

27 March 2019

Gordon Kirkby
Chair of Moolarben Coal Mine Modifications IPC Panel
Independent Planning Commission
Level 3, 201 Elizabeth Street
Sydney, NSW 2100

By email: ipcn@ipcn.nsw.gov.au

Dear Mr Kirkby

Moolarben Coal Mine Stage 1 (05_0117 Mod 14) and Stage 2 (08_0135 Mod 3) Modifications – Submission regarding recent decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7

1. We act for the Mudgee District Environment Group (**MDEG**) in relation to the proposed Moolarben Coal Mine Stage 1 Modification 14 and Stage 2 Modification 3 (**Modifications**).
2. We were requested to provide the following information on behalf of our client, in light of the recent decision of the NSW Land and Environment Court (**Court**) in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**attached**), which was handed down on 8 February 2019. In that case, Chief Justice Preston dismissed an appeal against the Rocky Hill Coal Mine's refusal and determined the mine's application by refusal.
3. Our client submits that this judgment requires close scrutiny by the IPC as a number of the circumstances of the Rocky Hill project and the Modifications are similar. As such, our client submits that the Court's findings are particularly relevant to the IPC's consideration of the impacts of the Modifications. These are discussed below.
4. In relation to climate change impacts of the Rocky Hill Coal Mine project, the Court accepted Professor Will Steffen's expert opinion and found, that "*the direct and indirect GHG emissions of the Rocky Hill Coal Project will contribute cumulatively to the global total GHG emissions*".¹ Significantly, Professor Steffen's evidence was not contested by the Minister for Planning in the Rocky Hill case. We note that Professor Steffen has provided equivalent evidence for the consideration of the IPC in relation to the Modifications (see attachment to our client's submission to the IPC).
5. Moreover, the Court found that there "*is a causal link between the [Rocky Hill Coal] Project's cumulative GHG emissions and climate change and its*

¹ [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [515].

consequences."² Therefore, the cumulative impact of the Rocky Hill Coal Project's direct and indirect GHG emissions on global climate change were relevant considerations to be taken into account in the Court's decision to refuse development consent for the project. Similarly, our client submits that the cumulative impact of the Modification's direct and indirect GHG emissions on global climate change is a relevant consideration to be taken into account by the IPC when assessing the Modifications.

6. We note that in this case, the Modifications involve a request for an expansion of the annual project output, yet continue to permit mining operations to be carried out on the site until 31 December 2038, as reflected in the draft Conditions of Consent.
7. In relation to climate change impacts of the Rocky Hill Coal Mine project, the Court further found, amongst other things:

[487] Although GRL submitted that Scope 3 emissions should not be considered in determining GRL's application for consent for the Rocky Hill Coal Project, I find they are relevant to be considered.

[488] At the most basic level, the consent authority must consider and determine the particular development application that has been made to carry out the State significant development of the proposed coal mine (s 4.38(1) of the EPA Act). For State significant development such as the Rocky Hill Coal Project, the development application is required to be accompanied by an environmental impact statement (s 4.12(1) and s 4.39(1)(a) of the EPA Act and cl 50(1)(a) and Sch 1, cl 2(1)(e) of the EPA Regulation). The environmental impact statement must address the environmental assessment requirements of the Secretary as well as the content requirements in Sch 1, cl 7 of the EPA Regulation, including the likely impact on the environment of the development and the reasons justifying the carrying out of the development, having regard to biophysical, economic and social considerations, including the principles of ecologically sustainable development (**ESD**). The principles of ESD are defined to be the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms (cl 7(4) of Sch 1 of the EPA Regulation). As I note below, consideration of the principles of ESD can involve consideration of climate change.

...

[529] The first reason GRL gave was that the increase in GHG emissions associated with the Project would not necessarily cause the carbon budget to be exceeded, because, as Dr Fisher had argued, reductions in GHG emissions by other sources (such as in the electricity generation and transport sectors) or increases in removals of GHGs by sinks (in the oceans or terrestrial vegetation or soils) could balance the increase in GHG emissions associated with the Project.

[530] I do not accept this reason. It is speculative and hypothetical...

[531] The second reason given by GRL was based on Dr Fisher's argument that "the size of the global abatement task calls for making emissions reductions where they count most and generate the least economic and social harm." (Fisher report [13]). Dr Fisher considered that refusing approval to individual coal mines, such as the Rocky Hill Coal Project, would not achieve this abatement at least cost.

² [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [525].

[532] I do not accept this second reason. A consent authority, in determining an application for consent for a coal mine, is not formulating policy as to how best to make emissions reductions to achieve the global abatement task. The consent authority's task is to determine the particular development application and determine whether to grant or refuse consent to the particular development the subject of that development application. Where the development will result in GHG emissions, the consent authority must determine the acceptability of those emissions and the likely impacts on the climate system, the environment and people. The consent authority cannot avoid this task by speculating on how to achieve "meaningful emissions reductions from large sources where it is cost-effective and alternative technologies can be brought to bear" (Fisher Report, [13]). Such emissions reductions from other sources are unrelated to the development that is the subject of the development application that the consent authority is required to determine.

...

[534] The third reason GRL advanced for approving the Project was that the GHG emissions of the Project will occur regardless of whether the Project was approved or not, because of market substitution and carbon leakage...

...

[536] I reject this third reason. On carbon leakage, GRL has failed to substantiate, in the evidence before the Court, that this risk of carbon leakage will actually occur if approval for the Rocky Hill Coal Project were not to be granted...

...

[538] The market substitution argument is also flawed. There is no certainty that there will be market substitution by new coking coal mines in India or Indonesia or any other country supplying the coal that would have been produced by the Project...

...

[546] The fourth reason GRL advanced for approving the Project is that the GHG emissions associated with the Project are justifiable. GRL contended that the Project will produce high quality coking coal, not thermal coal, which is needed for the main way of producing steel, by the BOF process; steel is critical to our society; and there are limited substitutes for coking coal in steel production.

[547] I find that GRL overstates this argument. It may be true that currently most of the world's steel (around 74%) is produced using the BOF process, which depends on coking coal, and although technological innovations might reduce the proportion of steel produced using the BOF process, for the reasons given by Mr Buckley, there is still likely to be demand for coking coal for steel production during the life of the Project.

[548] The current and likely future demand for coking coal for use in steel production can be met, however, by other coking coal mines, both existing and approved, in Australia...

8. As a result, the Court concluded that the Rocky Hill Coal Project's "*poor environmental and social performance in relative terms*" justified its refusal and that included the "*GHG emissions of the [Rocky Hill Coal] Project and their likely contribution to adverse impacts on the climate system, environment and people*".³

³ [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [556].

9. We submit that these issues also form relevant considerations in relation to the Modifications.

10. Please do not hesitate to contact the solicitor responsible for this matter, Natalie Vella on ph [REDACTED] or email [REDACTED]

Yours sincerely,
EDO NSW

[REDACTED]

Natalie Vella
Senior Solicitor

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