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14 November 2018

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

**By Email:** [ipcn@ipcn.nsw.gov.au](mailto:ipcn@ipcn.nsw.gov.au)

Dear Chair,

**RE: BYLONG COAL PROJECT – SUBMISSION BY LOCAWAY PTY LTD**

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We refer to the consideration of the development application lodged by KEPCO Bylong Australia Pty Limited (**KEPCO**) of the Bylong Coal Project (**Project**) by the Independent Planning Commission of New South Wales (**IPCN**).

This letter is a submission by Locaway Pty Ltd (**Locaway**).

Locaway is the registered proprietor of:

1. Lot 1 DP 421103 (commonly known as Cherrydale Park); and
2. Lot 31 DP 598162 (previously commonly known as Bimbal Park).

These two parcels of land are operated as a single enterprise known as Cherrydale Park (collectively the **Property**).

Locaway is also the holder of Water Access Licences:

1. WAL 177718 for 860 units; and
2. WAL 17728 for 5 units,

both being aquifer licences in the Bylong River Water Source (**Bylong Water Source**) under the *Water Sharing Plan for the Hunter Unregulated and Alluvial Water Sources 2009* (collectively **Locaway's Water Rights**).

The Property is operated as a commercial agricultural operation comprising:

1. beef cattle farming with a carrying capacity of approximately 300 breeders and calves;
2. 120 hectares of irrigated farm land for growing lucerne to support the beef cattle operations and for the production and sale of hay;
3. a large facility for the storage of hay; and
4. significant associated farming infrastructure including a grassed airstrip, workshops, sheds, dams, pumps and water reticulation.

Receiver 56 is the closest Locaway dwelling to the Project and is currently occupied full time by the Property's station manager.

In addition to Receiver 56, significant residential improvements also exist at the Property (identified in the EIS as Receivers 57A, 57B and 57C) including:

1. 3 bedroom homestead with office and separate gym and library;
2. substantial landscaped gardens adjoining the main homestead; and
3. separate 3 bedroom guest accommodation.

A significant portion of the Property has been identified as biophysical strategic agricultural land (**BSAL**) under the *Upper Hunter Strategic Regional Land Use Plan*.

Despite contrary assertions, the agricultural operations at the Property are carried out in a genuine and businesslike manner and regularly used by the owners.

### **Consent authority**

As the IPCN will no doubt be aware, its function as the consent authority for the Project is declared directly by the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). The IPCN is not acting as a delegate of the Minister for Planning. This is a subtle but important change. As the IPCN is the consent authority it must ensure that it applies the relevant laws and provisions as the consent authority, and doesn't simply rely on the process undertaken by the Department of Planning and Environment (**DPE**).

In this regard, we note that clause 55 of the *Environment Planning & Assessment Regulation 2000* (NSW) (**EP&A Regulations**) requires the consent authority (not DPE) to consent to any amendment of the development application. In this regard, we note that the application was amended (in a relatively significant way as it relates to Cherrydale) in or around July 2018. Presumably the IPCN has consented to that amendment.

### **Consultation**

The EIS and the DPE's Assessment Report has given either no or very minimal consideration to the environmental, social and economic impacts of the Project on the Property. Although the EIS does not make any statement in relation to the position of Locaway or the Property, it is considered that the glaring omissions in the EIS concerning the Property are based upon the mistaken assumption made by KEPCO, that Locaway is a mine related company.

It is assumed that this has occurred because Locaway had entered into an option agreement with the proponent of the (former) Mt Penny Coal Project. If that option had been exercised, it would have led to the Property and Locaway's Water Rights being owned by a coal mining company. That option agreement was terminated in 2015. KEPCO were informed of this fact by Locaway.

It is therefore considered that KEPCO has adopted the position that any impacts from the Project were either not relevant or were not required to be considered in the preparation of the EIS.

### **Formulation of the Study Area and Project Boundary**

The Project Boundary for the Project is largely (but not completely) in accordance with the boundary of the land owned by KEPCO. That is largely unsurprising. However, what is

unacceptable is the use of the Project Boundary to limit the assessment and relevance of impacts. This is a concept used by KEPCO to limit where the impacts of the Project and the relevance of those impacts must be considered. An example of this the EIS's consideration of BSAL. It does not consider any impacts of the Project on BSAL outside of the Project Boundary or outside of KEPCO owned land.

### **Gateway Certificate**

We have previously raised matters concerning the validity of the current Gateway Certificate.

Pursuant to clause 50A of the EP&A Regulations, the development application for the Project must be accompanied by a 'current gateway certificate in respect of the proposed development.' That is currently not the case.

On 15 April 2014, the Mining & Petroleum Gateway Panel issued a Conditional Gateway Certificate in respect of development which stated:

*'The Bylong Coal Project proposes to development an open-cut and underground mining complex to recover about 121 million tonnes of Run-of-Mine (ROM) coal over a period of up to 29 years.'*

The Gateway Certificate then certified that in the opinion of the Gateway Panel, with respect to the criteria proposed in clause 17(h)(4) of *State Environment Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, the proposed development complied with one criteria and did not comply with the remaining eleven.

On 23 June 2014, the Secretary's Environmental Assessment Requirements (**Original SEARs**) were issued in respect of development relevantly described as

*'[T]he Bylong Coal Project, which includes: developing new open cut and underground mining operations on the site to extract up to 6 million tonnes of coal per year over a period of 29 years.'*

One of the General Requirements of the Original SEARs was the requirement that the EIS must comply with the requirements in the Mining & Petroleum Gateway Panel's Conditional Gateway Certificate.

On 20 October 2014, KEPCO lodged a letter with DPE informing them of some 'minor amendments' to the Project and (purportedly) seeking concurrence that these 'minor amendment' would not require amendment to the SEARs and the Gateway Certificate for the Project.

Those 'minor amendments' are then described in shorthand as a revised project layout, but in fact constitute:

- (a) an increased production rate;
- (b) a change in the open cut mining schedule;
- (c) an increase in longwall panel widths from 250 metres to 350 metres;
- (d) the recovery of an additional 2.8 MT from the open cut area;
- (e) a reduction in the overall life of the Project;

- (f) a revised footprint for the rail loop and CHPP; and
- (g) a revised mine water system.

KEPCO then assert that the environment impacts of these changes:

*'will overall result in less impact and as a consequence have no such consequence for the SEARs that have been issued for the Project.'*

KEPCO then ask for written confirmation that the SEARs and the Gateway Certificate do not require amendments. The letter was copied to the Gateway Panel Secretariat.

Clearly DPE did not agree with KEPCO's assertion that the SEARs did not require amendment, as on 11 November 2014 the SEARs were amended to reflect the revised proposed development (**Revised SEARs**). There is no record of the Gateway Certificate also being amended.

We also note that the development application was amended in July 2018 in relation to the proposed open cut mining areas. We are uncertain if that was formally done.

Given these changes, there is no current Gateway Certificate in respect of the Project, which has now been amended twice since the initial proposal that was considered by the Gateway Panel. It is irrelevant that the Proponent considers that the changes are minor and the environmental impact is less. There is no scope to unilaterally change the proposed development without a consequent change to the Gateway Certificate.

Accordingly, the development application for the Project does not comply with clause 50A of the EP&A Regulations and the development application should be immediately rejected as an invalid application.

Alternatively, KEPCO should be required to seek an amended Gateway Certificate before any further steps in the assessment process are undertaken.

### **Agricultural**

The EIS fails to undertake any assessment of the impacts from the Project on the Property's BSAL land. As the Gateway Panel determined:

*'indirect impacts on potential BSAL adjacent to the Project Boundary area have not been assessed and are potentially significant.'*

Locaway submits that the Project will have a significant and unacceptable impact on the BSAL land on its Property and in the broader Bylong Valley. The Gateway Panel reached this same conclusion. This has not been addressed by the Proponent.

### **Air quality**

With respect to air quality, DPE's Assessment Report is limited in being able to provide an accurate assessment of impacts due to the incomplete background dust monitoring data. The lack of a complete set (one or more complete years) of suitable data is not unusual, but is increasingly less common for significant coal mine projects.

This limitation also affects the period chosen for the modelling. In this case, the period with the most complete data set was selected. However, this coincides with a period of generally higher

than typical rainfall levels, and may thus slightly underestimate dust levels which may occur under typical rainfall conditions.

The EIS contains very little information on the parameters of the model which would allow for a full examination of whether the model is accurately representative of the Bylong Valley.

Under the current assessment, Receivers 56, 57A and 57C are predicted to experience dust levels of approximately 8 to 12µg/m<sup>3</sup> as a result of the Project. Whilst this is an impact, it is noted that this impact is within the currently acceptable range under the current relevant NSW Government policy.

We note that draft condition 19 Schedule 4 requires a comprehensive predictive system. This condition is supported.

## **Noise**

Locaway is concerned about the significant impacts of noise on the Property. There are three residences on the Cherrydale Park property, denoted R56, R57A and R57C in EIS. Background noise monitoring conducted in the local vicinity of Cherrydale Park by the Proponent established a night time background noise level of 24 dB(A), L90. Background noise monitoring conducted at a Cherrydale Park residence in 2011 established a night time background noise level of 21 dB(A), L90.

Based on the adopted default minimum background noise level, a noise criterion of 35 dB(A), Leq (15min) was adopted for day, evening and night. This is the “background + 5dB” intrusiveness criterion.

The worst case predicted operational noise level at Cherrydale Park is 37 dB(A), Leq (15min). This has been considered a “marginal” (1-2 dB) exceedance within the Noise and Blasting Impact Assessment (**NBIA**) and in the agency responses. This is in line with definitions in the Voluntary Land Acquisition and Management Policy (**VLAMP**) which is a formalisation of the historically applied concepts of noise management, mitigation and acquisition zones.

In this case KEPCO has provided insufficient justification for the establishment of a Project Specific Noise Level (**PSNL**) above 35Db(A).

This is particularly so where the NBIA may not have adequately considered the extreme temperature inversions in the Bylong Valley. In these conditions, the marginal 1-2 dB noise exceedance could easily increase to 3 to 4 dB noise exceedance at Cherrydale Park. Under the recommended conditions of consent, the Proponent is given a waiver as the noise limits do not apply under extreme inversion conditions.

## **Noise – low frequency sound**

The Revised SEARs issued on 23 June 2014 require an assessment of the likely operational noise impacts of the development (including construction noise) under the NSW Industrial Noise Policy (**INP**).

The environmental assessment for the Project does not conduct an assessment under the INP. Instead, it carries out an assessment under the *Noise Policy for Industry 2017*. The consequence of this is that there has been no assessment of low frequency noise impacts of the Project, even though this required by the Revised SEARs.

The IPCN cannot determine the development application for the Project until this occurs.

This is not a cursory issue, as it addresses the question of whether or not Cherrydale Park should be afforded acquisition rights under any development consent.

When the Revised SEARs were issued, the INP required that, if the C-weighted noise level (measured or predicted) from a noise source under investigation exceeds the A-weighted level (both quantities are an Leq(15min) value) by 15 dB or more, then + 5dB modifying factor correction is added to the predicted A-weighted noise level.

The worst case predicted C-weighted noise level for a Cherrydale Park residence is 52 dB(C) (see Appendix D.1 and D.2 NBIA 2015). This is 15 dB greater than the A-weighted level of 37 dB(A) and an application of the INP methodology requires the predicted 37 dB(A) to be reported as 42 dB(A). This is 7 dB greater than the criterion of 35 dB(A) and under the provisions of the VLAMP, acquisition rights apply to Receiver 56.

Accordingly, under the INP, Receiver 56 would have clearly been afforded acquisition rights under the recommended conditions of consent.

The NBIA however, adopted the Broner criterion that has been applied by DPE in recent years despite the express provisions of the INP. The Broner criteria of 60dB(C) (recommended) and 65 dB(C) (maximum) were adopted as assessment criteria. As the Broner low frequency criteria were not exceeded at the Property, the +5dB modifying factor was not applied and the three residences on Cherrydale remained as “marginally” impacted.

The EPA initially rejected the use of the Broner criteria in its submission, noting that assessment of low frequency noise against INP criteria was required in the Revised SEAR’s for the Project. DPE discussed with EPA the fact that there are low frequency criteria, modified for exterior application from the internal criteria developed by DEFRA (UK), incorporated in the EPA’s Draft Industrial Noise Guideline (**ING**). Consequently, the EPA agreed that the modified DEFRA criteria are “consistent with modern science” and agreed that these criteria should be applied to the project.

The adoption of the modified DEFRA criteria raises the problem that there has been no meaningful low frequency noise assessment conducted for the Project. Agreement between DPE and EPA on the suitability of the modified DEFRA criteria for application to the Project means that the CadnaA (CONCAWE) model cannot conduct a low frequency assessment of the Project. Of the thirteen third-octave bands from 10Hz to 160Hz included in the DEFRA method, only two bands, being 63Hz and 125Hz, can be modelled by CONCAWE.

These matters must be addressed by KEPCO and Receiver 56 should be afforded acquisition rights consistent with the Revised SEARs and the INP.

### **Water impacts**

According to the DPE’s Assessment Report, DPE accepts that:

*‘the Project is unlikely to result in any significant impact to groundwater users in the locality.’*

That view is not supported by parts of the NSW Office of Water, who believe that the Bylong River alluvium will be ‘pumped dry.’ Presumably the documents which express this view have now been provided to the IPCN. Please let us know if you require these documents to be provided.

Cherrydale Park is heavily reliant on groundwater from the Growee River alluvium for irrigation. There are seven shallow alluvial wells located within the Property, with licences totalling 865 ML/year.

Figure 7.21 of AGE (2015) is a graphical representation of the conceptual hydrogeology. It is therefore an important figure. Page 74 provides a narrative on the conceptual hydrogeology, including the relationship between surface water and alluvial groundwater, groundwater in the deeper coal seams and a perched groundwater system above basalts, recharge and discharge.

Figure 7.21 indicates that the coal seams dip and, as a result, the coal seams proposed to be mined outcrop (the formations hosting the coal seams are marked 'Pi' in Figure 5.15) or sub-crop to the east of Cherrydale Park.

Figure 7.8 indicates a regional groundwater system that follows the patterns of surface water drainage and is consistent with Figure 9.4, a model-predicted map. Groundwater flow, perpendicular to the contours of Figure 9.4, is to the north and groundwater in the Growee River alluvium and that in the Bylong River Alluvium will merge, just like the surface waters do. It follows that groundwater in the Growee River Alluvium and those in Lee Creek and Bylong River Alluvium are connected.

The key question for the Project is the ability to extract 100% of the allocated licences. This issue is highlighted by the Proponent's own modelling that refers to model testing indicating that many wells are unable to produce the full quantity of groundwater entitlements because of the limited saturated thickness of the alluvial aquifer. Consequently, AGE used 30% of the entitlements in the model (page 81 AGE 2015). In our view, AGE should be required to model extraction rates of 100% of entitlements in the Bylong Water Source and model the Project on the basis that its bores can only extract 30% of the entitlement.

A likely consequence is that KEPCO will be forced to put down more bores to extract the required water as each bore may only achieve 20 - 30% extraction. To ensure that there is no impact on privately owned bores, we suggest a condition that any change to the current bore field layout requires a modification of the development consent or, if that is not agreed, that any bores for the Project must not be located in the Growee River aquifer. In addition, we consider that a limit on daily water take should be implemented, consistent with the EIS predictions.

We also submit that the specific impacts in Table 8 on the Alluvial Aquifers should be listed. For instance, KEPCO's EIS states that there will be no impact on the Growee River alluvial aquifer. The consent should state this. As presently drafted, the only requirement is for there to be no impact over what is predicted in the EIS. Once you read the definition of EIS in the recommended conditions of consent, you will see that the EIS consists of numerous lengthy documents. This would allow any person to cherry pick the best parts of the consent and lead to a dispute about compensatory water supplies. The consent conditions should state the performance measure that there will be no impact on the Growee River alluvial aquifer.

### **Compensatory water supply**

KEPCO has consulted with Locaway about the contents of a draft Compensatory Water Agreement in a form provided in the revised Water Management Plan. At this point in time, Locaway is not prepared to enter into any Compensatory Water Agreement with KEPCO, primarily because:

1. the agreement is to truck water to a single location for stock and domestic only;

2. there are no guarantees on water quality; and
3. the process to reach an understanding of whether the Project has affected the bores on Cherrydale Park are in favour of KEPCO and can only lead to a dispute.

In numerous respects, the draft agreement is significantly over and above the proposed condition 25.

The process of compensating for water also does not take account of the practical likelihood that there may be no water or insufficient water available from the Project's borefield, to transport to Cherrydale Park on a daily basis. It is certainly unlikely that 865 ML will be available.

In this regard, the water balance for the Project does not account for the possibility that KEPCO may need to extract up to 865ML to deliver (in some way or another) a very significant amount of water to Cherrydale Park. This assessment should be undertaken prior to the determination of the development application.

In addition, we suggest that condition 24 requires that KEPCO cease mining operations should there be any more than a proven 2 metre decrease at the registered bores on Cherrydale Park.

### **Water licensing**

KEPCO made an application for a significant bore licence under the *Water Act 1912* (NSW) (**Water Act**) for underground mine dewatering for the water sources not covered by the *Water Sharing Plan for the Hunter Unregulated and Alluvial Water Source 2010*. Those waters are all water other than surface water and alluvial water in the Bylong River alluvium.

Since the proclamation of the *Water Sharing Plan for the North Coast Fractured and Porous Rock Ground Water Sources 2016* (**North Coast Groundwater WSP**) on 1 July 2016, rather than requiring a bore licence under the Water Act, KEPCO require a water access licence under the *Water Management Act 2000* (NSW) (**WM Act**). The Project is within the Sydney Basin – North Coast Groundwater Source.

The IPCN should note that the obtaining of a water access licence is one of the very limited authorisations or licences that is not excluded from being required or which must be granted consistently with any development consent under sections 4.41 and 4.42 EP&A Act. That is, the State significant development provisions do not override the requirements of the WM Act to hold a water access licence for take of water. Consequently, the obtaining of this water access licence is of principal importance.

Currently, as the DPE note, KEPCO only has a valid application. The use of the word valid is of no importance. They have an application only.

In these regard we suggest that condition 24 is amended to clarify what stages it applies to. For instance, that the Proponent has all of the necessary water licences prior to the commencement of any underground mining operations.

### **EPBC**

We recommend the IPCN look closely at the consideration and requirements of the Independent Expert Scientific Committee (including in respect to the water trigger) under the *Environmental Protection and Biodiversity and Conservation Act 1999* (Cth) (**EPBC**) to ensure that Committee's requirements have been appropriately considered.

## **Conclusion**

Locaway objects to the Bylong Coal Project because of the unacceptable impacts of the Project and the EIS's significant failure to consider the impacts of the Project on the Property properly, or at all.

Locaway reserves its right to ensure that the IPCN process complies with the relevant laws and requirements including the application of the Industrial Noise Policy as required by the EP&A Act.

A summary of our suggested amendments to the recommended conditions are set out in Appendix A.

Yours faithfully,



**Brendan Tobin**  
**Director**

**Appendix A – Amendments to recommended conditions of consent**

We suggest the following conditions for inclusion in the recommended conditions of consent:

Condition no	Change	Reason
Schedule 4		
Condition 1 Acquisition upon request	Add Receiver 56 to Table 3 with an acquisition basis of noise	Assessment of low frequency sound in accordance with the SEARS and INP
Condition 4 Noise Criteria	The evening and night time noise criteria for Receivers 56, 57A and 57C are set to 35 Bb(A). In the alternative, add to Table 4, Receivers 57A and 57C in condition 3.	KEPCO has provided insufficient justification for the setting of a PSNL above 35Db(A).
	Delete the entire sentence “Appendix 5 sets out...”	The Proponent should be required to comply with the noise limits and not be given an exclusion in temperature inversions.
Condition 5	Delete the entire sentence beginning with “Appendix 5 sets out...”	The Proponent should be required to comply with the noise limits and not be given an exclusion in temperature inversions.
Condition 7	Delete the words ‘unless the Secretary agrees otherwise’ in the opening line.	The Noise Management Plan should not be at the discretion of the Secretary.
Condition 22	Amend condition to require cessation of mining operations should there be a more than 2 metre drawdown at Cherrydale Park registered bores	To ensure compliance with the EIS.
Condition 24	Amend condition to require that licences are held prior to the commencement of underground mining operations.	The grant of licences under the water sharing plans for underground mine dewatering is of fundamental importance and should be obtained prior to the commencement of construction.
Condition 29	Delete the words ‘to the satisfaction of the Secretary’ in the opening line of condition 29.	The compliance with the stated performance measures should be strict and not at the discretion of the Secretary.
Condition 25	The note referring to	Avoid a dispute and bind KEPCO to

Compensatory Water Supply	'trigger levels' should incorporate what the trigger levels are not allow it to be set in the Water Management Plan.	the EIS.
Condition 27 Water Performance Measures Table 8 General	Delete the words 'to the satisfaction of the Secretary' in the opening line of condition 27.	The compliance with the stated performance measures should be strict and not at the discretion of the Secretary.
	That any change to the current bore field layout requires a modification of the development consent or that any bores for the Project must not be located in the Growee River Aquifer.	To ensure there is no impact from additional bores needed as consequence of the Proponent not being able to pump 100% their allocation from the bore field and to protect those privately owned bores on the Growee River aquifer.
	A limit on daily take should be implemented consistent with the EIS predictions	
Condition 28 Water Management Plan	Last dot point – specify the trigger level as being nil impact.	Avoid a dispute and bind KEPCO to the EIS predictions.
Schedule 6		
Appendix 5	Delete condition 1.	
	Amend condition 6 to define excessive noise.	
	In respect to condition 6 the Applicant should be required to carry this out prior to the grant of development consent.	