Environmental Defenders Office

Submission to the Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 (NSW)

December 2019

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Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:
NSW Legislative Council's Portfolio Committee No. 7 – Planning and Environment
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Executive Summary

EDO welcomes the opportunity to make a submission to the Inquiry into the provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 (NSW) (**the Bill**) being undertaken by the NSW Parliament Legislative Council's Portfolio Committee No. 7 - Planning and Environment (**the Committee**).

We do not support the Bill. The Bill is a retrograde step that will undermine the ability of decision-makers to properly assess and regulate the climate impacts of fossil fuel projects on the environment and local communities in NSW. Further, as drafted, the Bill is overreaching and ambiguous, and will have significant implications for planning decisions and the protection of the environment in NSW.

In the absence of any public consultation on the Bill prior to it being introduced to the NSW Parliament, this inquiry provides an important opportunity for the Bill to be properly scrutinised and for the Committee to make key recommendations as to whether the Bill should proceed. This will assist in ensuring that the laws passed in this State are based on robust, credible evidence and are in the best interest of the people and environment of NSW.

The Bill fails to provide certainty to NSW communities already suffering from the impacts of climate change, and leaves both industry and communities vulnerable to a chaotic and unplanned transition away from fossil fuels consumption and use.

In particular, we are concerned that:

- The Bill seeks to unnecessarily and inappropriately restrict the consideration and regulation of scope 3 emissions from fossil fuel projects.

- As drafted, proposed section 4.17A of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) is overreaching and ambiguous. For example, section 4.17A:
  - is not limited to extractive industries or fossil fuel developments;
  - does not define the term "impacts"; and
  - applies to impacts occurring in NSW.

- As drafted, proposed section 4.17A is likely to have unintended consequences, including with respect to:
  - the regulation of scope 1 and 2 greenhouse gas (**GHG**) emissions;
  - potential carbon offsetting, or other impact mitigation measures; and
  - the regulation of impacts in NSW.

- The proposed change to *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**) is unwarranted.

- The community has perceived the Bill as special legislation, coinciding with lobbying from vested industry interests and with no community consultation, and designed to overcome recent decisions against coal mine companies. This is not an appropriate way to implement sensible, science-based laws in NSW.

Our submission also aims to assist the committee to understand the context and background leading to the introduction of the Bill, the legal implications of the Bill, including potential unintended consequences, and the retrograde step that the Bill represents at a time when clear leadership and legal guidance for taking action to limit GHG emissions is needed.

Our submission is structured as follows:

1. **Background and context setting**
   - **1.1 Outline of Government's proposals**
   - **1.2 Summary of recent, relevant planning decisions**
   - **1.3 Climate change, international agreements and impacts in NSW**

2. **Provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019**
   - **2.1 Schedule 1 - Amendment to the *Environmental Planning and Assessment Act 1979***
     - **a) Key concerns**
     - **b) Unintended consequences**
     - **c) Other key issues**
       - **i) Concerns about the regulation of international trade**
       - **ii) Concerns about double counting**
   - **2.2 Schedule 2 - Amendment to *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007***

3. **Recommendations and suggested amendments**

With scientific consensus on the causes and impacts of anthropogenic climate change, and international agreement to keep the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the increase to 1.5°C; the NSW Parliament has a responsibility to ensure that decisions made under NSW laws are consistent with the science of climate change and global efforts to limit global warming.

The people of NSW are already experiencing the impacts of climate change, including extreme drought and bushfires. NSW should be implementing sensible laws, based on science, that plan for a just transition to low carbon economies and that ensure the proper, long-term protection of the people and environment of NSW, including a safe climate for current and future generations.[1]

Our overarching recommendation is that the Bill should not proceed. In the event that the Bill does proceed, we have recommended a number of amendments to ameliorate the unintended consequences of the Bill identified in our submission, however we reiterate that we do not support the Bill.

Our recommendations are summarised in the box below, with detailed explanation of our recommendations in parts 2 and 3 of this submission.

[1] The Environmental Defenders Office 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.* Available at: https://www.edonsw.org.au/climate_ready_planning_laws

Summary of recommendations and amendments

Recommendation 1

Our overarching recommendation is that the Bill should not proceed.

Recommendation 2

In the event that the committee considers that amendments to the EP&A Act are warranted due to concerns about the regulation of international trade, the committee should reject proposed section 4.17A and changes to the Mining SEPP, and consider alternative options for regulating international trade that are not broad, over-reaching and ambiguous.

Recommendation 3

In the event that the Bill does proceed, the committee should consider amendments to ameliorate some of the unintended consequences of the Bill identified in our submission (***however we reiterate that we do not support the Bill***).

We suggest the following amendments to the Bill:

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

Section 4.17A
Insert after 4.17 –

4.17A Prohibited conditions

(1) For development for the purpose of mining, petroleum production or extractive industry under clause 7 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007,* a condition of a development consent described in this section has no effect despite anything to the contrary in this Act, unless the applicant proposes such a condition to the consent authority.

(2) A condition imposed for the purpose of achieving outcomes or objectives relating to—

a. the impacts exclusively occurring outside Australia or an external Territory of downstream greenhouse gas emissions as a result of the development.

~~b. the impacts occurring in the State as a result of any development carried out outside Australia or an external Territory.~~

(3) This section does not apply to any development consent granted before the commencement of this section.

- **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).~~

Detailed explanation for these recommendations and amendments are set out in Parts 2 and 3 of the submission.

1. Background and context setting

We expect that this inquiry will identify a range of issues regarding the Bill, and also the regulation of fossil fuel developments in NSW more broadly, after hearing from a range of stakeholders. To assist the Committee to understand the Bill and broader stakeholder concerns, we provide a summary of background information, including:

1.1 Outline of Government's proposals
1.2 Summary of recent, relevant planning decisions
1.3 Climate change, international agreements and impacts in NSW

1.1. Outline of Government's proposals

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 (scope 3 (downstream)) GHG emissions in local mining approvals.[2] The package would include:

- Amending the EP&A Act to prohibit approval conditions relating to downstream emissions;
- Removing the specific consideration of downstream emissions in the Mining SEPP;
- Developing a NSW Government policy and guidelines on GHG emissions; and
- Continuing the existing review of the NSW Independent Planning Commission (**IPC**) and its functions.

The announcement from the Deputy Premier followed shortly after the commencement of a campaign by the NSW Minerals Council to push for changes to planning laws in NSW.[3]

On 24 October 2019, the Planning Minister introduced the Bill to the NSW Parliament to implement the first two parts of the Government's reform package.[4] Separately, the NSW Productivity Commissioner is continuing a review of the IPC.[5] At this stage, there is no further public information (that we have seen) about the Government's proposal to develop a policy and guidelines on GHG emissions.[6]

We note that there are some discrepancies in the messages coming from Government, particularly regarding what the Government is trying to address through proposed legislation and the scope of the proposed reforms.[7] This has likely led to differing stakeholder expectations and differing understandings of the Bill.

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[2] See: Liberal Party of NSW, *NSW Government provides certainty for mining investment*, 22 October 2019, available at https://nsw.liberal.org.au/CERTAINTY-FOR-MINING-INVESTMENT

[3] See NSW Mining, *New mining ad campaign to protect NSW jobs and the economy,* 23 September 2019, available at http://www.nswmining.com.au/menu/media/news/2019/september/new-mining-ad-campaign-to-protect-nsw-jobs-and-the

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

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

[6] Guidelines on greenhouse gas emissions have the potential to provide greater certainty to proponents, decision-makers and the community about how GHG emissions should be assessed and considered in planning decision. For example, EDO has previously recommended that the Government should publish assessment guidelines to ensure consistent, robust assessment of GHG emissions is based on best available science. Guidelines should advise on how to assess direct and indirect greenhouse gas emissions, apply an 'avoid, mitigate and offset' hierarchy for reducing emissions, achieve best-practice carbon offsetting, and advise on best practice adaptation principles. See EDO *Climate-ready planning laws for NSW – Rocky Hill and beyond, Full Report,* above no 1. Recommendation 8.

[7] For example, the Deputy Premier has said that:

- The intention of the reform package is "*prevent the regulation of overseas, or scope-three, greenhouse gas emissions in local mining approvals*"; and
- "*These changes will help restore NSW law and policy to the situation that existed prior to the Rocky Hill decision and will provide the mining sector with greater certainty*".

Liberal Party of NSW, *NSW Government provides certainty for mining investment*, 22 October 2019, Above no. 2
Whereas Minister for Planning and Public Spaces, the Hon. Rob Stokes, has said that:

The community has perceived the Bill as special legislation, coinciding with lobbying from vested industry interests and with no community consultation, and designed to overcome recent decisions against coal mine companies.

In our view, ad hoc special legislation is not an appropriate way to implement sensible, science-based laws in NSW. 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 our report *Climate-ready planning laws for NSW – Rocky Hill and beyond.*[8]

1.2 Summary of recent, relevant planning decisions

We recognise that there have been a number of key decisions on coal mine projects in 2019, 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 due to its significant and unacceptable planning, visual and social impacts as well as the GHG emissions of the project and their likely contribution to adverse impacts on the climate system, environment and people;[9]
- The IPC's equally significant decision to refuse a new open cut coal mine in the picturesque Bylong Valley in part because the GHG aspects of the project remain problematical;[10]
- 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;[11] 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.[12]

Those decisions by the L&E Court and IPC are not radical. We reject claims (made by the Minerals Council of Australia) that the recent decisions, and particularly the way decision-makers have considered scope 3 emissions, is an example of regulatory creep.[13] Downstream impacts, and more specifically, scope 3 emissions have been relevant to environmental assessment in many jurisdictions for some time. For example:

- In 2004 the Full Federal Court of Australia held in *Minister for Environment and Heritage v Queensland Conservation Council*[14]*,* when considering whether downstream pollution was an adverse impact of the proposed construction and operation of the Nathan dam in

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- The EP&A Act *"does not deal expressly with the extraterritorial impacts of development - that is, impacts of development outside the territorial limits of Australia and therefore outside the territorial capacity of the New South Wales planning system to effectively be involved with the enforcement of such conditions".*[7]
- "*This new provision in the Environmental Planning and Assessment Act 1979 is about conditions of development consent. It is not about the evaluation of a proposal. Nothing in the bill will change the requirements in the Act for a robust assessment of the impacts of development*".

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

[8] Environmental Defenders Office, *Climate-ready planning laws for NSW – Rocky Hill and beyond* above no. 1.

[9] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7

[10] See https://www.ipcn.nsw.gov.au/projects/2018/10/bylong-coal-project

[11] See https://www.ipcn.nsw.gov.au/projects/2019/02/dartbrook-coal-mine-modification-7

[12] https://www.ipcn.nsw.gov.au/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142

[13] For example, Tania Constable, Chief Executive Office of the Minerals Council of Australia has said that: "*Regulatory creep and overreach – including the use of regulation by unelected bodies to block mining projects and the jobs and prosperity they bring to regional communities – is a serious concern in the regulation of the minerals sector across Australia*", Mineral Council of Australia, Media Release, *Action on NSW mining projects good news for regional communities*, 22 October 2019, available at https://minerals.org.au/news/action-nsw-mining-projects-good-news-regional-communities

[14] *Minister for Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24; [2004] FCAFC 190, [53]

central Queensland, that the impact of an action includes not only the direct but also the indirect influences or effects of the action, including "each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether the consequences are within the control of the proponent or not."[15]

- Obligations on decision-makers to consider the principles of ecologically sustainable development (ESD), particularly the precautionary principle and the principle of intergenerational equity, have been held to require consideration of the impact of a development on climate change and the impact of climate change on a development. The decision of Chief Judge Preston in the Rocky Hill case helpfully sets out the many court decisions throughout Australia, and internationally, which have considered scope 3 emissions to be relevant to the assessment of mining projects in the context of the principles of ESD.[16]

- In Queensland, the Court of Appeal determined that in making a decision under s 223 of the *Environmental Protection Act 1994* (Qld), the Land Court is either required to consider (per McMurdo P at [11]) or is not precluded from considering (per Fraser JA at [45] and Morrison JA at [51]) scope 3 emissions when making a decision as to whether to recommend the granting of an environmental approval for a coal mine.[17] The Land Court has also determined, and the Supreme Court has confirmed, that in considering the factor in s 269(4)(k) of the *Mineral Resources Act 1989* (Qld), as to whether "public rights and interests will be prejudiced" by the granting of the mining lease, the Land Court is empowered to consider scope 3 emissions.[18]

The most recent L&E Court and IPC decisions flow naturally from the application of the best available science on climate change to well established principles of law in NSW. When contemporary climate change science and policy was applied to existing laws, the unacceptable climate change impacts (amongst other environmental and social impacts) of the relevant mining projects led to them being refused, or approved with conditions aimed at addressing those impacts. This is an entirely appropriate and orthodox application of existing NSW laws having regard to the impacts of those projects.

1.3 Climate change, international agreements and impacts in NSW

The decisions outlined above, and the discussions about the Bill, have happened and are happening in the context of NSW decision-makers and communities facing the very real threat of climate change and the challenge of how to manage its impacts. For this reason, it is useful to provide some background information on climate change, current science, and policy settings, and their implications for NSW.

Australia's climate has warmed by just over one degree since 1910 and the best available science tells us that average temperatures are projected to rise further.[19] Australia is already experiencing the impacts of climate change, which include the warming and acidification of oceans, sea level rise, decreased rainfall in southern parts of the country and increased, more intense, rainfall in the north, and the long-term increase in extreme fire weather. Extreme heat

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[15] Ibid [57]

[16] See, for example, *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720; *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1; [2007] NSWLEC 59; *Aldous v Greater Taree City Council* (2009) 167 LGERA 13; [2009] NSWLEC 17; and *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221; *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth* [2012] QLC 13; *Hancock Coal Pty Ltd v Kelly (No. 4)* [2014] QLC 12; *Coast and Country Association of Qld v Smith* [2016] QCA 242

[17] *Coast and Country Association Queensland Inc v Smith* [2016] QCA 242.

[18] *Hancock Coal Pty Ltd v Kelly (No 4)* (2004) 35 QLCR 56; [2014] QLC 12, [218] (Land Court) and *Coast and Country Association of Queensland v Smith* [2015] QSC 260, [39] (Queensland Supreme Court).

[19] See Commonwealth Scientific and Industrial Research Organisation (CSIRO), *Climate change in Australia - Projections for Australia's NRM regions*, https://www.climatechangeinaustralia.gov.au/en/climate-projections/future-climate/regional-climate-change-explorer/clusters/; see also NSW Office of Environment and Heritage (OEH), *AdaptNSW*, https://climatechange.environment.nsw.gov.au/.

days, longer dry spells, and harsher fire weather will increasingly become the norm, although the severity of impacts will be less if emissions can be reduced.[20]

Predicted impacts for NSW include:[21]

- up to 10 additional days above 40 degrees each year in northern NSW by 2030, rising to 33 additional days by 2070;
- increased crop failure, human and animal deaths;
- longer and more intense bushfire seasons;
- accelerated biodiversity loss; and
- increased irreversible soil erosion, affecting food security and water quality.

The Intergovernmental Panel on Climate Change (**IPCC**) (2014) is highly confident that:

> *Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to high to very high risk of severe, widespread, and irreversible impacts globally…*[22]

In light of the unequivocal scientific evidence of the impacts of anthropogenic climate change, the international community agreed in late 2015 to keep the increase in global average temperature to well below 2 degrees Celsius (**°C**) above pre-industrial levels; and to pursue efforts to limit the increase to 1.5 °C (**the Paris Agreement**).[23] The Paris Agreement provides clear impetus for strong action and targets on climate change across government, business and community sectors.

The subsequent 2018 Special Report of the IPCC makes it clear that the consequences of warming beyond 1.5°C are dire and indicates that current actions are not enough to limit warming to 1.5°C.[24] Failing to limit global warming to 1.5C will have catastrophic impacts including greater levels of sea-level rise and coastal inundation, extreme heatwaves, severe droughts, the death of coral reefs, and mass extinctions.[25] And the impacts of climate change are not just environmental; there will be significant implications across all sectors, including health, the economy and national security.[26]

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[20] The impacts of a warming climate on Australia are set out in more details in Bureau of Meteorology and CSIRO, *State of the Climate 2018* (2018), www.bom.gov.au/state-of-the-climate.

[21] See for example NSW Office of Environment and Heritage, *Impacts of Climate Change* AdaptNSW: http://climatechange.environment.nsw.gov.au/impacts-of-climate-change; see also CSIRO, *New climate change projections for Australia* (27 January 2015), http://www.csiro.au/en/News/News-releases/2015/New-climate-change-projections-for-Australia.

[22] Intergovernmental Panel on Climate Change (IPCC) *Climate Change 2014: Synthesis Report*. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)] (2014) p 17, http://www.ipcc.ch/report/ar5/syr/.

[23] In December 2015, over 190 nations affirmed a goal to reduce greenhouse gas emissions in order to limit average global warming to well below 2ºC above pre-industrial levels and to pursue efforts to limit warming to 1.5ºC. United Nations Framework Convention on Climate Change Conference of the Parties 21, *Adoption of the Paris Agreement*, 'Annex - Paris Agreement', Article 2 (FCCC/CP/2015/L.9/Rev.1). The Paris Agreement builds on past international commitments in Cancun, Lima and elsewhere under the 1992 UN Framework Convention on Climate Change.

[24] Intergovernmental Panel on Climate Change, *Special Report Global Warming of 1.5ºC,* An IPCC Special Report on the impacts of global warming of 1.5ºC above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, (2018), https://www.ipcc.ch/sr15/.

[25] *Ibid*.

[26] For example, the World Health Organisation (WHO) advises that Climate change affects the social and environmental determinants of health – clean air, safe drinking water, sufficient food and secure shelter, a and that between 2030 and 2050, climate change is expected to cause approximately 250 000 additional deaths per year, from malnutrition, malaria, diarrhoea and heat stress, see https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health. In 2017, the Australian Senate Foreign Affairs, Defence and Trade References committee recognised climate change as a current and existential national security risk, see https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Nationalsecurity/Final_Report. The Reserve Bank of Australia has recently announced that banks, business and investors must

Despite the urgency, the legal and governance frameworks needed to achieve the global commitment to reduce GHG emissions and limit global warming are mostly absent. NSW is no exception. Our laws fall far short of what is needed, with many of our important environment and planning laws remaining silent when it comes to climate change.

At a time when stronger, more robust laws are required, the decision to introduce special legislation to limit the ability of decision-makers to appropriately regulate climate change impacts caused by GHG emissions is a retrograde step. It sends the wrong signal to proponents, decision-makers and the broader community about the urgent and real need to make decisions in line with the need to rapidly make deep cuts in emissions in order to meet the Paris Agreement's goal of limiting average global warming to well below 2ºC above pre-industrial levels, whilst pursuing efforts to limit warming to 1.5ºC.

Environmental assessments of GHG emissions break them down into the following categories:

- Scope 1 emissions: Direct emissions released to the atmosphere as a direct result of an activity, or series of activities at a project level.
- Scope 2 emissions: Offsite GHG emissions associated with generation of electricity, heat or steam purchased by the project; and
- Scope 3 emissions: Indirect GHG 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.[27]

Climate change is already impacting the NSW environment and communities, and impacts will only worsen unless there is a significant reduction of GHG emissions. It is therefore entirely appropriate for the consideration of GHG emissions, including downstream (scope 3) emissions, to be an explicit requirement for decision-makers assessing new fossil projects in NSW.

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think about the economic impacts of climate change, see https://www.abc.net.au/news/2019-03-12/reserve-bank-warns-of-impact-of-climate-change-on-the-economy/10893792.

[27] For further information see NSW Government, *Technical Notes supporting the Guidelines for Economic Assessment of Mining and Coal Seam Gas Proposals*, April 2018, available at 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; and http://www.cleanenergyregulator.gov.au/NGER/About-the-National-Greenhouse-and-Energy-Reporting-scheme/Greenhouse-gases-and-energy

2. Provisions of the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

Having set out background information and context in Part 1 of our submission, we now look at the provisions of the Bill subject to this inquiry.

We specifically look at:

2.1 Schedule 1 - Amendment to the *Environmental Planning and Assessment Act 1979*
   a) Key concerns
   b) Unintended consequences
   c) Other key issues
      - Concerns about the regulation of international trade
      - Concerns about 'double counting'

2.2 Schedule 2 - Amendment to *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*

2.1 Schedule 1 - Amendment to the *Environmental Planning and Assessment Act 1979*

a) Key concerns

In our view, proposed section 4.17A as drafted, is ambiguous, over-reaching and may have unintended consequences. Our view is that the approach taken by the Government in introducing the proposed changes is not warranted.

Schedule 1 of the Bill proposes to amend the 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.*

The Government has stated that the purpose of the Bill is to prohibit the regulation of downstream GHG emissions by local mining approvals.[28] However, proposed section 4.17A will have a much further reach than this purpose. For example:

- ***Section 4.17A is not limited to extractive industries or fossil fuel developments*** - As drafted, proposed section 4.17A 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.

- ***"Impacts" is undefined*** - Because the term "impacts" is not defined, proposed section 4.17A could apply to prohibit conditions aimed at regulating not just downstream (scope 3) GHG emissions, but also scope 1 and scope 2 GHG emissions; or any other environmental impact of a project.

- ***Section 4.17A(2)(b) relates to impacts occurring in NSW*** - As drafted, proposed section 4.17A(2)(b) seeks to prohibit conditions for the purpose of achieving outcomes or objectives

[28] Liberal Party of NSW, *NSW Government provides certainty for mining investment*, 22 October 2019, above no 2.

related to impacts occurring in NSW as a result of any development carried out outside Australia or an external Territory.

Understanding that, based on a plain and ordinary approach to statutory interpretation, the scope of proposed section 4.17A is significantly broad is important, particularly when considering the implications of how it will operate in practice, deciding whether the provisions are appropriate, and ultimately whether the Bill should proceed.

b) Potential unintended consequences

Given proposed section 4.17A is so broad there is a real risk that unintended consequences will arise. The drafting attempts to distinguish between impacts in NSW and impacts occurring outside Australia or an external Territory, and also between development occurring in NSW or occurring overseas. This differentiation is problematic given the global nature of climate change.

It is not logical to differentiate climate change impacts based on a distinction between scope 1, scope 2 and scope 3 emissions - once released into the atmosphere, the carbon dioxide becomes both a local and a global problem. That is, all GHG emissions from projects in NSW, whether they be scope 1, 2 or 3 emissions, and whether they occur in NSW or somewhere else, increase GHG levels in the global atmosphere and cause impacts both in NSW and across the entire globe. Or put another way, climate change impacts, whether they be more intense bushfire seasons in NSW, rapid melting of polar ice-caps, or threats to Pacific nations due to rising sea levels, are a consequence of multiple decisions at a local level to approve new sources of GHG emissions (e.g. a coal mine in NSW); and unless appropriately ameliorated, GHG emissions, no matter their source, will have impacts right across the globe.

While proposed section 4.17A was likely intended to apply solely to the scope 3 GHG emissions of projects in NSW (which we say is inappropriate in itself, as the consideration and regulation of scope 3 emissions by the NSW planning system is necessary and appropriate), there is a risk that other types of development and impacts will be captured by proposed section 4.17A. While it is difficult to predict all potential scenarios that may also be captured by proposed section 4.17A, we put forward a number of examples below of potential unintended consequences that warrant further consideration, particularly in relation to how proposed section 4.17A would operate to limit decision-makers from taking important steps to regulate the impacts of development proposed in NSW, or impacts that may occur in NSW.

- ***Regulation of scope 1 and 2 GHG emissions***

We submit that it is entirely appropriate for conditions to be imposed to address all emissions under NSW planning laws. While being aimed at scope 3 emissions, proposed clause 4.17A may also have unintended consequences for the regulation of scope 1 and scope 2 GHG emissions in NSW, due to the global nature of climate change and the fact that GHG emissions generated in NSW will have impacts globally. This is concerning as scope 1 and 2 emissions can and should be addressed and regulated by the NSW planning system. For example:

- It is has been established by the Courts that consent conditions addressing scope 1 emissions, being emissions released to the atmosphere as a direct result of the project and in the control of the proponent, can be lawfully imposed. In *Hunter Environment Lobby Inc v Minister for Planning & Anor*[29], the L&E Court found that proposed conditions requiring the offset of scope 1 GHG emissions were lawful[30] (although, because the Commonwealth Government's emission trading scheme commenced shortly afterwards, the Court subsequently found that the emissions trading scheme and related legislation met the purpose of imposing a condition requiring the offsetting of scope 1 GHG emissions, and that such a condition was not necessary in that instance)[31].

[29] *Hunter Environment Lobby Inc v Minister for Planning & Anor* [2011] NSWLEC 221.
[30] Ibid [100].
[31] *Hunter Environment Lobby Inc v Minister for Planning* (No 2) [2012] NSWLEC 40 [15]-[16].

- The L&E Court did not consider whether offsets in relation to scope 2 GHG emissions are lawful in that case as it was not necessary to do so,[32] however following the reasoning of the Court in relation to scope 1 emissions, a condition requiring the offset of scope 2 GHG emissions could be lawful, particularly where the condition fairly relates to the development in question. Indeed, there are examples of proponents indicating that they can influence reductions in scope 2 emissions by undertaking mitigation steps such as pursuing electricity reduction and efficiency initiatives.[33]

- In practice, conditions of consent often require proponents to develop GHG management plans that include measures aimed at minimising GHG emissions from a development site,[34] or require proponents to implement all reasonable and feasible measures to minimise the release of GHG from the site.[35] While we have previously raised concerns that these high-level conditions are broadly discretionary and fall far short of avoiding, minimising and offsetting all GHG emissions, they are examples of consent conditions that relate to the regulation of GHG emissions.[36]

Accordingly, it is clear that under the existing law it is appropriate for consent conditions to regulate scope 1 and scope 2 emissions from NSW projects. However, as discussed above, scope 1 and 2 emissions have both local and global impacts. Therefore, the impacts of scope 1 and 2 emissions from a project in NSW could be interpreted to constitute "*impacts occurring outside Australia or an external Territory as a result of the development".* Proposed section 4.17(2)(a) would prevent decision-makers imposing consent conditions in relation to such impacts. Therefore, there is a strong risk that proposed section 4.17A(2)(a), could prevent decision-makers from imposing consent conditions to mitigate the impacts of scope 1 and 2 GHG emissions from projects in NSW.

- ***Limits potential carbon offsetting or other impact mitigation measures***

As currently drafted, proposed section 4.17A would also render ineffective conditions of consent giving effect to measures proposed by project proponents themselves to mitigate or offset the GHG emissions of their projects (particularly in relation to scope 3 emissions). For example, a proponent may propose carbon-offsetting as a method to ameliorate the impacts of the GHG emissions from their project. Carbon offsets could very well mean the difference between a decision-maker determining that a project should be approved or refused. That is, a decision-maker may determine that the climate change impacts of a project can be appropriately managed via carbon offsets such that the project can be approved. Alternatively, absent the carbon offsets, a decision-maker may determine that the project's climate change impacts are unacceptable and the project should be refused. However, as noted above, proposed section 4.17A would render any condition of consent giving effect to a proposal to secure carbon-offsets ineffective, as such a condition would be aimed at addressing impacts occurring outside Australia (i.e. global climate change impacts). Similarly, proposed section 4.17A may prevent proponents from proposing other mitigation options such as electricity reduction and efficiency initiatives. It may also stymie advancements in technology such as carbon capture and storage. While EDO has concerns about the current ability of technologies such as carbon capture and storage (or negative

[32] Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221, [94]
[33] For example, the proponent of the United Wambo Open Cut Coal Mine indicated in its Greenhouse Gas and Energy Assessment (GHGE Assessment) that it can influence reductions in Scope 2 emissions by pursuing electricity reduction and efficiency initiatives, see *United Wambo Open Cut Coal Mine*, *Environmental Impact Assessment, Appendix 8 - Greenhouse Gas and Energy Assessment*, p ii, available at https://www.unitedproject.com.au/en/publications/EIS/Appendix-8-Greenhouse-Gas-and-Energy-Assessment.pdf
[34] See, for example, Conditions B26 for the Rix's Creek South Continuing Mine Project, available at https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2019/06/rixs-creek-south-continuation-of-mining-project-ssd-6300/determination/191012-rixs-creek--conditions-of-consent.pdf; see also
[35] See, for example, Conditions 9 for the Wallarah 2 Coal Project, available at https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2017/09/wallarah-2-coal-project/determination/wallarah-2-coal-mine-consent-conditions-signed-20180116.pdf
[36] See EDO *Climate-ready planning laws for NSW – Rocky Hill and beyond, Full Report,* available at https://www.edonsw.org.au/climate_ready_planning_laws

emission technology) and carbon offsetting, to meaningfully mitigate, store or offset GHG emissions, [37] proposed section 4.17A should not prohibit proponents from proposing measures and consent conditions to mitigate or offset GHG emissions from their projects, if they so choose.

- ***Inability to regulate impacts in NSW***

Proposed section 4.17A(2)(b) seeks to prohibit conditions for the purpose of achieving outcomes or objectives related to impacts occurring in NSW as a result of any development carried out outside Australia or an external Territory. While this is likely intended as an additional measure to prohibit the regulation of downstream emissions from projects in NSW (on the basis that downstream GHG emissions from NSW projects [e.g. emissions from the combustion of NSW mined coal overseas] will contribute to global climate change that will necessarily have impacts in NSW), this is not specified in the text of the proposed section. In our view, it is not appropriate to limit the power of decision-makers to impose conditions on a NSW project approval that seeks to address impacts that will actually occur in NSW.

The inappropriateness of this proposal is exacerbated by the fact that proposed section 4.17A will apply to all Part 4 development (not just fossil fuel development producing scope 3 emissions).[38] For example, proposed section 4.17A(2)(b) could prevent decision-makers from imposing appropriate conditions on coastal urban development to address impacts from sea level rise, and coastal inundation and erosion, on the basis that these are *"impacts occurring in the State as a result of any development carried out outside Australia or an external Territory"* (that is, the coastal urban development does not cause the impacts sought to be addressed - these impacts are caused by an increase in global GHG emissions). An example of this kind of condition is the Independent Planning System Review Panel's recommendation that time limited development consents of up to 90 years should be permitted for areas subject to projected sea level rise as a consequence of climate change.[39] If proposed section 4.17A is enacted, such a condition would have no effect.

- ***Regulation of other environmental impacts***

Finally, as noted above, because the term "impacts" is not defined, the application of proposed section 4.17A is not limited to consent conditions aimed at addressing impacts from downstream GHG emissions, or even GHG emissions generally. As drafted, it would apply to all environmental impacts. While it appears that GHG emissions are the environmental impact that proposed section 4.17A is intended to address, due to the global nature of climate change, it may be that proposed section 4.17A also applies to prohibit consent conditions in regard to other environmental impacts. An example of this may be conditions addressing impacts on migratory birds. That is, a proposed development may have an impact on a key migratory bird breeding site in NSW, which would then have flow-on impacts on global bird numbers and the health of populations outside Australia. Therefore, the impacts of the NSW development on the migratory bird species would also occur outside of Australia. However, in such a scenario, consent conditions relating to the management of those impacts on the migratory bird species would be prohibited by proposed section 4.17A.[40]

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[37] See EDO, *Climate-ready planning laws for NSW – Rocky Hill and beyond, Implications for current projects*, 2019, available at https://www.edonsw.org.au/climate_ready_planning_laws

[38] "Part 4 development" is development regulated under Part 4 of the EP&A Act.

[39] Tim Moore and Ron Dyer, *The Way Ahead for Planning in NSW, Recommendations of the NSW Planning System Review, Volume 1 – Major Issues*, May 2012, Recommendation109, https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/the-way-ahead-for-planning-in-nsw-recommendations-of-the-nsw-planning-system-review-vol-1-2012-05.pdf. We note that the issue of time-limited consents was considered by the L&E Court in *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel; Stewartville Pty Ltd v New South Wales Transitional Coastal Panel; Robert Watson v New South Wales Transitional Coastal Panel* [2018] NSWLEC 207

[40] For example, condition A7 for the Port Waratah Coal Services Terminal 4 Project provides:

A7 - Construction to create the compensatory migratory shorebird habitat at the Tomago Offset Site must be completed prior to the commencement of construction at the Site which would impact on migratory shorebird habitat and in accordance with an approved Biodiversity Offset Package required under condition B27.

Available at: https://www.pwcs.com.au/media/1772/t4_conditions_of_approval_20160805.pdf

c) Other key issues

i) Concerns about the regulation of international trade

We recognise that the decision on the United Wambo Open Cut Coal Mine has raised concerns about the regulation of international trade under the EP&A Act.

In that instance, the IPC approved a significant expansion of open cut mining operations at the existing Wambo Coal Mine and United Colliery to allow for the extraction of an additional 150 million tonnes of run-of-mine coal over a period of 23 years. In granting the approval, the IPC imposed a condition B32 which requires the mine owners to prepare an export management plan to ensure that coal is only exported to countries that are signatories to the Paris agreement, or to countries that have similar policies in place to reduce GHG emissions.[41] The IPC stated that the condition was imposed to ensure that all reasonable and feasible measures are adopted to minimise GHG emissions to the greatest extent practicable.

At the outset, we note that EDO, on behalf of our client, Hunter Environment Lobby, had opposed the proposed condition because it is based on the fundamentally flawed assumption that export of the Project's coal to Paris Agreement signatory countries will comprise "all practicable measures" to minimise scope 3 greenhouse emissions, and therefore it will fail to achieve its stated purpose. EDO argued that the only appropriate condition in relation to the Project's GHG emissions would be to require the Project's total GHG emissions to be permanently offset so that the Project is carbon neutral.[42] Ultimately however, the condition was imposed.

The Department of Planning, Industry and Environment did not support the condition on the basis that there is no State or Commonwealth policy that would support the imposition of conditions on an applicant to minimise the scope 3 emissions of its development proposal.[43] The Department also raised concerns about whether EP&A Act could regulate matters of international trade, and Minister Stokes also indicated he was seeking clarification from the Commonwealth on this issue.[44]

For reasons outlined earlier in our submission, we submit that it is entirely appropriate for decision-makers to consider the impacts of scope 3 emissions when determining development proposals, and where appropriate, to impose conditions of consent to address those impacts, including conditions related to any mitigation measures proposed by the proponent. If there are legitimate concerns regarding conditions that impact on international trade, we suggest that

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[41] See condition B32 which provides that:
The Applicant must prepare an Export Management Plan for the development to the satisfaction of the Planning Secretary. This plan must set out protocols that require the Applicant to use all reasonable and feasible measures to ensure that any coal extracted from the development that is to be exported from Australia, is only exported to countries that are:

a) parties to the Paris Agreement within the United Nations Framework Convention on Climate Change; or
b) b) countries that the Planning Secretary considers have policies for reducing greenhouse gas emissions that would otherwise be similar to policies that would be required of that country if it were a party to the Agreement at (a) above;
as at the date of sale. The purpose of the Export Management Plan is to ensure that all reasonable and feasible measures are adopted by the Applicant to minimise greenhouse gas emissions identified as Scope 3 emissions in the EIS to the greatest extent practicable.

Available at https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/determination/ssd-7142-recommended-conditions-of-consent-final.pdf

[42] See EDO Letter to the IPC dated 9 August 2019, available at https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/comments-on-proposed-condition-august-2019/hel-submission_redacted.pdf

[43] See Letter from Department of Planning, Industry and Environment to IPC, undated, available at https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/late-comments-on-proposed-condition-august-2019/190815injim-betts-dpie--re-proposed-condition.pdf

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

alternative options could be considered for addressing those concerns, including alternative amendments to the EP&A Act. We do not consider that it is an appropriate response to such concerns to create an overriding prohibition on conditions of consent seeking to address scope 3 emissions, and we do not consider that proposed section 4.17A is appropriate, particularly given its broad implications and potential unintended consequences.

ii) Concerns about 'double counting'

We understand that some stakeholders are concerned that by placing conditions on NSW projects to deal with scope 3 emissions, those emissions will be 'double counted' when they are assessed (as scope 1 emissions) as part of an overseas project.

Double counting is generally understood in the context of 'accounting' of GHG emissions for the purpose of demonstrating that mitigation targets have been reached in the context of a signatory's Nationally Determined Contributions (**NDCs**) under the Paris Agreement. Signatories are expected to implement domestic mitigation measures that will achieve the objectives of their NDCs. Australia's NDC is to "implement an economy-wide target to reduce greenhouse gas emissions by 26 to 28 per cent below 2005 levels by 2030".[45]

However, Australia's current NDC (which, as noted in a previous EDO report, is insufficient to achieve the Paris Agreement temperature targets)[46] is not relevant to a decision-maker's obligation under the EP&A Act to consider whether a development will have an impact on the environment of NSW and, if so, whether such an impact should be mitigated by way of consent conditions. The EP&A Act is specifically concerned with land use planning and the assessment of environmental impacts on the *environment of NSW*, and, as discussed above, it is reasonable to conclude that environmental impacts will be caused in NSW by any or all of a project's scope 1, 2 and 3 GHG emissions. In contrast, Australia's NDC relates to Australia's obligations under international law and does not relate to land use planning or environmental assessment under domestic legislation. Accordingly, as the EP&A Act is a separate and different regime to Australia's international law obligations, no issue of double counting arises in relation to consent conditions imposed under the EP&A Act to address the impacts of a project's scope 3 emissions.

Moreover, any suggestion that double counting may affect the consideration of scope 3 emissions as part of the assessment and determination of development applications in NSW was arguably rejected by the L&E Court in the Rocky Hill case.

In that case the Court held that:

> *"[a] consent authority cannot rationally approve a development that is likely to have some identified environmental impact on the theoretical possibility that the environmental impact will be mitigated or offset by some unspecified and uncertain action at some unspecified and uncertain time in the future*".[47]

The Court pointed out that the role of a consent authority is not to speculate as to how to achieve emissions reductions from other sources that are not the subject of the development application. Rather, the consent authority's task is to determine whether to grant consent to a particular development application, and where the development application will result in GHG emissions, to determine the acceptability of those emissions.[48]

Seeking to prevent the imposition of conditions of consent based on concerns about 'double counting' is not in line with the reasoning of the L&E Court, or the expert evidence accepted in the Rocky Hill case. It is also inconsistent with the EP&A Act's focus on the impacts of development

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[45] See http://www.environment.gov.au/climate-change/government/international

[46] See EDO *Climate-ready planning laws for NSW – Rocky Hill and beyond, Implications for current projects,* available at https://www.edonsw.org.au/climate_ready_planning_laws

[47] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [525]

[48] Ibid [532]

on the environment of NSW, and whether such impacts should be mitigated through the imposition of consent conditions.

2.2 Schedule 2 - Amendment to *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*

Schedule 2 of the Bill proposes to amend 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.[49]

We do not agree that this amendment is consequential to the insertion of proposed section 4.17A into the EP&A Act. Proposed section 4.17A seeks to limit the imposition of conditions. That should not in any way alter a consent authority's existing obligations to consider of all relevant impacts of a proposed development, including downstream emissions, in determining whether to approve project or not.

The removal of 'including downstream emissions' from clause 14 of the Mining SEPP may have an inadvertent chilling effect on the proper consideration of impacts of proposed development. As outlined earlier in our submission, the consideration of scope 3 emissions has been required as part of the environmental assessment of proposed developments in many jurisdictions for some time.

[49] 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.

3. Recommendations and suggested amendments

Recommendation 1

Our overarching recommendation is that the Bill should not proceed.

Recommendation 2

In the event that the committee considers that amendments to the EP&A Act are warranted due to concerns about the regulation of international trade, the committee should reject proposed section 4.17A and changes to the Mining SEPP, and consider alternative options for regulating international trade that are not broad, over-reaching and ambiguous.

Recommendation 3

In the event that the Bill does proceed, the committee should consider amendments to ameliorate some of the unintended consequences of the Bill identified in our submission (***however we reiterate that we do not support the Bill***).

We suggest the following amendments to the Bill:

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

Section 4.17A
Insert after 4.17 –

4.17A Prohibited conditions

(1) For development for the purpose of mining, petroleum production or extractive industry under clause 7 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007,* a condition of a development consent described in this section has no effect despite anything to the contrary in this Act, unless the applicant proposes such a condition to the consent authority.

(2) A condition imposed for the purpose of achieving outcomes or objectives relating to—

a. the impacts exclusively occurring outside Australia or an external Territory of downstream greenhouse gas emissions as a result of the development.

~~b. the impacts occurring in the State as a result of any development carried out outside Australia or an external Territory.~~

(3) This section does not apply to any development consent granted before the commencement of this section.

Explanation

4.17A (1) - As drafted, proposed section 4.17A 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 *Environmental Planning and Assessment Act 1979* (EP&A Act). This may have serious ramifications for development conditions in NSW for Part 4 development generally. Proposed section 4.17A should be limited to extractive industries or fossil fuel developments by limiting the scope of section 4.17A to development to which *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (Mining SEPP) applies (e.g. development identified in clause 7 of the Mining SEPP, namely, mining, petroleum production, extractive industry). Further as drafted, proposed section 4.17A potentially makes it difficult for proponents to propose 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). Proposed section 4.17A(1) should allow for applicants to propose their own conditions regarding downstream GHG emissions if they so choose.

4.17A (2)(a) - As drafted, proposed section 4.17A(2) will have much further reach than intended, if the true purpose of the Bill is to simply prohibit the regulation of downstream GHG emissions occurring outside Australia. Because the term "impacts" is not defined, proposed section 4.17A could apply to conditions regarding environmental impacts other than GHG emissions or climate change. Further, as drafted, proposed section 4.17A(2)(a) may have a chilling effect on conditions regarding the impacts of scope 1 and 2 emissions, which while occurring in Australia, by their very nature, have impacts that occur outside Australia. Proposed section 4.17A should be clearly limited to the regulation of impacts occurring exclusively outside Australia or an external Territory of downstream (not scope 1 or scope 2) GHG emissions as a result of the development.

4.17(2)(b) - As drafted, proposed section 4.17A(2)(b) seeks to prohibit conditions for the purpose of achieving outcomes or objectives related to impacts occurring in the State as a result of any development carried out outside Australia or an external Territory. It is intended as an additional measure to prohibit the regulation of downstream emissions (on the basis that downstream GHG emissions will contribute to climate change that will have impacts in NSW).
It is not appropriate to prohibit conditions that seek to address impacts occurring in NSW. It is entirely appropriate for a determining authority to put in place conditions of consent to address impacts in NSW. The sub-clause should therefore be deleted.

4.17A (3) – While the Minister's second reading speech indicates that proposed section 4.17A would not act retrospectively, we suggest that an additional sub-section could be added that would make this clear on the face of proposed section 4.17A.

- **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).~~

Explanation

Schedule 2 seeks to amend clause 14 of the Mining SEPP, by removing downstream emissions as a mandatory consideration for consent authorities. We do not agree that this amendment is consequential to the insertion of proposed section 4.17A into the EP&A Act, particularly as amended above. Proposed section 4.17A seeks to prohibit a very specific type of condition. It should not affect any existing requirement imposed on a consent authority to consider all relevant impacts of a proposed development, including downstream emissions. The removal of 'including downstream emissions' from clause 14 of the Mining SEPP may have an inadvertent chilling effect on the proper consideration of impacts of proposed development.