

7 January 2019

Professor Mary O’Kane
Chair, Independent Planning Commission
Level 3
201 Elizabeth St
SYDNEY NSW 2000

cc The Hon. Gladys Berejiklian, MP NSW Premier
The Hon. John Barilaro MP NSW Deputy Premier
The Hon. Anthony Roberts, MP, NSW Minister for Planning
Consul-General Sangsoo Yoon, Republic of Korea (Sydney)
Ambassador Baek-Soon Lee, Republic of Korea (Canberra)

Dear Professor O’Kane,

Re: Integrity of the Department of Planning and Environment’s Assessment Report into the Hume Coal and Berrima Rail Project and Implications for the Independence of the NSW Planning Regime for Major Projects

Hume Coal is a subsidiary of the POSCO, one of the world’s largest steel manufacturers and the largest non-government purchaser of Australian exports.

The Hume and Berrima Rail projects have a capital investment of around \$500 million, and would represent the first wholly owned project by POSCO in Australia, which has invested some \$2.1 billion in joint ventures since 1981 in Australia alone.

On December 4, 2018 the NSW Department of Planning and Environment (DP&E) made a referral to the Independent Planning Commission (IPC) which included a request for a public hearing into the Hume Coal and Berrima Rail projects and to make ‘recommendations’ within 8 weeks of holding a public hearing, unless otherwise agreed with the DP&E Secretary.

Hume Coal is concerned that the NSW planning and assessment process, as administered by DP&E, is not independent from political interference and, as a direct result, the independence and integrity of the entire planning approval regime is compromised. The IPC must be seen to be truly independent of the DP&E if investors are to have faith in a merit-based planning system where the IPC is supposed to be an independent determining authority.

These matters are a threat to the investment climate in NSW and create negative perceptions about how ‘independent’ is the IPC when assessing major projects. This erosion of independence of the IPC occurs in two ways. First, the role of DP&E in making ‘recommendations’ which in effect gives directions to the IPC, limiting the Commission’s discretion by specifying what matters the IPC will address. Second, the ministerial referral under s 2.9(1)(d) of the Environmental Planning and Assessment Act 1979 directs the IPC to deliver recommendations in an unrealistic timeframe. Although the IPC can request an extension of time, this must be agreed with the Planning Secretary, yet another restriction on the discretion and independence of the IPC.

Describing a clear example of the level political influence on DP&E management of the planning assessment process, on November 27 2018, Hume Coal wrote to DP&E expressing concern about public comments by the

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Member for Goulburn. These comments clearly demonstrated prior knowledge of the contents of DP&E's assessment report, including recommendations (copy attached). Other than a cursory email on 29 November 2018, stating that DP&E is "examining your concerns, and will get back to you shortly", no response has been received from the Department to Hume Coal's correspondence.

In contrast, at the time, the proponent had not been advised of the Department's recommendations or, indeed, the contents of the assessment report. Further, the proponent only became formally aware of the extent of the Department's findings when it was publicly listed on the major project's website on December 11, 2018

Indeed, during the assessment process it was common practice for DP&E not to respond to letters written by the proponent.

Based on the relatively low level of assessment conducted by DP&E into the projects, the biased language used in the assessment report and the recommendations made by DP&E one could be forgiven in believing DP&E had a pre-determined position on the Hume Coal and Berrima Rail projects. There are also significant factual errors in the DP&E Assessment report that will be addressed in due course.

DP&E also failed to deal appropriately with resolving issues arising from scientific expert reports commissioned by the proponent, government and community groups.

It is our contention, given the number of unresolved issues, the way DP&E failed to impose the rigor necessary to balance contrary expert scientific evidence, and the cursory treatment of complex scientific reports, it was inappropriate for the Department to make any recommendation for the projects to be refused. This itself is fettering the discretion of the IPC to arrive at an independent merit-based assessment and leads to a perception that DP&E is 'leading' the IPC to arrive at a pre-determined outcome.

Our view is supported by the NSW Auditor-General (19 Jan 2017) in a report into the operation of the predecessor of the IPC, the Planning Assessment Commission (PAC)¹.

The Auditor-General made specific findings into the role of DP&E in informing the planning assessment process. Specifically, the Auditor-General recommended:

"To minimise the perception that the Commission is simply 'rubber stamping' the Department's recommendations, assessment reports should not recommend whether or not a project be approved. Instead, they should provide the Department's views on whether a project meets relevant legislative and policy requirements"

In a media release, dated 19 January 2017, the Auditor-General said:

"It is pleasing to see that the Commission has accepted all my recommendations."

Further, in a separate report of the Department's assessment of State Significant Development (SSD) in August 2017² by former EPA Director-General, Lisa Corbyn she noted that DP&E had already changed its policy on making recommendations for approval or refusal:

"Where the Independent Planning Assessment Commission is the determining authority, I support the recent change in the approach from making an explicit recommendation for approval or refusal to providing the Department's conclusions on whether a proposal is approvable or not. Although a small change, it provides more clarity on who is the decision maker while, at the same time, being transparent and clear on the Department's view about the merit of a proposal".³

¹ <https://www.audit.nsw.gov.au/publications/latest-reports/assessing-major-development-applications>

² <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assessment-report-independent-review-2018-09-12.ashx>

³ Page iv Corbyn review

Given the importance of the integrity of the planning system for transparency and independence and to ensure investment confidence in major projects in NSW, we would appreciate your advice on the following:

- (a) Does the IPC agree with the recommendations of the Auditor-General regarding the role of DP&E in dealing with major projects before the IPC?
- (b) Will the IPC implement all the Auditor-General's recommendations as agreed by your predecessor and noted in the Corbyn review, commencing with the Hume Coal and Berrima Rail projects?
- (c) Will the IPC return the Assessment Report to DP&E for modification and conduct a proper merit-based assessment to meet the standards outlined by the Auditor-General and others, ensuring DP&E conducts a review of its assessment by persons other than those involved with the original assessment? This power is available to the IPC under section 2.11(3)(a) of the EP&A Act.

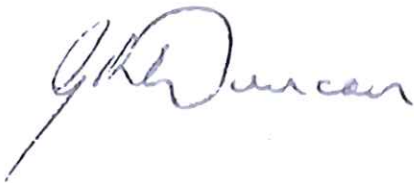
As a major investor in Australia and NSW, we believe the findings of the Auditor-General are minimum standard that needs to be adopted to ensure integrity of the IPC process, not tainted by political considerations and a truly 'independent' merit-based assessment.

I look forward to your consideration of the matters raised in this letter to return confidence in a planning system for major investors.

We request your response by 21 January 2019.

We reserve our legal rights under domestic laws and under the Korea Australia Free Trade Agreement.

Yours faithfully,



Greig Duncan
Project Director
Hume Coal Project

Attachment: Hume Coal letter to David Kitto (27/11/2018) re: Member of Goulburn Comments

27 November 2018

Mr David Kitto
Executive Director, Resource Assessments
NSW Department of Planning & Environment
GPO 39
Sydney NSW 2001

Dear Mr Kitto,

Re: Member for Goulburn Comments

During a radio interview on the local radio station (2ST) this morning, State Member for Goulburn, Pru Goward, made a number of comments relating to the Hume Coal Project. These comments are paraphrased below:

'I am hearing the Department of Planning report is likely to be out fairly soon, in the next week or two. If that report recommends the project not be approved, that is the advice that will go to the independent planning commission. Given enormous public interest, the independent planning commission will hold a public hearing in the highlands, that will be the opportunity again for the people to have their say. Given the DPE has put it skates on and hurried things up a bit, will may be able to have the IPC come to a conclusion before March'

The clear inference from the interview is that the Member for Goulburn has advance knowledge of the Department of Planning & Environment's (DP&E) schedule for the release of the Preliminary Assessment Report and its contents. Public statements of this type cast doubt on the integrity of DP&E's development assessment process.

Hume Coal would be further concerned should the Member for Goulburn's comment, that DP&E's report recommends refusal of the Hume project, be correct and this would further call into question the independence of the NSW State Significant development approval and assessment process.

Any recommendations by DP&E to the Independent Planning Commission (IPC) gives the appearance of DP&E exerting undue influence on the process, prior to the IPC's own consideration of the issues. This cannot be in the interests of either DP&E, the IPC, the proponent or community stakeholders.

Hume Coal now seeks the following clarifications:


- Has the State Member for Goulburn, Pru Goward, been briefed on the expected dates for release of the Preliminary Assessment Report and its contents.
- When can Hume Coal expect confirmation of the proposed delivery date for the Preliminary Assessment Report
- What is DP&E's strategy for transparency and procedural fairness relating to communications with stakeholders

In addition, Hume Coal requests an update relating to the information requests (copies attached) sent to DP&E earlier this month.

Regarding the matter of procedural fairness and, if DP&E's Preliminary Assessment Report does make specific recommendations to the IPC, Hume Coal reserves its legal right to advise the IPC of the concerns of Hume Coal, and its parent company POSCO, relating to DP&E compromising the apparent integrity and independence of the IPC and the impact this will have on major investment decisions in NSW.

Should you have any questions regarding this letter or any Hume Coal activities, please contact myself or Ben Anderson 0429 474 394 or Banderson@humecoal.com.au

Yours Sincerely,



Greg Duncan

Project Director

POSCOs Hume Coal Project

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