NSW GOVERNMENT | Planning, Industry & Environment

Office of the Secretary

IRF19/5523

Mr Tony Pearson
Chair of the Independent Planning Commission Panel
United Wambo Open Cut Coal Mine Project
Level 3, 201 Elizabeth St
SYDNEY NSW 2000

Dear Mr Pearson

Thank you for the opportunity to make a submission on the statement released on 2 August 2019 by the Independent Planning Commission's (IPC) Panel for the United Wambo Coal Mine Project regarding a potential condition related to overseas downstream greenhouse gas (GHG) emissions.

The decision of the *Land and Environment Court in Gloucester Resources Ltd v Minister for Planning [2019] NSWLEC 7* noted that scope 3 emissions are able to be taken into consideration in determining whether or not to grant consent to a development application.

However, it does not automatically follow that scope 3 emissions are properly the subject of a condition, are warranted in any particular case, or that a particular condition that refers to scope 3 emissions is necessarily appropriate. Every condition of a consent must be for a proper planning purpose, must fairly and reasonably relate to the subject development, and must not be manifestly unreasonable.

Under clause 14 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, a consent authority has two obligations.

First, it must consider an assessment of the GHG emissions of the development, including any downstream emissions.

This is intended to ensure that the consent authority considers the full range of GHG emissions that would result from the development in weighing up the merits of the application, including the direct emissions generated by the applicant in extracting and producing the coal and the indirect emissions generated by third parties - both in Australia and overseas - in transporting and using the coal.

In considering these emissions, the consent authority must have regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.

There are several applicable policies, programs or guidelines that warrant consideration in this instance. However, it is important to stress that none of these documents contemplate any action being taken (or being required to be taken) by either the State or Commonwealth government or the private sector in Australia to minimise or offset the GHG emissions of any parties outside Australia, including the emissions that may be generated in transporting or using goods that are produced in Australia (such as coal).

While it is acknowledged that consent authorities in NSW have a broad discretion to weigh up the merits of development applications under section 4.15 of the *Environmental Planning and Assessment Act 1979*, and may refuse a development application if they concluded it would result in unacceptable downstream impacts, it is anticipated that this discretion would be exercised carefully with the broader policy framework and that departures from this framework would only occur in exceptional circumstances.

Second the consent authority must consider whether or not consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner including conditions to ensure that GHG emissions are minimised to the greatest extent practicable.

The policy intent of this obligation has always been to focus on the direct impacts of the development (or scope 1 and relevant scope 2 emissions) that can reasonably be controlled by the applicant and not the scope 3 or downstream emissions that would flow from the development, as these would be the scope 1 or 2 emissions of another, separate project or projects. This is consistent with the approach taken to GHG emissions in all national and international agreements and the associated arrangements for accounting and reporting on these emissions.

There is no policy at either the State or Commonwealth level that would support the imposition of conditions on an applicant to minimise the scope 3 emissions of its development proposal.

Any such policy is likely to result in significant implications for the NSW and Australian economy and it is not clear it would have any effect on reducing the global GHG emissions generated by parties in other jurisdictions outside Australia.

Even if such a policy was made, it is likely to be more efficient and equitable to apply it across the board through legislation rather than waiting for individual companies to apply for development consent under the planning system in NSW.

Finally, I wish to confirm that it is not this State Government's policy that greenhouse gas policies, or planning conditions, should seek to regulate, directly or indirectly, matters of international trade.

Matters of international trade are properly regulated by the Commonwealth Government and conditions on NSW planning approvals should address the impact of the subject development rather than trade matters.

Please let me know if you would like further input on this matter.

Yours sincerely

Jim Betts

Jim Betts
Secretary