Since June 2013, CVA has made a number of written submissions objecting to the Airly Mine Extension Proposal ("the proposal"), and outlining its reasons for such objection, and the expert and lay evidence upon which its objection was based. CVA continues to object to approval of the proposal, and to do so in reliance upon the evidence previously identified, and the further evidence referred to below.

2. As submitted below, CVA respectfully submits that granting development consent on the basis of the currently proposed conditions would be erroneous in law, and legally unreasonable.

3. Without derogating from its primary position of opposition to the proposal being approved, and recognising that the PAC is likely to favourably consider the proposal, CVA supports the conditions of development consent sought by other groups opposing the proposal, and seeks a number of conditions directed specifically to protection of water resources, their remediation, and "make good" and compensation measures for protect landholders in the event that water supply or quality is compromised.

4. In the circumstances detailed below, CVA submits that the proper, and only legally permissible or justifiable course for the PAC is to:

1. defer determination of the fate of the proposal until,;
2. the proponent prepares and exhibits for public comment, and expert evaluation, detailed proposals, costings, securities and timelines to implement the provisions of draft conditions of development consent numbered 13 and 15 issued by the PAC in October 2016, and;
3. the PAC considers the matters referred to in 2 above.

Background

5. In its submission to the Commonwealth Department of the Environment in relation to "controlled action" pursuant to the Environment Protection and Biodiversity Conservation Act 1999 Cth ("the EPBC Act") dated 23 December 2013, CVA raised a number of issues with respect to the potential impact of the proposal on water resources upon which the Capertee Valley was dependent. The submission relied upon CVA's submissions of 28 June and 9 July 2013. Copies of each of these submissions are on the record, and are relied upon in support of CVA's opposition to the proposal and/or the imposition of conditions if approval is granted.

6. CVA's submissions reveal the nature and extent of landholder activity in the Capertee Valley, the history, role and social and economic importance of pastoralism in the valley since white settlement in 1837, and their dependence upon groundwater resources. As all the expert evidence recognises, the ephemeral nature of surface water resources in the Capertee Valley renders survival dependent on groundwater.

7. CVA relies upon the cautionary expert opinion evidence contained in the "Cook Report", to which extensive reference was made in its earlier submissions, and notes that the "long term monitoring" of water resources, and development of "backup groundwater resources" recommended in the report (detailed at p.2-3, 23/12/13 submission), have not been addressed, or have been inadequately addressed by the proposal. The seriousness of the concerns which CVA and others have articulated for more than three years has been vindicated, and heightened by recent reduced flow levels of Airly-Coco, Gap and Genowlan Creeks in a year of significantly greater than average rainfall.

8. In its submissions dated 9 and 15 July 2014, CVA reiterated its objection to Centennial Coal's application to modify its existing Airly Mine approval beyond, and the basis of it, and attached copies of expert reports upon which it relied. Those submissions, and the expert reports are on the record, and are relied upon in support of CVA's objection to the proposal.

9. In its submission to the PAC public hearing with respect to the Airly Mine modification application on 30 September 2014, CVA reiterated its concerns with respect to the existing Airly Mine, and their basis. That submission is on the record, and is relied upon in opposition to the proposal. CVA particularly relies upon the nature and extent of the ongoing failure of the proposal to engage with, and address the real concerns identified in the Cook Report.

10. In its 13 November 2014 report, the Independent Expert Scientific Committee ("IESC") identified a number of major concerns of substance with respect to the potential impact of the proposal on water resources in the Capertee Valley revealed by the proponent's EIS. CVA submits that the proposal, and proposed terms of consent approval fail to adequately safeguard against the concerns identified by the IESC.

11. The IESC report is submitted to have identified numerous substantial issues which "modelling" cannot be guaranteed to adequately address. Although the proponents have subsequently sought to address the IESC's concerns with further modelling, two matters remain of major concern:

1. modelling cannot adequately substitute for the kind of longitudinal studies of the potential impacts on groundwater dependent ecosystems identified by the IESC as providing the necessary foundations for such modelling;
2. despite the risks to water resources identified by the IESC, and the limitations inherent in the proponent's modelling, and the proponent's repeated assertions of confidence in its modelling, no clear, meaningful, or

enforceable conditions with respect to protection of supply, or replacement supply to landholders dependent upon those resources are offered by the proponents.

12. EDONSW has lodged a number of expert reports in relation to the proposal. CVA gratefully relies upon those reports in support of its submissions.

13. In its November 2015 Review Report, the PAC accepted (p.9) that an Independent Expert Review Panel ("IRP") should be appointed to further consider the "key issues" of subsidence predicted to result from the proposal, and identified such issues (at para 3.1.8, p.11).

14. The report recommended (p.17) that the proponent's water management plan should be "strengthened" to address identified potential impacts to downstream water users. The report also recommended that the proponent should provide "a compensatory water supply to downstream users" of water resources potentially impacted by the proposal. CVA submits that the proponent has failed to address that recommendation, and that the conditions of consent proposed by the PAC fail to adequately address the concerns which have been consistently identified.

15. The report of the IRP dated 1 July 2016 engaged extensively with "sensitive surface features" (p.i), as it was well qualified to, but expressly stated that it had not considered "surface features such as those that may be sensitive to the impacts of subsidence on groundwater systems". Inferentially, that was because the members of the IRP did not profess the expertise required to do so. The concerns which the PAC identified in its November 2015 report with respect to potential impacts of the proposal on water resources were thus not addressed, and, to the best of CVA's knowledge, have not been independently addressed and assessed.

16. CVA advances no specific evidence with respect to the conclusions which the IRP did make, but does adopt the expert opinion evidence of Dr Haydn Washington of October 2016, who contends that the IRP "failed totally" to assess the risk to critically endangered flora represented by the proposal, or to apply the "precautionary principle" (discussed by Preston J, as the Chief Judge of the LEC then was, in Telstra Corporation Ltd v Hornsby Shire Council (2006) NSWLEC 133) to protect key conservation areas. Although it is for others to agitate, CVA notes that the failure of the PAC to consider the issues raised by Dr Washington may infect its determination with jurisdictional error.

17. The executive summary to the final assessment report prepared by the Department of Planning and Environment ("DPE") in September 2016 suggests (p.1) that the DPE has adopted all but one (which is not of moment for present purposes) of the PAC's November 2015 recommendations with respect to potential impacts on downstream water users, strengthening conditions relating to compensatory water supply measures, and the timing of visual mitigation measures. As submitted above, the PAC recommended (p.22) that these issues be reflected in "strengthened" consent conditions. The DPE report (p.12) accepted

the advice of the EPA in relation to the water resource issues previously identified, and referred to above, and supported the proposed terms of consent approval which had by then been formulated.

The October 2016 draft conditions of consent

18. As asserted above, and for the reasons articulated below, and particularly advanced with respect to water resources, CVA submits that:

1. consent approval should not be granted for the proposal until the proponent provides detailed proposals for legally enforceable agreements, undertakings and securities to protect water users in the Capertee Valley from the risks of the proposal to quality and supply of surface and groundwater, and remediation of and compensation for harm, injury, damage or loss suffered by them as a result of such risks, and;
2. all interested, and potentially impacted parties be afforded the opportunity to comment on, and present evidence with respect to such proposals as a matter of procedural fairness, and;
3. the PAC considers submissions and evidence, including expert opinion evidence, with respect to such proposals prior to finally determining the proposal.

19. CVA's submission is advanced in reliance on three grounds:

1. asserted jurisdictional error;
2. asserted ultra vires delegation of power, and;
3. legal unreasonableness.

20. The draft conditions envisage that, after consent approval is granted, and prior to work commencing pursuant to the granting of approval, various environmental instruments will be prepared by the proponent in consultation with identified statutory instrumentalities, such as OEH and DPI Water to address issues such as those identified with respect to the Water Management Plan (clause 8(iii)). As the draft conditions contemplate, these measures will not be before the PAC for its consideration.

21. CVA and other potentially impacted parties will have no opportunity to make submissions or be heard by the PAC with respect to the terms and conditions of them. Similar observations apply to the "Compensatory Water Supply" provisions (clause 13, p.15). As the particulars of the matters required to be addressed make clear, these environmental instruments will be detailed, and the detail will be influential, if not decisive as to their efficacy.

22. The terms of the proposed draft conditions are submitted to be deficient, in that they do no more than identify what may later be agreed or determined by others, in the purported exercise of delegated authority, the details of which are not available to the PAC. CVA submits that the PAC is obliged to give "proper, genuine and realistic consideration" to the merits of the proposal in order to validly exercise its delegated authority under the Act (see generally, Minister for

Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611).

23. It is submitted to be beyond doubt that the potential impact on water resources of the proposal is a matter which constitutes a mandatory relevant consideration for the PAC. The fact that the potential impact "triggered" the provisions of the EPBC Act is submitted to leave no room for doubt in that regard.

24. Whether it be considered a constructive failure to exercise jurisdiction (see Resource Pacific Pty Ltd v Wilkinson (2013) NSWCA 33, at p.8, per Basten JA), or to exceed jurisdiction by "ignoring relevant material" (Kirk v Industrial Court (NSW) (2009) 239 CLR 531, at 572), CVA submits that to approve the proposal on the conditions currently proposed would constitute jurisdictional error by the PAC. Put crudely, it is not possible for the PAC to give proper, genuine and realistic consideration to a water management plan which has yet to be agreed or determined.

25. The second limb of this submission flows from its first limb: CVA and other potentially impacted parties cannot be afforded natural justice and procedural fairness with respect to the proposed conditions, for the same reason as the PAC cannot consider and assess them according to the requirements of administrative law. If the proposed conditions are adopted by the PAC, and development consent granted, the absence of natural justice will be compounded by the inability to obtain natural justice, other than by recourse to administrative review. Denial of natural justice is a well accepted foundation of jurisdictional error (see discussion in Authority to Decide: The Law of Jurisdiction in Australia, Leeming, p.66-68).

26. The second complaint identified above, concerns the asserted impermissible delegation of delegated administrative authority. Put crudely, the authority to determine the proposal is delegated to the PAC, in accordance with the provisions of the Act. CVA submits that it is not open to delegate that authority to others, over whom the PAC, and parties impacted by their decisions or agreements have no authority. The justification for the principle is submitted to be readily apparent, and rooted in notions of fairness and natural justice. The PAC is entrusted with determining the fate of a state significant development. To abdicate a part of that function as important as the water management plan is submitted to be erroneous, whether as offending the non-delegation principle, or a failure to exercise jurisdiction.

27. The matters advanced above are submitted to amply underpin CVA's submission that the failure of the PAC to defer determination of the details of water management issues would be manifestly, and legally, unreasonable. To read the matters with which the water management plan must engage is to realise at least three significant indicators of unreasonableness:

1. the nature, scope and extent of the matters about with which plan must engage;

2. the matters about which the plan need not provide, or those determining its contents need engage, and;
3. what happens if there is no agreement in relation to the contents of the plan.

28. The single most concerning deficiency/omission from the draft conditions with respect to the water management plan relates to the "plan to respond to any exceedances of the (yet to be agreed/determined) performance measures, and repair, mitigate and/or offset any adverse surface water impacts of the development, including measures to provide compensatory water supply to any affected downstream water user under condition 13". To read that statement, and reflect on the issue to which it is purportedly directed is to sense the enormity, and cost of implementing an effective response within an achievable time frame- livestock do not suspend drinking until water is restored. The unreasonableness of the condition is palpable: all that can be imposed pursuant to it are provisions to which the proponent agrees. The draft conditions are submitted to be tantamount to self-regulation of the water management plan by the proponent, and manifestly unfair to Capertee Valley landholders, and thus legally unreasonable.

29. The complete absence of any provision for financial or other compensation, or its assessment and recovery in the draft conditions is gravely concerning. More so is the complete absence of any such provisions with respect to groundwater. If approved in their current terms, as a matter of interpretation, the proponent could properly decline to agree or commit to any plan to "repair, mitigate and/or offset any adverse" groundwater impacts unless such plan was acceptable to it, leaving adversely impacted landholders to go "cap in hand" to the proponent for whatever remediation/alleviation it may deign to grant.

30. Draft clause 13 is submitted to be demonstrably unenforceable, and probably legally void for uncertainty. Although trite, the reality is that the draft water management conditions deny the PAC its best opportunity to secure environmental sustainability, by withholding development consent unless and until water resources, and those whose lives and livelihoods depend upon them, are properly protected. CVA submits that granting development consent in reliance upon the current draft conditions would constitute jurisdictional error, on one or more of the grounds articulated above.

31. Implicit in the draft conditions with respect to water resources is acceptance by the PAC that the proponent will, in the absence of binding or effective constraints, "do the right thing". A number of factors are submitted to be counter-indicative of that being a realistic expectation:

1. the proponent's history of environmental breaches, as reflected in the attached government compiled list of licence non-compliances, and the findings of fact by the Land and Environment Court in Secretary, Department of Planning and Environment v Charbon Coal Pty Ltd (2016) NSWLEC 106, decided on 18 August 2016, Charbon being a wholly owned subsidiary of the present proponent);

2. the proponent's status as a wholly owned subsidiary of a foreign company, Banpu, a public company listed in Thailand;
3. the probability that the cost of remediation after the expiration of the economic life of the proposal will provide a disincentive for the proponent to be amenable to Australian court orders for remediation and/or compensation referrable to impacts on water resources;
4. the proponent's unwillingness to provide tangible, enforceable and realistic remediation/compensation measures as conditions of consent approval;
5. the proponent's unwillingness to provide real, and accessible financial security for its performance of the conditions of its approval to appropriate public resources for private gain;
6. the consistent assertions of the proponent that its modelling suggests that risks to water resources, and those dependent upon them, are minimal, suggesting that bona fide enforceable remediation/compensation measures represent little or no financial risk to the proponent;
7. the proponent's increases in the rates of extraction for the proposal- 50% initially, increased to 66%, and reductions areas of extraction under high cliff areas.

32. CVA submits that, prior to determining the application for development consent, as a bare minimum, the PAC should be provided with draft conditions with respect to any proposed water management plan which include:

1. an onshore secured fund to be capitalised and maintained by the regulator at a level which is realistically capable of meeting the proponent's obligations with respect to "exceedances" and their consequences pursuant to the water management plan;
2. a secure and legally accessible sustainable alternate source of adequate quality water in quantities sufficient for domestic, stock and crop needs, and delivery infrastructure capable of rapid deployment in accordance with previous expert opinions and recommendations to the PAC;
3. processes and mechanisms, including ADR processes, to enable impacted landholders to access remediation and/or compensation payments in a quick, just and cheap manner.

33. CVA submits that, in the circumstances, the absence of draft conditions of the kind identified above deprives the PAC of jurisdictional facts, the existence of which are an essential precondition to the exercise of power to grant approval (see Friends of Tumblebee Incorporated v ATB Morton Pty Ltd (No 2) (2016) NSWLEC 16).

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