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Briefing Note - October 2019

Environmental Planning and Assessment (Territorial Limits) Bill

Summary

The NSW Government is proposing to **limit the ability for decision-makers to consider the downstream (Scope 3) impacts of greenhouse gas (GHG) emissions from coal mines.**

Proposed changes to NSW planning laws will:

- prohibit decision-makers from imposing conditions on mining approvals aimed at mitigating the impacts of the greenhouse gas (GHG) emissions produced when coal from those mines is burnt overseas; and
- remove an explicit requirement for decision-makers to consider downstream emissions when determining whether or not to approve a coal project.

This is a retrograde step that would undermine the ability of decision-makers to properly assess and regulate the climate impacts of coal mines on the environment and local communities in NSW.

The proposed changes fail to provide certainty to NSW communities impacted by climate change, and leave coal communities vulnerable to a chaotic and unplanned transition as the rest of the world moves to rapidly phase out fossil fuels globally. There is also a risk that the proposed changes will have unintended consequences for the application of planning laws more broadly.

NSW should be implementing sensible laws, based on science, that plan for a just transition to low carbon economies and a safe climate for current and future generations.

Background

On 22 October 2019, the NSW Deputy Premier, John Barilaro, announced that the NSW Government would introduce a package of measures to prevent the regulation of overseas, or scope-three, greenhouse gas emissions in local mining approvals.[1] The package would include:

- Amending the *Environmental Planning & Assessment Act 1979* to prohibit approval conditions relating to downstream emissions;
- Removing the specific consideration of downstream emissions in the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*;
- Developing a NSW Government policy and guidelines on greenhouse gas emissions; and
- Continuing the existing review of the NSW Independent Planning Commission (**IPC**) and its functions.

On 24 October 2019, Planning Minister Rob Stokes introduced the *Environmental Planning and Assessment (Territorial Limits) Bill 2019* to the NSW Parliament to implement the first two parts Government's reform package.[2] It is expected that Government will seek to pass the Bill before the end of the year. The NSW Productivity Commissioner is continuing his review of the IPC.[3]

The proposed changes appear to respond to a campaign by the NSW Minerals Council to push for changes to the law to prevent mining projects from being rejected on climate grounds. This follows a number of key decisions this year including:

- The NSW Land and Environment Court's (**L&E Court**) historic decision to refuse the Rocky Hill coal mine proposed near the town of Gloucester;
- The IPC's equally significant decision to refuse a new open cut coal mine in the picturesque Bylong Valley;
- The IPC's decision to refuse a 5 year extension of the Dartbrook underground coal mine in the Upper Hunter Valley because it was not in the public interest for reasons including failure of the proponent to consider GHG emissions and their impacts; and
- The IPC's decision to approve the United Wambo mine in the Hunter Valley, but with a condition requiring coal from the mine to be sold only to countries that are signatories to the Paris Agreement, or that have equivalent policies in place.

The recent decisions by the L&E Court and IPC are not radical. The public interest and principles of ecologically sustainable development (**ESD**) are already well-established in NSW planning laws. When contemporary climate change science and policy are applied, unacceptable climate change impacts (amongst other environmental and social impacts) have led to projects being refused, or approved with conditions aimed to address those impacts.

Outline of proposed changes and potential implications

The *Environmental Planning and Assessment (Territorial Limits) Bill 2019* proposes the following changes:

- Amends the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) by inserting a new section 4.17A as follows:

  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.

- Amends the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**) by omitting downstream emissions as a mandatory consideration under clause 14(2) of the Mining SEPP.[4]

While the Government has suggested that the aim of the changes is to "clarify how conditions of development consent under the State's planning legislation treat impacts occurring outside the territorial limits of Australia",[5] we are concerned that the changes will have broader implications for the consideration of GHG emission impacts from coal mines and climate change impacts in NSW.

In particular we are concerned that:

- Currently, environmental impacts on NSW are properly regulated by the EP&A Act. The proposed changes unnecessarily and inappropriately restrict the consideration and regulation

of scope 3 emissions from coal mines - the biggest contribution Australia makes to the climate crisis. This has direct impacts on communities in NSW, in particular, rural and regional communities suffering from extreme drought and bushfires.

- The scope of proposed section 4.17A is too broad, and could operate to curtail the appropriate regulation of impacts of development more broadly. In particular, we are concerned that, as drafted, proposed section 4.17A:
  - Applies to all downstream greenhouse gas and climate change impacts outside Australia from NSW projects, but also to conditions regarding environmental impacts other than greenhouse gas emissions or climate change because the term "impacts" is not defined;
  - May have a chilling effect on conditions regarding Scope 1 and 2 emissions, which, by their very nature, have impacts that occur outside Australia;
  - Is not limited to extractive industries or fossil fuel developments, but rather applies to all development that requires development consent under Part 4 of the EP&A Act. This may have serious ramifications for development conditions in NSW for Part 4 development generally; and
  - Will potentially make it difficult for proponents to propose their own conditions regarding Scope 1, 2 and 3 emissions or climate change (such as carbon offsetting conditions) for their own projects, as such conditions may be invalid under subsection (1).

- The Bill is an inappropriate, knee-jerk, political response that follows lobbying pressure from the NSW Minerals Council and its members who have vested interests in coal mining. A more appropriate policy response would be comprehensive legislative reform to ensure the proper consideration and regulation of the impacts of coal projects, including all GHG emissions. EDO NSW has identified the necessary package of law reform recommendations to ensure that NSW planning laws are climate-ready – see *Climate-ready planning laws for NSW – Rocky Hill and beyond.*[6]

The Government's decision to introduce special legislation to amend planning laws, albeit disappointing, is not unpredictable. Recent history shows that NSW governments, of all persuasions, often have knee-jerk reactions to landmark Court rulings that uphold environmental protections, especially when those cases are brought by conservation groups or local communities in the public interest.

It is alarming that, at such a critical point in the climate crisis – when the science is unequivocal about the immediate need to make deep reductions to our GHG emissions in order to prevent catastrophic climate change - the NSW Government is seeking to prevent decision-makers from attempting to regulate the most significant adverse impact of NSW coal mining on our communities and environment.

Downstream (Scope 3) emissions from NSW coal mine projects will contribute to global climate change. Climate change is already impacting the NSW environment and communities, and impacts will only worsen unless there is a significant reduction of GHG emissions which limit global warming to 1.5 degrees Celsius (^{o}C) and no more than 2 ^{o}C. The consideration of GHG emissions, including downstream emissions, must be an explicit consideration for decision-makers assessing new coal mines in NSW.

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REFERENCES

[1] See: https://nsw.liberal.org.au/CERTAINTY-FOR-MINING-INVESTMENT

[2] See: https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3717

[3] See: http://productivity.nsw.gov.au/ipc-review

[4] Clauses 14(1) and 14(2) of the Mining SEPP currently provide that:

(1) Before granting consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following—

(a) that impacts on significant water resources, including surface and groundwater resources, are avoided, or are minimised to the greatest extent practicable,

(b) that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable,

(c) that greenhouse gas emissions are minimised to the greatest extent practicable.

*(2) 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.*

[5] NSW, *Parliamentary Debates*, Legislative Assembly, 24 October 2019, Pinpoint (Mr Rob Stokes, Minister for Planning and Public Spaces), https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-108481'

[6] Available at: https://www.edonsw.org.au/climate_ready_planning_laws