



MARYLOU POTTS PTY LTD
ACN 074 696 263

Comments on Bylong Compensatory Water Agreement¹

I wish to thank BVPA for making available KEPCO's draft Bylong Compensatory Water Agreement (Agreement) for MLPPL comment. The comments below are based on the Agreement as at 11 January 2019. They are not provided as legal advice.

KEPCO's Agreement less favourable than Condition 25

The terms of this Agreement are less advantageous than those provided in the DPE Recommended Condition 25 for Bylong² (**Condition 25**). Contrary to Condition 25, the burden of proof in this Agreement is on the landholder to prove that the adverse impact³ is caused directly by the Project. As a consequence, all cost and risk is on the landholder.

Landholder should be no worse off

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

Bylong condition worse than Ulan and Wallarah 2 conditions

It is noted that Condition 25 is in worse terms than its equivalent in the Wallarah 2 and the Ulan Project⁴. In the Wallarah 2 and Ulan Compensatory Water condition, interim water is to be provided within 24 hours of the loss. In Bylong and Shenhua, "as soon as practicable". The impact in the Bylong Project has to be proved to be directly caused by the Project. The equivalent Ulan condition does not require the cause to be

¹ Comments made on 18 January 2019

² http://www.majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6367

³ Query how an adverse impact directly related to the Project will be proved? The cost of establishing this must be on KEPCO and should be undertaken by an independent party. Is a blast which causes a fault which results in a slow drain, a direct result? Is the cutting through the aquifer in an open cut or underground mine some kilometres away which results in the flow of water into the mine and a lowering of bores a direct result? And, even if the burden is on KEPCO, could it not simply say "its the drought". Then the burden shifts back to the landholder to prove that the adverse impact is not the drought. It is in this conundrum that the make good concept is flawed.

⁴ MOD 3 Determination The Proponent shall provide a compensatory water supply to any owner of privately-owned land whose **supply is** adversely impacted (other than an impact that is negligible) as a result of the project, in consultation with **DPI Water**, and to the satisfaction of the **Secretary**.

direct, meaning the cause can be both direct and indirect. As a consequence, Bylong's Condition 25 will not assist landholders where the adverse impact is indirect. This is a significant limitation which I anticipate will result in much dispute.

"Make good" ripe for disputes

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

General comments on KEPCO Compensatory Water Agreement:

- Shift the burden back onto KEPCO to prove the adverse impact is not a result of the Project.
- Delete references to "directly" caused, so as to allow for indirect causation.
- Clearly establish what would constitute sufficient evidence of causation.
- Ensure evidence of causation, all baseline, monitoring, assessment of adverse impact, and devising of interim and final measures are done by an independent entity paid for by KEPCO.
- Baseline has to be at least 12 months, preferably 2 years before Project starts.
- All reasonable costs, legal, expert, and landholder are payable by KEPCO on presentation of invoice.
- Landholder can rely on condition 25 if the Agreement is terminated.
- Copyright in all records is owned by the landholder and provided to the landholder in a comprehensible format.
- No clawback by KEPCO if water requested in good faith.
- Option to take compensation is with the Landholder. Compensation payments should not preclude further payments if the conditions worsen.
- Security available if KEPCO fails to act.

General Comments on Recommended Condition 25

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

- Insert a condition that the “*landholder and the environment should be no worse off as a consequence of the Project*”.
- Insert a condition of the Development Consent that KEPCO has the capability, throughout the term of the impact, to carry out all the potential Compensatory Water Measures for impacted landholders.
- Amend the compensation condition to ensure it is the landholder’s choice not the proponents, and the interim supply is to be provided until the compensation is agreed.
- All related reasonable costs: legal, landholder, experts, for proof of causation, adverse impact, baseline assessment, monitoring, determination of measures, disputes, compensation must be borne on presentation of invoice by KEPCO. Any dispute as to costs goes to Costs Assessment at the Supreme Court. Otherwise there is an unacceptable and costs burden on landholders.
- Access to the security, under s261B of the Mining Act, should be made, via the Secretary, available to Landholders for purchase of compensatory water, as a minimum, if KEPCO surrenders the development consent, goes into voluntary liquidation or fails to provide interim water supply within 24 hours of loss, or, discontinues interim water supply without compensatory water measures in place or discontinues or fails to provide adequate compensatory water measures.
- The “make good” obligation must be a condition of the Mining Lease: see s261B(1) Mining Act. The security deposit must be sufficient to cover the supply of equivalent quality and volume of water to adversely impacted landholders on a per annum basis and held until the adverse impact has been resolved. We recommend the security be in place before commencement of Project construction and be available immediately upon breach by KEPCO of Condition 25 or a water supply term of a Compensatory Water Agreement, that is available by showing loss to the Secretary.

Note the comments⁵ made by MLPPL on the clauses in the Agreement do not include clauses to cover all the points made above.

Clause	Comments on KEPCO Compensatory Water Supply Agreement
Background	
B	Delete “not” predicted to be adversely affected.
E	Baseline Assessment should be carried out by an independent entity. Funding paid by Kepco preferably via the Secretary.
Definitions	
1.1 Defined terms	
Adversely impacted	What are the trigger levels? Insert “it is assumed that an Adverse Impact has been caused by the Project unless KEPCO can prove to the satisfaction of the landholder that the adverse impact has another unrelated and direct cause.”
Compensation payment	See clause 9.1 comments

⁵ These comments do not cover the Baseline Assessment Guideline or the Bore Impact Assessment Guideline, as the Agreement does not include these documents.

Clause	Comments on KEPCO Compensatory Water Supply Agreement
Compensatory Water Supply Measures	Should be defined as the “measures which provide the landholder with an alternative supply of water that is equivalent, in quality and volume, to the loss suffered by the landholder which is attributable to the Project.” This is the language of Condition 25.
Condition 25	See comments later. Landholder should not be bound by modifications to condition 25 which are detrimental, but able to take up modifications of condition 25 which are advantageous. Note Condition 25 provides “This condition does not apply if the Applicant has a compensatory water agreement with the owners of the land and the applicant has advised the Department in writing of the terms of this agreement.
Interim Water Supply	Note that this definition is not consistent with Condition 25 of the DPE recommended conditions as it restricts the Interim Water Supply to only supply water for domestic and stock purposes. This has flow on implications for holding landholder to ransom if the landholder has licensed water requirements where the compensatory water measures are not agreed in a timely manner. The definition of Interim Water Supply should be “a supply equivalent in quality and volume, to the loss attributable to the development”. Condition 25 requires the provision of an equivalent water supply within 24 hours.
1.2 Interpretation	
(l)	Note the joint and several liability is more likely to apply to landholders.
3 Intention	
(b)	Consider whether you want KEPCO undertaking the Baseline assessment. KEPCO has a conflict of interest. Copyright in the Baseline assessment should be assigned to the landholder.
(c)	Consider whether you want KEPCO undertaking monitoring. KEPCO has a conflict of interest. Monitoring results should be automatically made available to the landholder in a form understandable to the landholder. Copyright in the monitoring results should be assigned to the landholder.
(d)	Some time frame should be inserted to ensure the compensatory water measures are undertaken as soon as practicable after the loss is identified. See condition 25.
(e)	To some landholders, compensation is not an acceptable option. The option to choose compensation should be with the landholder. KEPCO must be able to show that it has sufficient water licenses to cover make good for all potentially impacted landholders on a worse case scenario basis.
(f)	The obligation to make good must continue as long as the water resources on the property are impacted by the Project. Condition 25 ensures the obligation runs with the land.
4 Landholder obligations	
(a)	Delete “prudently, in accordance with sound operating practises”. This is not an obligation in Condition 25 or under the water licensing. It can be used against the landholder.
(b)	Delete. This is not an obligation in Condition 25 and it is an onerous obligation on the landholder to be required to keep records and provide them to KEPCO. The landholder may not have this capability.

Clause	Comments on KEPCO Compensatory Water Supply Agreement
(d)	What is a “material change”? Delete. The obligation to give notice of a material change should be on the person monitoring the water. The landholder may not have this information.
5 Baseline Assessment	
5.1 KEPCO to undertake Baseline Assessment	KEPCO has a conflict of interest. An independent entity should take the baseline. The Baseline Assessment should cover at least 4 seasons of the year. Often exploration licence conditions require title holder to take 2 years of baseline water data. Where does baseline stop and monitoring begin?
5.2 Landholder to cooperate	KEPCO has a conflict of interest. All this information must be returned to the landholder. All this information cannot be used against the landholder.
6 Access to the Property	Note s.81 Mining Act for mining leases under the surface, consent of the landholder required to access the surface. The mining lease holder has no legislative right to enter. Some landholders do not wish the lease holder to enter their land. In these instances, the landholder would presumably want the lease holder to deliver water to the gate and pay for the necessary infrastructure to get that water to where it was originally available. Note also s.58(3) and (4) Mining Act On the grant of the mining lease, the exploration licence over the same area ceases, unless the decision maker determines it is likely to make the exercise of rights under the lease impracticable.
6.1 Landholder's obligations	Preferable that the entity undertaking the Baseline Assessment does not have a conflict of interest. KEPCO to keep numbers and disturbance to a minimum. All persons must be identifiable and notified names, roles and contact details in the notice referred to in clause 6.3. No guns, dogs or criminals.
6.2 Reasons for access to the Property	Preferable that the entity undertaking the Baseline Assessment does not have a conflict of interest.
6.3 Access by KEPCO	KEPCO must pay for landholder time devoted to repairing, remedying damage caused by KEPCO.
(a)	At least 1 weeks written notice. Agree on where and time to access. Consider no access unless landholder or agent in attendance and consents.
(b)	Must comply with any reasonable requests of the landholder.
(c)	Landholder operations take precedence KEPCO.
(e)	Delete “as far as is practicable and necessary”. KEPCO must compensate the landholder on an indemnity basis and on demand for any loss or damage done by KEPCO or its contractors, agents, invitees while on the Property. KEPCO responsible for contractors etc.
7 Trigger for Compensatory Water Supply Measures	

Clause	Comments on KEPCO Compensatory Water Supply Agreement
7.1 Notification issued by landholder	
(a)(i)	Agreement needs to cover situation where the landholder has no records.
(a)(ii)	The obligation here is on the landholder to prove that the impact is caused directly by the project. This is contrary to Condition 25 which places the burden of proof on KEPCO. Delete "directly".
(b)	What happens if KEPCO does not verify the landholder's notification? Can KEPCO simply not act? KEPCO must provide the Interim Water Supply within 24 hours whether or not it has verified the loss.
7.2 Adverse impact identified by KEPCO	Note that the adverse impact must be found to be as a direct result of the Project. Delete "direct". Note KEPCO has a conflict of interest. Reverse the burden of proof to bring in line with Condition 25. Insert "immediately" before "provide notice" in line 2. Establish what evidence would be required to satisfy adverse impact as a "result of the project". What of indirect results? ie open cut mining cuts across groundwater aquifer which then drains water into mine shaft resulting in lower water table. Amend to ensure KEPCO must provide the Interim Water Supply within 24 hours whether or not it has verified the loss.
7.3 Response to notifications	
(a)	Replace "Promptly after" with a time frame "Without impacting KEPCO's obligations in clause 8 and within 24 hours of".
(a)(i)	Delete "directly". Envision substantial dispute about whether the impact is a result of the Project. It is to the advantage of KEPCO not to resolve this dispute. KEPCO places the burden on the landholder to prove the impact is as a direct result of the Project. Set out how this can be proved and who pays for the proving.
(a)(ii)	It is in KEPCO's interest to ensure that the shortfall is as small as possible.
(a)(iii)	The compensatory water supply measures need to be appropriate to the landholder. KEPCO must comply with the landholder's requirements. EG truck in water, pipe in water.
(b)	Delete "direct". It is in KEPCO's interest not to agree that the Existing Water Supply has been directly impacted by the Project. KEPCO can hold the landholder to ransom by not agreeing putting the landholder in a desperate position. What is the time frame?
(c)(i)	Delete "direct".

Clause	Comments on KEPCO Compensatory Water Supply Agreement
8 Provision of Compensatory Water Supply Measures	
8.1 Interim Water Supply	
(a)	Note we have recommended amending the definition of Interim Water Supply so that it is “equivalent in quality and volume, to the loss attributable to the development”, as provided in Condition 25. This ensures landholders who have a water licence will be provided equivalent water as part of the interim supply and not be in an untenable position when agreeing the Compensatory Water Supply Measures. It could take be some months to negotiate those measures. We recommend inserting a security requiring KEPCO to provide water so landholders can call on this to purchase water should KEPCO fail to provide water. Open with “Notwithstanding clause 7, “
(d)	Note delivery proposed to a single location. Does this work for the landholder? In some areas dams are not an option. In such cases, KEPCO may need to also provide water storage tanks and connection to the water infrastructure on the property.
(e)	Delete this paragraph, it is not in Condition 25 and not in a landholder’s interests.
(f)	Delete this clawback clause and replace it with an indemnity that KEPCO pay for crops lost, agricultural land damaged as a consequence of the adverse impact and or for failing to provide all water for which the landholder was licensed to use from the date of the impact.
8.2 Compensatory Water Supply Measures	Replace the words “as soon as reasonably practicable” with “within 5 days of the loss being identified”.
8.3 Provision of Compensatory Water Supply Measures	
(a)	These consultations must not hold up the provision of the interim water supply to the landholder.
(b)	Delete “direct”.
9 Compensation	The Landholder should be given the choice of: (i) continuing the Interim Water Supply if Compensatory Water Measures cannot be agreed; or (ii) Compensation. The choice of whether or not to provide water should not be KEPCO’s.
9.1 Method to determine value of compensation payment	

Clause	Comments on KEPCO Compensatory Water Supply Agreement
(a)	Replace “or if KEPCO is unable to carry out Compensatory Supply Measures,” with “and the landholder chooses to take compensation in lieu of water,”. Note amendment of the definition of “Compensatory Water Measures” otherwise you may simply be compensated for the deepening or repositioning of a bore. A landholder should not be put in a position where his or her Property has no water and has to agree compensation. The choice whether or not to take compensation should be the landholder’s choice.
(b)	Replace “either party” with “landholder” to make it the landholder’s choice whether to take compensation. Delete the sentence “Such determination is final and binding.”
9.2 Approval of Compensation Payment by the Secretary	It is likely that an initial adverse impact may get worse. Note Condition 25 runs with the land. Note the opening comments on the issues with compensation. Delete this paragraph, it is unnecessary.
9.3 Making Compensation payment	Replace 20 with 10 Business days. Note that the approval or determination of the Secretary may take some time.
9.4 No further compensation claim	Delete. This is not an obligation in Condition 25 and releases KEPCO from “any Claim” concerning Existing Water Supply Adversely Impacted as a direct result of the Project. One cannot know what will happen in the future.
10 Monitoring	
(a)	Review the Water Management Plan before agreeing to this paragraph. The Water Management Plan may not have monitoring bores on the Property. KEPCO has a conflict. The monitoring should be done by an independent entity.
(b)	Delete “upon request”. Monitoring results should automatically be provided to the landholder. It is in the landholders interest to see these results as and when produced in an understandable manner. Assign the copyright in the monitoring data to the landholder upon its creation.
11 Dispute Resolution	
11.1 Negotiation	Some words appear to be missing. Replace “then” with “and” and add “then” after the word “dispute,” in the second line.
11.2 Referral to the NSW Land and Water Commissioner	
(a)	What is “adjudication”? Mediation? Conciliation?
11.3 Resolution by the Secretary	
(b)	Delete. This goes well beyond Condition 25. A landholder should retain the right to litigate to protect stock and domestic and and its licensed water supply.
12 Costs	

Clause	Comments on KEPCO Compensatory Water Supply Agreement
12.1 Cost reimbursement	\$1000 (GST exclusive) is very unlikely to cover the landholder's legal costs and should include GST. The costs reimbursement should include landholder time, landholder experts, landholder legal costs and these persons' costs associated with proof of causation, adverse impact, baseline assessment, monitoring, determination of measures, disputes, compensation in relation to this Agreement. Otherwise, there is a very significant cost burden and a significant technical and legal disadvantage on the landholder.
13 Dealing with the Property	
13.1 Landholder not to deal adversely with Property	Delete. There should be no adverse consequences for the landholder insofar as continuation of supply of water, if the landholder is in breach of this clause.
13.2 Sale or disposal of the Property	Delete. If a landholder makes an agreement, it should not hamper, in any way, any attempt to dispose of the property. It could have a significant impact on the landholder's ability to sell the property.
14 Termination	
14.1 Termination of deed	
(b)	Delete. KEPCO could decide not to proceed at any time, leaving the landholder adversely impacted and termination leaves the landholder with no agreement to enforce make good, unless the landholder can go back and rely on Condition 25.
(c)	Delete. Expiry or surrender of the development consent is not necessarily at a time when the adverse impact has been resolved. In fact, it is likely that the adverse impact will continue for a significant time after mine closure.
14.2 KEPCO released from further obligation	Delete. This goes beyond Condition 25. The obligation to provide compensatory water continues with the land until there is no adverse impact.
16 GST	Ensure in any compensation discussion that you are aware of your GST obligations
17 General	
17.2 Assignment	Delete or Landholder consent required. KEPCO could assign this deed to an entity with no capacity to provide water or compensation. KEPCO could assign this deed to an entity without your knowledge. An entity you may not be able to locate.