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young LAWYERS

Submission on the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

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Portfolio Committee No. 7 - Planning and Environment

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The NSW Young Lawyers Environment and Planning Law Committee ('Committee') makes the following submission in response to the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 ('Bill').

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change ('IPCC') in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining "carbon budget".

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO2 (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The Committee comprises of a group of approximately 250 members interested in our natural and built environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of Recommendations

1. That the Parliamentary Committee include in its report a requirement that Minister Stokes obtain a response from the Commonwealth Minister for Energy and Emissions Reduction prior to any further debate on the Bill.

2. That the Parliamentary Committee prepare a report primarily on the basis that the Bill not be passed by the Legislative Assembly in its present form.

3. That the Parliamentary Committee include in its report a statement to the effect that any and all measures to reduce carbon (and its equivalent) emissions are matters with a sufficient causal nexus to development being approved under the *Environmental Planning and Assessment Act 1979* ('EP&A Act') pursuant to the principles of ecologically sustainable development ('ESD'), and that conditions enforcing carbon emission reductions both within and beyond State borders therefore satisfy the *Newbury* test.

4. That the Parliamentary Committee include in its report a statement to the effect that legislators have a responsibility to act on climate change and strengthen our laws to be climate change ready, and policies must be implemented to move from a hydrocarbon export-based economy towards a renewable and circular economy for economic, social, and environmental prosperity.

5. Noting that the Committee's primary recommendation is that the Bill not be passed, in the alternative to Recommendation 2, that the Parliamentary Committee include in its report a conclusion that the Bill be passed without the proposed amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* ('SEPP').

Introduction

The Committee welcomes the opportunity to make a submission on the Bill and provides several comments and recommendations in respect of the following aspects of the Bill:

1. The current statutory framework for the assessment of major projects with impacts occurring outside of New South Wales;
2. The ramifications of the proposed changes to the EP&A Act; and
3. The consequences of the proposed changes to the SEPP.

The Bill proposes amendments to the existing NSW planning regime that appear minor in length but are significant in consequence. In essence, the amendments (which are more closely analysed later in this submission) propose to:

(a) Strip consent authorities of the power to impose conditions of consent that address the 'downstream emissions' of a development; and

(b) Remove downstream emissions from a consent authority's list of mandatory considerations.

Plainly, the implications for the assessment, and the conceptualisation of the suitability, of future mining proposals (particularly coal and gas seam projects) are fundamental.

The presentation and, now, consideration of the Bill have arisen in a social, environmental and legal context seemingly at odds with the proposed amendments.

Internationally, NSW's commitments to the lowering of global greenhouse gas emissions are evident in its adoption of the NSW Climate Change Policy Framework ('Framework'), which draws on Australia's commitments made pursuant to the Paris Climate Agreement.[1] This includes an aspirational target of net-zero emissions by 2050.[2] The Paris Agreement is a collaborative global document both in terms of its preparation and the desired outcomes (broadly, emission reduction). As such, by addressing only greenhouse gases emitted in NSW while facilitating greater emissions in other regions would be, on its face, inconsistent with NSW and Australia's commitments.

Despite the NSW government endorsing the Paris Agreement and, in its Framework, stating that it will take action that is consistent with the level of effort to achieve Australia's commitments to the Paris Agreement, the Bill appears to be a retrograde step. As one of the most significant pieces of environmental legislation in NSW, the EP&A Act should reflect the long-term commitments to the Paris Agreement, and Parliament ought be looking for ways to strengthen those commitments in line with the Framework, rather than permitting them to be undermined by way of amendments such as the Bill.

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[1] *UNFCCC: Paris Agreement: Decision – CP.21*, United Nations, opened for signature 16 February 2016 (entered into force 4 November 2016).
[2] NSW Environment Protection Authority, *NSW State of the Environment 2018* (December 2018) 135.

Looking more closely at the legislative and policy regime, the SEPP itself includes (and will continue to include even if the Bill is enacted) greenhouse gases as a mandatory consideration when assessing mining proposals,[3] conveying a continued commitment to emissions reduction measures. In order for such a requirement to serve its purpose, it must form part of a global effort. It makes little sense to reduce local emissions while facilitating the cancelling out of that reduction by contributing to the emissions elsewhere in the world.

The objects of the EP&A Act,[4] meanwhile, include the facilitation of ESD. ESD is defined[5] to include inter-generational equity, the precautionary principle, ecological integrity and the 'polluter pays' principle. All greenhouse gas emissions, whether emitted in New South Wales or abroad, have an impact on the extent to which these pillars can be achieved. It is self-evident that consideration of downstream emissions, and implementation of conditions of consent that aim to address them, sit neatly within the scope of the EP&A Act's objects.

Background to the Bill

The above statutory themes have logically prompted decision-makers to consider, and in some cases reject development applications on the basis of, downstream emissions when assessing mining proposals. The *Rocky Hill* decision[6] is perhaps the most prominent example, where downstream emissions were considered by the NSW Land and Environment Court ('LEC') to comprise a reason for refusal of a mining proposal.

Since that decision, the NSW Independent Planning Commission ('IPC') has taken similar views by refusing a proposal for a new open cut coal mine in the Bylong Valley, refusing an extension of the Dartbrook underground coal mine and the imposition of a condition of consent for the United Wambo mine in the Hunter Valley that the coal extracted from it be exported only to other countries that have signed the Paris Agreement (or have similar mechanisms in place). These decisions have all been informed by consideration of greenhouse gas emissions associated with the proposals and are addressed in more detail later in this submission.

The Committee submits that the Bill is entirely at odds with this background and the legal direction in which the State and Commonwealth is heading.

Support for this Bill, meanwhile, comes largely from those most immediately adversely affected by the above trend, being the proponents of such projects. This is evidenced, for example, in the submission on this Bill lodged by the NSW Minerals Council. The Minerals Council have been a vocal supporter of the Bill and an equally vocal critic of 2019's Court and IPC decisions in the area.[7] The Committee does not consider those

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[3] *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) cl 14(2)
[4] *Environmental Planning and Assessment Act 1979* (NSW) s 1.3.
[5] By reference to s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW).
[6] *Gloucester Resources Limited v Minister for Planning* (2019) NSWLEC 7
[7] See, for example, Sam Langford, 'As bushfires rage, NSW parliament will consider weakening environmental protections', *The Feed (SBS)* (12 November 2019).

views to be indicative of the prevailing interpretation and operation of the broader New South Wales planning and environmental regime.

The Second Reading Speech

The Second Reading speech of the Bill by Hon. Rob Stokes ultimately argues that "it is not the Government's policy to regulate – either directly or indirectly – matters of international trade. These are matters for the Commonwealth Government." With respect, the Minister is correct in stating this bare assertion, but is incorrect in framing this issue as a matter of 'international trade'. There are numerous examples of New South Wales laws which, pursuant to the division of powers doctrine, are limited to matters which are domestic in nature but international in effect. In this respect, we commend the submission lodged by the Environmental Defenders Office dated December 2019.

To frame this matter as one of international trade is to mis-characterise the basis for a condition of consent imposed purely on an environmental basis. In light of the climate crisis which the Committee, and NSW Young Lawyers more broadly, recognises, , the Committee cannot recommend more strongly that the Bill not be considered in this context. Notwithstanding this, the Committee recommends initially that any debate on the Bill be adjourned until such time as Minister Stokes receives a response to his request for details and guidance from the Commonwealth Minister for Energy and Emissions Reduction (made on or before 24 October 2019).

It is against this background, and in light of the comments of the Minister above, that the Committee puts forward its submissions on the Bill and makes its primary recommendation that the Bill be rejected.

Recommendation:

1. That the Parliamentary Committee include in its report a requirement that Minister Stokes obtain a response from the Commonwealth Minister for Energy and Emissions Reduction prior to any further debate on the Bill.
2. That the Parliamentary Committee prepare a report primarily on the basis that the Bill not be passed by the Legislative Assembly in its present form.

Proposed changes to the EP&A Act

The Minister stated in the second reading speech that "The legislation is consistent with the well-defined *Newbury* test for conditions of consent and the development of case law in line with the *Newbury* Principles. It simply codifies how planning conditions can be created."

In saying this, the Minister was referring to the line of common law authority culminating in *Newbury District Council v Secretary for the Environment* [1981] AC 578[8] and appears to be saying that a condition of consent granted to a mining or extractive development that limits the countries in which the extracted product may be sold:

1. Has not been imposed for a planning purpose, and has an ulterior purpose,
2. Does not fairly and reasonably relate to the development subject to the approval; and
3. Is so unreasonable that no reasonable planning authority would have imposed it.

With respect, this is an incorrect starting position to hold, and is not one that the Minister should hold out as being the basis for the Bill. The insertion of s 4.17A into the EP&A is misconceived when prior decisions relating to the Newbury principles and emissions resulting from New South Wales mining proposals are considered, which is done in brief as follows.

A 'planning purpose' is one that 'implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.'[9] As s 4.17(1)(a) of the EP&A Act specifically mentions matters to be considered under the preceding s 4.15(1), conditions relating to the public interest will therefore satisfy the first test, so long as there is no ulterior object, 'however desirable that object may seem to be in the public interest.'[10]

According to Basten JA:

> "[Former] Section 80A [of the EP&A Act, now s 4.17] empowers the consent authority to impose a condition if 'it relates to any matter referred to in [former] s 79C(1) [now s 4.15(1)] of relevance to the development the subject of the consent': [former] s 80A(1)(a). [Former] Section 79C(1) identifies general matters for consideration by the consent authority in determining a development application. Those matters include 'the likely impacts of that development...on both the natural and built environments and social and economic impacts in the locality': [former] s 79C(1)(b)…In respect of any specific condition, there may be a question as to how distant, remote or indirect the relationship may be between that development and the likely impacts on the environment."[11]

The second test relates to the consideration of whether or not there is a connection between the condition and the development. This test is usually satisfied if there is a 'nexus' between the proposed condition/s and the development subject to the consent.[12] Courts have taken the 'fair and reasonable' element on a case by case

[8] Followed by the High Court in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63
[9] *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63 at 57
[10] *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, 66
[11] *Botany Bay City Council v Saab Corp Pty Ltd* (2011) 183 LGERA 228, 9
[12] *Cavasinni Constructions Pty Ltd v Fairfield City Council* (2010) 173 LGERA 456

basis, as the circumstances may call for a different response in different situations.[13] Importantly, this test can still be met in circumstances where the condition does not result in a benefit to the development itself.[14] Road maintenance and upgrade levies imposed via conditions of consent have been held to be permissible,[15] as was a condition enforcing the establishment of a community consultation group on the basis of the social and environmental impacts.[16]

The Committee notes that conditions requiring the emissions of a coal mine to be offset in their entirety were held to be too unreasonable and too uncertain to be valid,[17] with subsequent challenges to the consent of new coal mines narrowing their offsetting conditions substantially.[18] However, the scope of conditions regulating countries to which coal may be sold has both a planning purpose and the absence of an ulterior motive, in the Committee's submission.

As regards the 'reasonableness' test, in *Botany Bay City Council v Saab Corp Pty*[19] it was held that improving the amenity of an area adjacent to a development via conditions of consent was not contrary to the tests of validity.[20] This case suggests that '…there is very considerable scope for continued innovation in the imposition of conditions of approval to address at least some threats of serious or irreversible environmental damage by precautionary measures, proportionate response or adaptive management,'[21] despite the lack of an overarching policy requiring such measures.

How distant, remote or indirect the relationship between the development and the impacts of the environment must be considered, but may not be grounds to invalidate a condition.[22] The Committee submits that this is true for the conditions that have clearly given rise to the Bill, regardless of the apparent legislative intention.
The Committee notes that there have been a number of decisions that have questioned the validity of conditions that require monitoring and adaptive management, including adjusting the scale of a mining operation to match the available water supply. Preston J (as he then was) decided in one such case, *Ulan Coal Mines Ltd v Minister for Planning,*[23] that such conditions perfectly matched a precautionary approach regarding issues of environmental harm, and were nowhere near an unreasonable request so as to meet the *Wednesbury* test.[24]

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[13] *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63; *Dogild Pty Ltd v Warringah Council* (2008) 158 LGERA 429
[14] *Dogild Pty Ltd v Warringah Council* (2008) 158 LGERA 429, 52; *Cavasinni Constructions Pty Ltd v Fairfield City Council* (2010) 173 LGERA 456, 33
[15] *Carbone Bros Pty Ltd v Shire of Harvey* (2014) 202 LGERA 455
[16] *Hanson Construction Materials Pty Ltd v Shire of Serpentine-Jarrahdale* [2012] WASAT 140
[17] *Greenpeace Aust Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGERA 143, 156-157
[18] *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, 34
[19] *Botany Bay City Council v Saab Corp Pty Ltd* (2011) 183 LGERA 228
[20] *Botany Bay City Council v Saab Corp Pty Ltd* (2011) 183 LGERA 228, 179
[21] The Honourable Justice Stephen Estcourt, 'The precautionary principle, the coast and Temwood Holdings' (2014) 31 *Environmental and Planning Law Journal* 288 at 294
[22] *Cavasinni Constructions Pty Ltd v Fairfield City Council* (2010) 173 LGERA 456
[23] *Ulan Coal Mines Ltd v Minister for Planning* (2008) 160 LGERA 20, 99
[24] *Ulan Coal Mines Ltd v Minister for Planning* (2008) 160 LGERA 20, 100

In the case of *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc*, a condition of consent requiring ongoing funding to a research project relating to endangered ecological community regeneration was not even challenged as to its validity, such was the opinion of all parties and the Court that it was for a planning purpose and was not unreasonable.[25] The Committee notes that academic observations have been made that, regarding future greenfield coal mine applications and coal mine expansion applications:

> Conditions are a widely used policy instrument for other environmental impacts of development and there appears no reason in principle why such a mechanism should not be applied to [greenhouse gas] ('GHG') emissions from coal mines. Conditions requiring [carbon capture and storage] of GHG emissions from coal mines are a logical step for the future response to climate change.[26]

The Committee submits further that just because a worldwide environmental problem is not specifically called out in the EP&A Act, and therefore any conditions of consent imposed on this basis are not expressly empowered, the role that mitigation conditions can play in adopting measures proportionate to the environmental threat should still be considered.[27] After all, there are myriad examples of the harm that climate change will have on the New South Wales environment, including adverse impacts to coastal communities (human and ecological), threatened species, National Parks, Aboriginal sites and bushfire management programs; all of which are managed by NSW legislative instruments which expressly mention an obligation to take into account the principles of ESD.[28]

Of critical importance in the matter of *Hunter Environment Lobby Inc v Minister for Planning* was the fact that despite the coal mining project proponents arguing that there was no mandatory government policy regarding the offsetting of GHG emissions, and that no other coal mine in NSW was subject to conditions requiring the same offset standard, Pain J still decided that it was not unreasonable[29] for a proposed mine to be the first to be subject to such an offset regime. Her Honour stated that:

> The orthodox approach applied generally in all areas of environmental impact assessment is that any adverse impact must be avoided where feasible and practical to do so. Where harm is unavoidable other measures should be considered to ameliorate the impact, one of which can be offsetting measures.[30]

While the scope 2 emissions were left out of the offset conditions, it was not comprehensively determined that controlling these emissions via conditions of consent would be beyond power, although Her Honour expressed some doubt that they would be within power if so imposed. Her rationale was that it would be unfair insofar as those emissions 'are under the control of others'. I.e. the electricity generators and diesel fuel suppliers, and

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[25] *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375, 348
[26] Chris Mcgrath, 'Regulating Greenhouse Gas Emissions from Australian Coal Mines' (2008) 25 *Environmental and Planning Law Journal* 240, 262
[27] The Honourable Justice Stephen Estcourt, 'The precautionary principle, the coast and Temwood Holdings' (2014) 31 *Environmental and Planning Law Journal* 288, 292 in consideration of *Environment East Gippsland Inc v VicForests* [2010] VSC 335, 212
[28] *Coastal Protection Act 1979* ss 37A,38(1)(b1), 39(4)(a1), 44(a1), 54A; *Fisheries Management Act 1994* ss 7E(e), 57(2)(a), 143(5), 198, 220A(a), 220S(2), 221A(1)(e), 221IE(1)(f), 221K(2)(g), (3)(e), 221Q(2)(b); *National Parks and Wildlife Act 1974* ss 2A(2), 91CC(2)(b); *Plantations and Reafforestation Act 1999* ss 3, 15(6)(g); *Rural Fires Act 1997* ss 9(3), 48(3), 51(2), 100J(3)(a); *Threatened Species Conservation Act 1995* ss 3(a), 44(2), 97(1)(e), 110(2)(h), (3)(e), 116(2)(b), 140(2) (b)
[29] Insofar as passing the *Wednesbury* test.
[30] *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, 98

there would be no commensurate incentive for these third parties to reduce their emissions if the mine operator were to do so.[31]

Regardless of this consideration, the effects of this decision were to highlight both the ability for emissions directly consequential to the project (that is, scope 1 and 2 emissions) to be offset via conditions of consent, and the vastly higher proportion of emissions generated by burning coal (that is, scope 3 emissions) that cannot be legally offset via conditions of consent. Consequently, the Committee submits that it is the responsibility of the New South Wales government to legislate a *stronger* emissions reductions regime, or to introduce a price on carbon, in order for the as yet unaccounted for externality of GHG emissions to be sheeted home to coal mines, coal fired power stations or (via export tariffs, in the case of foreign exports of coal) the foreign purchasers of Australian coal[32] rather than to introduce a Bill seeking to avoid that responsibility.

There are many examples of valid conditions being imposed to uphold the principles of ESD in a vaguely procedural if not specifically substantive sense in the cases above. *Hunter Environment Lobby*[33] provides a particularly pertinent example of the requirement to offset emissions generated by a development (scope 1), and leaves open the door to enforce the mitigation hierarchy upon emissions caused indirectly in the construction and operation of a development (scope 2),[34] on the condition that these indirect emissions can be reported, managed and/or controlled by the proponent.

In the context of these authorities and the principles behind the extracted sections, it is a perplexing development for the Bill to be proposed in its present form, noting also that the proposed amendments to the EP&A Act are uncertain and ambiguous in the potential for them to apply only to extractive industries and other fossil fuel developments.

The Committee submits that not only should the Bill be refused, the Parliamentary Committee should take the opportunity to include in its report a statement affirming the power of a consent authority to impose conditions such as those that have resulted in the Bill being tabled, and to call for stronger environmental protection laws that are climate change ready.

Recommendation:

3. That the Parliamentary Committee include in its report a statement to the effect that any and all measures to reduce carbon (and its equivalent) emissions are matters with a sufficient causal nexus to development being approved under the EP&A Act pursuant to the principles of ESD

[31] *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, 94; also see the contract dispute between Delta Electricity and Centennial Mandalong Coal regarding the 'passing down' of the national emission reduction penalties under the now-repealed *Clean Energy Act 2011* (Cth) in *Centennial Mandalong v Delta Electricity (No.2)* [2013] NSWSC 1860
[32] Christensen, Durrant, Connor et at, 'Regulating greenhouse gas emissions from coal mining activities in the context of climate change' (2011) 28 *Environmental and Planning Law Journal* 381, 415
[33] *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221
[34] *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221, 94

and that conditions enforcing carbon emission reductions both within and beyond State borders therefore satisfy the *Newbury* test.

4. That the Parliamentary Committee include in its report a statement to the effect that legislators have a responsibility to act on climate change and strengthen our laws to be climate change ready, and policies must be implemented to move from a hydrocarbon export-based economy towards a renewable and circular economy for economic, social, and environmental prosperity.

Proposed changes to the SEPP

The Committee **does not support** the change to the SEPP, as it will unduly restrain consent authorities from considering the environmental impacts of developments in relation to climate change, both domestically and internationally.

<u>The amendment extends beyond the stated purposes of the Bill</u>

According to the Minister's second reading speech,[35] the proposed change to the Mining SEPP are "in line with the new restriction on development consent conditions". In this regard, the Minister also stated that the changes related only to conditions, and that "nothing in the bill will change the requirements in the Act for a robust assessment of the impacts of development".

While the proposed s 4.17A to be inserted into the EP&A Act by the Bill intends to prohibit the imposition of conditions that regulate any impacts of the development occurring outside Australia, the proposed amendment to the SEPP goes beyond this purpose. The SEPP amendment will affect the assessment of the development, not just the imposition of conditions. It will also have implications for the assessment of greenhouse gases emitted in New South Wales and Australia, not just overseas emissions.

The current cl. 14(2) of the SEPP reads:

> "Without limiting subclause (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the 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."[36]

If, as proposed by the bill, the words "including downstream emissions" are removed from this clause, it will have the following implications:

[35] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 October 2019, 1575, (Rob Stokes, Minister for Planning and Public Spaces)
[36] *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) cl. 14(2).

(a) Downstream emissions are no longer a mandatory consideration in determining a development application for mining and extractive industries of any kind.

(b) More specifically, this will mean that downstream emissions from the burning of extracted fossil fuels in both New South Wales and elsewhere in Australia are not a mandatory consideration. This is because the definition of downstream emissions makes no distinction between territorial boundaries.

Definition of downstream emissions

Downstream emissions are not defined in the SEPP, nor in the EP&A Act. However, the Minister equated downstream emissions with 'scope 3' emissions. In New South Wales Government policy documents, emissions are categorised as follows:

(a) Scope 1 emissions: Direct emissions, such as fossil fuel combustion and the release of methane;

(b) Scope 2 emissions: Offsite GHG emissions associated with generation of electricity, heat or steam purchased by the project; and

(c) 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.[37]

Downstream emissions as a mandatory relevant consideration

Under s 4.15 of the EP&A Act, the consent authority is bound to take into consideration the provisions of any relevant environmental planning instrument when determining a development application.[38]

For mining, petroleum production and extractive industries developments, s 4.15 of the EP&A Act incorporates the provisions of the SEPP, as a relevant environmental planning instrument. By virtue of cl 14(2) of the SEPP, this requires an assessment of greenhouse gas emissions, including downstream emissions.

If downstream emissions are removed from cl 14(2) of the SEPP, they would no longer have a clear status as a mandatory relevant consideration in determining mining developments.

This is not to say that downstream emissions could not be taken into account at all. They could be relevant to other matters for consideration under the EP&A Act, including:

- The Environmental Impact Statement required to be lodged with a State significant development application;
- Any submissions made in respect of the State significant development; and
- The public interest (which, by extension, includes the principles of ESD as one of the objects of the EP&A Act).

[37] NSW Department of Planning & Environment, *Technical Notes Supporting the Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals*, (April 2018) 44, https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/technical-notes-supporting-the-guidelines-for-the-economic-assessment-of-mining-and-coal-seam-gas-proposals-2018-04-27.pdf?la=en; accessed 26/01/2020

[38] 4.15(1)(a)(i)

However, none of these contain an explicit statement that downstream emissions specifically *must* be taken into account by the consent authority. When public interest objectors have tried to enforce the consideration of greenhouse gas emissions and climate change as part of the requirement to consider the public interest, this has been met with difficulties.[39]

In *Gray v Minister for Planning*[40], the Court set aside the Director-General's decision to accept an environmental assessment of the Anvil Hill Project in the Hunter Valley as adequately addressing the Director-General's environmental assessment requirements. Rather, the Court stated that 'there is a failure to take the principle of intergenerational equity into account…if the major component of GHG which results from the use of the coal, namely scope 3 emissions, is not required to be assessed,'[41] making it clear that emissions from downstream use are (and should remain) relevant considerations in environmental assessment.

The consideration of downstream emissions are clearly a necessary part of the environmental impact assessment in order to provide a full picture of the development's environmental impacts. This is particularly the case where the development relates to the extraction of fossil fuels to be burnt by downstream customers. For example, the greenhouse gas emissions for the recently approved United Wambo mining development are overwhelmingly from scope 3 sources.

Table 1: United Wambo predicted life of mine emissions[42]

	(t CO2-e)	%
Scope 1	5 802 000	2.18
Scope 2	797 000	0.30
Scope 3	259 296 000	97.52

Downstream emissions in New South Wales and Australia

The Bill is apparently concerned with prohibiting the imposition of planning conditions to minimise or offset emissions occurring overseas. However, the definition of downstream emissions, outlined above, does not make any distinction between emissions from the burning of fossil fuels domestically, and those occurring overseas. The conflation of downstream emissions with overseas emissions is due to recent mining projects that are intended to mine coal for export to Asia: e.g. United Wambo, Watermark Coal Project and the Vickery Mine extension. In the environmental impact assessment of these projects, it was highlighted that most of the

[39] In *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 at [126],[135], Pain J found that the Minister needed to apply the principles of ESD including the precautionary principle and the principle of intergenerational equity. This in turn required the consideration of scope 3 emissions in the environmental impact assessment for the development. In subsequent cases, the Court took the opposite view – the public interest and the principles of ESD are broad concepts, such that they are not confined to any specific subject matter such as greenhouse gas emissions or anthropogenic climate change - *Haughton v Minister for Planning* [2011] NSWLEC 217 per Craig J at [165], see also *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 per Hodgson JA at [55].
[40] *Ibid* n 39
[41] *Ibid* n 39 at [135]
[42] *United Wambo Open Cut Coal Mine Project (SSD 7142) and associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)* (NSW Independent Planning Commission, 29 August 2019) 43.

coal would be intended for export, and therefore scope 3 emissions from the burning of coal would not count towards Australia's emissions for the purposes of the Paris Agreement.[43]

This is not the case if any coal from mining developments is intended for consumption within New South Wales or Australia. The downstream ('scope 3') emissions of a particular development would still be considered scope 1 emissions when reported at the national level. While the Committee believes that it is not practically useful to distinguish between domestic and international emissions since both contribute to climate change, Australia is directly accountable for domestic emissions under international law. It would therefore be a retrograde step to remove the requirement for these to be considered in determining a mining development application.

The Bill inappropriately confines a global issue to (arbitrary) jurisdictional boundaries, and disregards the inter-jurisdictional nature of climate-related issues. There is one climate system. Once released into the atmosphere, greenhouse gases become both a local, regional and global problem. Greenhouse gas emissions will have impacts across the globe. Burning NSW coal overseas impacts communities in Australia and worldwide.

In light of the commitments under the Framework and international obligations under the Paris Agreement, it is inappropriate to amend the EP&A Act by curtailing the power of planning authorities to consider emissions when weighing up the merits of new mining projects and prohibiting conditions of consent that are for the purpose of achieving outcomes relating to climate impacts outside Australia as a result of a development. It is inappropriate for the New South Wales Government to ignore its role in combatting global climate issues.
As such, the Committee considers that downstream emissions should remain a relevant and mandatory consideration in granting consent to development applications and an express reference to 'downstream emissions' in Clause 14(2) of the SEPP should remain.

Recommendation:

5. Noting that the Committee's primary recommendation is that the Bill not be passed, in the alternative to Recommendation 2 above, that the Parliamentary Committee include in its report a conclusion that the Bill be passed without the proposed amendments to the SEPP.

[43] United Collieries Pty Ltd., *United Wambo Open Cut Coal Mine Project Response to Submissions Part A*, (SSD-7142, March 2017) 170 https://www.planningportal.nsw.gov.au/major-projects/project/25271 accessed 27 January 2020; Shenhua Watermark Coal Pty Ltd., *Watermark Coal Project Response to Submissions – Section 4 Environmental and Social Impacts* (SSD-4975, November 2013) 239 http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=4975 accessed 27 January 2020; Whitehaven Coal Ltd., *Vickery Extension Project Submissions Report*, (SSD-7480, August 2019) 204 https://www.planningportal.nsw.gov.au/major-projects/project/9621 accessed 27 January 2020.

Concluding Comments

Climate change is a global problem that requires the support of all levels of government to combat, from the local to international scale. This includes the development and planning laws which are the responsibility of State governments in Australia, including New South Wales. National and international laws are not adequate on their own, particularly where State governments are responsible for planning and environment laws which regulate development, and therefore there are numerous decisions made by State governments which directly and indirectly impact the emission of greenhouse gas emissions.

With the advent of a range of new technologies and breakthroughs in the areas of offshore wind energy, solar and storage solutions and green hydrogen generation, New South Wales is poised at the cusp of a new generation of energy export industries. The cost of renewable energy generation and storage equipment is substantially cheaper than it was ten years ago when a pathway towards a net zero emissions economy in New South Wales was planned out,[44] and with minimal subsidies required, New South Wales is well placed to take advantage of these future technologies.[45]

While this transition occurs, it is integral that the most harmful impacts flowing from our hydrocarbon export industry are managed and mitigated to the greatest extent possible, such as through the sale to countries which have ratified the Paris Agreement. In this context, the passage of the Bill would be a significant retrograde step. The Parliamentary Committee's report should recommend against its passage in the strongest possible language.

NSW Young Lawyers and the Committee thanks the NSW Parliamentary Committee No 7 for the opportunity to make this submission and for the extension of time to do so. If you have any queries or require further information, please contact the undersigned at your convenience.

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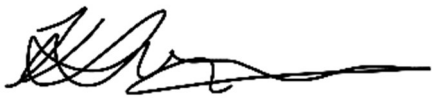

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[44] The University of Melbourne Energy Research Institute and Beyond Zero Emissions, 'Zero Carbon Australia Stationary Energy Plan' 2010

[45] Ross Gittins (quoting Professor Ross Garnaut), 'Australia positioned to be renewable energy superpower', *Sydney Morning Herald* 17.02.17