Submission
No 4

INQUIRY INTO ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (TERRITORIAL LIMITS) BILL 2019

Organisation: Lock the Gate Alliance

Date Received: 13 December 2019

Reply to: Georgina Woods

13 December 2019

Submission: Territorial Limits Bill

Thank you for the opportunity to make a submission on this Bill. We would appreciate the opportunity to present our views on this Bill at the Committee's hearing on 6 February.

Lock the Gate Alliance opposes this legislation. It introduces uncertainty where now there is clarity and would blinker planning authorities to important considerations in the exercise of their functions under the *Environmental Planning and Assessment Act 1979* (*EP&A Act*).

This deceptively simple Bill is a clumsy intervention in a complex and hugely significant issue that has implications for every person in New South Wales. It will leave New South Wales exposed to unforeseen and poorly-considered environmental and social consequences and leave planning authorities unable to create mitigating consent conditions for the companies responsible for that damage. We are disappointed that the Government introduced legislation like this without any prior public consultation and are grateful to the Committee for providing scrutiny, transparency and accessibility on the public's behalf. As we write this submission, people in regional communities across the state and in outer suburban areas are grappling with cataclysmic bushfires following three years of drought and fuelled by the high temperatures of the early stages of climate change. Fire has consumed bushland on the eastern, southern and western sides of Lake Burragorang in the Warragamba Special Area of Sydney's drinking water catchment, introducing water quality risks for Sydney. Australian scientists have known and warned for two decades that climate change would bring more numerous and more intense bushfires. In eastern Australia, increased temperatures in all seasons means there is a lot less moisture around, dramatically increasing fire risk. Large parts of northern New South Wales have in the last two years and throughout this year suffered their lowest rainfall on record. All people in New South Wales have a stake in this issue.

This Bill has been created by the Government under pressure from the coal mining industry following recent decisions by the Independent Planning Commission which the industry did not like. A timeline of events is provided in the Appendix. Documents obtained by Lock the Gate under GIPA law clearly show that six months before this Bill was introduced, the Government held the view that legislation to change the way downstream emissions were treated in the *EP&A Act* was unnecessary, "would not prevent GHG emissions being considered and may create more uncertainty as it would still be open to a consent authority to consider such matters."[1] Following the imposition of the "Export Management Plan" condition on the United Wambo mine and the refusal of the Bylong coal project a month later, the NSW Minerals Council campaigned publicly for downstream greenhouse gas emissions to be removed from the considerations of planning authorities. With this bill, the

[1] Briefing Note prepared by the Department of Planning, Industry and Environment for Minister's meeting with the NSW Minerals Council, 12 June 2019.

Government has delivered on that demand. The Government will claim that the legislation does not prohibit consideration of downstream greenhouse emissions in planning decisions about coal mines and gasfields. However, the bill will clearly undermine the currently clarity provided by clause 14 (2) of the State Environmental Planning Policy for mining. At best, the bill introduces uncertainty. At worst, it is a political intervention to blinker planning authorities from what is widely recognised as the most severe and lasting environmental, social and economic challenge of our age.

Schedule 1 will make it unlawful to impose a condition on any development for the purpose of achieving something related to impacts occurring outside Australia as a result of the development or impacts occurring here that are the result of development carried out outside Australia. In short, no condition will be able to be imposed that addresses climate change. This provision is not specific to restraint of trade but would also prevent a consent authority requiring greenhouse offsets, or payments into the Climate Change Fund or local adaptation funds, or any other climate change-related mitigation measures. It will apply retrospectively, so that a condition recently imposed on the approved United Wambo coal mine in the Hunter Valley, requiring its proponent to ensure the coal exported from the mine is only sold to countries that are party to the Paris Climate Agreement or taking similar action, will be voided.

Schedule 2 will remove the words "(including downstream emissions)" from clause 14 (2) of the *State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) 2007* (the Mining SEPP) - words that have been there since the Mining SEPP was created in 2007. Consent authorities will no longer be required to consider the impact of downstream emissions when they're deciding whether or not to let a mine (or a gasfield) go ahead. This change will not *prohibit* a planning authority from considering climate change, but would introduce considerable doubt over whether they should do so, and may leave them open to legal action by mining companies if they do.

This submission deals separately with the Bill's two schedules, beginning with Schedule 2, and provides contextual background information that is crucial to the Committee's consideration of it.

Background

Though it has been part of the material considered in weighing up the environmental impacts of coal mines for twelve years, it has only been since the judgement in the Rocky Hill case (*Gloucester Resources v Minister for Planning*) in February 2019 that downstream emissions and climate change began to be treated seriously in the process.

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. The Commission began to ask proponents to situate coal mining projects in the context of the Paris climate agreement and global mitigation efforts. In August, the United Wambo coal mine expansion was approved with a condition requiring the coal to only be sent to countries that are signatories of the Paris Agreement or who have equivalent climate action measures underway. In September, the IPC refused approval for the proposed Bylong coal mine, citing downstream greenhouse gas emissions as a supporting factor in its decision (with the prime factors for refusal being direct impacts on soils and water resources).

We know from GIPA requests and Ministerial diaries that the NSW Minerals Council has advocated since shortly after the March 2019 NSW election for the removal of downstream emissions from the assessment process for coal mines. On 4 April, the Minerals Council wrote to the Minister seeking "statutory and policy certainty by clarifying scope three emissions are not required to be accounted for and justified by a consent authority."

On 12 June, the Minister met with Minerals Council representatives. A GIPA-obtained briefing note for that meeting indicated that at that time, the Government did not support removing downstream emissions from planning law. This briefing note defended the inclusion of downstream emissions in the consideration of mining projects, arguing that:

- “these emissions are a consequence of the proposed development and are therefore a relevant consideration under the EP&A Act - the weight to be given to them is a matter for the consent authority to determine.”
- “The consideration of scope 3 emissions in development assessment processes is well established in many other jurisdictions and has been a factor in the assessment of mining projects in NSW since the commencement of the Mining SEPP.”
- “To address its concerns, the NSWMC may request the Mining SEPP be amended to remove the requirement to assess downstream emissions. However, this would not prevent GHG emissions being considered and may create more uncertainty as it would still be open to a consent authority to consider such matters.”

Ministerial diaries show that the Planning Minister met the Minerals Council again on 18 September, the same day the Independent Planning Commission published its decision to refuse approval to the Bylong coal mine. The following day, a *Daily Telegraph* report on Bylong refusal included comment from the Deputy Premier to the effect that, “The IPC’s idea of telling companies which countries they can and cannot sell coal to creates a sovereign risk for investment in NSW,” and the Planning Minister was quoted saying, “I share the Deputy Premier’s concerns about Scope 3 emissions and we are reviewing how major resource projects can continue to go ahead in NSW and be assessed more quickly.”

On 12 October, the Rix’s Creek extension project was determined by the IPC. In that decision, it was apparent that the politicisation of downstream greenhouse gas emissions in the intervening two months had led to a reticence on the part of the Commission to properly exercise its functions. The mine expansion was approved with no condition imposed that would ensure that coal exported from Rix’s Creek mine would be burnt only in countries that are signatories to the Paris Climate Agreement. As for United Wambo, the coal from Rix’s Creek is expected to be sold to Japan, South Korea and Taiwan, but the Statement of Reasons published by the Commission on 12 October argued that “market forces are likely to lead buyers in those countries with the most significant emissions reductions targets to seek coal products which best meet their requirements and minimise associated emissions in order to achieve the relevant domestic emissions reduction targets.”

In October, while unprecedented spring bushfires burned in the state’s north east, the Planning Minister introduced the *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019*, to amend the Act and the Mining SEPP to wind back the role of downstream emissions in planning decisions.

The role of New South Wales coal mines in global climate change is important and complicated. Analysis has shown that in order to keep the Paris Agreement temperature goals within reach, global carbon emissions from coal-fired power stations need to peak in 2020 and coal needs to be eliminated from electricity generation by 2040.[2] Current and planned coal power generation

[2] September 2019. *Global and regional coal phase-out requirements of the Paris Agreement: Insights from the IPCC Special Report on 1.5°C. Climate Analytics*. https://climateanalytics.org/publications/2019/coal-phase-out-insights-from-the-ipcc-special-report-on-15c-and-global-trends-since-2015/

capacity around the world is not consistent with this pathway, or with the NSW Government's commitment to the goals of the Paris Climate Agreement. UN Environment Program analysis clearly outlines the challenge: even full implementation of promised commitments for greenhouse gas emissions reductions is likely to lead to global warming of 3 degrees or more and that countries must increase the ambition of their commitments ambitions threefold to achieve the "well below 2°C" goal and more than fivefold to achieve the 1.5°C goal.[3] Put simply, the market being supplied by coal producers in New South Wales is a market that assumes the Paris climate agreement temperature goals will not be met, despite this country and this state pledging support for them. It is a contradiction that will be resolved one way or another, but which cannot and must not be ignored by planning authorities for the sake of short-term political conveniences.

These are matters of considerable complexity and relatively rapid change that it is difficult for NSW planning authorities and legislators to follow in close detail given their other responsibilities. If the members of the Committee and the parliament are not familiar with the implications of these temperature thresholds, it is important that some attention be given to it so that the implications of this Bill are properly illuminated. Australian researchers, for example, have warned that with 2 degrees of warming, average summer temperatures would outstrip those of the record-breaking summer of 2012/13 and that in any given year, there would be an 87% chance that temperatures in the Coral Sea would be as hot as they were in 2016, when mass coral bleaching occurred. In any given year under 2 degrees of warming, there will be a 74% chance that temperatures will reach the extremes experienced in the 2006 drought. The conditions currently being experienced in New South Wales provide a visceral preview of these conditions: hotter weather means less moisture, more risk of fire and increased evaporation of available water.[4] As far back as 2007, when the Mining SEPP was created, Australian scientists were warning that by 2020, with one degree of global warming, the number of days with fire danger higher than "very high" would increase by 10-65%.[5] That report forecast that in 2050, with 2.9 degrees of warming, there would four to five-fold increase in frequency of very high or worse fire danger at many sites.

The long delays between emission and accumulation of greenhouse gases and global warming effects means that we have very nearly made this catastrophic and irreversible future an inevitability. Decisions made next year and in every subsequent year between now and 2030 will seal this fate. New South Wales cannot alone prevent these impacts occurring, but as they will profoundly affect every man, woman and child in the state, they are crucial considerations for planning authorities considering new coal mines.

If the Department of Planning, Industry and Environment had been exercising its duties responsibly for the last twelve years in its assessments of coal mining projects under the Mining SEPP, the actions of the Land and Environment Court and the Independent Planning Commission may not have come as such a shock. It has been the Department's failure to provide robust and comprehensive assessments of these matters that have enabled the disconnect between decision making under the *Environmental Planning and Assessment Act 1979* and the lived reality of the environmental consequences of expanding coal production use over the last twenty years. This disconnect is now

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[3] UNEP Emissions Gap Report. November 2019.

[4] King, A, Karoly, D and Henley, B. "Australian climate extremes at 1.5 °C and 2 °C of global warming" *Nature Climate Change* 7, pages 412–416 (2017) https://www.nature.com/articles/nclimate3296

[5] Lucas, C et al. September 2007. "Bushfire Weather in Southeast Australia: Recent Trends and Projected Climate Change Impacts" Bushfire CRC and Australian Bureau of Meteorology, CSIRO Marine and Atmospheric Research

beginning to be addressed. That the NSW Government's response to this correction is to remove climate change considerations from the process is reprehensible and frankly disgraceful.

We urge the Committee to reject this Bill.

Schedule 2: Confusion where there is clarity

Schedule 2 must be removed from the Bill. There is no public good served by it.

The Minister's second reading speech is misleading about the effect and intent of Schedule 2, which has nothing to do with consent conditions. The Minister's speech stated that "the bill will amend the State environmental planning policy for mining, petroleum production and extractive industries *in line with the new restriction on development consent conditions* by omitting a specific reference to downstream greenhouse gas emissions in clause 14 of the State environmental planning policy" (our emphasis). It also claims that the Bill "provides certainty to all players in the planning system about how extraterritorial impacts can be dealt with in New South Wales planning approvals."

Contrary to the Minister's speech, Schedule 2 has nothing to do with consent conditions and introduces uncertainty where currently there is clarity.

The inclusion of downstream emissions in clause 14(2) of the Mining SEPP has been part of the instrument since it was first gazetted. It was included in part because the Land and Environment Court had established three months prior in *Gray v Minister for Planning* that the impacts of climate change were relevant to the mandatory considerations under the *EP&A Act* for consent authorities making decisions about new coal mines. As Justice Pain observed at paragraph 118 in the *Gray* judgement:

> *The key purpose of environmental assessment is to provide information about the impact of a particular activity on the environment to a decision maker to enable him or her to make an informed decision based on adequate information about the environmental consequences of a particular development.*

She also observed at paragraph 138 that

> *Environmental assessment is intended to enable decision makers to be properly informed about the future environmental consequences of the project before them. The environmental assessment is a prediction of what the impacts might be given that the project is yet to be built. It is not appropriate to limit the scope of the environmental assessment on the basis that GHG emissions may or may not be subject to regulation in the future whether in NSW or overseas.*

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 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. The parliament must not impose such a blindfold on the planning system. To do so puts the people and environments of New South Wales at risk and is counter to the principles of ecologically sustainable development, which are enshrined in New South Wales law.

In the months since the LEC's decision in *Gloucester Resources v Minister for Planning*, we have observed a maturing of the consideration of greenhouse gas emissions and intergenerational equity in the approach of the Independent Planning Commission, which is the consent authority for controversial or politically sensitive mining projects. The proponents of the United Wambo, Vickery,

Rix's Creek expansion and Bylong coal mine projects were all asked to or voluntarily submitted additional information regarding the issue. For the United Wambo mine, for example, the proponent put forward material that rested on expectations of future coal demand modelled in the *World Energy Outlook 2018* "New Policies Scenario." This scenario is, in the words of international experts on the matter "a business as usual scenario that charts a dangerous course to a world with between 2.7°C and 3°C of warming."[6] In the cases of United Wambo and Rix's Creek, this further information did *not* lead to a refusal of the projects. In the case of Bylong, which was refused, greenhouse emissions were one of many issues cited. The Vickery coal project is not yet determined, but the IPC has included greenhouse emissions among a suite of issues that "require detailed consideration by the Department in evaluating the merits of the Project."

There is a world of difference between disclosing the volume of downstream greenhouse gas emissions associated with a coal mine development, and assessing that impact. The same can be said for other environmental impacts: do we simply count the kilograms of particulate pollution created per year, or should we consider that pollution against relevant policies and standards, and its effect on people's health? As remarked above, the Department of Planning, Industry and Environment has been derelict in its responsibility to ensure adequate assessment of these matters and has been content with mere counting of the volume of emissions without examining their consequences. A maturing of the assessment of greenhouse and climate change impacts of coal mine developments was long overdue and reflects the high level of concern in the public about the impacts of climate change and the role of New South Wales coal burned here and overseas in driving it.

In a letter to the Premier dated 3 February 2019, the NSW Climate Change Council described the vulnerability of NSW to climate change impacts.[7] Whilst this letter pre-dates the introduction of this legislation, it none-the-less provides a clear rationale as to why it is absolutely in the public interest to maintain a requirement that downstream greenhouse gas emissions are considered in determining a development application.

> NSW remains one of the most at risk States from climate change, including from bushfires, extreme rainfall, increased summer heatwaves and heat extremes, declining water supplies and sea level rises. This summer is indicative of the challenges we are to face. These impacts place much of the States' infrastructure at risk and will have devastating consequences on our rural and ever-expanding urban communities. In addition, climate change presents major challenges for key government services, including for our emergency services and our public health system.

Schedule 2 of this Bill is a regressive, irresponsible and politically-motivated interference with the sober consideration of coal mining projects in New South Wales. It will create confusion and risks blinding consent authorities to damaging environmental impacts that will reverberate for generations. We urge the parliament to reject this Bill for as long as this provision is part of it.

Schedule 1: preventing climate change mitigation

The Minister's second reading speech claimed that "the bill will not have retrospective effect. It will not invalidate any conditions of previously granted development consents before it is enacted. The

[6] "Joint letter to the IEA" 2 April 2019. *Mission 2020*. http://www.mission2020.global/letter-to-iea/

[7] Peter Hannam, 12 March 2019. "'Ignored': climate experts appeal to Berejiklian government." *Sydney Morning Herald* https://www.smh.com.au/environment/climate-change/ignored-climate-experts-appeal-to-berejiklian-government-20190312-p513lq.html?utm medium=Social&utm source=Twitter#Echobox=1552420120

bill only applies to future decisions and sends a clear message to all consent authorities about the limits of the New South Wales planning system." 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.

We oppose the provisions of Schedule 1 and believe they are unnecessary but at the very least, require amendment as they are far broader in their effect than the Minister apparently intends.

The event that triggered the creation of this Bill by the Government was the approval by the IPC in August 2019 of the United Wambo coal mine joint venture and inclusion in its consent conditions of a requirement for an "Export Management Plan." This condition requires the mine proponents to demonstrate that coal from the mine is being sold into countries that are signatories of the Paris Agreement or have equivalent mitigation policies. Given the enormity and complexity of climate change and the Government's failure to provide any guidance to the Commission on this matter, it was not unreasonable of the IPC to require this matter to be dealt with via a management plan, as so many other environmental impacts of coal mines are. The management planning framework has evolved to provide what the Government and the mining companies term "adaptive management." Unlike housing developments or static infrastructure, the environmental and social impacts of coal mines change and intensify over time. Environmental Management Plans provide flexible frameworks to monitor and respond to these changes.

The *NSW Climate Change Policy Framework* specifically endorses the Paris Agreement on climate change. That framework also lists among NSW's roles in climate change "Advocate for Commonwealth, COAG and international action consistent with the Paris Agreement." "Action consistent with the Paris Agreement" means consistent with nationally determined commitments, but also consistent with the goals of the agreement, which are to limit warming to below 2 degrees above pre-industrial temperatures and to investigate the more stringent temperature goal of 1.5 degrees warming. The inclusion in the policy of advocacy for "international action consistent with the Paris Agreement" provided the IPC with a basis for considering the adequacy of international action for meeting the temperature goals of the Paris Agreement when making its determination for this project.

The Paris Agreement, unlike other international frameworks, establishes a continuous, regular process to escalate mitigation efforts by all countries, known as the "ambition mechanism." This process is comprised of:

- A stocktake of implementation and collective progress every five years;
- Submission of updated nationally determined contributions (NDCs) from each country every five years, informed by the stocktake; and
- Explicit expectation of highest possible ambition in each successive contribution.

The crucial element here is *time* and the amendment and adjustment every five years of what each country and the collective parties to the Agreement deem to be the greatest extent practicable emissions reductions.

In the case of a planning consent for a coal mine that will operate for 25 years during what is widely accepted to be the period where the world will either avert or not an irreversible decline into

catastrophic levels of global warming, it was entirely appropriate that a management plan be imposed.

We agree with and accept the argument put forward by Glencore and Peabody, joint venture partners in the United Wambo project, that having such a management plan for one mine only was inconsistent and ineffective in the long term. However, the IPC does not have the power or authority to amend the planning consents of existing coal mines. Strategic, industry-wide policy is supposed to be the responsibility of the Department, the Cabinet or the parliament, and every one of these bodies has failed for twenty years to implement orderly and responsible policy for these matters. Should planning authorities now be prohibited from responsively making conditions to address actual environmental and social impacts of development because other Government bodies have failed to do so?

As it is drafted, the provisions of Schedule 1 have much wider effect than simply preventing a planning authority from interfering in the convention that the Commonwealth regulate trade. It would prohibit a planning authority from imposing a condition that addressed climate change but had nothing to do with trade, for example a simple requirement to purchase greenhouse offsets, or contribute to a climate change adaptation program here in New South Wales.

Conclusion

We urge the Committee to recommend the parliament reject this Bill. This legislation is contrary to the interests of the people of New South Wales and will leave planning authorities confused, blind-folded and hamstrung about a lasting and severe environmental, social and economic impact of the further expansion of New South Wales' coal industry. We're grateful to the Committee for examining this Bill and seeking the public's views on this crucial issue. This is what the Government should have done in the first place.

We look forward to the opportunity to address these matters further in person at the Committee's public hearing.

Appendix: Timeline of "Territorial Limits" Bill

12 June: Minister for Planning meets the NSW Minerals Council and is briefed by the Department that it would be unnecessary, controversial and unhelpful to amend planning law to remove downstream greenhouse gas emissions from coal mining decisions.

15 July: Emails obtained under GIPA show the Department of Planning discussing internally that the IPC had asked them for advice about a condition relating to Scope 3 emissions it was considering for the United Wambo coal mine expansion, a joint venture of Glencore and Peabody.

24 July: Perhaps informed by the Department of the IPC's intention, Glencore and Peabody write to the IPC asking for the opportunity to have input into consent conditions it was considering imposing on the United Wambo coal mine citing a 20 year history of this practice.

29 July: Deputy Premier meets Glencore and Peabody. GIPA documents show Barilaro requested advice from the Department that afternoon about Scope 3 emissions in coal mine decisions.

2 August: IPC releases a statement indicating it is considering a condition for United Wambo requiring Glencore and Peabody to ensure customer countries buying coal from the mine are parties to the Paris Climate Agreement. The IPC offers to take comment on this proposal and GIPA documents show the Deputy Premier asked the Resources and Geosciences Division of the Department to prepare one. Gary Barnes, Coordinator General for Regions, Industry, Agriculture and Resources and Jim Betts, Secretary of the Department of Planning, Industry and Environment, both wrote letters of submission opposing the move.

29 August: IPC approved United Wambo, including a condition requiring the proponents to ensure the customer countries buying coal from the mine are parties to the Paris Climate Agreement.

30 August: Minerals Council meets Minister for Energy and Environment, Matt Kean.

18 Sept: Planning Minister meets Minerals Council with Peabody and Glencore
18 Sept: Bylong coal mine refused by the IPC, citing impacts on groundwater, strategic farmland and climate change.

19 Sept: Daily Telegraph report on Bylong refusal includes comment from the Deputy Premier "The IPC's idea of telling companies which countries they can and cannot sell coal to creates a sovereign risk for investment in NSW," and the Planning Minister "I share the Deputy Premier's concerns about Scope 3 emissions and we are reviewing how major resource projects can continue to go ahead in NSW and be assessed more quickly."

26 Sept: Daily Telegraph reports that the Govt is considering changing the law on Scope 3.

21 Oct: Minerals Council CEO Stephen Galilee appears at the ICAC's Operation Eclipse, investigating lobbying and influence in NSW. He tells the Commission "at the moment we're involved in a public campaign to seek changes to that Act, ideally, or at least improvements to the planning system..."

23 Oct: Minister Stokes moves notice of motion to introduce the "Territorial Limits Bill" which will change the Environmental Planning and Assessment Act 1979 to prevent consent authorities imposing conditions on a development that address its contribution to climate change and change the State Environmental Planning Policy for Mining, removing the explicit requirement that downstream emissions be considered by authorities determining applications for coal mines and gasfields.