

15 April 2019

Gordon Kirkby
Chair of Bylong Coal Project IPC Panel
Independent Planning Commission
Level 3, 201 Elizabeth Street
Sydney, NSW 2100

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

Dear Mr Kirkby

Bylong Coal Project SSD 14_6367 (“Bylong Coal Project”) – Submission regarding recent decision in *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31

1. As you know, we act for the Bylong Valley Protection Alliance.
2. We refer to our client’s submission dated 14 November 2018 and its subsequent submissions dated 15 February 2019 and 8 March 2019, in respect to the Bylong Coal Project.
3. We are instructed to provide the following supplementary submission on behalf of our client in light of the recent decision of the Land and Environment Court (**Court**) in *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31 (**Wallerah 2**).
4. Our client submits that statements made by Moore J in Wallarah 2 demonstrate the Land and Environment Court’s tacit approval of the “wrong time” test for the assessment of major fossil fuel projects, as set out by Preston CJ in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill**). The “wrong time” test requires proponents to demonstrate why the fossil fuel reserves relevant to their project should be allowed to be exploited and burned, over and above other projects, at a time where a rapid and deep reduction in greenhouse gas (**GHG**) emissions is needed to stay within the global Carbon Budget, and avoid dangerous climate change. Particularly given evidence¹ that predicted GHG emissions from existing (including approved but not yet constructed) fossil fuel projects will already set us on course to exceed the Carbon Budget.²
5. We refer you to the following observations made by Moore J, in that regard:

¹ 181114 Submission of Professor Will Steffen [53]-[58]

² *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, [527], [697], [699].

- (a) First, Moore J sets out the “wrong time” test in his judgment³ and notes the ‘lucid’ nature of Preston CJ’s reasoning in applying that test, which formed one of the bases for the Court’s refusal of the proposed Rocky Hill mine;⁴
 - (b) Second, his Honour recognises that a merits assessment will turn on the particular facts and circumstances of a proposal being considered and the evidence brought before the decision maker in respect to that proposal – which in Rocky Hill included evidence of the Carbon Budget concept underpinning the “wrong time” test;⁵
 - (c) Third, his Honour notes that the evidence that was before the then Planning and Assessment Commission (**PAC**) in Wallarah 2 and the evidence that was before the Court in Rocky Hill was different.⁶ Indeed, the PAC did not have the benefit of evidence regarding the Carbon Budget when considering the impacts of Scope 3 GHG emissions from the Wallarah 2 Coal Project. However, that evidence was before the Court in Rocky Hill and formed the basis of the “wrong time” test, which was a key factor in Preston CJ’s decision to refuse the Rocky Hill mine proposal;
 - (d) Finally, Moore J specifically states that he does not endorse the merits of the PAC’s approach to addressing the Scope 3 GHG emissions of the Wallarah 2 Coal Project⁷ – in that instance the PAC determined (contrary to Preston CJ in Rocky Hill) that the impacts of GHG emissions from the downstream use of coal needed to be accounted for at the (unspecified) time and location where that coal is ultimately burnt, and not as part of the assessment of the impacts of the project itself.⁸
6. Significantly, the same evidence that was before the Court in Rocky Hill, in respect to the Carbon Budget, is also before the IPC in relation to the Bylong Coal Project (see **attached** submission of Professor Will Steffen dated 14 November 2018). Accordingly, and given the above, our client respectfully submits that the correct approach to the assessing the environmental impacts of the Bylong Coal Project’s Scope 3 GHG emissions, in light of the evidence of the Carbon Budget, is to apply the “wrong time” test as developed by Preston CJ in Rocky Hill.
 7. Accordingly, our client respectfully submits that the application of the “wrong time” test to the Bylong Coal Project means that the IPC should not approve the Bylong Coal Project as the proponent has failed to demonstrate why this particular project, over other projects, should be permitted to facilitate the exploitation and burning of significant new fossil fuel reserves (which would

³ *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31, [34]-[35].

⁴ *Ibid*, [40].

⁵ *Ibid*, [39].

⁶ *Ibid*, [38].

⁷ *Ibid*, [41].

⁸ *Ibid*, [41].

not assist in keeping global GHG emissions within the Carbon Budget), given the urgent need to significantly reduce GHG emissions to avoid dangerous climate change.⁹

Please do not hesitate to contact the writer on (02) 9262 6989 if you wish to discuss this letter.

Yours sincerely,

EDO NSW

A handwritten signature in black ink, appearing to be 'Nadja Zimmermann', written in a cursive style.

Nadja Zimmermann
Solicitor

Enclosure: 181114 Submission of Professor Will Steffen.

Our Ref: 1522462

⁹ *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [697], [699].