Submission
No 14

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

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The Australia Institute
Research that matters.

Environmental Planning and Assessment Amendment (Territorial Limits) Bill

Submission to Portfolio Committee No. 7 - Planning and Environment

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The Australia Institute is an economics and policy research organisation. We have conducted extensive research and made numerous submissions on the economic and environmental aspects of planning decisions regarding coal mines in NSW.

The Australia Institute welcomes the opportunity to make this submission on the *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019*.

The *content* of the Bill is addressed below, but the *context* of the Bill is just as important, if not more so.

The Bill is an attempt to prevent NSW consent authorities from considering the single largest impact NSW has on the global climate system: coal mining, mostly for export.

The Bill has been introduced following coal industry pressure including misleading advertising campaigns.

At a time when NSW faces drought, catastrophic fires and extreme heat, and Sydney is choking on toxic bushfire smoke, it beggars belief that NSW Parliament is being asked to pass new laws limiting NSW consent authorities consideration of climate change.

Context: NSW coal mines, scope 3 emissions and democracy

This submission draws on major report from The Australia Institute regarding the legal, governance and environmental aspects of current debates about emissions from coal mines in NSW. The report is attached to this submission, and summarised below.

Coal mining is by far NSW's largest source of greenhouse gas emissions. Emissions from coal mining in NSW, including scope 3 combustion emissions, are four times larger than direct emissions from NSW, larger than emissions from France or the UK, and nearly as large as direct emissions from Australia.

Despite this, the topic of scope 3 emissions has been virtually taboo in mining, planning and government circles – until recently.

RECENT PLANNING DECISIONS

The NSW coal industry is now using hyperbolic and false claims to try to overturn modest legal protections against climate change from new coal mines, seen in recent independent planning decisions:

- the Rocky Hill coal mine, rejected by the Chief Judge of the NSW Land and Environment Court (LEC),
- the United Wambo mine in the Hunter Valley, approved with conditions by the Independent Planning Commission (IPC), and
- the Bylong coal mine, rejected by the IPC.

These decisions are mostly based on social impacts, noise, dust and groundwater. However, the coal lobby is fighting these decisions to because they are the first to seriously consider the "scope 3" emissions from the coal itself. These decisions refute the industry argument that 'if we don't dig it up, someone else will'. Instead of contesting the arguments and evidence, the coal lobby is pressuring the government to simply change the law.

COAL MINING IS A SMALL PART OF NSW ECONOMY

Contrary to coal lobby fear campaigns, stopping new mines will have little impact on NSW as coal mining is a small part of the NSW economy.

- Coal mining employs fewer than one in 200 people in NSW. Coal mining jobs have fallen back to levels seen a decade ago, while the total NSW jobs has increased by 22%.
- Coal royalties are less than 2% of the NSW budget, and projected to fall even as overall budget revenue grows.
- Contrary to coal lobby claims the NSW planning system makes NSW an “investment laughing stock”, business investment in NSW is all time high.

DECISIONS FOLLOW INDEPENDENT PROCESS

The coal lobby is unjustified in its criticisms of the Independent Planning Commission as “unelected and unaccountable”. The IPC is set up by laws passed by parliament and its members are appointed by elected government ministers. In recent decisions it has followed the law and NSW government policy, including the NSW government commitment to the Paris Agreement and its target for net zero emissions by 2050.

The coal lobby ignores the IPC’s role as an “important safeguard against potential corrupt conduct”, in the words of ICAC, which has uncovered significant corruption around coal mining. Former ICAC commissioners have expressed concern about the Minerals Councils’ attacks on the IPC.

The IPC holds extensive public consultation, but the NSWMC itself almost never makes submissions, having made no submission at least 76 out of 81 IPC decisions on coal mines. An unusual NSWMC submission on the United Wambo mine emphasised the NSWMC efforts to change the law and government policy.

NSW CLIMATE POLICY

Preventing consideration of scope 3 emissions contradicts the spirit of the Paris Agreement, which nowhere prohibits such consideration.

Moreover, building new coal mines contradicts NSW government policy of net zero emissions by 2050. Fugitive emissions direct from coal mines make up 10% of NSW emissions. These emissions cannot be brought to net-zero while new mines are built (at least without full offsetting).

The NSW Government itself acknowledges “net-zero emissions is consistent with strong economic growth” and is “consistent with the approach of leading Australian corporations”. The mining and financial industries increasingly expect companies to account for scope 3 emissions.

It would be highly concerning if mining lobby pressure and access resulted in new laws to reduce action on climate change. Excluding scope 3 emissions from consideration

would be out of step with evolving corporate expectations and contrary to NSW government commitments to the goals of the Paris Agreement.

Content of the Bill

The *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019* is very short. The substantive elements, included in full below, consists of two short schedules:

1) Schedule 1 prohibits any condition placed on a project in a development approval from relating to impacts
   i) that occur overseas, or
   ii) occur in NSW due to development overseas.
2) Schedule 2 removes a specific requirement for the consent authority to consider downstream greenhouse gas emissions.

According to the Minister in the second reading speech, the Bill seeks to “clarify” how conditions should treat impacts and development overseas.[1] In reality, it seeks to *prohibit* any such conditions. Yet in doing, it so creates a new source of confusion and uncertainty, the opposite of the stated intention.

SCHEDULE 1 - MORE UNCERTAINTY AND UNINTENDED CONSEQUENCES

Schedule 1 captures far more than climate change and so is likely result in unintended consequences. It also shows a remarkable disregard for the well-being of the international community. Its scope would have potential consequences for any conditions relating to international matters or trade.

For example, it would appear to prevent consent authorities from imposing conditions intending to uphold NSW’s international reputation as a place of business or destination. It would limit concern for Australia’s neighbours in the Pacific, preventing conditions for the purpose of assisting the Pacific ‘step up’ or preventing impacts that undermine it.

The legislation directly contradicts the NSW government’s Climate Policy which endorses the global goals of the Paris Agreement to reduce greenhouse gas emissions

[1] NSW Legislative Assembly Hansard (2019) *Mr Rob Stokes, Second Reading Speech, Environmental Planning And Assessment Amendment (Territorial Limits) Bill 2019*
https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-108481

to net zero. The Paris Agreement is explicitly based on common concern for climate impacts occurring all over the world. The proposed legislation seeks to prohibit planning conditions on that basis. While Paris requires countries to reduce domestic emissions, nothing in the Paris Agreement prohibits consideration of emissions occurring overseas.

Despite this, the legislation relates only to *conditions* in approvals, not to assessment as such or decisions relating to approval or refusal.

The Minister says it follows "close scrutiny as a result of some recent case law". The case law in question is the Rocky Hill case, in which downstream emissions lead to grounds, amongst many others, to reject the mine. It is significant the Minister does not mention this case or the Bylong decision, instead focusing on the United Wambo mine, where the IPC approved the mine while placing conditions on the export of the coal.

Nothing in the legislation would appear to bear on cases like Rocky Hill or Bylong where, in different ways, downstream emission considerations lead to the refusal of consent. If the legislation limits the scope of consent authorities to impose conditions relating to exported coal, this may strengthen the grounds for refusal.

It is quite unclear how a consent authority or court should interpret "the impacts occurring in the State as a result of any development carried out outside Australia or an external Territory." In a highly globalised world nearly everything that occurs within NSW is linked in some way to development overseas. But the Bill gives no basis on which to distinguish those causal roles and types of developments that are at issue.

The Minister, in his second reading speech, says

> requirements have always focused on the impacts of development that can reasonably be controlled by the applicant. By contrast, there are no applicable State or national policies requiring New South Wales coal projects to minimise or offset downstream emissions that occur overseas. … It is therefore important that we clarify the limitations of the New South Wales planning system to control the impacts of development that occurs overseas.[2]

But this reasoning is both unsound and invalid.

Decisions whether or not to mine coal are manifestly a cause of the customer being able to burn that coal or not. Impacts on NSW by coal from NSW coal mines are caused *inter alia* by those mines and can be prevented by refusing those mines. The applicant,

[2] Ibid

and the consent authority, can reasonably control those impacts. This is key to the Rocky Hill case and would not be nullified by the Bill.

Moreover, the lack of explicit statutory requirements to minimise or offset overseas downstream emissions gives no basis on which to prohibit planning conditions to this effect. On the contrary, the “recent case law” to which the Minister refers finds that NSW planning law and climate policy as currently stand does in fact require limits on overseas downstream emissions.

It is presumably the intention in the legislation that the consent authority would judge that the harms are in fact caused not by the mining but by the burning of the coal. However, nothing in the Bill ensures this reading. Moreover, that reading would be tendentious, in light of the fact that both the mining and the burning of the coal are required for the impact to occur. This latter reasoning is explicit in the Rocky Hill case.

SCHEDULE 2 – CONSIDERATION OF DOWNSTREAM EMISSIONS

Schedule 2 removes a requirement to consider downstream emissions. The consent authority would still be *required* to consider emissions from the project, would be *able* to consider impacts from downstream emissions, and would be *justified* in doing so, in particular under the precedent of the Rocky Hill case.

It is justified for consent authorities to consider downstream emissions even if concern is restricted entirely to NSW emissions. New coal mines supplying domestic coal power stations potentially increase NSW emissions, in contradiction of NSW emission targets. Concern to limit consideration of international emissions should have no bearing on downstream emissions in Australia.

Text of the Bill

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

Section 4.17A

Insert after section 4.17—

4.17A Prohibited conditions

(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.

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)