



LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 7

Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 [Provisions]

Report 1

March 2020

7



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Portfolio Committee No. 7 - Planning and Environment

**Environmental Planning
and Assessment
Amendment (Territorial
Limits) Bill 2019
[Provisions]**

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Table of contents

	Terms of reference	v
	Committee details	vi
	Chair's foreword	vii
	Recommendations	viii
	Conduct of inquiry	ix
Chapter 1	Overview	1
	Reference	1
	Background and purpose of the bill	1
	Overview of the bill's provisions	4
Chapter 2	Key issues	5
	Context to the introduction of the bill	5
	What are 'downstream' greenhouse gas emissions?	5
	Planning decisions preceding the bill	6
	Impetus for the bill	9
	Concerns about climate change	12
	Contribution of the mining industry to NSW	15
	Jurisdictional issues	16
	Extraterritorial considerations and the New South Wales planning system	16
	Accounting for scope 3 emissions	18
	Limitation of considerations in planning decisions	20
	The global nature of climate change	21
	Operation of the bill	22
	Scope of Schedule 1	22
	Conditions imposed under Schedule 1	23
	Effect of section 4.17A	25
	Amendments to the <i>State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007</i>	26
	Retrospective application	27
	Proposed amendments	28
	Committee comment	29
Appendix 1	Submissions	32
Appendix 2	Witnesses at hearings	34
Appendix 3	Minutes	35

Appendix 4 Dissenting statement

48

Terms of reference

That:

- (a) the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 be referred to the Portfolio Committee No. 7 – Planning and Environment for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly,
- (c) the committee report by Tuesday 17 March 2020, and
- (d) on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill and that the bill proceed through all remaining stages according to standing and sessional orders.

The terms of reference were referred by the Legislative Council on 12 November 2019.¹

¹ *Minutes*, NSW Legislative Council, 12 November 2019, p 629.

Committee details

Committee members

Ms Cate Faehrmann MLC	The Greens	<i>Chair</i>
The Hon Mark Pearson MLC	Animal Justice Party	<i>Deputy Chair</i>
Ms Abigail Boyd MLC*	The Greens	
The Hon Mark Buttigieg MLC**	Australian Labor Party	
The Hon Catherine Cusack MLC	Liberal Party	
The Hon Ben Franklin MLC	The Nationals	
The Hon Shayne Mallard MLC	Liberal Party	
The Hon Adam Searle MLC***	Australian Labor Party	
The Hon Penny Sharpe MLC	Australian Labor Party	

* Ms Abigail Boyd MLC was a participating member from 19 November 2019 for the duration of the inquiry.

** Hon Mark Buttigieg MLC was a participating member from 6 February 2020 for the duration of the inquiry.

*** Hon Adam Searle MLC was substituting for the Hon Mark Buttigieg MLC from 6 February 2020 for the duration of the inquiry.

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Chair's foreword

On 12 November 2019, the Legislative Council's Selection of Bills Committee referred the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 to Portfolio Committee No. 7 – Planning and Environment for inquiry and report.

Through amendments to existing legislation, the bills seeks to prohibit the imposition of consent conditions relating to impacts of development outside Australia and remove the express requirement for a consent authority to consider downstream greenhouse gas emissions when weighing up the impacts of mining projects for the purpose of granting or refusing development consent.

I am encouraged by the response to the online submission process trial, with close to 3000 responses. An overwhelming majority of these respondents opposed the bill and noted concerns about climate change and the impacts of greenhouse gas emissions on climate change.

At the hearing and in submissions, some expert witnesses raised concerns that the bill would discourage consent authorities from considering greenhouse gas emissions in making determinations on mining projects and could have a broader impact than intended. Others from industry were concerned that the bill could increase the risk of refusal of mining projects without the power of the consent authority to impose conditions relating to downstream emissions. Stakeholders also questioned whether this bill was necessary in reference to recent case law leading up to the introduction to the bill.

On behalf of the committee, I wish to express my gratitude to my committee colleagues and all who participated in the inquiry at short notice.



Ms Cate Faehrmann MLC

Committee Chair

Recommendations

Recommendation 1 30

That the bill not be passed in its current form.

Recommendation 2 31

If the bill is to proceed further, the Legislative Council consider the following amendments to the bill which reflect the majority concerns expressed during the inquiry, with the bill to make clear that for the avoidance of doubt, the bill does not prevent the consideration of scope 3 emissions.

Schedule 1 Amendment of *Environmental Planning and Assessment Act 1979 No 203*

Section 4.17A

Insert after 4.17 –

4.17A Prohibited conditions

(1) For development for the purpose of mining, petroleum production or extractive industry under clause 7 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, a condition of a development consent described in this section has no effect despite anything to the contrary in this Act, unless the applicant proposes such a condition to the consent authority.

(2) A condition imposed for the purpose of achieving outcomes or objectives relating to –

- a. the impacts regulation of downstream greenhouse gas emissions occurring outside Australia or an external Territory as a result of the development
- b. the impacts occurring in the State as a result of any development carried out outside Australia or an external territory.

(3) This section does not apply to any development consent granted before the commencement of this section.

Schedule 2 Amendment of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*

Clause 14 ~~Natural resource management and environmental management~~

Omit ~~“(including downstream emissions)”~~ from clause 14(2).

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 12 November 2019.

The committee received 19 submissions and 2602 responses to an online submission process.

The committee held 1 public hearing at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcript, tabled documents and a report on the views expressed in the online submission process.

Chapter 1 Overview

Reference

- 1.1 The Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 was introduced into the Legislative Assembly on 24 October 2019 by the Hon Rob Stokes MP, Minister for Planning and Public Spaces.
- 1.2 On 12 November 2019, the Selection of Bills Committee recommended that the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 be referred to Portfolio Committee No. 7 – Energy and Environment for inquiry and report by 17 March 2020.²
- 1.3 On tabling the Selection of Bills Committee report that day, the Legislative Council agreed to the motion of committee chair the Hon Natasha Maclaren-Jones MLC, and referred the provisions of the bill to the committee.³

Background and purpose of the bill

- 1.4 The Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 seeks to amend the *Environmental Planning and Assessment Act 1979* to prohibit the imposition of conditions of a development consent that purport to regulate any impact of the development occurring outside Australia or any impact of development carried out outside Australia.⁴ The bill also seeks to amend the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* to remove the specific requirement to consider downstream greenhouse gas emissions in determining a development application for mining, petroleum or extractive industries.
- 1.5 The key provisions of the bill are Schedule 1 and 2. Schedule 1 would insert a new section – 4.17A – into the *Environmental Planning and Assessment Act 1979*. Schedule 1 of the bill would introduce a new section of 'prohibited conditions' to designate certain conditions of development that are to have no effect, if they relate to:
- the impacts occurring outside Australia (or an external Territory) as a result of the development, or
 - the impacts occurring in New South Wales as a result of any development carried out outside Australia or an external Territory.
- 1.6 Schedule 2 of the bill would amend the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*. Clause 14 provides that before development consent is granted to a mine, petroleum production or extractive industry, the consent authority must consider whether conditions should be imposed to ensure the development is undertaken in an

² Selection of Bills Committee Report No. 27 – 12 November 2019, p 2.

³ Minutes, NSW Legislative Council, 12 November 2019, p 629.

⁴ Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, Explanatory Note, p 1.

environmentally responsible manner. Clause 14(2) currently states that a consent authority 'must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions'.⁵ The bill would remove the words 'including downstream emissions' from clause 14(2).

- 1.7** The Hon Rob Stokes MP, Minister for Planning and Public Spaces, in his second reading speech, stated that the purpose of the bill is 'to clarify how conditions of development consent under the State's planning legislation treat impacts occurring outside the territorial limits of Australia'.⁶
- 1.8** In his second reading speech, the Minister referred to development consent granted to Wambo Coal to operate an open-cut coal mine in August 2019. The Independent Planning Commission granted development consent to Wambo Coal which included a condition that the proponent ensure the extracted coal is only exported to signatories to the Paris Climate Agreement or countries declared to have similar policies.
- 1.9** The Minister stated that cases such as Wambo Coal 'highlight a technical and jurisdictional issue' with the *Environmental Planning and Assessment Act 1979* and suggested that any impacts of development outside Australia cannot be effectively regulated by New South Wales.⁷ The Minister argued that the bill provides certainty by clarifying the limitations of existing planning legislation, stating: 'the bill principally clarifies that development consent conditions can only be imposed if they relate to impacts occurring within Australia or its external territories'.⁸
- 1.10** The Minister noted that while it is 'absolutely appropriate' that the planning system continues to require consideration of greenhouse gas emissions, 'such requirements have always focused on the impacts of development that can reasonably be controlled by the applicant'.⁹ Further, he said 'there are no applicable State or national policies requiring New South Wales coal projects to minimise or offset downstream emissions that occur overseas'.¹⁰ The Minister noted that regulating international trade, either directly or indirectly, is a matter for the Commonwealth Government and that he had written to the Commonwealth Minister for Energy and Emissions

⁵ *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* cl 14(2).

⁶ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 1.

⁷ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

⁸ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

⁹ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

¹⁰ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

Reduction seeking guidance on the issue.¹¹ A response from the Commonwealth Government was received on 16 December 2019.¹²

- 1.11** The Minister explained that the bill nullifies two types of consent conditions that aim to achieve objectives or outcomes relating to the impacts of development:
1. conditions that consider the impacts outside Australia of development that occurs in New South Wales, and
 2. conditions that consider the impact in New South Wales of development that is carried out overseas.¹³
- 1.12** In his second reading speech, the Minister observed that the bill is 'about conditions of development consent ... not about the evaluation of a proposal',¹⁴ and that the consent authority would still be required to assess the economic, environmental and social impacts of proposed development on a case-by-case basis.¹⁵ The Minister confirmed that the bill would not apply retrospectively and 'will not invalidate any conditions of previously granted development consents'.¹⁶
- 1.13** In relation to Schedule 2 of the bill, the Minister stated that the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* would be amended in line with the restriction in Schedule 1 of the proposed bill, by omitting the reference to 'downstream' greenhouse gas emissions.¹⁷

¹¹ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

¹² Correspondence from Mr Nestor Tsambos, Executive Planning Officer, Office of the Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, to Secretariat, 29 January 2020, p 1.

¹³ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

¹⁴ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

¹⁵ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

¹⁶ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

¹⁷ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

Overview of the bill's provisions

- 1.14** The object of this bill, as set out in the explanatory note, is: to prohibit the imposition of conditions of a development consent that purport to regulate any impact of the development occurring outside Australia or any impact of development carried out outside Australia.¹⁸
- 1.15** Schedule 1 of the bill inserts a new section 4.17A 'Prohibited conditions' in the *Environmental Planning and Assessment Act 1979*. It states:
- (1) A condition of a development consent described in this section has no effect despite anything to the contrary in this Act.
 - (2) A condition imposed for the purpose of achieving outcomes or objectives relating to—
 - (a) the impacts occurring outside Australia or an external Territory as a result of the development, or
 - (b) the impacts occurring in the State as a result of any development carried out outside Australia or an external Territory.
- 1.16** Schedule 2 of the bill amends the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* to omit the words 'including downstream emissions' from clause 14(2).

¹⁸ Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, Explanatory Note, p 1.

Chapter 2 Key issues

This chapter explores the key issues to emerge from the written and oral evidence, and the varying viewpoints put forward by stakeholders on elements of the bill. It consists of three sections. The first section is a discussion of underlying themes and debates around the bill, including key planning decisions that preceded the bill's introduction. The second section examines jurisdictional concerns relating to the bill, whilst the third section examines issues raised regarding the bill's operation.

Context to the introduction of the bill

2.1 This section begins with an explanation of 'downstream' greenhouse gas emissions, as dealt with in the bill, followed by an overview of key planning decisions preceding the bill's introduction and stakeholder views on the impetus for the bill. It then provides context to the underlying themes and debates around the bill, in particular concerns about the mining industry's contribution to climate change, as balanced against mining's contribution to the New South Wales economy.

What are 'downstream' greenhouse gas emissions?

2.2 Before turning to consideration of the bill it is important to understand the concept of downstream emissions. 'Downstream' greenhouse gas emissions are not defined in NSW legislation. According a recent decision of the Land and Environment Court, the term is 'commonly understood to denote the greenhouse gas emissions relating to sold goods and services and thus caused by end-users' use of the product (e.g. coal) produced by a project'.¹⁹

2.3 Greenhouse gas emissions are often categorised into three broad 'scopes'. In the context of mining development approvals, downstream emissions generally refer to scope 3 emissions.

2.4 According to the submission of the Construction Forestry Mining Maritime and Energy Union (the CFMMEU), scope 1 emissions are those produced directly by the activity of a business, scope 2 emissions are produced indirectly as a result of the consumption of electricity by the business, and scope 3 emissions arise along the value chain associated with a business but are not produced by that business.²⁰

2.5 The Environmental Defenders Office also set out the categorisation of emissions into scopes as follows:

- Scope 1 emissions: Direct emissions released to the atmosphere as a direct result of an activity, or a series of activities at a project level.
- Scope 2 emissions: Offsite greenhouse gas emissions associated with generation of electricity, heat or steam purchased by the project.

¹⁹ *Wollar Property Progress Association Inc v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92 Sheahan J at [126].

²⁰ Submission 7, Construction Forestry Maritime Mining and Energy Union (CFMMEU), p 3.

- Scope 3 emissions: Indirect greenhouse gas emissions (other than scope 2) that are generated in the wider economy. They occur as a consequence of the activities of a facility, but from sources not owned or controlled by that facility's business.²¹

Planning decisions preceding the bill

- 2.6** Three significant planning decisions in 2019 preceded the introduction of the bill – the Rocky Hill decision by the Land and Environment Court, the Bylong Coal and the Wambo Coal decisions by the Independent Planning Commission. As noted in chapter 1, the Minister in his second reading speech singled out the Wambo Coal decision as the impetus for this bill.
- 2.7** The NSW Government in support of the bill argued that these cases highlight issues with planning law that need to be fixed, whereas those who opposed the bill argued these decisions were appropriate and consequently there was no need to amend planning law.

Rocky Hill Coal Project

- 2.8** In February 2019, the Land and Environment Court upheld an earlier decision of the Independent Planning Commission to refuse development consent for a proposed mine at Rocky Hill. The court considered a number of projected effects of the proposed mine, including economic, visual, social and climate change impacts.
- 2.9** The court found that if the project went ahead, it would contribute to climate change.²² In his judgment, Chief Justice Preston held that when assessing the likely impacts of a particular development, consent authorities are required to consider 'both direct and indirect environmental impacts'.²³ Regarding the greenhouse gas emissions of the project, he stated: 'there is a causal link between the Project's cumulative [greenhouse gas (GHG)] emissions and climate change and its consequences. The Project's cumulative GHG emissions will contribute to the global total of GHG concentrations in the atmosphere'.²⁴

Bylong Coal Project

- 2.10** Since the Rocky Hill decision, the Independent Planning Commission refused development consent to the proposed Bylong coal mine in September 2019, citing the project's projected greenhouse gas emissions as a factor in its refusal. In their statement of reasons for this decision, the Commission said that in the context of New South Wales moving away from fossil fuels, 'the cumulative environmental impact of [the project] needs to be considered when weighing the acceptability of greenhouse gas emissions associated with the mine'.²⁵

²¹ Submission 8, Environmental Defenders Office, p 8.

²² *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [525].

²³ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [494].

²⁴ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [525].

²⁵ New South Wales Government IPC, *Statement of reasons for decision, Bylong Coal Project (SSD 6367)*, 18 September 2019, p 122 at [692].

United Wambo Open Cut Coal Mine Project

- 2.11** In August 2019, the Independent Planning Commission approved development of the United Wambo open cut coal mine. Along with other conditions of consent, this mine was approved with a condition that the owners of the mine prepare an Export Management Plan to ensure that any coal extracted from the mine is sold only to countries that are signatories to the Paris Climate Agreement or have similar greenhouse gas emission policies.²⁶
- 2.12** In the statement of reasons for the decision, the Independent Planning Commission discussed the arguments for and against imposing the export management condition and concluded that conditions to regulate scope 3 emissions 'are an appropriate mechanism for managing and minimising greenhouse gas emissions (including scope 3 greenhouse gas emissions) as required under clause 14(1) of the [*State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*]'.²⁷ The Independent Planning Commission noted that the export condition meets the Newbury test for a lawful condition as it is: 'for a planning purpose ... related to the development and is a reasonable measure over which the Applicant has some control'.²⁸
- 2.13** The Commission also commented on concerns about who bears responsibility for scope 3 emissions, stating:

'while the principal responsibility for the mitigation and management of scope 3 greenhouse gas emissions rests with the downstream ... the cost of such emissions is arguably the responsibility of each party that operates in the relevant supply chain of the product coal ...'²⁹

Stakeholder views on recent planning decisions

- 2.14** Stakeholders such as Lawyers for Climate Justice Australia told the inquiry that, although the Rocky Hill mine was refused for a number of environmental, social and economic reasons, it was established in that case that the mine would have increased greenhouse gas emissions via downstream emissions of overseas end users of the coal.³⁰ The Nature Conservation Council of NSW argued that this judgment demonstrated that the impacts of the potential mine on the environment and public interest justify the consideration of scope 3 emissions.³¹ Groundswell

²⁶ New South Wales Government IPC '*Statement of reasons for decision: United Wambo Open Cut Coal Mine Project (SSD 7142) and associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)*', 29 August 2019, [para 309].

²⁷ New South Wales Government IPC '*Statement of reasons for decision: United Wambo Open Cut Coal Mine Project (SSD 7142) and associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)*', 29 August 2019, [para 310].

²⁸ New South Wales Government IPC '*Statement of reasons for decision: United Wambo Open Cut Coal Mine Project (SSD 7142) and associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)*', 29 August 2019, [para 311]. For a discussion of the Newbury test, see Submission 18, NSW Young Lawyers, p 7.

²⁹ New South Wales Government IPC '*Statement of reasons for decision: United Wambo Open Cut Coal Mine Project (SSD 7142) and associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)*', 29 August 2019, [para 311].

³⁰ Submission 2, Lawyers for Climate Justice Australia, p 1.

³¹ Submission 6, Nature Conservation Council of NSW, p 3.

Gloucester also felt it was significant that the court had stated that it was the 'wrong time' for such a project as it would increase global greenhouse gas emissions at a critical time for climate change.³²

- 2.15** Commenting on the Wambo Coal approval, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, told the committee that the condition imposed on the Wambo mine allowed the Secretary of the Department of Planning, Industry and Environment to vary or set the condition aside if it was found to be not practicable or necessary and in this context she agreed the condition could be characterised as a 'best endeavours' clause.³³ Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment also agreed the condition was a best endeavours approach,³⁴ but nevertheless noted that this sort of condition was 'highly unusual' and had not been imposed before.³⁵
- 2.16** The NSW Minerals Council stated that they opposed the imposition of an export management plan condition in the Wambo case, arguing that imposing conditions on exports undermines the United Framework Convention on Climate Change.³⁶ The Environmental Defenders Office said they, on behalf of their client Hunter Environment Lobby, were also opposed to the condition as they did not believe that exporting coal to only Paris Climate Agreement signatory countries would sufficiently minimise the project's scope 3 greenhouse gas emissions.³⁷
- 2.17** Ms Woods of Lock the Gate Alliance, pointed out that an expansion of the Rix's Creek mine was approved by the Independent Planning Commission in late 2019 without an export condition like that imposed on the Wambo mine.³⁸ She argued that the Commission's decision to rely on market forces and emissions targets of other countries to mitigate downstream emissions rather than impose an export condition in the Rix's Creek case indicates that 'there is not any sort of burdensome accounting regime being imposed, nor is there actually an impediment to mine expansions being imposed'.³⁹
- 2.18** A number of stakeholders pointed out that the above decisions have resulted in more information about environmental impacts being provided in planning decisions. Lock the Gate Alliance stated in their submission: 'in the wake of Rocky Hill, the Independent Planning Commission sought more detailed information from mine proponents about how their downstream emissions fit into the global climate change context'.⁴⁰ Similarly, the Nature Conservation Council of NSW argued that since the Rocky Hill judgment, 'mining companies have been more transparent by providing more information about climate change in the context of new coal mines'.⁴¹ They also argued that the Rocky Hill judgment demonstrates how planning

³² Submission 3, Groundswell Gloucester, p 2.

³³ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 5.

³⁴ Evidence, Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 58.

³⁵ Evidence, Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, pp 63-64.

³⁶ Submission 5, NSW Minerals Council, p 4.

³⁷ Submission 8, Environmental Defenders Office, p 13.

³⁸ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 11.

³⁹ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 11.

⁴⁰ Submission 4, Lock the Gate Alliance, p 2.

⁴¹ Submission 6, Nature Conservation Council of NSW, p 2.

laws can support court proceedings 'by providing decision-makers with a more holistic view of the environmental impacts of a project'.⁴²

- 2.19** Ms Woods agreed that the shift in how greenhouse gas emissions have been considered in recent cases was a positive step. She said:

Following the judgement in the Gloucester Resources case in February last year, there was a change in the way that the Independent Planning Commission was applying this regulation. We were pleased to see that, moving on from a simple cursory examination of the downstream greenhouse gas emissions of coal projects, the [Independent Planning] Commission was taking the time and consideration to explore how this longstanding regulation applies in the age that we are now in, where there is a great deal of urgency about climate change ...⁴³

- 2.20** Mr Peter Colley, National Research Director, CFMMEU, argued that although these cases were not decided solely on greenhouse gases, the shift in the way the law has been interpreted in these recent cases and commentary about them indicates that consideration of greenhouse gas emissions will play more of a role in mining applications in future.⁴⁴

Impetus for the bill

- 2.21** The Hon Rob Stokes MP, Minister for Planning and Public Spaces stated that cases such as the United Wambo decision 'highlight a technical and jurisdictional issue' with the *Environmental Planning and Assessment Act 1979* that the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 aims to address.⁴⁵ In evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, clarified that the bill was introduced in response to the Wambo condition and not the reasoning in the Rocky Hill decision.⁴⁶
- 2.22** A number of stakeholders, however, gave evidence that it was unnecessary to amend existing legislation to deal with the outcome of recent planning decisions. The Environmental Defenders Office told the committee that recent decisions do not need to be corrected by a new bill as they were 'an entirely appropriate and orthodox application of existing New South Wales laws having regard to the impacts of those projects'.⁴⁷
- 2.23** Stakeholders, including the Environmental Defenders Office, argued that recent consideration of downstream greenhouse gases in planning approvals was not reflective of a change in the law but rather an evolving understanding of the law as well as growing awareness of the impact of

⁴² Submission 6, Nature Conservation Council of NSW , p 3.

⁴³ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 3.

⁴⁴ Evidence, Mr Peter Colley, National Research Director, Construction Forestry Maritime Mining and Energy Union (CFMMEU), 6 February 2020, p 43.

⁴⁵ The Hon Rob Stokes MP, Minister for Planning and Public Spaces, Second Reading Speech: Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019, 24 October 2019, p 2.

⁴⁶ Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 61.

⁴⁷ Submission 8, Environmental Defenders Office, p 8.

greenhouse gas emissions on climate change. Ms Rachel Walmsley, Policy and Law Reform Director at the Environmental Defenders Office told the committee:

The law has not changed ... What has changed is our understanding of climate change and the relevant impacts that decision-makers need to take into account now ... it is not a matter of needing this bill to correct any law. If you look at the Rocky Hill decision, that was a very orthodox application of legal precedence and what is in the law already.⁴⁸

2.24 Mr Marcus Ray of the department set out the NSW Government's view of how the law's interpretation had changed. He said:

... the approach taken in Rocky Hill was consistent with those previous decisions in that scope 3 emissions were a key consideration. But, obviously, for the first time, those scope 3 emissions became a contributory factor to a refusal of a development application. So that is something that had not happened before in the previous 12 years that scope 3 emissions had been considered. To that extent, that component of it was a new advance, but it was in a tradition that had been going for 12 years.⁴⁹

2.25 In addition to arguing that the change to the law was unnecessary, stakeholders said that a change in the law would not have affected the outcomes of the recent planning decisions. The Nature Conservation Council of NSW argued that the bill would not have changed the outcome of cases such as the above because the Rocky Hill and Bylong projects were not refused based on their downstream emissions alone but because of unacceptable local and environmental impacts.⁵⁰ For example, Ms Woods of Lock the Gate Alliance noted that the proposed Rocky Hill mine would have been very close to populated areas of Gloucester and the proposed Bylong mine would have had a dramatic effect on groundwater in the area.⁵¹

2.26 Mr Ray confirmed that the Rocky Hill mine had been rejected due mainly to the social impacts of the mine and noted that the department had initially recommended the application be refused.⁵² He stated:

... that particular mining proposal was at first recommended for refusal by the department and refused by the Independent Planning Commission mainly on the social impact grounds of the proximity of the mine to rural residential development around Gloucester.⁵³

2.27 Some submission authors raised concerns that the bill was brought about as a result of lobbying by mining interests following recent key planning decisions. Groundswell Gloucester stated in their submission that in 2019 the NSW Minerals Council launched a public campaign to remove the consideration of downstream emissions and met with the Minister for Planning and Public

⁴⁸ Evidence, Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office, 6 February 2020, p 16.

⁴⁹ Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 63.

⁵⁰ Submission 6, Nature Conservation Council of NSW, p 2.

⁵¹ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 6.

⁵² Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 58.

⁵³ Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 58.

Spaces on 18 September 2019, the same day the Bylong decision was published.⁵⁴ Lock the Gate Alliance argued that the NSW Government had changed their position regarding downstream emissions in response to lobbying from the NSW Minerals Council.⁵⁵ They observed that, according to a departmental briefing note for a meeting with the NSW Minerals Council in June 2019, the NSW Government had supported the consideration of downstream emissions in mining projects at that time.⁵⁶

- 2.28** When asked about meetings the NSW Minerals Council had with NSW Government ministers about the bill, Mr Stephen Galilee, Chief Executive Officer, stated that the NSW Minerals Council had had 'none in relation to the development of the bill'.⁵⁷ When asked about meetings they had about scope 3 emissions and inclusion of conditions more broadly, he stated:

We met with the current Planning Minister – I think we may have met with him twice on this over that 12-month period. We met with the Deputy Premier once on this and I think that was a joint meeting with the CFMMEU to discuss a range of matters, including this. We met with Minister Kean to discuss a range of issues, including this, when the Government was re-elected. We have had one meeting with the Premier to discuss a range of issues on our planning concerns over that period of time and this was discussed briefly as well.⁵⁸

- 2.29** However, in their evidence, the NSW Minerals Council expressed reservations about the legislation. Mr Galilee stated:

The NSW Minerals Council agrees with the principle of the NSW Government's policy approach on these matters and it supports the Government's efforts to formalise this through the legislation and regulation. However, it does have some reservations about the bill in its current form. The bill in its current form fails to clarify and give effect to the NSW Government's policy position and principles...⁵⁹

- 2.30** The potential influence of mining interests on this bill was of concern to a number of inquiry stakeholders, particularly because they said that no public consultation had been carried out prior to the introduction of the bill. The Public Health Association of Australia, for example, noted in their submission that the lack of any community consultation was concerning given the public interest in climate change.⁶⁰ Summarising some of these views, the Environmental Defenders Office stated: 'the community has perceived the bill as special legislation, coinciding with lobbying from vested industry interests and with no community consultation, and designed to overcome recent decisions against coal mine companies'.⁶¹

⁵⁴ Submission 3, Groundswell Gloucester, p 2.

⁵⁵ Submission 4, Lock the Gate Alliance, p 3.

⁵⁶ Submission 4, Lock the Gate Alliance, p 3.

⁵⁷ Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, p 49.

⁵⁸ Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, p 49.

⁵⁹ Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, p 46.

⁶⁰ Submission 9, Public Health Association of Australia, p 6.

⁶¹ Submission 8, Environmental Defenders Office, p 5.

Concerns about climate change

- 2.31** Concerns about climate change underpinned most inquiry participants' opposition to the bill. Participants were concerned that the bill would increase greenhouse gas emissions and therefore exacerbate climate change and its effects. Stakeholders argued that Australia is already feeling impacts of climate change and these impacts are predicted to worsen in future.⁶² Wollar Progress Association argued that 'climate change is now the largest threat to our economic, social and environmental welfare'.⁶³ Lock the Gate Alliance, in their submission to the inquiry, highlighted statistics that warn that increased average temperatures will lead to increased risk of fire and drought.⁶⁴
- 2.32** Stakeholders described the climate impacts their communities were experiencing, in particular their experience of recent bushfires in New South Wales. Ms Bev Smiles, Secretary of Wollar Progress Association, described how climate change impacts affected her local community, noting with concern that a number of mining operations in her area had been approved to draw down groundwater sources at a time of record drought.⁶⁵ Similarly, Ms Julie Lyford, Chairperson of Groundswell Gloucester, described how bushfires and drought had impacted her area, stating: 'climate fuelled bushfires have decimated our mid-coast communities'.⁶⁶
- 2.33** Other stakeholders drew attention to how the bushfires have impacted on the economy and public health. Mr Tom Swann, Senior Researcher at The Australia Institute, described some of the research The Australia Institute had conducted on the recent bushfires in New South Wales, including findings that there had been almost 2 million days of missed work.⁶⁷
- 2.34** Dr Van Der Kallen, Chair of Doctors for the Environment Australia, noted the public health impact of the bushfires, including 'air pollution which has seen a 25 to 30 per cent increase in presentation to emergency departments and affected the growth of children and unborn babies'.⁶⁸ Stakeholders also told the committee how the recent bushfires had impacted on mental health, declaring that their communities are traumatised and terrified,⁶⁹ and that 'depression is everywhere'.⁷⁰
- 2.35** Doctors for the Environment Australia described in their submission how the effects of climate change such as temperature stress, extreme weather and disruptions to food supply will continue to have a significant impact on the health of populations.⁷¹ They viewed climate change as a public health issue and argued that the bill would increase greenhouse gas emissions and have a negative effect on various health indicators.⁷² Similarly, the Public Health Association of

⁶² Submission 8, Environmental Defenders Office, pp 6-7.

⁶³ Submission 11, Wollar Progress Association, p 1.

⁶⁴ Submission 4, Lock the Gate Alliance, p 4.

⁶⁵ Evidence, Ms Bev Smiles, Secretary, Wollar Progress Association, 6 February 2020, p 15.

⁶⁶ Evidence, Ms Julie Lyford, Chairperson, Groundswell Gloucester, 6 February 2020, p 14.

⁶⁷ Evidence, Mr Tom Swann, Senior Researcher, The Australia Institute, 6 February 2020, p 33.

⁶⁸ Evidence, Dr John Van Der Kallen, Chair, Doctors for the Environment, 6 February 2020, p 25.

⁶⁹ Evidence, Ms Ingrid Johnston, Senior Policy Officer, Public Health Association of Australia, 6 February 2020, p 26.

⁷⁰ Evidence, Ms Dianne Montague, Member, Groundswell Gloucester, 6 February 2020, p 15.

⁷¹ Submission 13, Doctors for the Environment Australia, pp 1-2.

⁷² Submission 13, Doctors for the Environment Australia, p 1.

Australia, in their submission, argued that the bill 'directly contradicts the known evidence linking fossil fuels and health'.⁷³

2.36 Participants in the online submission process were overwhelmingly opposed to the bill, with 2,562 of the 2,602 respondents opposing the bill.⁷⁴ They expressed concerns about climate change and described how New South Wales was already being impacted by climate change. For example, they told the committee:

- 'Our State is in the grip of a bushfire crisis ... fuelled by extraordinarily dry and hot conditions, the like of which we have never seen before.'
- 'Climate change is being felt more across the nation as a result of natural disasters including severe weather events, critical water shortages, bushfires and heat waves becoming more regular and severe.'
- 'Any new legislation relating to activities which are likely to contribute to further warming should be tightened to increase oversight, not lessened.'
- 'In light of Australia's current situation, the impacts and the warnings of the consequences of rising emissions in the face of climate change, the bushfires that in particular have devastated New South Wales, the notion of eliminating downstream emissions as a consideration for development applications is abhorrent.'
- 'In a time where Australians are directly suffering the effects with drought, bushfires and extreme winds the Government should be discussing these effects from coal and gas and how they will move to renewable sources of energy.'

2.37 Many participants were concerned about how mining fossil fuels contributes to climate change and how the bill might exacerbate this. They stated, for example:

- 'I am deeply concerned about the environmental consequences of the bill. I am troubled by any bill which would prevent planning authorities from considering the contribution of coal mines and gas fields make to greenhouse gas emissions.'
- 'Extractive industries in Australia not only supply the fossil fuels that are driving climate change, they are also using vast amounts of our fresh water, contaminating our land and destroying our aquifers and catchment areas.'
- 'Coal is a major driver for climate change which will drive global temperatures above the acceptable 1.5 degrees.'

⁷³ Submission 9, Public Health Association of Australia, p 5.

⁷⁴ Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Report on the online submission process: Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019*, 6 February 2020, p 1.

The online questionnaire was not a statistically valid, random survey. Respondents were self-selected in choosing to participate (in the same way that submission authors are self-selected) and should not be considered a representative sample of the population.

- 'The mining and burning of fossil fuels is the primary contributor to climate change which is devastating communities through rampant drought, causing the collapse of the Murray-Darling river system and catastrophic bushfires as we are currently seeing'.⁷⁵

- 2.38** A number of inquiry stakeholders highlighted the contribution New South Wales currently makes to global greenhouse gas emissions. The Australia Institute stated in their submission that 'coal mining is by far NSW' largest source of greenhouse gas emissions'.⁷⁶ Lawyers for Climate Justice Australia submitted that Australia is the third largest exporter of fossil fuels in the world and the largest exporter of coal, and that Australia's fossil fuel exports create 3.5 per cent of annual global emissions.⁷⁷
- 2.39** Stakeholders stressed the need for Australia and New South Wales to limit their greenhouse gas emissions. Ms Liz Hadjia, Climate and Energy Campaigner with the Nature Conservation Council of NSW, argued that to avoid dangerous climate change 'all of Australia's coal-fired power stations need to close by 2030 and 90 per cent of our coal reserves must remain unburnt'.⁷⁸ The Nature Conservation Council of NSW submitted that, as a signatory to the Paris Climate Agreement, Australia has acknowledged that global warming must be limited to below 2 degrees Celsius to avoid the worst impacts of climate change but stated 'we are not on track to meet that goal'.⁷⁹
- 2.40** In this context, stakeholders including NSW Young Lawyers, felt the bill represents a failure to act against climate change and a retrograde step in the wrong direction.⁸⁰ The Maules Creek Branch of the Country Women's Association, for example, stated in their submission that: 'weakening community and environmental protection using environmental planning assessment laws ... is a ridiculous situation to find our State in'.⁸¹ Ms Hadjia of the Nature Conservation Council of NSW, told the committee that the bill undermines efforts to address climate change as it will make it easier for new fossil fuel projects to be approved.⁸²
- 2.41** The Environment Institute of Australia and New Zealand contended that instead of the introduction of this bill, New South Wales should commit to clear policy action to lower the State's greenhouse gas emissions.⁸³ The Nature Conservation Council of NSW argued that the NSW Government has a responsibility to protect communities and the environment from the

⁷⁵ Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Report on the online submission process: Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019*, 6 February 2020, pp 2-5.

⁷⁶ Submission 14, The Australia Institute, p 2.

⁷⁷ Submission 2, Lawyers for Climate Justice Australia, p 2.

⁷⁸ Evidence, Ms Liz Hadjia, Climate and Energy Campaigner, Nature Conservation Council of NSW, 6 February 2020, p 4.

⁷⁹ Submission 6, Nature Conservation Council of NSW, p 1.

⁸⁰ E.g. Submission 18, NSW Young Lawyers, p 4; Submission 3, Groundswell Gloucester, p 2; Submission 11, Wollar Progress Association, p 2

⁸¹ Submission 12, Maules Creek Branch of the Country Women's Association of NSW, p 2.

⁸² Evidence, Ms Liz Hadjia, Climate and Energy Campaigner, Nature Conservation Council of NSW, 6 February 2020, p 4.

⁸³ Submission 17, The Environment Institute of Australia and New Zealand (EIANZ), p 1.

impacts of climate change.⁸⁴ Ms Rachel Walmsley, Policy and Law Reform Director at the Environmental Defenders Office told the committee:

New South Wales should be implementing sensible laws based on science that plan for a just and rapid transition to low carbon economies that ensure the proper long-term protection of the people and environment of New South Wales, including a safe climate for current and future generations.⁸⁵

- 2.42** The NSW Minerals Council acknowledged the need to ameliorate the impacts of climate change. The Council's climate change, energy and emissions policy, which it attached to its submission, stated that '... sustained global action is required to reduce the risks of human-induced climate change' and that they support 'a measured transition to a low emissions global economy' which includes participation in global agreements such as the Paris Climate Agreement.⁸⁶

Contribution of the mining industry to NSW

- 2.43** The committee also received evidence about the importance of the mining industry to New South Wales. The NSW Minerals Council stated that mining is a \$25 billion industry in New South Wales and that coal is the State's most valuable export, worth \$19.7 billion.⁸⁷ They submitted that, as well as direct benefits such as employing around 40,000 people in New South Wales, the mining industry has significant flow on benefits to other industries.⁸⁸ In particular, the NSW Minerals Council argued that mining was especially important to regional New South Wales: 'the economic contribution of the employment and direct spending is critical to many towns and communities across large parts of regional New South Wales'.⁸⁹
- 2.44** The CFMMEU also highlighted the importance of coal mining to the economy and budget. They stated that the coal mining industry employs around 21,000 people in New South Wales and that these jobs have significant multipliers through wages spent back into local areas and the creation of jobs related to the industry.⁹⁰ They also noted that mining royalties are a key revenue stream for State governments and that it is coal mining that 'produced the vast bulk of mining royalty revenue for the NSW Government', estimated to be worth just over \$2 billion in the 2019 budget.⁹¹
- 2.45** In this context, stakeholders who supported the bill argued that the bill was necessary to support the continuity of an important industry. The NSW Minerals Council, for example, stated that mining in New South Wales requires a 'stable and responsible regulatory framework'.⁹²

⁸⁴ Submission 6, Nature Conservation Council of NSW, p 2.

⁸⁵ Evidence, Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office, 6 February 2020, p 13.

⁸⁶ Submission 5, NSW Minerals Council, Attachment A.

⁸⁷ Submission 5, NSW Minerals Council, p 3.

⁸⁸ Submission 5, NSW Minerals Council, p 3.

⁸⁹ Submission 5, NSW Minerals Council, p 3.

⁹⁰ Submission 7, Construction Forestry Maritime Mining and Energy Union (CFMMEU), p 2.

⁹¹ Submission 7, Construction Forestry Maritime Mining and Energy Union (CFMMEU), p 2.

⁹² Submission 5, NSW Minerals Council, pp 3-5.

- 2.46** By contrast, some witnesses argued that the economic benefits of mining in New South Wales had been overstated. The Australia Institute argued that coal mining is only a small part of the economy, employing less than one in 200 people in New South Wales and with royalties representing less than 2 per cent of the New South Wales budget.⁹³ Mr Roderick Campbell, Research Director at The Australia Institute, also told the committee that export revenues do not translate into benefits to New South Wales as much of the mining in the State is foreign-owned and profits are sent offshore.⁹⁴
- 2.47** Witnesses from regional communities suggested that, while their communities may see some economic benefit, they also bear the brunt of negative social and environmental impacts of mining. Ms Dianne Montague, a member of Groundswell Gloucester, described the impacts on her local community, arguing that 'we are the ones who bear the burden of the social impacts of coal and coal seam gas mining. Now we, the regional and rural communities, are the ones bearing the burden of the impacts of the heating planet through drought and fires'.⁹⁵
- 2.48** Others asserted that demand for New South Wales coal has reduced. Mr Chris Gambian, Chief Executive of the Nature Conservation Council of NSW, told the committee that while mining is an important industry to many communities, New South Wales must come to terms with the long-term prospects of the sector.⁹⁶ Mr Peter Colley, National Research Director, CFMMEU, stated 'we acknowledge that the domestic coal power industry is in decline',⁹⁷ and argued not enough work has been done in Australia to manage this structural adjustment and transition mine workers.⁹⁸

Jurisdictional issues

- 2.49** This section provides an overview of the debate around the jurisdictional aspects of the bill. This includes broader issues relating not just to the bill, but across the New South Wales planning system. In particular, it discusses the assessment of extraterritorial impacts of developments in New South Wales, accounting for scope 3 emissions, the limitation of the considerations taken into account in making planning decisions and the global nature of climate change.

Extraterritorial considerations and the New South Wales planning system

- 2.50** Much of the debate around the bill centred around the jurisdiction of the New South Wales planning system, and whether planning authorities in New South Wales should – or could – impose conditions to regulate matters outside the territorial limits of New South Wales.

⁹³ Submission 14, The Australia Institute, pp 2-3.

⁹⁴ Evidence, Mr Roderick Campbell, Research Director, The Australia Institute, 6 February 2020, p 34.

⁹⁵ Evidence, Ms Dianne Montague, Member, Groundswell Gloucester, 6 February 2020, p 15.

⁹⁶ Evidence, Mr Chris Gambian, Chief Executive, Nature Conservation Council of NSW, 6 February 2020, p 3.

⁹⁷ Evidence, Mr Peter Colley, National Research Director, Construction Forestry Maritime Mining and Energy Union (CFMMEU), 6 February 2020, p 41.

⁹⁸ Evidence, Mr Peter Colley, National Research Director, Construction Forestry Maritime Mining and Energy Union (CFMMEU), 6 February 2020, p 41.

- 2.51** Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment told the committee that the condition of development consent imposed by the Independent Planning Commission in the United Wambo project was 'the first time ... a condition ... would effectively regulate, and require the [Department of Planning, Industry and Environment] to regulate, the export of the product of a development that was approved in New South Wales'.⁹⁹
- 2.52** In evidence, Mr Ray also contended that the situation following the United Wambo decision 'highlight[ed] the broader jurisdictional issue within the New South Wales planning legislation' along with raising more 'practical limits' regarding the enforcement of such issues by New South Wales planning authorities.¹⁰⁰
- 2.53** On this point, a number of witnesses were questioned on whether the condition imposed by the Independent Planning Commission in this decision was indeed a novel step for a New South Wales planning authority. Of those asked, none could recall an example of when such a condition had previously been imposed at the State level.¹⁰¹
- 2.54** Regarding the interaction between State and Federal responsibility for international trade and the associated challenges with enforcement, Mr Ray advised that the Commonwealth, rather than New South Wales, has the ability to enforce the Wambo condition:
- ... the power to regulate international trade is clearly given to the Commonwealth. The nature of the condition in the Wambo case was about how coal is treated after it leaves New South Wales and leaves Australia. So it seems to me that that is clearly a matter that the Commonwealth had very detailed legislation on. It is also a matter that the Commonwealth can regulate by its interactions with foreign governments. New South Wales doesn't have that role—doesn't have that capacity to engage with foreign governments. Therefore, the idea of New South Wales being able to enforce requirements is just—it is not within our ability to do that.¹⁰²
- 2.55** Others stakeholders questioned the enforceability of such a condition, with Mr Colley of the CFMMEU suggesting that 'imposing a particular condition on a single mine and then trying to direct who they can sell and not sell coal to is highly likely to be unworkable'.¹⁰³

⁹⁹ Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 63.

¹⁰⁰ Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 57.

¹⁰¹ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 12; Evidence, Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office, 6 February 2020, p 21; Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 63.

¹⁰² Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 62.

¹⁰³ Evidence, Mr Peter Colley, National Research Director, Mining and Energy Division, Construction Forestry, Maritime, Mining and Energy Union (CFMMEU), 6 February 2020, p 40.

- 2.56** In evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council also expressed doubt about the enforceability of the condition, stating:

I doubt that condition would be enforceable or legal under the Newbury test as you describe it, as is the case with, potentially, the United Wambo condition. That is, as we understand it, an issue the Government is seeking to address through this bill: that there will not be conditions placed on projects that are unenforceable, that do not pass the Newbury test, so to speak, and that are potentially challengeable by proponents, for example.¹⁰⁴

Accounting for scope 3 emissions

- 2.57** Stakeholders also gave evidence on whether mining companies operating in New South Wales should account for scope 3 emissions. Mr Colley of the CFMMEU argued that assigning responsibility for scope 3 emissions to mine proponents in New South Wales was 'directly contrary to the Paris Agreement and to the international methodology for emissions accounting that lies underneath it'.¹⁰⁵ On this point, the CFMMEU's written submission also contended that assigning responsibility for scope 3 emissions to a mining project:

... has the implicit effect of removing that responsibility from the entities that are the Scope 1 and Scope 2 emitters.

Scope 3 emission calculations were never intended to be used that way. Such calculations are meant to inform the strategic thinking of a business in the context of climate change, but are not meant to remove liability for Scope 1 and Scope 2 emitters from those that actually produce them.¹⁰⁶

- 2.58** The NSW Minerals Council, in their submission to the inquiry, argued that New South Wales has a responsibility not to undermine international and national frameworks for greenhouse gas emissions by double-counting.¹⁰⁷ At the hearing, Mr Abbey called for work to ensure the New South Wales planning system is in 'direct consistency with the Paris Agreement accounting framework'.¹⁰⁸

¹⁰⁴ Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, 6 February 2020, p 48.

¹⁰⁵ Evidence, Mr Peter Colley, National Research Director, Mining and Energy Division, Construction Forestry, Maritime, Mining and Energy Union (CFMMEU), 6 February 2020, p 42.

¹⁰⁶ Submission 7, Construction, Forestry, Maritime, Mining & Energy Union (CFMMEU), p 10.

¹⁰⁷ Submission 5, NSW Minerals Council, p 4.

¹⁰⁸ Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 6 February 2020, p 52.

- 2.59** At the hearing, Mr Ray was questioned about a briefing note prepared by then Department of Planning and Environment in June 2019 for the Minister for Planning and Public Spaces ahead of a meeting with the NSW Minerals Council, and whether he stood by the position expressed in that note, that: 'The NSW [Minerals Council] has conflated obligations under international and national GHG accounting frameworks with the assessment of impacts associated with projects under the EP&A Act.'¹⁰⁹ Mr Ray responded: 'Yes, I stand by that comment'.¹¹⁰
- 2.60** In response to questions from the committee as to whether 'responsibility' for and 'consideration' of emissions were two distinct issues, Mr Colley of the CFMMEU expressed the view that '[t]his argument about the difference between responsibility and consideration I think is a sophistry ... in practice responsibility is being assigned'.¹¹¹
- 2.61** On the bill's specific interaction with global accounting mechanisms such as the Paris Climate Agreement, The Australia Institute argued that preventing consideration of scope 3 emissions would contradict the spirit of the agreement, which aims to reduce global greenhouse gas emissions.¹¹² Similarly, the Environmental Defenders Office noted that considering scope 3 emissions under the *Environmental Planning and Assessment Act 1979* is a separate regime – of land use planning and environmental assessment – to counting emissions for the purpose of global emissions targets.¹¹³ Doctors for the Environment noted in their submission that greenhouse gas emissions accounting frameworks are not the same as frameworks for environmental and health impact assessments of individual projects.¹¹⁴
- 2.62** Within this global context, the Nature Conservation Council of NSW argued that considering downstream, or scope 3, emissions in mining development applications is important as scope 3 emissions often represent the largest portion of greenhouse gas emissions from fossil fuel developments.¹¹⁵ They also claimed in their submission that fossil fuels burned outside Australia produce more carbon dioxide 'than the exported emissions of nearly all the world's biggest oil and gas producing nations'.¹¹⁶ Similarly, The Australia Institute noted that emissions from coal mining in New South Wales, when scope 3 emissions are included, 'are four times larger than direct emissions from New South Wales, larger than emissions from France or the UK and nearly as large as direct emissions from Australia'.¹¹⁷

¹⁰⁹ Correspondence, 6 February 2020, from Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, to the Committee, attaching a briefing note prepared by the NSW Department of Planning and Environment for the Minister for Planning and Public Spaces on 12 June 2019.

¹¹⁰ Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 60.

¹¹¹ Evidence, Mr Peter Colley, National Research Director, Mining and Energy Division, Construction Forestry, Maritime, Mining and Energy Union (CFMMEU), 6 February 2020, p 42.

¹¹² Submission, 14, The Australia Institute, pp 3-4.

¹¹³ Submission 8, Environmental Defenders Office, p 14.

¹¹⁴ Submission 13, Doctors for the Environment, p 2.

¹¹⁵ Submission 6, Nature Conservation Council of NSW, p 2.

¹¹⁶ Submission 6, Nature Conservation Council of NSW, p 2.

¹¹⁷ Submission 14, The Australia Institute, p 2.

Limitation of considerations in planning decisions

2.63 Some stakeholders objected to what they saw as the bill's limitation of the considerations to be taken into account in planning assessments, including extraterritorial considerations. Doctors for the Environment argued that to do so would be 'artificially constraining' and against the objects and intent of the *Environmental Planning and Assessment Act 1979*, noting:

[T]wo Objects of the *Environmental Planning and Assessment Act* [1979] are stated thus:

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.

The proposed amendment is explicitly against these objects and intent of the original Act. Artificially constraining the scope of environmental health assessment of major projects does not change the environmental health impact of that project. DEA's stance has always remained that a healthy environment is vital for 'social and economic welfare', as the consequences of negative health have social and economic consequence for all.¹¹⁸

2.64 In response to questioning from the committee on the bill's interaction with the intent of the *Environmental Planning and Assessment Act 1979*, Ms Walmsley of the Environmental Defenders Office gave evidence that the bill may constrain decision makers from taking relevant considerations into account:

What this bill is attempting to do is to hive off a specific consideration—[S]chedule 2 of this bill is attempting to limit consideration in regard to downstream emissions. Arguably that is trying to inhibit decision-makers from turning their minds to what is a relevant consideration ... we have had in the Act requirements to consider a range of issues for a really long time and that is a fundamentally important part of the Act.¹¹⁹

2.65 Some stakeholders also expressed concern around the effect of the bill on the independence of both the Independent Planning Commission and Land and Environment Court. Wollar Progress Association refer to the bill as 'mak[ing] a mockery of the "independence" of decision-makers in regard to large thermal coal projects',¹²⁰ whilst Hunter Communities Network argued that 'independent decision-makers should not be directed by changes in planning law to limit their consideration of this critical environmental risk'.¹²¹

¹¹⁸ Submission 13, Doctors for the Environment Australia, p 4.

¹¹⁹ Evidence, Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office, 6 February 2020, p 17.

¹²⁰ Submission 11, Wollar Progress Association, p 1.

¹²¹ Submission 10, Hunter Communities Network, p 2.

2.66 An online submission author echoed these sentiments, stating:

The Independent Planning Commission needs to remain independent of governments that rely on donations from fossil fuel industries. The Independent Planning Commission's power ... to assess the effects of new coal mines and gas wells on global warming should remain as it is ...¹²²

The global nature of climate change

2.67 The 'global nature' of climate change, in that it does not stop at state or national borders, was an issue raised by many stakeholders. For example, the Environmental Defenders Office expressed concern about placing territorial limits on the environmental impacts of development, stating:

The drafting [of the bill] attempts to distinguish between impacts in New South Wales and impacts occurring outside Australia or an external Territory, and also between development occurring in NSW or occurring overseas. This differentiation is problematic given the global nature of climate change.

... [C]limate change impacts, whether they be more intense bushfire seasons in New South Wales, rapid melting of polar ice-caps, or threats to Pacific nations due to rising sea levels, are a consequence of multiple decisions at a local level to approve new sources of GHG emissions (e.g. a coal mine in New South Wales); and unless appropriately ameliorated, GHG emissions, no matter their source, will have impacts right across the globe.¹²³

2.68 Similarly, the Environmental Institute of Australia and New Zealand observed that the effects of climate change affect the entire planet:

The well-documented climate consequences of burning fossil fuels are not limited to the jurisdiction in which they are burned – they affect the entire planet. As such we believe that including the consideration of scope 3 emissions in planning decisions is not only correct, but is a moral obligation to the people of New South Wales, the planet and all future generations.¹²⁴

2.69 Many participants in the online submission process shared this view, with some participants stating:

- 'Downstream emissions outside Australia will have as much impact on climate change as they would in Australia, there are no borders on global warming.'

¹²² Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Report on the online submission process: Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019*, 6 February 2020, p 3.

¹²³ Submission 8, Environmental Defenders Office, p 10.

¹²⁴ Submission 17, Environmental Institute of Australia and New Zealand (EIANZ), p 1.

- 'There are no territorial limits on the greenhouse gas emissions from burning fossil fuels such as coal and gas. The emissions from exported fossil fuels are just as dangerous to Australians whether they are burned here or on the other side of the world ...'¹²⁵

Operation of the bill

- 2.70** This section examines concerns raised by stakeholders about the drafting of the bill. These concerns centred on the 'broad scope' of Schedule 1 and the conditions that could be imposed under the new legislation, as well as the potential 'uncertainty' created by the removal of the words 'including downstream emissions' under Schedule 2.

Scope of Schedule 1

- 2.71** In relation to the scope of the new section 4.17A to be inserted by Schedule 1, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance argued that the section went beyond preventing the imposition of conditions relating to scope 3 emissions:

I think that schedule 1 is far broader than the intent expressed by the Minister in his second reading speech and the Government's stated intent. It would simply make it unlawful to impose a condition for the purpose of achieving anything related to impacts occurring outside of Australia because of things that happen here or impacts occurring here because of activities outside of Australia. That would certainly not limit it to climate change. On the subject of climate change, if the planning authority, for example, wanted a proponent to put money into an adaptation fund or ensure that they were buying greenhouse offsets, I think that that would be difficult for them to do if schedule 1 went through as it is.¹²⁶

- 2.72** Similarly, Lawyers for Climate Justice Australia argued that as proposed, the wording of section 4.17A would have 'broad and serious ramifications', with the potential to 'curtail appropriate regulation of impacts of development'.¹²⁷
- 2.73** Stakeholders argued that, as currently worded, section 4.17A would apply to all development applications determined under Part 4 of the *Environmental Planning and Assessment Act 1979*, not just those for extractive industries such as mining. For example, Ms Walmsley of the Environmental Defenders Office stated that 'the proposed section 4.17A is overreaching and ambiguous ... it is not limited to extractive industries or fossil fuel developments'.¹²⁸

¹²⁵ Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Report on the online submission process: Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019*, 6 February 2020, p 2.

¹²⁶ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 4.

¹²⁷ Submission 2, Lawyers for Climate Justice Australia, p 2.

¹²⁸ Evidence, Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office, 6 February 2020, p 13.

2.74 In response to questioning from the committee on this assertion, Mr Ray appeared to support the conclusion that section 4.17A would apply more broadly than the mining and extractive industries:

[The bill] could apply in the same way to other matters where the products of developments in New South Wales are exported. There seems to be good reason for that to be a consistent approach not just for mining, petroleum and extractive industries.¹²⁹

Conditions imposed under Schedule 1

2.75 Stakeholders including Lock the Gate also raised concerns around the wording of proposed section 4.17A(2)(b), which they contended would prohibit the imposition of a condition as a result of the impacts in New South Wales.¹³⁰ This could extend to a condition voluntarily proposed by the applicant. This also extended to preventing a consent authority from taking into account a range of environmental impacts incurring in New South Wales itself. When asked by the committee if this concerned the organisation, Ms Georgina Woods, Lock the Gate Alliance responded:

Yes, absolutely ... there are not territorial limits to climate change and the impacts of greenhouse gases, even though the greenhouse gases might be produced somewhere else, they do have an environmental effect [in New South Wales].¹³¹

2.76 Similarly the Environmental Defenders Office commented:

... [T]hat is one of the most disturbing aspects of the bill. Impacts in New South Wales have to be considered by decision makers. That is the very purpose of the assessment process under our New South Wales planning laws. As you have heard from our clients, these impacts are very real and very devastating. Any step in law to blindfold decision-makers or to preclude proper consideration of these impacts is against the intent of the *Environmental Planning and Assessment Act*.¹³²

2.77 The Environmental Defenders Office referred to the 'strong risk' that proposed section 4.17A(2)(a) would prevent decision makers from imposing consent conditions to mitigate the impacts of scope 1 and 2 emissions from projects in New South Wales.¹³³ This was based on the belief that these emissions could be interpreted to constitute 'impacts occurring outside Australia or an external territory as a result of [a] development' under this subsection.¹³⁴

¹²⁹ Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 59.

¹³⁰ Submission 4, Lock the Gate Alliance, p 2.

¹³¹ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 4.

¹³² Evidence, Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office, 6 February 2020, p 16.

¹³³ Submission 8, Environmental Defenders Office, p 11.

¹³⁴ Submission 8, Environmental Defenders Office, p 11.

2.78 Some stakeholders, including the Environmental Defenders Office attributed their concerns to the fact that the term 'impacts' was not defined by the bill.¹³⁵ Lawyers for Climate Justice Australia echoed these concerns:

[B]ecause the term '*impacts*' is not defined, proposed section 4.17A would apply to all downstream greenhouse gas and climate change impacts outside Australia from NSW projects, and to conditions regarding environmental impacts other than greenhouse gas emissions or climate change. This could affect conditions regarding Scope 1 and 2 emissions, which have impacts inside and outside of Australia.¹³⁶

2.79 Other stakeholders argued that, as worded, the proposed section 4.17A would prevent any conditions being placed on an approval, even those voluntarily proposed by the applicant. For example, the Environmental Defenders Office contended:

As currently drafted, proposed section 4.17A would also render ineffective conditions of consent giving effect to measures proposed by project proponents themselves to mitigate or offset the GHG emissions of their projects (particularly in relation to scope 3 emissions).¹³⁷

2.80 Many stakeholders also suggested this provision might lead to an outright refusal of a project. For some, this was based on the view that without the power to impose a condition relating to scope 3 or downstream emissions, a consent authority could refuse the project based on its environmental impact.

2.81 Evidence from the CFMMEU indicated that it was not content with the legislation in its present form. The union does not want downstream or greenhouse gas emissions to be included in any assessment of coal mining applications. Evidence from the union indicated that the legislation could increase the level of uncertainty for the industry.¹³⁸ Mr Colley of the CFMMEU contended, based on legal advice provided by Allens:

... prohibiting the imposition of a condition with respect to scope 3 emissions may result in a mine being simply rejected on the basis of scope 3 emissions because a condition was not able to be imposed.¹³⁹

2.82 The NSW Minerals Council agreed with the CFMMEU that the bill increases the risk of refusals in the coal mining industry,¹⁴⁰ because the bill removes the ability for mitigation measures through conditions of consent.¹⁴¹

¹³⁵ Submission 8, Environmental Defenders Office, p 9.

¹³⁶ Submission 2, Lawyers for Climate Justice Australia, p 2. Emphasis as per original.

¹³⁷ Submission 8, Environmental Defenders Office, p 11.

¹³⁸ Evidence, Mr Peter Colley, National Research Director, Mining and Energy Division, Construction Forestry, Maritime, Mining and Energy Union (CFMMEU), 6 February 2020, p 30; 43.

¹³⁹ Evidence, Mr Peter Colley, National Research Director, Mining and Energy Division, Construction Forestry, Maritime, Mining and Energy Union (CFMMEU), 6 February 2020, p 43.

¹⁴⁰ Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, 6 February 2020, p 48.

¹⁴¹ Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 6 February 2020, p 53.

2.83 Mr Andrew Abbey, Policy Director at the NSW Minerals Council stated that:

... there is a risk that under section 4.15 [of the *Environmental Planning and Assessment Act 1979*], the public interest test, the courts could still refuse a project and that risk...has been increased because [the bill has] removed the ability for mitigation measures through conditions of consent.¹⁴²

2.84 He stated further, that: 'Our concern is that the assessment authority may choose not to approve a project because it does not have the option of imposing a condition on it.'¹⁴³ The NSW Minerals Council also indicated that it 'does have some reservations about the bill in its current form ... [because it] fails to clarify and give effect to the NSW Government's policy position' on emissions accounting frameworks.¹⁴⁴

Effect of section 4.17A

2.85 The NSW Minerals Council described the bill as 'deliver[ing] a partial remedy only without the other necessary component parts to make it explicit that downstream emissions cannot be used to refuse New South Wales projects'.¹⁴⁵ On the risk that a project may be refused under the current wording of the bill, the NSW Minerals Council stated:

Under the proposed amendment a consent authority can still refuse a development on the basis of greenhouse gas or climate change considerations under the multiple heads of consideration under s 4.15 of the EP&A Act.

The addition of s 4.17A into the EP&A Act (which prohibits conditions relating to impacts in other jurisdictions only, and is not specifically related to scope 3 emissions) without an associated change to other sections of the EP&A Act means the Bill fails to prevent NSW projects from potentially being refused on the basis of scope 3 emissions.

The omission of an associated change to other sections of the EP&A Act potentially leads to greater risk of refusals in the event a consent authority forms the view that without a condition dealing with impacts in other jurisdictions (such as United Wambo) they have no option but to refuse the project.¹⁴⁶

2.86 The CFMMEU shared these concerns, noting:

... the prohibition of approval conditions that concern impacts in another country does not prevent the authority from continuing to consider Scope 3 emissions in other countries

... such consideration may result in a mine project being refused because the authority is not able to impose a condition of approval with respect to Scope 3 emissions.

¹⁴² Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 6 February 2020, p 53.

¹⁴³ Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 6 February 2020, p 55.

¹⁴⁴ Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, 6 February 2020, p 46.

¹⁴⁵ Submission 5, NSW Minerals Council, p 5.

¹⁴⁶ Submission 5, NSW Minerals Council, p 5.

Perhaps what is needed is careful scoping of what the legitimate considerations should be in assessing a mine proposal, with Scope 3 emissions, being the primary responsibility of other parties, not being a legitimate consideration.¹⁴⁷

Amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*

- 2.87** Stakeholders also highlighted issues with Schedule 2 of the bill, which, if passed, would remove the words 'including downstream emissions' from clause 14(2) of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*. On the history of this phrase, stakeholders including Lock the Gate Alliance and the Nature Conservation Council of NSW reiterated that the phrase had formed part of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* from its creation.¹⁴⁸ As a result of recent decisions of the Independent Planning Commission and Land and Environment Court, Ms Woods confirmed that, in her view, this policy had been applied in a more thorough way to consider downstream emissions in mining, petroleum production or extractive industry development applications.¹⁴⁹
- 2.88** In response to questions from the committee, the stakeholders agreed that whilst the removal of these words by Schedule 2 of the bill would remove the *requirement*; it would not *prohibit* the consideration of downstream emissions. For example, Mr Chris Gambian, Chief Executive of the Nature Conservation Council of NSW stated that 'I do not believe [the bill] does prohibit consideration. What it does is remove the requirement'.¹⁵⁰ This contention was also supported by evidence given by Mr Tom Swann of The Australia Institute¹⁵¹ and Mr Ray of the Department of Planning, Industry and Environment.¹⁵² Ms Walmsley of the Environmental Defenders Office agreed that downstream emissions may still be considered, but contended that the removal of these words 'sends a signal [and] will create regulatory chill'.¹⁵³
- 2.89** Others, such as Ms Woods of Lock the Gate Alliance, argued that 'the bill confuses where there is currently clarify in the law'.¹⁵⁴ In their written submission, the organisation stated:

By creating uncertainty about whether certain environmental impacts of a development should be considered or not, this Bill will confuse the assessment process and create a

¹⁴⁷ Submission 7, Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), p 5.

¹⁴⁸ Submission 4, Lock the Gate Alliance, p 2; Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 3, 6; Evidence, Mr Chris Gambian, Chief Executive, Nature Conservation Council, 6 February 2020, p 10.

¹⁴⁹ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 3.

¹⁵⁰ Evidence, Mr Chris Gambian, Chief Executive, Nature Conservation Council, 6 February 2020, p 12.

¹⁵¹ Evidence, Mr Tom Swann, Senior Researcher, The Australia Institute, 6 February 2020, p 36-37.

¹⁵² Evidence, Mr Tom Swann, Senior Researcher, The Australia Institute, 6 February 2020, p 36-37; Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 57-58, 61.

¹⁵³ Evidence, Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office, 6 February 2020, p 19.

¹⁵⁴ Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 6 February 2020, p 6.

blindfold for consent authorities about an environmental impact that has been well-established and accepted to be partly caused by New South Wales coal mines.¹⁵⁵

- 2.90** Similar evidence was provided by Climate Change Australia (Hastings), who stated that planning authorities would be unsure whether to consider downstream emissions of mining or gas projects:

With the removal of these words, consent authorities will no longer be required to consider the impact of downstream emissions when they are deciding whether or not to allow a coal mine or gas field to go ahead. This change would introduce considerable doubt over whether a planning authority should consider climate change in its approval, and may leave them open to legal action by mining companies if they do. There is no reason to remove these words other than to absolve proponents from their responsibility for downstream emissions.¹⁵⁶

Retrospective application

- 2.91** Some stakeholders' written submissions expressed concern about the potential retrospective application of the bill. In particular, Lock the Gate Alliance disagreed with the Minister's assurance that the bill did not apply retrospectively to decisions already determined:

The Minister's second reading speech claimed that 'the bill will not have retrospective effect ...' This is untrue. Schedule 1 of the Bill states that, 'A condition of a development consent described in this section has no effect despite anything to the contrary in this Act.' This provision will clearly apply to any existing condition of a development consent that is captured by the new prohibition clause. It is disappointing that the Minister has misrepresented the effect and intent of this Bill in his second reading speech but unsurprising, given the politically-motivated origins of the Bill.¹⁵⁷

- 2.92** However, Mr Ray gave evidence at the hearing confirming the Minister's statement that the bill would not have retrospective effect.¹⁵⁸

- 2.93** In response to lingering questions about the bill's application, the Environmental Defenders Office suggested that 'while the Minister's second reading speech indicates that proposed section 4.17A would not act retrospectively [an] additional sub-section could be added that would make this clear on the face of proposed section 4.17A'.¹⁵⁹

¹⁵⁵ Submission 4, Lock the Gate Alliance, p 5.

¹⁵⁶ Submission 1, Climate Change Australia (Hastings), p 2.

¹⁵⁷ Submission 4, Lock the Gate Alliance, pp 6-7.

¹⁵⁸ Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 64.

¹⁵⁹ Submission 8, Environmental Defenders Office, p 17.

Proposed amendments

2.94 Whilst a number of stakeholders, in particular environmental groups, opposed the bill, they suggested that amendments to particular provisions may 'ameliorate some of the unintended consequences of the bill' should the bill go ahead.¹⁶⁰ For example, the Environmental Defenders Office proposed the following amendments to the bill:

Schedule 1 Amendment of *Environmental Planning and Assessment Act 1979* *No 203*

Section 4.17A

Insert after 4.17 –

4.17A Prohibited conditions

(1) For development for the purpose of mining, petroleum production or extractive industry under clause 7 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, a condition of a development consent described in this section has no effect despite anything to the contrary in this Act, unless the applicant proposes such a condition to the consent authority.

(2) A condition imposed for the purpose of achieving outcomes or objectives relating to

a. the impacts **exclusively** occurring outside Australia or an external Territory of **downstream greenhouse gas emissions** as a result of the development.

b. ~~the impacts occurring in the State as a result of any development carried out outside Australia or an external territory.~~

(3) This section does not apply to any development consent granted before the commencement of this section.

Schedule 2 Amendment of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*

~~Clause 14 Natural resource management and environmental management~~

~~Omit "(including downstream emissions)" from clause 14(2).~~¹⁶¹

2.95 At the hearing, Mr Ray was questioned on how to make clear that the bill was not intended to prohibit the consideration of scope 3 emissions. In response to questioning as to whether the phrase 'for the avoidance of doubt, this [bill] does not prevent the consideration of scope 3 emissions' could be inserted, Mr Ray of the Department of Planning, Industry and Environment responded: "The advice to me is that that would be a legally correct statement".¹⁶²

¹⁶⁰ Submission 8, Environmental Defenders Office, p 17.

¹⁶¹ Submission 8, Environmental Defenders Office, p 3.

¹⁶² Evidence, Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, 6 February 2020, p 61.

Committee comment

- 2.96** It is clear to the committee that, although for different reasons, the key stakeholders and community groups are each unhappy with the legislation. The overwhelming number of public submissions to the inquiry are opposed to it.
- 2.97** The committee is alarmed that this bill is being considered at a time when New South Wales is reeling from the impact of devastating bushfires and prolonged drought. The committee was particularly moved by evidence of the impact recent bushfires had on local communities. We note the broad ranging impacts of climate change that are predicted and currently being felt, including through bushfires, drought and public health impacts.
- 2.98** The committee shares the deep concerns of the thousands of stakeholders who provided submissions and strongly believes that immediate, sustained and global action is necessary to reduce climate change and its effect on populations and the environment. Burning of fossil fuels directly contributes to climate change and Australia, and in particular New South Wales, is already responsible for too much of the world's greenhouse gas emissions from burning of fossil fuels.
- 2.99** In the committee's view, the bill is designed to discourage planning authorities from considering the downstream greenhouse gas emissions of proposed developments in their assessments. The committee believes that New South Wales has a global as well as a local responsibility to reduce greenhouse gas emissions. The committee is not persuaded of the need for legislative change, as proposed by the NSW Government. The committee is also opposed to removing the consideration of greenhouse gases from the planning assessment process.
- 2.100** We do not accept that considering downstream greenhouse gas emissions in planning decisions goes against emissions accounting schemes under the Paris Climate Agreement. Instead, the committee believes that considering downstream greenhouse gas emissions supports international agreements aimed at reducing emissions and combating climate change.
- 2.101** The legislation does not address the key concerns of the NSW Minerals Council and the CFMMEU. Those concerns are directed to what may happen in the future rather than a presently existing situation. The stated aim of the NSW Government, through the Minister's second reading speech and its witnesses to this inquiry, is not to address those concerns but to prevent conditions of consent (such as in the Wambo decision) that may have an extraterritorial effect. However, the committee believes the effect of the bill would be far wider than the stated aim of stopping consent authorities imposing conditions relating to the foreign sale or trade in the resources sector. This is based on the following concerns with the bill:
- The new section 4.17A is not limited to the mining and extractive industries only, but may extend to all development requiring development consent.
 - The use of the term 'impacts' is broad and goes beyond greenhouse gas or environmental effects.
 - The new section 4.17A prevents any conditions being placed on an approval, even those voluntarily proposed by an applicant.
 - Proposed section 4.17A(2)(a) is not limited to the regulation of downstream Scope 3 greenhouse gas emissions occurring outside Australia as a result of the development.

- Proposed section 4.17A(2)(b) would prevent a consent authority taking into account a range of environmental impacts occurring inside New South Wales itself.

2.102 The committee is also concerned with the proposed amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* under Schedule 2. A number of environmental, legal and community groups highlighted that removing the phrase 'including downstream emissions' from this policy would not only create confusion, but that it would also contradict well-established principles of New South Wales planning law. Given that the committee heard that emissions from mining projects are overwhelmingly from downstream sources, it is imperative that any assessment of the impacts of such projects continue to include this form of emission.

2.103 In conclusion, the committee recommends that the bill not be passed in its current form. If the bill is to proceed further, the Legislative Council should amend the bill as shown in Recommendation 2 to address concerns the raised in the inquiry.¹⁶³

Recommendation 1

That the bill not be passed in its current form.

¹⁶³ In Recommendation 2, proposed deletions to the bill are represented as strikethrough text and proposed insertions are underlined.

Recommendation 2

If the bill is to proceed further, the Legislative Council consider the following amendments to the bill which reflect the majority concerns expressed during the inquiry, with the bill to make clear that for the avoidance of doubt, the bill does not prevent the consideration of scope 3 emissions.

Schedule 1 Amendment of *Environmental Planning and Assessment Act 1979 No 203*

Section 4.17A

Insert after 4.17 –

4.17A Prohibited conditions

(1) For development for the purpose of mining, petroleum production or extractive industry under clause 7 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, a condition of a development consent described in this section has no effect despite anything to the contrary in this Act, unless the applicant proposes such a condition to the consent authority.

(2) A condition imposed for the purpose of achieving outcomes or objectives relating to –

- a. the impacts regulation of downstream greenhouse gas emissions occurring outside Australia or an external Territory as a result of the development
- b. the impacts occurring in the State as a result of any development carried out outside Australia or an external territory.

(3) This section does not apply to any development consent granted before the commencement of this section.

Schedule 2 Amendment of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*

~~Clause 14 Natural resource management and environmental management~~

~~Omit “(including downstream emissions)” from clause 14(2).~~

Appendix 1 Submissions

No.	Author
1	Climate Change Australia (Hastings)
2	Lawyers for Climate Justice Australia
3	Groundswell Gloucester
4	Lock the Gate Alliance
5	NSW Minerals Council
6	Nature Conservation Council of NSW
7	Construction, Forestry, Maritime, Mining & Energy Union
8	Environmental Defenders Office
9	Public Health Association of Australia
10	Hunter Communities Network
11	Wollar Progress Association
12	Maules Creek Branch of the Country Women's Association of NSW
13	Doctors for the Environment Australia (DEA)
14	The Australia Institute
15	Ms Sonya Mckay
16	Ms Libby Ciesiolka
17	EIANZ NSW
18	NSW Young Lawyers
19	Planning Institute of Australia (PIA)

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Thursday, 6 February 2020, Macquarie Room, Parliament House, Sydney	Ms Georgina Woods	NSW Coordinator, Lock the Gate Alliance
	Mr Chris Gambian	Chief Executive, Nature Conservation Council of NSW
	Ms Liz Hadjia	Climate and Energy Campaigner, Nature Conservation Council of NSW
	Ms Elaine Johnson	Principal Solicitor, Environmental Defenders Office
	Ms Rachel Walmsley	Policy and Law Reform Director, Environmental Defenders Office
	Ms Julie Lyford OAM	President, Groundswell Gloucester
	Ms Dianne Montague	Member, Groundswell Gloucester
	Ms Bev Smiles	Secretary, Wollar Progress Association
	Dr Van Der Kallen	Chair, Doctors for the Environment
	Dr Kathleen Wild	Member, Doctors for the Environment
	Dr Patrick Harris	NSW Branch President, Public Health Association of Australia
	Ms Ingrid Johnston	Senior Policy Officer, Public Health Association of Australia
	Mr Roderick Campbell	Research Director, The Australia Institute
	Mr Tom Swann	Senior Researcher, The Australia Institute
	Mr Grahame Kelly	General Secretary, Mining and Energy Division, CFMMEU
	Mr Peter Colley	National Research Director, Mining and Energy Division, CFMMEU
Mr Stephen Galilee	Chief Executive Officer, NSW Minerals Council	
Mr Andrew Abbey	Policy Director, NSW Minerals Council	
Mr Marcus Ray	Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment	

Appendix 3 Minutes

Minutes no. 16

Tuesday 19 November 2019

Portfolio Committee No. 7 – Planning and Environment

Room 1136, Parliament House, Sydney, 2.02 pm

1. Members present

Ms Faehrmann, *Chair*

Mr Pearson, *Deputy Chair*

Mr Buttigieg

Mr Franklin

Mr Mallard

Ms Sharpe

2. Apologies

Ms Cusack

3. Correspondence

Committee to note the following items of correspondence:

Received:

- 19 November 2019 – Email from Ms Abigail Boyd MLC, request to participate for the duration of the inquiry
- 19 November 2019 – Email from the office of Mr Justin Field MLC, request to participate for the duration of the inquiry

4. Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

4.1 Consideration of terms of reference

The committee considered the following self-referred terms of reference:

That:

- a. the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 be referred to the Portfolio Committee No. 7 – Planning and Environment for inquiry and report,
- b. the bill be referred to the committee upon receipt of the message on the bill from the Legislative Assembly,
- c. the committee report by Tuesday 17 March 2020, and
- d. on the report being tabled, a motion may be moved immediately for the first reading and printing of the bill and that the bill proceed through all remaining stages according to standing and sessional orders.

4.2 Proposed timeline

Resolved, on the motion of Mr Pearson: That the committee adopt the following timeline for the administration of the inquiry:

- Sunday 15 December 2019 – closing date for submissions (4 weeks)
- Thursday 6 February 2020 – 1 full day hearing
- Monday 24 February – circulation of chair's draft report
- Thursday 27 February (8.30 am) – report deliberative
- Friday 6 March – report tabled.

4.3 Stakeholder and witness list

Resolved, on the motion of Ms Sharpe: That the following stakeholders be invited to make a submission and to appear as a witness at the hearing:

- NSW Minerals Council
- Australian Coal Association
- NSW Government (including Department of Planning, Industry and Environment)
- Lock the Gate
- Environmental Defenders Office
- Lawyers for Climate Justice Australia
- UNSW Climate Change Research Centre
- Nature Conservation Council
- Climate Council.

Further, that members be provided with the opportunity to nominate additional stakeholders to make submissions, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement.

4.4 Additional stakeholders

Resolved, on the motion of Mr Buttigieg: That the following additional stakeholders be invited to make a submission and to appear as a witness at the hearing:

- Construction Forestry Maritime Mining Energy Union (CFMMEU)
- The Australian Workers' Union (AWU).

4.5 Submissions and online questionnaire

Resolved, on the motion of Ms Sharpe:

- That the committee not accept individual submissions through the website and not accept any proformas.
- That individuals who have already made a submission via the portal be advised that they can participate through the online questionnaire.
- That the wording for the website include the following points:
 - Individuals are invited to submit their comments on the bill via the questionnaire.
 - The questionnaire is a new way for individuals to make submissions to the inquiry.
 - The committee will not accept proformas.
 - Organisation or particular individuals may make a more detailed submission on application to the committee chair.

4.6 Online questionnaire

Resolved, on the motion of Mr Franklin: That the committee use an online questionnaire to capture individuals' views, and that the draft questions be as follows:

- What is your position on the bill? Select one of these options: support, oppose, neutral/undecided
- In relation to the previous question, please explain your position on the bill (500 word text box)
- Do you have any other comments on the bill? (250 word text box)

Further, that the media release announcing the establishment of the inquiry and the committee's website and emails to stakeholders note that there will be an online questionnaire to capture individuals' views.

4.7 Advertising

All inquiries are advertised via Twitter, Facebook, stakeholder emails and a media release distributed to all media outlets in New South Wales.

It is no longer standard practice to advertise in the print media. The committee should pass a resolution if it wishes to do so.

4.8 Questions on notice and supplementary questions

Resolved, on the motion of Mr Mallard: That there be no questions taken on notice at the public hearing or supplementary questions from members.

5. Adjournment

The committee adjourned at 2.25 pm, *sine die*.

Madeleine Foley

Clerk to the Committee

Minutes no. 21

Thursday 6 February 2020

Portfolio Committee No. 7 – Planning and Environment

Macquarie Room, Parliament House, Sydney, 9.17 am

1. Members present

Ms Faehrmann, *Chair*

Mr Pearson, *Deputy Chair*

Ms Boyd (participating)

Mr Buttigieg (participating)

Ms Cusack

Mr Franklin

Mr Mallard

Mr Searle (substituting for Mr Buttigieg)

Ms Sharpe

2. Apologies**3. Correspondence**

The Committee noted the following items of correspondence:

Received

- Various correspondence received from individuals through the online submission portal.
- 6 December 2019 – Email from Geoff Pettett, objection submission letter to secretariat regarding the inquiry.
- 12 December 2019 – Email from Ms Sue Abbott, forwarding email sent to local member regarding objections to the proposed Bill.
- 16 December 2019 – Email from Hon Mark Buttigieg MLC, participating member notification for Hon Adam Searle MLC for the duration of the inquiry.
- 17 December 2019 – Email from D Williamson, opposing the proposed bill.
- 30 January 2020 – Email from Mr Nestor Tambor, Executive Planning Officer, Office of the Group Deputy Secretary, Planning & Assessment, to the committee, attaching a document entitled 'Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019: Department Submission'.

- 6 February 2020 – Email from Ms Trish Marinozzi, office of the Hon Mark Buttigieg MLC, Opposition Whip, advising the Hon Adam Searle MLC will be substituting for the Hon Mark Buttigieg MLC for the duration of the inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 and that Mr Buttigieg will be a participating member.

Sent:

- 27 November 2019 – Email from Director of Committees to individuals advising that they can submit their views in responses to questions in an online submission process.
- 20 January 2020 – Email from Senior Council Officer to Dr Andrew Norton advising that a summary report of online submission responses will be published on the committee's website.

Resolved, on the motion of Mr Pearson: That the committee publish the correspondence from Mr Nestor Tsambos, Executive Planning Officer, Office of the Group Deputy Secretary, Planning & Assessment, dated 30 January 2020, which was provided as pre-hearing briefing material.

4. Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

4.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos 1-17.

Resolved, on the motion of Mr Franklin: That the committee authorise the publication of the following submissions: submission nos 15, 16 and 18.

4.2 Update on the online submission process

The committee noted the online questionnaire report.

Resolved, on the motion of Ms Cusack: That the committee authorise the publication of the online questionnaire report on the committee's website.

4.3 Provision of Chair's draft report

Resolved, on the motion of Mr Pearson:

- That in light of the short timeframe for the inquiry, the draft report be circulated to the committee for their consideration on Friday 21 February 2020, ahead of the deliberative on 8.00am, Thursday 27 February 2020.
- That the secretariat canvass another option for the report deliberative meeting as a reserve in case members are unable to meet on 8.00am, Thursday 27 February 2020.

4.4 Participating members

Resolved, on the motion of Mr Mallard: That Ms Boyd and Mr Buttigieg be provided with copies of all inquiry related documents, including meeting papers, unpublished submissions and the chair's draft report.

4.5 Sequence of questions

The committee noted that the resolution appointing the committee provides that questions are to alternate between opposition, crossbench and government members, in that order, with equal time allocated to each, unless the committee resolves otherwise.

4.6 Questions on notice and supplementary questions

The committee noted that they had previously resolved that there be no questions on notice or supplementary questions asked at this hearing.

4.7 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The Chair declared the public hearing for the inquiry into the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 open for examination.

The following witnesses were sworn

- Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance
- Mr Chris Gambian, Chief Executive, Nature Conservation Council
- Ms Liz Hadjia, Climate and Energy Campaigner, Nature Conservation Council.

Ms Woods tendered the following document:

- Tables displaying various greenhouse gas and mining statistics.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn

- Ms Elaine Johnson, Principal Solicitor, Environmental Defenders Office
- Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office
- Ms Julie Lyford OAM, President, Groundswell Gloucester
- Ms Dianne Montague, Member, Groundswell Gloucester
- Ms Bev Smiles, Secretary, Wollar Progress Association.

Ms Walmsley tendered the following documents:

- Report of Environmental Defenders Office entitled 'Climate-ready planning laws for NSW, Rocky Hill and beyond', dated March 2019
- Report of Environmental Defenders Office entitled 'Climate-ready planning laws for NSW, Rocky Hill and beyond, implications for the current projects', dated August 2019.

Ms Montague tendered the following documents:

- Ms Montague's opening statement
- Various media articles relating to climate change.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn

- Dr John Van Der Kallen, Chair, Doctors for the Environment
- Dr Kathleen Wild, Member, Doctors for the Environment
- Dr Patrick Harris, NSW Branch President, Public Health Association of Australia
- Ms Ingrid Johnston, Senior Policy Officer, Public Health Association of Australia.

Dr Van Der Kallen tendered the following document:

- Information regarding Australian fossil fuel exports, dated February 2020.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn

- Mr Roderick Campbell, Research Director, The Australia Institute
- Mr Tom Swann, Senior Researcher, The Australia Institute.

Mr Swan tendered the following documents:

- Graphs displaying mining statistics
- Report of The Australia Institute, entitled 'Enough Scope, NSW coal mines, scope 3 emissions and democracy', dated October 2019

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn

- Mr Grahame Kelly, General Secretary, Mining and Energy Division, Construction Forestry Maritime Mining and Energy Union
- Mr Peter Colley, National Research Director, Mining and Energy Division, Construction Forestry Maritime Mining and Energy Union.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn

- Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council
- Mr Andrew Abbey, Policy Director, NSW Minerals Council.

The evidence concluded and the witnesses withdrew.

The following witness was sworn

- Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment.

Mr Ray tendered the following document:

- Letter from the Hon Angus Taylor MP, Commonwealth Minister for Energy and Emissions Reduction to the Hon Rob Stokes MP, Minister for Planning and Public Spaces responding to the Hon Rob Stokes' letter of 11 September 2019, regarding the consideration of scope three greenhouse gas emissions in Australia's national climate policy, dated 20 November 2019.

The evidence concluded and the witness withdrew.

The public hearing concluded at 5:04 pm.

4.8 Tabled documents

Resolved, on the motion of Ms Cusack: That the committee accept and publish the following documents tendered during the public hearing:

- Tables displaying various greenhouse gas and mining statistics, tabled by Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance.
- Report of Environmental Defenders Office entitled 'Climate-ready planning laws for NSW, Rocky Hill and beyond', dated March 2019, tabled by Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office.
- Report of Environmental Defenders Office entitled 'Climate-ready planning laws for NSW, Rocky Hill and beyond, implications for the current projects', dated August 2019, tabled by Ms Rachel Walmsley, Policy and Law Reform Director, Environmental Defenders Office.
- Ms Montague's opening statement, tabled by Ms Dianne Montague, Member, Groundswell Gloucester.
- Various media articles relating to climate change, tabled by Ms Dianne Montague, Member, Groundswell Gloucester.
- Information regarding Australian fossil fuel exports, dated February 2020, tabled by Dr John Van Der Kallen, Chair, Doctors for the Environment.
- Graphs displaying mining statistics, tabled by Mr Tom Swann, Senior Researcher, The Australia Institute.
- Report of The Australia Institute, entitled 'Enough Scope, NSW coal mines, scope 3 emissions and democracy', dated October 2019, tabled by Mr Tom Swann, Senior Researcher, The Australia Institute.
- Letter from the Hon Angus Taylor MP, Commonwealth Minister for Energy and Emissions Reduction to the Hon Rob Stokes MP, Minister for Planning and Public Spaces responding to the Hon Rob Stokes' letter of 11 September 2019, regarding the consideration of scope three greenhouse gas emissions in Australia's national climate policy, dated 20 November 2019, tabled by Mr Marcus Ray, Group Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment.

4.9 Additional correspondence received from witnesses

The Committee noted the following items of correspondence:

Received

Resolved, on the motion of Mr Pearson: That the committee accept and publish the following correspondence received today from witnesses after their appearance at the public hearing:

- 6 February 2020 – Email from Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, attaching a briefing note prepared by the NSW Department of Planning and Environment for the Minister for Planning and Public Spaces on 12 June 2019.

- 6 February 2020 – Mr Tom Swann, Senior Researcher, The Australia Institute, providing additional information to evidence provided at the hearing on 6 February 2020.

5. Inquiry into koala populations and habitat in New South Wales

5.1 Amended hearing schedule

The committee noted the amended draft hearing schedule for the hearing on Tuesday 18 February 2020.

Resolved, on the motion of Ms Cusack: That the secretariat amend the draft hearing schedule, taking into consideration members' feedback, and recirculate it on Friday 7 February 2020 for the committee's approval.

6. Adjournment

The committee adjourned at 5:23pm until Tuesday 18 February 2020.

Laura Ismay

Committee Clerk

Minutes no. 24

Thursday, 27 February 2020

Portfolio Committee No.7 – Planning and Environment

Room 1136, Parliament House, Sydney, 8:00 am

1. Members present

Ms Faehrmann, *Chair*

Mr Pearson, *Deputy Chair*

Ms Boyd (participating)

Ms Cusack (from 8.21 am)

Mr Franklin (from 8.14 am)

Mr Mallard

Mr Searle

Ms Sharpe

2. Previous minutes

Resolved, on the motion of Ms Sharpe: That draft minutes no. 21 be confirmed.

3. Correspondence

The Committee noted the following item of correspondence:

Received:

- 6 February 2020 – Email from Mr Tom Loomes, attaching correspondence from the Hon Rob Stokes MP to the Hon Angus Taylor MP, Commonwealth Minister for Energy and Emissions Reduction, requesting advice on how the Commonwealth considered downstream greenhouse gas emissions.

4. Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

5.1 Public submissions

Resolved, on the motion of Mr Pearson: That the committee publish the following: submission nos 18 and 19.

4.1 Correction to transcript

The committee considered correspondence from Mr Nestor Tsambos, Department of Planning, Industry and Environment, requesting certain corrections to the transcript of Mr Marcus Ray for the hearing on Thursday 6 February 2020.

Resolved, on the motion of Mr Mallard: That the committee:

- request that Hansard review the audio of the hearing to clarify what Mr Ray said
- subject to Hansard's response, consider including footnotes in the transcript to reflect Mr Ray's requested corrections.

5.2 Consideration of Chair's draft report

The Chair submitted the Chair's draft report, entitled '*The Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 [provisions]*', which, having been previously circulated was taken as being read.

Mr Franklin joined the meeting.

Chapter 2

Resolved, on the motion of Mr Searle: That paragraph 2.21 be amended by inserting 'reasoning in the' before 'Rocky Hill decision'.

Resolved, on the motion of Mr Searle: That paragraph 2.44 be amended by omitting 'and characterised the bill as 'a good first step' after 'New South Wales requires a 'stable and responsible regulatory framework'.

Resolved, on the motion of Mr Searle: That paragraph 2.62 be amended by omitting 'betaken into account' and inserting instead 'be taken into account'.

Resolved, on the motion of Mr Searle: That paragraphs 2.79 and 2.80 be amended by:

- a) amending paragraph 2.79 by omitting 'For example' and inserting instead:

'For some, this was based on the view that without the power to impose a condition relating to scope 3 or downstream emissions, a consent authority could refuse the project based on its environmental impact.'

'The evidence from the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) indicated that it was not content with the legislation in its present form. The union does not want downstream or greenhouse gas emissions to be included in any assessment of coal mining applications. Evidence for the union indicated that the legislation could increase the level of uncertainty for the industry.' [FOOTNOTE: Evidence, Mr Peter Colley, National Research Director, Mining and Energy Division, Construction Forestry Maritime Mining and Energy Union, 6 February 2020, p 30; 43.]

- b) omitting paragraph 2.80:

'For some, this was based on the view that without the power to impose a condition relating to scope 3 or downstream emissions, a consent authority would be required to refuse the project based on its environmental impact. In evidence, Mr Andrew Abbey, Policy Director at the NSW Minerals Council stated:

... there is a risk that under section 4.15 [of the *Environmental Planning and Assessment Act 1979*], the public interest test, the courts could still refuse a project and that risk ... has been increased because [the bill has] removed the ability for mitigation measures through conditions of consent. [FOOTNOTE: Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 6 February 2020, p 53.]'

and inserting instead the following new paragraphs:

'The Minerals Council agreed with the CFMMEU that the bill increases the risk of refusals in the coal mining industry, [FOOTNOTE: Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, 6 February 2020, p 48.] because the bill removes the ability for mitigation

measures through conditions of consent. [FOOTNOTE: Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 6 February 2020, p 53.]

Mr Abbey, Policy Director, NSW Minerals Council, stated that:

... there is a risk that under section 4.15 [of the Environmental Planning and Assessment Act 1979], the public interest test, the courts could still refuse a project and that risk...has been increased because [the bill has] removed the ability for mitigation measures through conditions of consent. [FOOTNOTE: Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 6 February 2020, p 53.]

He stated further, that:

Our concern is that the assessment authority may choose not to approve a project because it does not have the option of imposing a condition on it. [FOOTNOTE: Evidence, Mr Andrew Abbey, Policy Director, NSW Minerals Council, 6 February 2020, p 55.]

The Minerals Council also indicated that it 'does have some reservations about the bill in its current form ... [because it] fails to clarify and give effect to the New South Wales Government's policy position' [FOOTNOTE: Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, 6 February 2020, p 46.] on emissions accounting frameworks.'

Resolved, on the motion of Mr Searle: That the following new paragraph be inserted before paragraph 2.92: 'It is clear to the committee that, although for different reasons, the key stakeholders and community groups are each unhappy with the legislation. The overwhelming number of public submissions to the inquiry are opposed to it.'

Resolved, on the motion of Mr Searle: That paragraph 2.94 be omitted:

'In the committee's view, this bill would effectively increase greenhouse gas emissions by discouraging planning authorities from considering the downstream greenhouse gas emissions of proposed developments in their assessments. The committee believes that New South Wales has a global responsibility to reduce greenhouse gas emissions and is responsible for considering how fossil fuels mined within its borders will impact on global greenhouse gas emissions and climate change and, consequently, on the environment and people of New South Wales. In the context of greenhouse gas emissions, the planning system should be free to consider all relevant impacts of potential development, including those occurring as a consequence overseas.'

and the following new paragraph be inserted instead:

'In the committee's view, the bill is designed to discourage planning authorities from considering the downstream greenhouse gas emissions of proposed developments in their assessments. The committee believes that New South Wales has a global as well as a local responsibility to reduce greenhouse gas emissions.'

Mr Searle moved: That paragraph 2.94 be amended by inserting at the end 'The committee is not persuaded of the need for legislative change, as proposed by the NSW Government'.

Question put.

The committee divided.

Ayes: Ms Faehrmann, Mr Pearson, Mr Searle, Ms Sharpe.

Noes: Mr Franklin, Mr Mallard.

Question resolved in the affirmative.

Resolved, on the motion of Mr Searle: That paragraph 2.94 be amended by inserting at the end: 'The committee is also opposed to removing the consideration of greenhouse gases from the planning assessment process'.

Resolved, on the motion of Mr Searle: That paragraph 2.95 be amended by omitting 'all potential' and inserting instead 'downstream greenhouse gas'.

Resolved, on the motion of Mr Searle: That paragraph 2.96 be omitted: 'The committee acknowledges the short-term economic benefit to New South Wales of coal mining. However, any economic benefit must be balanced against the short and long-term negative impacts of the industry on local communities, public health and climate change.'

Resolved, on the motion of Mr Searle: That paragraph 2.97 be amended by omitting 'On the specific provisions of the bill,' and inserting instead:

'The legislation does not address the key concerns of the NSW Minerals Council and the CFMMEU. Those concerns are directed to what may happen in the future rather than a presently existing situation. The stated aim of the NSW Government, through the Minister's second reading speech and its witnesses to this inquiry, is not to address those concerns but to prevent conditions of consent (such as in the Wambo decision) that may have an extra territorial effect. However,'

Ms Cusack joined the meeting.

Mr Searle moved: That paragraph 2.99 be omitted:

'In conclusion, the committee opposes the bill and calls on the Legislative Council to reject the bill at the second reading. If this recommendation is not agreed to and the bill proceeds, the committee urges the Legislative Council to amend the bill. We acknowledge that a number of stakeholders suggested that amendments to particular provisions may assist in mitigating some of the bill's more egregious consequences. On this, the committee takes note of the Environmental Defenders Office and the amendments proposed in their submission. These amendments are reflected in our Recommendation 2, noting that the underlined words are proposed insertions, and the strikethrough text proposes deletions.'

and the following new paragraph be inserted instead:

'In conclusion, the committee recommends that the bill not be passed in its current form. If the bill is to proceed further, the Legislative Council should amend the bill to address the concerns raised in the inquiry.'

Question put.

The committee divided.

Ayes: Ms Faehrmann, Mr Pearson, Mr Searle, Ms Sharpe.

Noes: Ms Cusack, Mr Franklin, Mr Mallard.

Question resolved in the affirmative.

Mr Mallard moved: That Recommendation 1 be omitted: 'That the Legislative Council decline to give the bill a second reading', and the following new recommendation be inserted instead:

Recommendation X

'That the Legislative Council proceed to the consider the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 including any amendments in the committee stage that address stakeholder concerns raised during this inquiry'.

Question put.

The committee divided.

Ayes: Ms Cusack, Mr Franklin, Mr Mallard.

Noes: Ms Faehrmann, Mr Pearson, Mr Searle, Ms Sharpe.

Question resolved in the negative.

Mr Searle moved: That Recommendation 1 be omitted: 'That the Legislative Council decline to give the bill a second reading', and the following new recommendation be inserted instead:

Recommendation X

'That the bill not be passed in its current form'.

Question put.

The committee divided.

Ayes: Ms Faehrmann, Mr Pearson, Mr Searle, Ms Sharpe.

Noes: Ms Cusack, Mr Franklin, Mr Mallard.

Question resolved in the affirmative.

Mr Searle moved: That Recommendation 2 be amended by:

- a. omitting 'if Recommendation 1 is not adopted' and inserting instead 'if the bill is to proceed further'
- b. inserting 'which reflect the majority concerns expressed during the inquiry' after 'agree to the following amendments to the bill'.

Question put.

The committee divided.

Ayes: Ms Faehrmann, Mr Pearson, Mr Searle, Ms Sharpe.

Noes: Ms Cusack, Mr Franklin, Mr Mallard.

Question resolved in the affirmative.

Mr Searle moved: That Recommendation 2 be amended by omitting 'agree to' and inserting instead 'consider' before 'the following amendments to the bill'.

Question put.

The committee divided.

Ayes: Ms Faehrmann, Mr Pearson, Mr Searle, Ms Sharpe.

Noes: Ms Cusack, Mr Franklin, Mr Mallard.

Question resolved in the affirmative.

Mr Searle moved: That Recommendation 2 be amended by omitting 'the impacts exclusively occurring outside Australia or an external Territory of downstream greenhouse gas emissions as a result of the development' and inserting instead 'the regulation of downstream greenhouse gas emissions occurring outside Australia or an external Territory as a result of the development'.

Question put.

The committee divided.

Ayes: Ms Faehrmann, Mr Pearson, Mr Searle, Ms Sharpe.

Noes: Ms Cusack, Mr Franklin, Mr Mallard.

Question resolved in the affirmative.

Resolved, on the motion of Mr Mallard: That the following new paragraph be inserted after paragraph 2.28:

'However, in their evidence the NSW Minerals Council expressed reservations about the legislation. Mr Galilee stated:

The NSW Minerals Council agrees with the principle of the NSW Government's policy approach on these matters and it supports the Government's efforts to formalise this through the legislation and regulation. However, it does have some reservations about the bill in its current form. The bill in its current form fails to clarify and give effect to the NSW Government's policy position and principles...! [FOOTNOTE: Evidence, Mr Stephen Galilee, Chief Executive Officer, NSW Minerals Council, 6 February 2020, p 46.]

Resolved, on the motion of Mr Searle: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, tabled documents and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat by 5.00 pm Thursday 5 March 2020;
- That the report be tabled on Friday 6 March 2020.

5. Other business

6. Next meeting

Wednesday, 4 March 2020 at 9.15 am, Macquarie Room, Parliament House (Budget Estimates hearing – Local Government portfolio).

Laura Ismay

Committee Clerk

Draft minutes no. 25

Wednesday 4 March 2020

Portfolio Committee No. 7 - Planning and Environment
Macquarie Room, Parliament House, Sydney, at 9.15 am

1. Members present

Mr Pearson, *Deputy Chair*

Mr Buttigieg

Ms Cusack (from 9.21 am)

Mr Franklin

Mr Mallard

Mr Primrose (substituting for Ms Sharpe)

Mr Field (participating until 11.30 am)

Ms Sharpe (participating from 1.40 pm until 2.00 pm)

Mr Shoebridge (participating from 11.00 am until 3.33 pm)

2. Apologies

Ms Faehrmann

3. Election of Deputy Chair for the purposes of the meeting

In the absence of the Chair, the Deputy Chair took the Chair for the purpose of the meeting.

The Chair called for nominations for a member to act as Deputy Chair for the purposes of this meeting only.

Mr Primrose moved: That Mr Buttigieg be elected as Deputy Chair of the committee for the purposes of this meeting only.

There being no further nomination, the Chair declared Mr Buttigieg elected Deputy Chair for the purposes of this meeting only.

4. Confirmation of draft minutes

Resolved, on the motion of Mr Mallard: That draft minutes no. 24 be confirmed.

5. ***

6. Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

6.1 Correction to transcript

Resolved on the motion of Mr Franklin: That the committee authorise the corrections to the transcript requested by Mr Nestor Tsambos.

6.2 Responses to online questionnaire

Resolved on the motion of Mr Franklin: That individual responses to the online questionnaire be kept confidential.

7. ***

Sharon Ohnesorge and Alex Stedman
Committee Clerks

Appendix 4 Dissenting statement

The Hon Shayne Mallard MLC, Liberal Party

The Hon Catherine Cusack MLC, Liberal Party

The Hon Ben Franklin MLC, The Nationals

This Inquiry and Final Report examine and make recommendations of the NSW Government's proposed legislation the *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019* (the Bill). As detailed by the Hon. Rob Stokes MP, Minister for Planning and Public Spaces, in his second reading speech and by Mr Marcus Ray, Deputy Secretary, Planning and Assessment, Department of Planning, Industry and Environment, in his opening statement to the public hearing of this inquiry, the Bill before us does not have retrospective effect and clarifies how planning approvals and assessments treat impacts occurring outside the territorial limits of New South Wales and Australia.

The Bill does not prevent consent authorities from considering global greenhouse gas emissions in assessing development applications, as insinuated by the report.

It is the government members' views that it is important that greenhouse gas emissions are considered as part of NSW's planning framework and assessments but within the legal parameters of the Constitution.

The background to this Bill arose from a development consent granted by the Independent Planning Commission for the United Wambo open-cut mine (the Wambo decision). The development consent was subject to a condition seeking to limit the export of coal from this mine to countries that are signatories to the Paris Agreement or have equivalent climate change policies. The Wambo decision highlights a broader jurisdictional issue within the New South Wales planning legislation, which does not expressly deal with conditions relating to the extraterritorial impacts of development.

The Bill clarifies those territorial limitations and identifies conditions that would have no effect if they were part of a development consent. The approach in the Bill is consistent with the constitutional constraints placed on the New South Wales power to regulate international trade.

Turning to the Inquiry, the Final Report and its recommendations, the government members are disappointed in the conduct of the Inquiry, in particular the public hearing. The government members also reject all recommendations made in this report as they fail to provide a solution that solves the jurisdictional issue highlighted above in its entirety.

The Committee heard from ten organisations and Mr Ray from the Department of Planning, Industry and Environment on the Bill. Of those ten groups, eight were environmental groups or associated with environmental groups who reject the Bill entirely and sought to misrepresent both the rationale for the Bill and the legal effect of the legislation. The other two groups are resource and mining industry groups who also did not agree with the Bill in its entirety.

The lack of diversity of opinions amongst those groups who attended the public hearing has skewed the Final Report and its recommendations. Furthermore, despite the resource and mining industry groups both stating they do not totally agree with the Bill, the Final Report in parts infers that groups like these are or were responsible for the creation of this legislation.

Turning to the recommendations, on recommendation 1, the government members reject this approach entirely.

On recommendation 2, the government members reject all amendments proposed. First, as it is highly unusual for a Committee to propose the terms of legislative amendments within a recommendation, and, second because the proposed amendments could generally create problematic law.

The proposed amendments are problematic. For instance, they seek to:

- tie the *Environmental Planning and Assessment Act 1979* to development under a specific State Environmental Planning Policy (SEPP), which could cause issues in the future if the instrument or SEPP is amended, repealed or if another instrument made provision for mining, petroleum or extractive industry development;
- allow an applicant to propose a condition, which is out of step with the way that planning legislation treats consent decisions and could have broader planning implications for planning decisions generally; and,
- unnecessarily enshrine the future effect of the proposed legislation with subsection (3). Section 30 of the *Interpretation Act 1987* provides that an amendment of an Act does not affect the previous operation of the Act.

The government members reject the Final Report and its recommendations for the reasons stated above.

