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23 July 2019

BY EMAIL: samantha.mclean@ipcn.nsw.gov.au

Samantha McLean
Executive Director
Independent Planning Commission NSW Secretariat
Level 3, 201 Elizabeth Street
Sydney NSW 2000

Dear Ms McLean

Bylong Coal Project SSD 14_6367 – Gateway Certificate under clause 17H of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (Mining SEPP)

1. We refer to your letter dated 18 July 2019 in relation to KEPCO's State Significant Development (**SSD**) application for the Bylong Coal Project (SSD 14_6367) (**Project**) and the Conditional Gateway Certificate for the Project which was issued on 15 April 2014 (**Gateway Certificate**) in which you:

   (a) indicated that the Independent Planning Commission (**IPC**) has formed the preliminary view that, by reason of clause 50A of the Environmental Planning and Assessment Act 2000 (NSW) (**EP&A Regulation**), it cannot determine the SSD Application for the Project in circumstances where the Gateway Certificate 'expired' on 15 April 2019;

   (b) requested either of the following by 5pm on 26 July 2019:

      (i) an indication from KEPCO whether it intends to make a fresh application for a gateway certificate for the Project; or, alternatively,

      (ii) if KEPCO disagrees with the Preliminary View, a submission from KEPCO setting out the reasons for such disagreement.

2. At the outset, KEPCO wishes to raise its extreme disappointment that this issue is being raised now and at this very late and critical stage of the assessment process, particularly in circumstances where the Commission is of the view that the Gateway Certificate purportedly 'expired' on 15 April 2019. This issue certainly should have been raised with KEPCO sooner and not three months after the date on which the Commission asserts the Gateway Certificate 'expired'. Please urgently advise when this issue first came to the attention of the Commission and precisely when the Commission formed the Preliminary View.

3. As the consent authority for the SSD application for the Project, the Commission has a statutory duty to determine the application as expeditiously as possible and, if the Preliminary View is correct (which KEPCO does not concede), then the Commission has

breached its statutory duty in circumstances where the currency of the Gateway Certificate imposed a deadline by which the Commission had to determine the application (ie 15 April 2019). The Commission (as consent authority) owed a duty to KEPCO (as proponent of the Project and application for the SSD application) and such duty has been breached if the Preliminary View is correct (which, again, KEPCO does not concede).

4. In KEPCO's view, the Commission has had more than ample time to consider, assess and determine (as consent authority) the SSD application for the Project before 15 April 2019 in circumstances where:

   (a) There has been a long and thorough assessment process for the SSD application for the Project which commenced with a request for Secretary's Environmental Assessment Requirements (**SEARs**) in January 2014, lodgement of the SSD application and Environmental Impact Statement in July 2015 and has since been the subject of a significant amount of review processes and public consultation including a public hearing associated with the review undertaken by the Commission (then the Planning Assessment Commission).

   (b) The Department of Planning and Environment's Final Assessment Report was released in October 2018. This afforded the Commission a six month period to assess and determine the SSD application for the Project before 15 April 2019.

   (c) The SSD application for the Project was referred to the Commission for determination in accordance with clause 8A of *State Environmental Planning Policy (State and Regional Development) 2011* and section 4.5(a) of the *Environmental Planning and Assessment Act 1979* (NSW) on 4 October 2018.

   (d) The Commission undertook an inspection of the Project site on 6 November 2018.

   (e) A public meeting was convened by the Commission on 7 November 2018.

   (f) Since the public meeting, the Commission has continued to:

      (i) Seek further expert review reports in relation to the SSD application for the Project including a heritage advice which was sought from GML on 24 May 2019 and issued on 12 June 2019 (**GML Report**). It is noted that the request for the GML Report by the Commission on 24 May 2019 occurred after the date on which the Commission purports that the Gateway Certificate 'expired' (ie 15 April 2019).

      (ii) Invite and receive further public submissions (which, at times, have only been provided to KEPCO months after receipt) which has contributed to the delay in the finalisation of the Commission's assessment process.

   (g) In a statement released on 1 May 2019, the Commission stated that it:

      (i) 'is continuing its deliberations in this case';

      (ii) 'as the determination is now pending, the Commission will not accept any further comments from stakeholders, including comments from members of the public'; and

      (iii) 'the Commission will publish a Statement of Reasons for Decision at the time a determination is made'.

   Again, it is noted that this statement was released after the date on which the Commission purports that the Gateway Certificate 'expired' (ie 15 April 2019). Furthermore, the representations made in the statement are inconsistent with the Preliminary View now held by the Commission.

Contrary to the Commission's representation that it will not accept further submissions, following the release of the GML Report on 12 June 2019, the Commission allowed further public submissions until 27 June 2019.

5. It is clear from a number of matters raised in paragraph 4 of this letter that the Commission has acted completely inconsistently with the Preliminary View.

6. Moving now to KEPCO's position on the Preliminary View.

7. KEPCO completely disagrees with the Preliminary View of the Commission and provides a copy of a joint opinion prepared by Richard Lancaster SC and David Hume which concluded that:

> 'For these reasons, we consider that the better interpretation of cl 50A(2) is that it imposes a time of application criterion. In our opinion, if, as in the present circumstances, a development application has been lodged with a current gateway certificate, it is not a precondition to a valid approval that the gateway certificate must also be current on the date of determination of the development application.'

8. The view presented in the joint opinion is consistent with KEPCO's understanding of the intent of the gateway certificate process which was described by the NSW Government as:

   (a) an independent, scientific and upfront assessment of the potential impacts of a mining (or CSG production) proposal on the agricultural values of the land upon which it is proposed; and

   (b) required to be undertaken at a very early stage 'before a development application is lodged' to ensure that the environmental assessment documentation to support the development application is prepared to address any recommendations within the relevant gateway certificate.

9. The intent of the gateway certificate process is described on a number of NSW Government guidance documents[1] and websites[2].

10. The Gateway Certificate for the Project was issued on 15 April 2014. The Gateway Certificate was appended to the SEARs which were issued on 23 June 2014 (and amended on 11 November 2014). The SSD application for the Project and supporting Bylong Coal Project Environmental Impact Statement (Hansen Bailey, 2015) which was prepared in accordance with the SEARs (which included the requirement to address the recommendations from the Gateway Certificate) was lodged with the NSW Government on 22 July 2015. As at the date of lodgement of the SSD application for the Project, it was accompanied by a 'current' Gateway Certificate in accordance with Clause 50A of the EP&A Regulation.

11. The role of the Commission (as consent authority) in determining the SSD application for the Project is contained in clause 17B(2) of SEPP Mining is, in effect, to consider

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[1] *Strategic Regional Land Use Plan for Upper Hunter Region* released in September 2012 (https://www.planning.nsw.gov.au/-/media/Files/DPE/Plans-and-policies/strategic-regional-land-use-plan-upper-hunter-2012-09.pdf?la=en);
Strategic Regional Land Use Policy - Frequently Asked Questions Introduction of Gateway Process & Gateway Panel dated October 2013 (https://www.planning.nsw.gov.au/-/media/Files/DPE/Factsheets-and-faqs/faqs-introduction-of-gateway-process-and-gateway-panel-2013-10.pdf?la=en);
NSW Government Media Release - *NSW Government Protects Key Farmland and Homes* dated 3 October 2013 (https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/media-release-nsw-government-protects-key-farmland-and-homes-2013-10-03.pdf?la=en);
Fact Sheet - Strategic Regional Land Use Policy Guideline for Gateway Applicants dated September 2013 (http://www.mpgp.nsw.gov.au/docs/Guideline%20for%20Gateway%20Applicants.pdf);

[2] Mining and Petroleum Gateway Panel website *(http://www.mpgp.nsw.gov.au/);*
Department of Planning Industry and Environment website (*https://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Gateway-Assessment-and-Site-Verification*)

whether the assessment documentation prepared in support of the SSD application has addressed the recommendations of the Gateway Certificate accompanying the SSD application.

12. Finally, contrary to the representation made by the Commission, the Gateway Certificate did not 'expire' on 15 April 2019. Clause 50A of the EP&A Regulation and Part 4AA of the Mining SEPP is devoid of any reference or concept of an 'expired' gateway certificate. The concept of a 'current' gateway certificate is referred to in clause 50A of the EP&A Regulation and is, therefore, only pertinent at the time of lodgement of the development application. At the time of determination of the application, that application need only be accompanied by a gateway certificate – noting the omission of the word 'current' in clause 17B(2) of the Mining SEPP.

We trust that our letter provides the Commission with the information required for it to come to the final view that it has the power to proceed with its determination of the SSD application for the Project.

Please do not hesitate to contact me on [redacted] if you wish to discuss this matter further.

Yours sincerely

William Vatovec
Chief Operating Officer
KEPCO Australia Pty Ltd

KEPCO BYLONG AUSTRALIA PTY LTD – BYLONG COAL PROJECT

JOINT OPINION IN RELATION TO GATEWAY CERTIFICATE

SUMMARY

1. We are briefed by Minter Ellison on behalf of KEPCO Bylong Australia Pty Ltd (**KEPCO**). KEPCO has a pending State Significant Development Application (**the SSD Application**) for the proposed Bylong Coal Project (**the Project**). The Project is located within the Mid-Western Regional Council local government area approximately 55km to the north east of Mudgee. The Project involves the construction and operation of an integrated coal mine using open and underground mining methods.

2. The assessment process for the Project is well-advanced. The Department has issued a Final Assessment Report. The consent authority is the Independent Planning Commission (**the IPC**). The Project is "mining or petroleum development" for the purposes of Part 4AA of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**the Mining SEPP**).

3. On 15 April 2014, KEPCO obtained a gateway certificate (**the Gateway Certificate**) in respect of the Project from the Mining and Petroleum Gateway Panel (**the Gateway Panel**) under Div 4 of Part 4AA of the Mining SEPP. The Gateway Certificate was expressed to remain current for 5 years from the date of issue. The certificate ceased to have currency on and from 15 April 2019.

4. An issue has arisen as to whether the IPC may consent to the SSD Application even though the Project does not have a current gateway certificate at the time a decision is made. The issue arises because of the terms of clause 50A of the *Environmental Planning and Assessment Regulation 2000* (NSW) (**EP&A Regulation**), which relevantly provides:

> **50A Special provisions relating to development applications relating to mining or petroleum development on strategic agricultural land**
>
> (1) This clause applies to a development application that relates to mining or petroleum development (within the meaning of Part 4AA of *State Environmental Planning*

Policy (Mining Petroleum Production and Extraction Industries) 2007) on the following land:

(a) land shown on the Strategic Agricultural Land Map,

(b) any other land that is the subject of a site verification certificate.

(2) A development application to which this clause applies must be accompanied by:

(a) in relation to proposed development on land shown on the Strategic Agricultural Land Map as critical industry land – a current gateway certificate in respect of the proposed development, or

(b) in relation to proposed development on any other land:

(i) a current gateway certificate in respect of the proposed development, or

(ii) a site verification certificate that certifies that the land on which the proposed development is to be carried out is not biophysical strategic agricultural land.

(3) This clause does not apply to or with respect to a development application if the relevant environmental assessment requirements under Part 2 of Schedule 2 of this Regulation were notified by the Planning Secretary on or before 10 September 2012.

5. We are instructed that the SSD Application is a development application to which clause 50A applies and that clause 50A(3) is not engaged in this case.

6. The issue for advice is the meaning and operation of clause 50A(2) in the present circumstances. In this context, the question we have been asked, and our answer, is as follows.

Q. May the consent authority consent to the SSD Application if the gateway certificate is not current at the time of the decision?

A. Yes – if, as in the present circumstances, a development application has been lodged with a current gateway certificate, it is not a precondition to a valid approval that the gateway certificate must also be current on the date of determination of the development application.

OPINION

Statutory background

7. We have set out key parts of cl 50A of the EP&A Regulation above. Three observations should immediately be made about the legislative context of cl 50A.

8. First, s 4.12(1) of the *Environmental Planning & Assessment Act 1979* (NSW) (**EP&A Act**) (formerly s 78A(1)) provides that "*A person may, subject to the regulations, apply to a consent authority for consent to carry out development*". Section 4.12(9) (formerly s 78A(9)) provides that "*The regulations may specify other things that are required to be submitted with a development application*". We proceed on the assumption that each of cl 50 and cl 50A was made under the former s 78A(9).

9. Secondly, cl 50 of the EP&A Regulation provides for "*How must a development application be made?*" Among other things, it provides in cl 50(1)(a) that a development application "*must contain the information, and be accompanied by the documents, specified in Part 1 of Schedule 1*". The gateway certificate referred to in cl 50A is *not* one of the documents referred to in cl 1 cl 2 of Part 1 of Schedule 1 of the EP&A Regulation. Those clauses set out information which a development application must "contain" (cl 1) and which must "accompany" (cl 2) the development application. The gateway certificate is therefore not one of those documents referred to in cl 50(1)(a) (which identifies what a development application must "contain" and be "accompanied by" by reference to Part 1 of Schedule 1).

10. Thirdly, cl 50A contains, as the heading to the clause indicates, "*Special provisions relating to development applications relating to mining or petroleum development on strategic agricultural land*". Clause 50A was introduced in 2013 as part of a suite of measures with Part 4AA of the Mining SEPP. Clause 50A and Part 4AA of the Mining SEPP commenced on the same day (4 October 2013). Clause 50A cross-refers to Part 4AA of the Mining SEPP. In that context, Part 4AA of the Mining SEPP is part of the context in which one ought to construe cl 50A (and vice versa). Further, one would expect the two to work harmoniously.

11. One of the documents that must accompany a development application for State significant development is an environmental impact statement: EP&A Act s 4.12(8) (former s 78A(8)); EP&A Regulation, Sch 1, cl 2(1)(e). The contents of an environmental impact statement are regulated by Sch 2 of the EP&A Regulation.

12. In Sch 2 of the EP&A Regulation (titled "Environmental Impact Statements"), cl 3(8) has the effect that an environmental impact statement must be prepared in accordance with "environmental assessment requirements" notified by the Secretary of the Department of Planning under cl 3.

13. Clauses 3(4), (4A), (4B), (5) and (8)) of Sch 2 of the EP&A Regulation provide:

> (4) In preparing the environmental assessment requirements with respect to an application for State significant development, the Planning Secretary must consult relevant public authorities and have regard to the need for the requirements to assess any key issues raised by those public authorities.
>
> (4A) Without limiting subclause (4):
>
> (a) if a gateway certificate has been issued in relation to State significant development to which an application for environmental assessment requirement relates, the Planning Secretary, in preparing the requirements, must address any recommendations of the Gateway Panel set out in the certificate;
>
> (b) if a gateway certificate has been issued by operation of clause 17I(3) of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* in relation to the State significant development to which an application for environmental assessment requirements relates, the Planning Secretary, in preparing the requirements, must consult with the Gateway Panel and have regard to the need for the requirements to assess any key issues raised by that Panel.
>
> (4B) If a gateway certificate in respect of proposed State significant development is issued after environmental assessment requirements for that proposed development have been notified under this clause, the Planning Secretary:
>
> (a) must have regard to any recommendations of the Gateway Panel set out in the gateway certificate; and
>
> (b) may modify the requirements in accordance with subclause (5).
>
> (5) The Planning Secretary is to notify the responsible person and (where relevant) the responsible authority in writing within the required time of the

environmental assessment requirements. The Planning Secretary may modify those requirements by further notice in writing.

…

(8) The responsible person must ensure that an environmental impact statement complies with any environmental assessment requirements that have been provided in writing to the person in accordance with this clause.

14. It can be seen that a significant purpose of the gateway certificate is to inform the contents of environmental assessment requirements, by the imposition of a requirement on the Planning Secretary to take into account any recommendations in the gateway certificate. The Planning Secretary must "address" any recommendations in the gateway certificate in preparing EARs (cl 3(4A)(a)), or if EARs have already been issued the Planning Secretary must "have regard to" any recommendations in the gateway certificate and may then modify the EARs (cl 3(4B)). The provisions explicitly deal with the giving of a gateway certificate *after* the (first) notification of EARs, nevertheless it is relevant to a proper understanding of the context to note that, in practice and for obvious reasons, environmental assessment requirements are prepared at an early stage of the assessment process.

15. We turn, then, to the Mining SEPP.

16. Part 4AA is entitled "*Mining and petroleum development on strategic agricultural land*".

17. Clause 17B of the Mining SEPP provides:

(1) Before determining an application for development consent for mining or petroleum development that is accompanied by a gateway certificate, the consent authority must:

(a) refer the application to the Minister for Regional Water for advice regarding the impact of the proposed development on water resources, and

(b) consider:

(i) any recommendations set out in the certificate, and

(ii) any written advice provided by the Minister for Regional Water in response to a referral under paragraph (a), and

(iii) any written advice of the Gateway Panel in relation to the development given as part of the consultations undertaken by the

Director-General under clause 3(4A)(b) of Schedule 2 to the *Environmental Planning and Assessment Regulation 2000*, and

(iv) any written advice of the IES Committee provided to the Gateway Panel as referred in clause 17G(1) (whether that advice was received before or after the expiry of the 60-day period referred to in clause 17G(1)(b)(i)), and

(v) any cost benefit analysis of the proposed development submitted with the application.

(2) In determining an application for development consent for mining or petroleum development that is accompanied by a gateway certificate, the consent authority must consider whether any recommendations set out in the certificate have or have not been addressed and, if addressed, the manner in which those recommendations have been addressed.

…

18. It can be noted that cl 17B(2) does not refer to a *current* gateway certificate. Further, the express obligation on the consent authority is to consider whether recommendations in the gateway certificate have been addressed, not the gateway certificate itself.

19. Clause 17F provides for the making of applications for gateway certificates. Clause 17H provides for the Gateway Panel to determine an application for a gateway certificate by issuing the certificate. Clauses 17H(2)-(5) relate to the content of a gateway certificate and provide:

(2) A gateway certificate must:

(a) state that the Gateway Panel is of the opinion that:

(i) the proposed development meets the relevant criteria (***an unconditional certificate***), or

(ii) the proposed development does not meet the relevant criteria (***a conditional certificate***), and

(b) include the Gateway Panel's reasons for the formation of the opinion stated in the certificate (and the reasons for the making of any recommendations included in the certificate).

(3) A conditional gateway certificate:

(a) is to include recommendations of the Gateway Panel to address the proposed development's failure to meet the relevant criteria, and

(b) may also include a recommendation that specified studies or further studies be undertaken by the applicant regarding the proposed development.

(4) The ***relevant criteria*** are as follows:

(a) in relation to biophysical strategic agricultural land – that the proposed development will not significantly reduce the agricultural productivity of any biophysical strategic agricultural land, based on a consideration of the following:

(i) any impacts on the land through surface area disturbance and subsidence,

(ii) any impacts on soil fertility, effective rooting depth or soil drainage,

(iii) increases in land surface micro-relief, soil salinity, rock outcrop, slope and surface rockiness or significant changes to soil pH,

(iv) any impacts on highly productive groundwater (within the meaning of the Aquifer Interference Policy),

(v) any fragmentation of agricultural land uses,

(vi) any reduction in the area of biophysical strategic agricultural land,

(b) in relation to critical industry cluster land – that the proposed development will not have a significant impact on the relevant critical industry based on a consideration of the following:

(i) any impacts on the land through surface area disturbance and subsidence,

(ii) reduced access to, or impacts on, water resources and agricultural resources,

(iii) reduced access to support services and infrastructure,

(iv) reduced access to transport routes,

(v) the loss of scenic and landscape values.

(5) In forming an opinion as to whether a proposed development meets the relevant criteria, the Gateway Panel is to have regard to:

(a) the duration of any impact referred to in subclause (4), and

(b) any proposed avoidance, mitigation, offset or rehabilitation measures in respect of any such impact.

20. As can be seen, there are two kinds of gateway certificates: conditional and unconditional. Where a certificate is conditional, it must include recommendations of the kind described in cl 17H(3). Those recommendations then inform the preparation of environmental assessment requirements under Sch 2 of the EP&A Regulation, which we have addressed above.

21. Further, a mandatory consideration for the consent authority under cl 17B(2) is whether any recommendations have or have not been addressed and, if addressed, the manner in which those recommendations have been addressed.

22. Clause 17K provides:

> A gateway certificate remains current for a period of 5 years (or such shorter period as is specified in the certificate) after the date on which it is issued by the Gateway Panel.

23. It follows that it would be open to the Gateway Panel to specify a period shorter (and much shorter) than 5 years in a particular case.

24. Clause 17L provides for amendment of gateway certificates. We do not consider that cl 17L would authorise the amendment of a certificate to extend its currency beyond the 5 year maximum: that would be using the power to amend to overcome a maximum time period fixed by the Mining SEPP.

25. The operation of cl 50 of the EP&A Regulation has been considered in the authorities.

26. In *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, (2018) 233 LGERA 170, the Court of Appeal considered the operation of cl 50(1)(a) and the requirement in cl 1(i) of Part 1 of Schedule 1 of the EP&A Regulation that the information that a development application must contain includes "*evidence that the owner of the land on which the development is to be carried out consents to the application, but only if the application is made by a person other than the owner and the owner's consent is required by this Regulation*". Clause 49(1) provides that development application may be made by the owner of the land or "*by any other person, with the consent in writing of the owner of that land*". Preston CJ of LEC delivered reasons with which Leeming JA agreed and with which Basten JA agreed, subject to his own reasons on some issues. The Court held that a consent

was invalid because owner's consent was required but had not been given before the determination of the application.

27. Preston CJ of LEC said (at [95]) that:

> The giving of owner's consent to the making of a development application with respect to the owner's land for the purpose of cl 49 of the Regulation is an essential prerequisite to, and part of the process of, a consent authority's determination of the application. That is to say, the giving of owner's consent is necessary to enable the consent authority to exercise its function to grant development consent to the application if it be minded to do so. …

28. At [96], his Honour said the failure of the development application to contain evidence of owner's consent at the time it is made does not render the development application invalid or void, referring to the observation of Spigelman CJ in *Currey v Sutherland Shire Council* (2003) 129 LGERA 223; [2003] NSWCA 300 at [35] that there is little if any scope under the EP&A Act for the concept of a 'valid' application.

29. Preston CJ of LEC said (at [97]-[98]) that:

> [97] The development application will be "*ineffective and incomplete*" whilst so ever the development application does not contain the information and is not accompanied by the documents that the EPA Act and the Regulation require to be provided in order for the consent authority to validly exercise the power to determine the development application. There can be no valid determination of the development application until there is substantial compliance with such statutory prescriptions: *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; [2008] NSWCA 209 at [189].
>
> [98] Substantial compliance may be satisfied by the later provision of the required information or documents: *Botany Bay City Council v Remath Investments No 6 Pty Ltd* at [14], [18] and *McGovern v Ku-ring-gai Council* at [187]-[200]. In particular, the lack of owner's consent to a development application can be cured at any time up until the determination of the application: see *Botany Bay City Council v Remath Investments No 6 Pty Ltd* at [5]-[7] and cases therein cited.

30. We also note that in *Community Association DP270447 v ATB Morton Pty Ltd* [2019] NSWCA 83, Leeming JA (with whom Bell P and Payne JA agreed) referred to Part 1 of Schedule 1 of the EP&A Regulation and said:

> Those provisions notwithstanding, it is well settled that what matters is whether, *at the time consent is granted*, that the owners of all land to which the consent relates have provided consent. As Spigelman CJ said in *Currey v Sutherland Shire Council* (2003) 129 LGERA 223; [2003] NSWCA 300 at [35], there is "very little, if any,

> scope in this legislative scheme for the concept of a 'valid' application". Rather, the obligation to obtain owners' consent is a prohibition upon the granting of consent. Thus, it is clear that the absence of owners' consent to a development application can be cured at any time up until its determination: see *Botany Bay City Council v Remath Investments No 6 Pty Ltd* (2000) 50 NSWLR 312; [2000] NSWCA 364 at [5]-[7] and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 at [98].

31. In our opinion, the passages set out above from the Court of Appeal's decision in *Al Maha* do not address or answer the question for advice. That is, while it may be accepted that a development application is "*ineffective and incomplete*" if it is never accompanied by a current gateway certificate, the reasons in *Al Maha* do not answer the particular question of construction as to the time(s) at which cl 50A(2) requires a development application to be accompanied by a current gateway certificate.

32. As Preston CJ of LEC also said in *Al Maha*:

> [220] The essentiality of the statutory prescriptions for development applications varies depending on the statutory prescription and the role it plays in the statutory scheme, the development for which consent is sought, including whether it is designated or State significant development, amongst other factors: see for example the considerations discussed in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55; [1999] NSWCA 8 at [36]-[108]; *Cranky Rock Road Action Group Inc v Cowra Shire Council* (2006) 150 LGERA 81; [2006] NSWCA 339 at [65]-[90]; *McGovern v Ku-ring-gai Council* at [189]-[203].

33. In *SHMH Properties Australia Pty Ltd v City of Sydney Council* [2018] NSWLEC 66, Preston CJ of LEC considered various provisions in cl 50 and Sch 1 of the EP&A Regulation that together require a development application for BASIX affected development to be accompanied by a BASIX certificate, and any documents or information that any BASIX certificate requires. His Honour said this:

> [15] The requirement for a development application for BASIX affected development to be accompanied by a BASIX certificate, and any documents or information that any BASIX certificate requires, is mandatory. The absence or inadequacy of documents required by Sch 1, cll 2 and 2A of the EPA Regulation to accompany a development application does not necessarily make the application invalid, but it does make the development application incomplete and, in a particular case, the absence or inadequacy of the documents may be of such significance as to prevent the consent authority from performing its statutory duty under the EPA Act when determining the application (see *Currey v Sutherland Shire Council* (2003) 129 LGERA 223; [2003] NSWCA 300 at [35]; *Cranky Rock Road Action Group Inc v Cowra Shire Council* (2006) 150 LGERA 81; [2006]

NSWCA 339 at [73]-[78], [88] and *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; [2008] NSWCA 209 at [198]-[200]).

34. In the result in *SHMH Properties*, the Court concluded (at [82]-[83]) that the development application for the development needed to be accompanied by a BASIX certificate but was not, but that the Council had addressed this failure appropriately by imposing a deferred commencement conditions to require the lodgment of the relevant BASIX certificate. In other words, the absence of the certificate at the time of determination did not invalidate the consent. Preston CJ of LEC considered that "*Apart from remedying the failure to comply with the procedural requirements for development applications in the EPA Act and EPA Regulation, the lodgment of the relevant BASIX certificate will enable operation of the prescribed condition of consent of fulfilment of any commitments listed in the BASIX certificate*" and accordingly dismissed the appeal from the Council's decision to impose the deferred commencement condition.

When must an application be accompanied by a current gateway certificate?

35. It is clear from cl 50A that the SSD application must be accompanied by "*a current gateway certificate in respect of the proposed development*". Clause 50A is, however, silent as to the *time* at which the application must be so accompanied.

36. There are at least two relevant possibilities: one is the time at which the application is made (in the sense of lodged in a manner and form that is substantially compliant with the EP&A Act and the EP&A Regulations); the other is the time at which the application is determined. In the area of migration law, these two possibilities are commonly described as "time of application" and "time of decision" criteria, and that terminology is of some use here.

37. We acknowledge that the words of cl 50A(2) of the EP&A Regulation do not resolve the issue of timing expressly. If the provision is approached literally and without regard to context, it might be said that the clause is not qualified or limited in time to the point at which the application is submitted (or any other stage of the process) and that it is expressed in terms apt to impose a continuing obligation. In other words, so the argument would go, if and for so long as there is a development application, it must be accompanied by a current certificate, including being accompanied by a current certificate up to and at the time of determination. The practical effect of the provision, on this interpretation, could be said to

be generally consistent with other requirements related to development applications, for example that owner's consent must be provided by and at the date of determination.

38. We note that it may be accepted that **if** the proper construction of the provision is that a development application must be accompanied by a gateway certificate that is current at the date of determination and **if** on the proper construction of the regulations that requirement is essential to the valid determination of the application, then upon the application of orthodox principle (see for example *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, (2018) 233 LGERA 170 at [97] and [41]) that would mean that the SSD Application cannot validly be determined.

39. In our opinion, the interpretation we set out in the two paragraphs above is open. However, in our opinion, that interpretation is not the preferable construction of the operation of the clause.

40. In our opinion, the better view is that cl 50A(2) imposes a time of application criterion. We hold that view for the following reasons.

41. First, cl 50A(2) in terms stipulates a requirement to be fulfilled in respect of a development application to which the clause applies. It does not expressly impose a requirement upon the consent authority that is to be considered at the time of determination of the application, let alone any express requirement that imposes a precondition to a valid determination by the consent authority. In our opinion, the words of the clause in their natural and ordinary meaning more comfortably describe a requirement in respect of the making of an application that may be satisfied at the time that the application is lodged. This is consistent with the conclusion of the Court of Appeal in *Cranky Rock Road Action Group Inc v Cowra Shire Council* [2006] NSWCA 339, (2006) 150 LGERA 81 at [35] (Tobias JA, Young CJ in Eq agreeing at [92], Campbell J agreeing at [93]). There, the Court of Appeal considered the term "*accompanied*" so far as various provisions of the EP&A Act required a development application to be accompanied by a Statement of Environmental Effects. The Court of Appeal said that "*accompanied*" referred to "*the lodging with the consent authority of [a Statement of Environmental Effects] prior to its determination of the application*". In this case, we are instructed that the application was lodged with a current gateway certificate, which was taken into account when the environmental assessment requirements were notified.

42. Secondly, in our opinion existing authority does not require the conclusion that a development application must be accompanied by a gateway certificate that is current at the date of determination. The authorities support a general principle that a development application must be complete and effective at the time of determination of the consent (see, for example, *Al Maha* at [95]-[98] and cases referred to there). That principle does not mean that it is not possible to speak of a development application having been made at a time prior to determination: see, for example, *Botany Bay City Council v Remath Investments No 6 Pty Ltd* (2000) 50 NSWLR 312 at [16]-[18], [48]-[50] (NSWCA). Further, that principle does not necessarily entail the proposition that all documents that are required to accompany a development application must accompany the development application both at the time that the application is lodged and at the time that it is determined. In our opinion, in each case it will be a question of construction, having regard to the terms of the regulation and the function of the accompanying document.

43. Further, so far as the principle referred to in *Al Maha* is relevant, it can be noted that that principle derives from cases on cl 50(1) and Part 1 of Sch 1 of the EP&A Regulation. Clause 50A(2) sits outside those provisions. The gateway certificate requirement applies only in respect of proposed mining or petroleum development on strategic agricultural land. The application and assessment process for development of that kind is notoriously complex and lengthy – many such projects take many years from application to determination. That is a matter which we consider ought also to be considered in the interpretation of cl 50A(2).

44. Thirdly, unlike cl 50A(2), cl 17B(2) of the Mining SEPP is, on any view, a "time of decision" criterion. It does not in terms require the gateway certificate to be current at that time. The drafter chose to make currency an express condition under r 50A(2), but not under cl 17B(2). In circumstances where the Mining SEPP and r 50A are part of a related and interconnected scheme, the drafting choice can be inferred to be deliberate. If that inference is drawn, then it would follow that at the time of decision the gateway certificate need not be current.

45. Clause 50A is apparently directed to the application process, particularly in the context of setting environmental assessment requirements. Clause 17B of the Mining SEPP is more particularly directed to the determination of an application. In our opinion, there is no occasion to read in the word "current" to cl 17B(1) and 17B(2) of the Mining SEPP, which

refer to things that must be done "before" and "in" determining a DA for mining development "*that is accompanied by a gateway certificate*".

46. Fourthly, in our opinion, consideration of the other context of cl 50A(2) and Pt 4AA of the Mining SEPP supports the conclusion that the function and purpose of a gateway certificate in the application process does not require an interpretation of the clause as requiring that the gateway certificate be current at the date of determination. Rather, the function and purpose of the currency of a gateway certificate in the application process is satisfied if the gateway certificate is current when the application is made, providing the opportunity for the Planning Secretary to have regard to the recommendations in it when setting environmental assessment requirements.

47. The time within which a gateway certificate remains current also serves the important function of ensuring that to be complete and effective a development application must be lodged within a period no longer than the Gateway Panel considers to be appropriate. On this construction, cl 50A(2) serves the important purpose of ensuring that the consent authority has before it the gateway certificate (whether or not it ultimately remains current) so that the consent authority can discharge its function under cl 17B(2).

48. Gateway certificates will commonly, perhaps in the vast majority of cases, be applied for and obtained at a very early stage of the application and assessment process: a primary purpose of a gateway certificate is to inform the preparation of environmental assessment requirements which, in turn, normally precede the preparation of an EIS. Part of the context is the use of the term "gateway" itself – a gateway certificate may be regarded as a regulatory threshold that must be passed in order for the application to proceed to environmental assessment and eventual determination.

49. In other words, while the provisions suggest that the contents of a gateway certificate have a function at date for determination, the fact of currency of the certificate does not have any apparent function at the time of determination. Reflecting that position, the provision directly relevant to the exercise of the consent authority's function of determination simply refers to the gateway certificate, without requiring it to be current. The Mining SEPP is, in terms, satisfied notwithstanding that a current gateway certificate that was lodged with the application expires before the date of determination.

50. Fifthly, in the interpretation of legislation and regulations consideration may be given to potentially impractical or absurd outcomes that might come about if the provisions are given a particular meaning. In this instance, it seems to us that very inconvenient and perhaps absurd outcomes might follow if cl 50A(2) is interpreted as requiring that there must be a current gateway certificate at the date of determination. For example, if through no fault of the proponent of development the determination of an otherwise compliant development application is delayed past the date of expiry of a gateway certificate, the proponent would be required to re-apply for a new certificate and the Planning Secretary would be obliged to consider any recommendations in any new certificate and may amend the environmental assessment requirements for the project. In our opinion one would not rush to adopt a construction of cl 50A that is not required by its terms but that might cause the assessment process to go back to square one.

51. It follows from the above observations that, if a gateway certificate was required to remain current at the time of decision, then either (i) many mining projects simply could never proceed to a valid consent because of the length of the assessment process, or (ii) the ability of a project to do so could be thwarted by the imposition by the Gateway Panel of a short period in which a gateway certificate was to remain current. It is most unlikely that the drafter of r 50A(2) intended these consequences.

Conclusion

52. For these reasons, we consider that the better interpretation of cl 50A(2) is that it imposes a time of application criterion. In our opinion, if, as in the present circumstances, a development application has been lodged with a current gateway certificate, it is not a precondition to a valid approval that the gateway certificate must also be current on the date of determination of the development application.

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