

# Inquiry into Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019

## *Department submission*

The Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 clarifies how planning approvals treat impacts occurring outside the territorial limits of NSW and Australia. This includes how downstream greenhouse gas emissions (also known as scope 3 emissions) are treated in development consents granted under the *Environmental Planning and Assessment Act 1979*, particularly for mining, petroleum production and extractive industries.

The Land and Environment Court's decision on the Rocky Hill coal project (*Gloucester Resources v Minister for Planning* [2019] NSWLEC 7) noted that scope 3 emissions can be taken into account when determining whether or not to grant consent to a development application. The Independent Planning Commission has relied on the Rocky Hill case as justification for closer scrutiny of downstream greenhouse gas emissions.

In August 2019 the Secretary of the Department of Planning, Industry and Environment wrote to the Independent Planning Commission to clarify the government's approach to downstream GHG emissions as part of the Commission's consideration of the United Wambo open cut coal mine.

The Secretary acknowledged the decision in the Rocky Hill case, noting that whilst scope 3 emissions could be taken into account when determining whether or not to grant consent to proposed development, it did not automatically make scope 3 conditions properly the subject of a consent condition. He also emphasised:

- the requirements in the planning system to consider GHG emissions are directed towards impacts that can reasonably be controlled by an applicant,
- there are no applicable state or national policies requiring NSW coal projects to minimise or offset downstream emissions that occur overseas, and
- it is not the government's policy that greenhouse gas policies or planning conditions should seek to directly or indirectly regulate matters of international trade as these are the responsibility of the Commonwealth.

The Minister for Planning and Public Spaces has also written to the Commonwealth Government seeking guidance on how Scope 3 emissions should be dealt with in the NSW planning system. A reply was received from the Commonwealth on 16 December 2019.

The Commission granted development consent for the United Wambo open cut coal mine in August 2019. The development consent was subject to a condition seeking to limit the export of coal to countries that are signatories to the Paris Agreement or have equivalent climate change policies. The State government is unable to regulate scope 3 emissions occurring in other countries outside the territorial limits of NSW or Australia.

This situation highlights a broader jurisdictional issue with the NSW planning legislation, which does not expressly deal with conditions relating to the extraterritorial impacts of development. The Bill therefore clarifies the territorial limitations of development consents by inserting a new section 4.17A in the *Environmental Planning and Assessment Act 1979* that identifies prohibited conditions which have no effect if they are part of a development consent granted under Part 4 of the Act. The prohibited conditions are those imposed for the purpose of achieving outcomes or objectives relating to:

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

This is consistent with the constitutional constraints of the State's power to regulate international trade. The provisions will prevent these conditions being imposed on development consents and any modifications to development consents.

The Bill also amends *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* in line with the new restriction on development consent conditions by omitting a specific reference to downstream greenhouse gas emissions in clause 14 of the Policy.

The proposed amendments will not affect the way a development application is evaluated by a consent authority, who will still be required to fully consider the impacts of proposed development. The consent authority will not be prevented from determining that the impact of development justifies or contributes to a decision to refuse a development application.

The proposed legislative change will not apply to development consents granted before it commences. It will apply to pending development applications and modification applications that have not yet been determined