Submission No 16

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

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To the Parliamentary Secretariat

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Submissions concerning the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

I make the following submissions as solicitor specialising in environmental law.

The Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 (the Bill) prohibits the imposition of any conditions of a development consent which consider or limit the impacts of carbon pollution. Consequently, the Bill has the perverse effect of preventing constituents and businesses from mitigating the risks of or avoiding carbon pollution, (or any other extra-territorial pollution), risks by imposing appropriate development conditions.

Denial of scientific consensus and common sense

The Bill is a cynical denial of climate change science and common sense. The impacts of NSW development on the earth's climate cannot by sensibly limited by the territorial jurisdictional boundaries of Australia by the Parliament of NSW. Development in NSW producing extra territorial (atmospheric) emissions will always cross territorial boundaries, including oceans. The Bill denies fundamental observable human understandings of how the earth's environment functions. It also denies scientific consensus regarding downstream impacts of development on the global climate. The transboundary nature of our Earth's functional services, including its climate, cannot be subverted by purporting to limit the effects of human development to the jurisdictional boundaries of the State of NSW or Australia.

Knee jerk reaction to the application of sensible anti-pollution laws

It appears that the Bill is a reaction to recent judicial diligence in applying anti-pollution laws. Greenhouse Gas Emissions have been recognised as pollutants which must be regulated by the law since at least 2006 with the decision in *Gray v Minister for Planning* (2006) 152 LGERA 258. Judges are not activists and should not be treated as such when doing their job. If a NSW judge is applying NSW law and the affected parties do not seek to challenge the lawfulness of those judgments in a higher court then this indicates that our democratic legal system is working properly and independently in accordance with the separation of powers principle. Parliament should not seek to subvert the democratic system and our independent judiciary's role simply to benefit legally recognised global polluters. Only a developer of a polluting industry can manage or minimise the pollution they produce as a result of their commercial activities. The public interest requires that the costs of all pollution must be borne by the polluter rather than the citizen. It is practical and sensible that the costs of pollution prevention and mitigation (eg carbon capture and storage technology) become a mandatory factor of any polluting industry development. The public interest requires that polluting activities which cannot be sustained in a free market should not proceed on economic grounds. The Bill seeks to preserve an unsustainable business model to the detriment of all Australian and global citizens. If it passes, Liberal policies concerning free market enterprise will be compromised rather than the judicial decisions subject to this knee jerk reaction to application of pollution conditions under the *Environmental Planning and Assessment Act 1979 (NSW)* (EP&A Act). Extra-territorial pollution may still be litigated under the common law tort of Nuisance despite the objective of prohibit conditions dealing with polluting activities.

Fundamentally bad law

The Bill is based on a fundamental misunderstanding of the powers of Parliament. For example, the NSW Parliament does not have power to legislate the removal of conditions in commercial licences which address responsibility for the flow of pollution from or into NSW via its rivers and waterways. Such a law is plainly contrary to common law and legislature power concerning peace, order and good government. Like water pollution, carbon emissions flow across territories and must be regulated to prevent harm done to both NSW constituents and by NSW residents globally. The fact that water flows and wind blows across territorial boundaries is absolutely undeniable. It is simply an observable fact which does not need scientific proof. An assumption that the legal territorial limits of State legislative power can be used to effectively "prohibit" consideration of extra-territorial impacts of NSW development consents (licences), as is provided in the Bill, is an impossibly impractical contention and fundamentally bad law.

In recognition of the fundamental circumstances that human activities have extra-territorial impacts section 2 of the *Australia Act 1986 (Cth)* provides that "the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation." The Bill is contrary to this fundamental rule concerning the exercise of State legislative power because it prohibits currently legislated extra territorial considerations concerning the impacts of development in NSW. The EP&A Act presently conforms to this fundamental rule concerning legislative power by providing for conditions that address the impacts of climate changing emissions. However, the Bill proposes to subvert the necessary requirements of peace order and good government by eliminating extra-territorial consideration of the impacts of development on not just the global climate (Scope 3 emissions) but potentially all carbon emissions (Scope 1 emissions and Scope 2 emissions) due to the Bills broad reference to "impacts".

The NSW Parliament simply does not have legislative power to remove current laws made for peace, order and good government having extra-territorial operation. This is particularly true for the Bill's proposed amendments to the EP&A Act due to the circumstance that the elimination of development conditions concerning climate changing emissions can only benefit a small sector of the Australian community, essentially miners and their political mates, at the expense of all other Australians. Current NSW and Australian Local Government climate emergency declarations support an overwhelming community concern that both Australian and global peace and order is severely threatened by global climate change. Therefore, the Bill denies and rejects accepted scientific and common sense norms and creates fundamentally bad law.

Application of the Bill to all extra-territorial pollution and consequential preclusion of risk management for NSW business

The Bill creates a perverse outcome for any citizen seeking development consent under the EP&A Act) who wishes to include conditions on that licence to ensure that they can meet their obligations to avoid extra-territorial harm by any pollution which may be caused by their activities. This will reduce the ability of applicants for development consent in NSW to seek global and local investment as they will not be able to prove that they have mitigated source of pollution risks. International and common law provides that the responsibility for pollution begins at the source. The removal of legislative requirements which define and manage extra-territorial pollution risks will have detrimental impacts on both investment and insurance of NSW businesses as a result. The Bill's denial of responsibility for pollution at the source is out of step with global and local investment and insurance practices so that the Bill, if passed, will make it much harder for NSW businesses to seek funding or maintain viability.

It may be argued that the Bill will make all NSW source pollution risks otiose by deleting them as proposed however, as carbon emissions pollution and other transboundary pollution is a well recognised global phenomena it is unlikely that any exceptions would be made for NSW commercial activities which regress global underwriting and investment practices concerning pollution responsibility. It is also likely that the NSW Government would be made responsible for source pollution by any member of the global community, rather than developers who are currently responsible under the EP&A Act, as a practical consequence of the Parliament's removal of these safeguards under the Bill. Weakening extra-territorial control of carbon and other pollution is entirely contradictory and out of step with global economic trends, not least the global transition to a renewable energy economy.

Conclusion

The Bill is not in the public interest or economic interest of NSW. It reverses the polluter pays policy which ensures that harm from pollution is an economic consideration in the approval of all polluting commercial activities. It offends against the principle of the separation of powers and other democratic norms concerning judicial independence. It is contrary to Liberal free market reasoning. It requires the citizen, including global citizens, to bear the burden of harmful commercial activities which ought to be regulated by the State. It creates a conundrum for investment and insurance of polluting NSW businesses. It denies and rejects accepted scientific and common sense norms and creates fundamentally bad law.

Yours faithfully,

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NSW Solicitor