

BEFORE THE INDEPENDENT PLANNING COMMISSION

PUBLIC HEARING HELD ON 2-3 JULY 2020

FOR THE VICKERY EXTENSION PROJECT

OPENING SUBMISSIONS

FOR

LOCK THE GATE

(1 JULY 2020)

PREPARED BY

**ROBERT WHITE OF COUNSEL
(12 WENTWORTH SELBORNE CHAMBERS)**

ENVIRONMENTAL DEFENDERS OFFICE LTD

INTRODUCTION

1. Lock the Gate (**LTG**) is a network of groups and individuals throughout Australia that are concerned about the impacts of coal mining.
2. LTG seeks a determination that the Vickery Extension (**Project**) be refused development consent.
3. In summary, LTG's case is that the Project should be refused approval on the basis of the following issues:
 - a. **Climate change:** The Project is not in the public interest and contrary to the principles of ecologically sustainable development (**ESD**) because, in order to ensure that the rise in global temperatures will be limited to well below 2 degrees Celsius above pre- industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius, the Project should not be approved at this time;
 - b. **Social and impact:** The Project will have a significant social impact on residents and the community of Boggabri and the surrounding area, contrary to the public interest and the principle of intergenerational equity. The Project has overstated the economic benefits of the Project.
 - c. **Groundwater:** The Project risks adverse impacts on future groundwater quality and quantity within the Namoi River floodplain, including from the long-term groundwater impacts arising from the final void, with associated impacts on water availability for local communities and the environment. The Project is contrary to the public interest and the principles of intergenerational equity and intragenerational equity.
 - d. **European Heritage:** The property 'Kurrumbede' is formerly the home of the Mackellar family and is closely associated with the poet Dorothea Mackellar who was a frequent visitor to the property. The Project will impact the visual and aesthetic amenity of the homestead, garden, outbuildings and broader rural aspect and as such significantly impact on the preservation of Australia's literary history. The Project is contrary to the public interest and the principle of intergenerational equity.

FACTUAL BACKGROUND

The assessment process

4. On 6 September 2018, the Minister for Planning (**Minister**) requested the Independent Planning Commission of New South Wales (**IPC**) conduct a public hearing into the carrying out of the Vickery Extension Project, to consider the evidence and to publish a report to the (now) Department of Planning, Industry and Environment (**Department**). A public hearing was held on 4-5 February 2019. The IPC published its Issues Report on 30 April 2019. At that time the IPC was not the consent authority; the Issues Report concluded that there were a number of ‘key’ issues where uncertainty remained about the predicted impacts of the Project.¹
5. On 19 February 2020 the Minister wrote to the IPC with the following request:
 1. *Conduct a further public hearing into the carrying out of the Vickery Extension Project (SSD 7480) prior to determining the development application for the project under the Environmental Planning and Assessment Act 1979, paying particular attention to:*
 - a) *the Department of Planning, Industry and Environment’s assessment report, including any recommended conditions of consent;*
 - b) *key issues raised in public submissions during the public hearing; and*
 - c) *any other documents or information relevant to the determination of the development application.*
 2. *Complete the public hearing and make its determination of the development application within 12 weeks of receiving the Departments assessment report in respect of the project, unless the Planning Secretary agrees otherwise.*
6. As such, the IPC is now the consent authority for the Project: s 4.5(a) of the EP&A Act & clause 8A of the State and Regional Development state environmental planning policy (**SEPP SRD**).
7. The Department’s assessment report was published on 19 May 2020. The referral letter from the Planning Secretary sending the Department’s assessment report to the IPC stated as follows:

The project would generate significant benefits to NSW and the region including employment for up to 450 FTE workers and 500 construction workers, a direct capital investment in the project of \$607 million, a net benefit of \$1.16 billion NPV from generation of additional tax revenue and royalties, and funding for local community projects and infrastructure for the Gunnedah and Narrabri LGA through planning agreements.

¹ IPC Issues Report dated 30 April 2019 at [380]

The Department has recommended a comprehensive and precautionary suite of conditions to protect the environment and the amenity of the local community, including conditions to ensure that the project complies with relevant criteria and standards, and residual impacts are effectively minimised, managed and/or at least compensate (sic) for.

Based on its assessment and subject to the recommended conditions of consent, the Department considers that the Project is approvable.

8. Whilst the Project is described variously by the proponent and by the Department as the ‘Vickery Extension Project’, it is important that the Project is assessed under the *Environmental Planning and Assessment Act 1979 (EP&A Act)* as a greenfield coal development. This was acknowledged in the IPC Issues Report dated 30 April 2019 at paragraph [97].
9. The evidence will demonstrate that the Department has overestimated the economic benefits of the Project, both to the local community and to NSW as a whole. In particular, the employment predictions are flawed and the environmental impacts of the Project, including the impacts of GHG emissions on climate change, have been generally underestimated by the proponent and by the Department. Insufficient consideration has been given to the social impacts of the Project, in particular on the community of Boggabri, and to the public interest, which decisively tell against the approval of the Project.

ROLE & POWERS OF THE IPC

10. The IPC is a statutory agency: s 2.7(3) of the EP&A Act. It is independent from, and not subject to the direction or control of, the Minister and the Department: s 2.7(2).
11. The Statement of Expectations published by the Minister for the period from 1 May 2020 to 30 June 2021 confirms the importance of the independence of the IPC from Government and from the Department:

The [IPC] plays an integral role in upholding the integrity of the NSW planning system, by fulfilling its primary purpose of providing independent decision making on contentious State significant development applications ... (emphasis added)

12. The Memorandum of Understanding between the Department and IPC (**MoU**) dated 5 May 2020 notes the ‘independence’ of the IPC and expressly states that it is to bring ‘a high level of independence and transparency to the assessment and determination of State significant developments.’ Members of the IPC are

appointed by the Minister but are ‘not subject to the direction or control of the Minister, except in relation to procedural matters.’ Further the MoU expressly identifies that the IPC is ‘also independent of DPIE and other government agencies, and plays an important role in strengthening public confidence in the planning system...’

13. The MoU identifies the IPC’s objectives which are to build public trust in the NSW planning system by:

- being independent and objective in its decision-making;
- being fair, open and transparent in its operations;
- delivering robust and timely determinations within the legislative and government policy framework to best serve the people of New South Wales; and encouraging affective community and other stakeholder participation to inform [IPC] determinations.

14. The IPC has the functions of the consent authority under Part 4 for State significant development: s 2.9(1)(a) of the EP&A Act.

15. In its role as consent authority, the task of the IPC is not to consider whether the recommendations of the Department in its assessment report are correct or preferable on the material available to it, but rather to determine, based on the evidence now before the IPC, what is the preferable outcome.²

RELEVANT MATTERS TO BE CONSIDERED

16. The IPC is a statutory body. It can have no wider powers than those conferred by the EP&A Act which created it. As consent authority, the matters for consideration by the IPC in determining a State Significant development application³ are those expressly stated in section 4.15(1) of the EP&A Act, but also those matters, which by implication from the subject matter, scope and purpose of the EP&A Act, are required to be considered.⁴

17. Section 4.15 relevantly provides:

Matters for consideration—general

In determining a development application, a consent authority is to take into

² *Bulga Milbrodale Progress Association Inc v Minister for Planning* (2013) 194 LGERA 347 at [28] and [7]-[11].

³ Defined in section 4.40, EP&A Act.

⁴ *Bulga Milbrodale Progress Association Inc v Minister for Planning* (2013) 194 LGERA 347 at [52].

consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:*
 - (i) any environmental planning instrument, and*
 - (ii) any proposed instrument...*
 - (iii) any development control plan, and*
 - (iiia) any planning agreement...*
 - (iv) the regulations*
that apply to the land to which the development application relates,
- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) the suitability of the site for the development,*
- (d) any submissions made in accordance with this Act or the regulations,*
- (e) the public interest.*

18. As well as the provisions of any relevant environmental planning instrument (**EPI**) (for which see below), s 4.15 requires that the IPC must take into account the likely environmental impacts of the development, the likely social impacts, the economic impacts, the suitability of the site for the development, and any submissions made in accordance with the EP&A Act. The IPC must also take into account the public interest: section 4.15 EP&A Act. The considerations relevant to the public interest are summarised below.

19. The Minister's Statement of Expectations states that he expects the IPC '*to make decisions based on the legislation and policy frameworks and informed by the Planning Secretary's assessment*'. To the extent that this statement seeks to depart from the text of s 4.15, it is bad in law; the IPC is bound to make its decisions in accordance with s 4.15 of the EP&A Act, and not the Statement of Expectations. In particular, there is no reference to the phrase 'policy frameworks' in s 4.15. Further, contrary to the suggestion in the Statement of Expectations, the EP&A Act does not identify that the Department's report should be given precedence over other evidence. The Department's report is not a mandatory relevant consideration. Whilst it is no doubt a relevant consideration to be taken into account by the IPC, it is of no greater import than other relevant evidence placed before the IPC, including by objectors to the Project.

20. Further, the Statement of Expectations states that the Minister encourages the IPC to

"seek guidance from the Planning Secretary to clarify policies or identify policy issues that may have implications for State significant development determinations." Again, this statement is inconsistent with the proper role of an independent IPC, which is required to determine the Project according to law, and not by reference to any guidance from the Planning Secretary on policy issues that may have implications for the Project.

The public interest

21. The public interest is of a "wide ambit".⁵ A consent authority may range widely in the search for material as to the public interest.⁶ According to Preston CJ, "A requirement that regard be had to the public interest operates at a high level of generality."⁷ The public interest must be applied having regard to the scope and purpose of the relevant statute.⁸
22. The objects of the EP&A Act include:
- a. facilitating ESD by integrating relevant economic, environmental and social considerations; and
 - b. promoting the social and economic welfare of the community and a better environment, and to provide increased opportunity for community participation in environmental planning and assessment.
23. The considerations relevant to these objects are detailed below.

The public interest and ESD

24. Decisions of the Land and Environment Court, and the Court of Appeal, have held that the public interest requires consideration of principles of ESD at the stage of merits assessment of projects which are equivalent to State significant development,⁹ including coal mines.¹⁰
25. In *Minister for Planning v Walker* (2008) 161 LGERA 423, Hodgson JA stated at [56]:

... I do suggest that the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions,

⁵ *Shoalhaven City Council v Lovell* (1996) 136 FLR 58 at [63].

⁶ *Terrace Tower Holdings Pty Limited v Sutherland Shire Council* (2003) 129 LGERA 195, per Mason P at [81].

⁷ *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375 at [298].

⁸ *Patra Holdings v Minister for Land* (2002) 119 LGERA 231 at [11].

⁹ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347 at [58].

¹⁰ *Hunter Environmental Lobby Inc v Minister for Planning* [2011] NSWLEC 221.

that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions. It was not suggested that this was already the situation at the time when the Minister's decision was made in this case, so that the decision in this case could be avoided on that basis; and I would not so conclude.

26. In *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* (2012) 194 LGERA 113, Pepper J stated at [170]:

*I therefore reject the submission of AGL and the Minister that there was no requirement to consider ESD principles. **In the words of Hodgson JA in Walker, the time has come that “the principles of ESD” can now “be seen as so plainly an element of the public interest”** (at [56]). [Emphasis added.]*

27. The public interest also includes community responses to the Project. In *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347, Preston CJ stated at [63]:

*The public interest also includes community responses regarding the project for which approval is sought. In *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10, I confirmed (at [192]) that community responses are aspects of the public interest in securing the advancement of one of the express objects of the EPA Act in s 5(c), being “to provide increased opportunity for public involvement and participation in environmental planning and assessment” (see also *Kulin Holdings Pty Ltd v Developments Pty Ltd v Baulkham Hills Shire Council* (2003) 127 LGERA 303 at [58]). I said, however, that in considering the community responses, an evaluation must be made of the reasonableness of the claimed perceptions of adverse effect on the amenity of the locality (see also *Foley v Waverley Municipal Council* [1963] NSWLR 373 at 376; (1962) 8 LGRA 26 at 30). An evaluation of reasonableness involves the identification of evidence that can be objectively assessed to ascertain whether it supports a factual finding of an adverse effect on the amenity of the locality. A fear or concern without rational or justified foundation is not a matter which, by itself, can be considered as an amenity or social impact: *Telstra v Hornsby Shire Council* at [193] and [195].*

28. In the Court of Appeal proceedings, (*Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 200 LGERA 375), the Court endorsed this approach, and held at [295]:

Likewise, we consider that community responses to the project were relevant to the public interest. As his Honour pointed out, at [430], the evidence of the community responses was relevant to a consideration of noise impacts, air quality, visual impacts and more generally, the social impacts on the community. All of those factors were aspects of the overall public interest.

THE ISSUES

A. CLIMATE CHANGE

29. In summary, LTG’s case is that approval of the Project at the current time is not in the public interest and contrary to the principles of ESD, in particular the principles of intergenerational equity and improved valuation, pricing and incentive mechanisms, because the Greenhouse Gas (**GHG**) emissions (Scope 1, 2 & 3) from the proposed development would adversely impact upon measures to limit dangerous anthropogenic climate change. The effects of carbon in the atmosphere arising from the activities at the site, and the burning of the coal extracted from the development, are inconsistent with the existing carbon budget and policy intentions to keep global temperature increases to below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius, and would have a cumulative effect on climate change effects in the long term. In light of that substantial planning harm, and the critical importance of combatting climate change now, the Project should be refused.
30. There are multiple statutory pathways under the EP&A Act by which the IPC must have regard to the impacts of the Project on climate change, and which permit the IPC to refuse the development on this ground. These are:
- a. s 4.15(1)(a), which requires the IPC to take into consideration the provisions of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*, which requires the decision maker to have regard to the downstream impacts of the mine, and to ensure that greenhouse gas emissions are *minimised to the greatest extent practicable* (emphasis added);
 - b. s 4.15(1)(b), which requires the IPC to take into consideration the likely impacts of the proposed development, including environmental impacts (which includes the impacts of GHG emissions on climate change); and
 - c. s 4.15(1)(e), which requires the IPC to take into consideration the public interest, including the principles of ESD.¹¹
31. As set out above, section 4.15 of the EP&A Act makes any applicable EPI a mandatory relevant consideration. The activities the subject of the Project meet the definition of “mining” in clause 3 of Mining SEPP. Consequently, the Mining

¹¹ IPC determination on Bylong Valley at [649]

SEPP applies to the determination of the Project.

32. Clause 14 of the Mining SEPP relevantly provides:

14 Natural resource management and environmental management

(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:

...

(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.

...

33. Accordingly, clause 14(2) of the Mining SEPP makes the downstream greenhouse gas emissions of the Project a mandatory relevant consideration to be taken into account by the IPC when determining the Project.¹²

34. In the Rocky Hill decision at [513], Preston CJ, having reviewed the authorities, concluded that the consideration of the impacts of the Project on the environment and the public interest justify considering not only the Scope 1 and Scope 2 emissions but also the Scope 3 emissions of the Project. Likewise, the Department explicitly acknowledges in the Assessment Report that the Scope 3 emissions from the combustion of product coal is a significant contributor to anthropological climate change and the contribution of the Project to the potential impacts of climate change in NSW must be considered in assessing the overall merits of the development application.¹³

35. It is irrelevant for the purposes of the s 4.15 assessment process that the Scope 3 emissions would not contribute to Australia's Nationally Determined Contribution (NDC) to the Paris targets and it is not necessary to determine whether consideration of the Scope 3 emissions extends beyond the borders of New South Wales to, for example, the use of coal in South Korea. That is because all of the direct and indirect GHG emissions of the Project will adversely impact the NSW environment. The IPC

¹² IPC determination on Bylong Valley at [687]

¹³ Department's Assessment Report at xiv

accepted this argument in the Bylong valley determination,¹⁴ agreeing with Preston CJ in Rocky Hill that:

“Nevertheless, the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve “a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century” (Article 4(1) of the Paris Agreement) or the long term temperature goal of limiting the increase in global average temperature to between 1.5°C and 2°C above pre-industrial levels (Article 2 of the Paris Agreement).” [525]

36. The argument should be accepted in this case.

Principles of ESD

Intergenerational equity

37. Section 1.4 of the EP&A Act provides that ESD “has the same meaning it has in section 6(2) of the *Protection of the Environment Administration Act 1991*” (**POEA Act**). Section 6(2) of the POEA Act provides:

For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequences of various options,

(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,

(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,

(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:

(i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,

(ii) the users of goods and services should pay prices based on the full

¹⁴ at [690]

life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
(iii) *environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.*

38. ESD includes two ethical elements: concern for the present – intragenerational justice or equity; and concern for the future – intergenerational equity. Intragenerational equity describes equity within the present generation while intergenerational equity describes equity between the present and future generations. The needs that are to be equitably shared relate to the three components of ESD: economic development, social development and environmental protection. Equity is not limited to the use or exploitation of natural resources. It extends to maintenance and enhancement of the environment.¹⁸ The importance to ESD of the component of environmental protection is made clear in Australia (and NSW) where intergenerational equity is defined by section 6(2)(b) of the POEA Act to require “*that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations*”.
39. The principles of intergenerational equity and intragenerational equity were discussed in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347, where Preston CJ stated at [492]:

*In an assessment of the equity or fairness of the Project’s distribution of benefits and burdens, assistance can be gained by consideration of **two distinct principles of ecologically sustainable development, inter-generational equity and intra-generational equity**. The principle of inter-generational equity provides that the **present generation should ensure that the health, diversity and productivity of the environment are maintained or advanced for the future generations** (see s 6(2)(b) of the Protection of the Environment Administration Act). The principle of intra-generational equity involves **people within the present generation having equal rights to benefit from the exploitation of resources as well as from the enjoyment of a clean and healthy environment**: see *Telstra v Hornsby Shire Council* at [117]. A decision-maker should conscientiously address the principles of ESD in dealing with any application for a project under the former Pt 3A of the EPA Act: see *Minister for Planning v Walker* at [62], [63]. [Emphasis added.]*

40. In *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1, a merits appeal against the approval of a large wind farm, the Court recognised that achieving intergenerational equity involved a

consideration of the conservations of options subprinciple. Preston CJ stated at [74]:

*The attainment of intergenerational equity in the production of energy involves meeting at least two requirements. The first requirement is that the timing of and the subsequent use in the production of energy of finite, fossil fuel resources needs to be sustainable. Sustainability refers not only to the exploitation and use of the resource ...but also to the environment in which the exploitation and use takes place and which may be affected. The objective is not only to extend the life of the finite resources and the benefits yielded by exploitation and use of the resources to future generations, but also to maintain the environment, including the ecological processes on which life depends, for the benefit of future generations. **The second requirement is, as far as is practicable, to increasingly substitute energy sources that result in less greenhouse gas emissions for energy sources that result in more greenhouse gas emissions, thereby reducing the cumulative and long-term effects caused by anthropogenic climate change. In this way, the present generation reduces the adverse consequences for future generations.** (emphasis added)*

41. Approval of the Project would breach the obligation of intergenerational equity in that the development of a new greenfield open cut coal mine, which the IPC should rightly consider this project to be, would have an adverse impact on climate change, in particular the existing carbon budget and policy intentions to keep global temperatures to less than 2 degrees Celsius and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.
43. Approving this greenfield coal mine will worsen the impacts of climate change, thus contributing to the burden that will be borne by future generations in living with, and addressing, the consequences of climate change.
42. The Project will result in approximately 370 million tonnes of greenhouse gas emissions (carbon dioxide equivalents (CO₂-e)).¹⁵
43. LTG adduces expert evidence from Professor Will Steffen, an Emeritus Professor at the Australian National University and a Senior Fellow at Stockholm Resilience Centre. In his report, Professor Steffen documents the current serious impacts of climate change and explains that the rate of climate change is “alarming”¹⁶ and primarily driven by carbon dioxide (CO₂) emissions, with about 90% of CO₂ emissions arising from fossil fuel (coal, oil, gas) combustion.¹⁷
44. Professor Steffen’s first report to the IPC provided in 2019 (**2019 Steffen report**)

¹⁵ Department’s Assessment Report at page xiv

¹⁶ Professor Will Steffen, Expert Report, [10].

¹⁷ Professor Will Steffen, Expert Report, [7].

summarises the science of anthropogenic climate change and its impacts (at [7]-[32]). In addition to this summary, LTG relies upon the helpful summary of the science and the international framework on climate change set out in the judgment of Mallon J in *Sarah Thomson v The Minister for Climate Change Issues* (2018) 2 NZLR 160; [2017] NZHC 733 at [8]-[42].

45. Further, the 2019 Steffen report provides a synthesis of current climate projections against the carbon budget which demonstrates that Australia is not on track to meet its NDC target for 2030. Further, if every country followed Australia's level of action, the world would be on a trajectory to reach a 3- 4°C temperature rise by 2100 and would thus face extremely damaging levels of climate change impacts.¹⁸
46. In order to address the issue of dangerous climate change, Australia, along 196 other Parties, is a signatory to the Paris Agreement, which entered into force on 4 November 2016. The Paris Agreement aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by, *inter alia*:

Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.
47. In Professor Steffen's opinion, the carbon budget approach, as adopted by the Intergovernmental Panel on Climate Change (**IPCC**), is the most robust way to determine the rate of emissions reductions required to meet the goals of the Paris Agreement. This approach limits the cumulative amount of additional CO₂ emissions that can be allowed consistent with achieving the Paris targets.
48. Professor Steffen further advice prepared for this IPC hearing provides an updated analysis of the carbon budget which shows that it is no longer possible to limit temperature rise to 1.5°C with a 66% probability of success.
49. Professor Steffen's further advice also notes the worsening risks and impacts of climate change have become even more evident over the past 12 months with the 2019-2020 bushfires in eastern Australia and the mass bleaching of the Great Barrier Reef.
50. In Professor Steffen's opinion, under any reasonable set of assumptions regarding

¹⁸ Professor Will Steffen, 1st Expert Report, [27], [36].

probabilities of actually meeting the carbon budget and the sensitivity of the climate system to the level of greenhouse gases in the atmosphere, fossil fuel combustion must be phased out quickly, and most of the world's existing fossil fuel reserves – coal, oil and gas – must be left in the ground, unburned, if the Paris Agreement climate targets are to be met. It therefore follows that no new fossil fuel development, including the Project, can be permitted because its approval would be inconsistent with the carbon budget approach towards climate stabilisation and the Paris Agreement climate target.

51. The proponent's argument that the Project contributes insignificantly to global GHG emissions, and thus has a minimal impact on climate change, should be dismissed immediately. Arguing that a single proposal or event is immaterial because it is a tiny percentage in terms of its impact fails to acknowledge cumulative and incremental impacts: see Preston CJ in Rocky Hill at [514]-[524]. In the Bylong Valley determination, the IPC also accepted that the cumulative environmental impact of the Project needed to be considered when weighing the acceptability of GHG emissions associated with the mine.¹⁹ Once again the IPC accepted the finding of Preston CJ in Rocky Hill when his Honour said:

“it would be rational to refuse fossil fuel developments with greater environmental, social and economic impacts than fossil fuel developments with lesser environmental, social and economic impacts. To do so not only achieves the goal of not increasing GHG emissions by source, but also achieves the collateral benefit of preventing those greater environmental, social and economic impacts.”

52. The proponent has not adduced evidence to demonstrate that, if the Project is not approved, the export markets will need to secure an alternative source of coal and that this coal may be of an inferior quality and may lead to poorer environmental outcomes. The IPC agreed with Preston CJ that unacceptable development does not become acceptable because alternative development is pursued that has unacceptable impacts:

“If a development will cause an environmental impact that is found to be unacceptable, the environmental impact does not become acceptable because a hypothetical and uncertain alternative development might also cause the same unacceptable environmental impact. The environmental impact remains unacceptable regardless of where it is caused. The potential for a hypothetical but uncertain alternative development to cause the same unacceptable environmental impact is not a reason to approve a definite development that will certainly cause the unacceptable environmental impacts. In this case, the potential that if the Project were not to be approved and therefore not cause the unacceptable GHG

¹⁹ *ibid* at [692]-[695].

emissions and climate change impacts, some other coal mine would do so, is not a reason for approving the Project and its unacceptable GHG emissions and climate change impacts: see Kane Bennett, “Australian climate change litigation: Assessing the impact of carbon emissions” (2016) 33 EPLJ 538 at 546-548; Justine Bell-James and Sean Ryan, “Climate change litigation in Queensland: A case study in incrementalism” (2016) 33 EPLJ 515 at 535 [Rocky Hill 545]

53. The approval of the Project at the current time is contrary to the principle of intergenerational equity because of the cumulative impact of GHG emissions from the Project, which is inconsistent with the carbon budget approach towards climate stabilisation and the Paris Agreement climate target. The Project’s contribution to cumulative climate change impacts mean that its approval would be inequitable for current and future generations.
54. Because the Project will contribute to cumulative anthropogenic GHG emissions that are currently projected to exceed the carbon budget, any conditions to be attached to the Project will be insufficient to address its cumulative GHG impacts. Accordingly, approval of the Project at the current time is not in the public interest, is contrary to the principles of ESD and should be refused consent.

B. SOCIAL AND ECONOMIC IMPACTS

55. Under s 4.15 of the EP&A Act, the IPC must consider the likely impacts of the development, including social and economic impacts in the locality.
56. The evidence will demonstrate that the Project will have a significant social impact on residents, some businesses, and the community of Boggabri, contrary to the public interest, and the principles of ESD. ESD requires the effective integration of social considerations in decision-making processes.
57. A number of landowner, resident and business objectors propose to speak to the significance of the Project in terms of the social impacts on the community.
58. Overall, the Project does not “promote the social and economic welfare of the community and a better environment”, contrary to s 1.3(a) of the EP&A Act. The Project should be refused.
59. LTG adduces further expert evidence from Dr Alison Ziller of Macquarie University. In her opinion, key issues are:
 - a. The lack of hard evidence provided by the proponent to support the numbers of jobs that will be created for local people;
 - b. The impact on public health;

- c. The lack of tangible mitigation strategies.
60. The IPC will also hear evidence in relation to the economic analysis of the Project, including from Mr Robert Henderson (an economic and financial consultant), Mr Simon Nicholas (Institute for Energy Economics and Financial Analysis) and Dr Alistair Davey (Pegasus Economics).
61. Collectively, this evidence will show:
- a. the proponent's conclusion that the project will generate benefits for the state of NSW is based on out-of-date coal price forecasts;
 - b. coal marketing forecasting based on assumptions that the world will respond to avoid dangerous climate change, predict significant declines in coal trade. This includes the International Energy Agency's Sustainable Development Scenario, which sees global thermal coal trade volumes drop by 65% by 2040 from 2017 levels and thermal coal trade for power generation drops by 79% by 2040.
 - c. increasing coal supply will lower the value of Australia's existing coal operations. This will inevitably put further downward pressure on coal prices;
 - d. the purported economic benefits are overstated, including by externalising the cost of greenhouse gas emissions;
 - e. the costs to alternative industries have not been adequately considered, including industries that trade internationally and are, or may become reliant on, trade agreements that consider Australia's contributions global to efforts to reduce greenhouse gas emissions;
 - f. the rapid shift to renewables creates a significant risk that the Vickery Extension Project will become a stranded asset leading the people of NSW with the financial burden of undertaking site rehabilitation.
62. LTG will argue that:
- a. the proponent has failed to substantiate that the Project would employ an operational workforce of approximately 344 FTE jobs between 2020 and 2044;
 - b. the proponent has failed to substantiate that 70% of those jobs would be taken up by local people;

- c. the Department has not demonstrated why it considers that the employment projections are reasonable;
- d. inadequate financial benefits will accrue to the local communities, particularly within Narrabri LGA, thus underscoring the distributional inequity of the development;
- e. residents within Narrabri LGA in particular suffer from poor health relative to other parts of NSW and the SIA does not adequately assess the public health impacts of the Proposal on those residents;
- f. the proposed mitigation strategies identified in the SIA are intangible and will not deliver an effective response to the social costs of the Project; and
- g. those negative impacts are not outweighed by the purported economic benefits of the Project and the purported benefits are overstated.

C. GROUNDWATER IMPACTS

63. Many rural property occupiers are dependent upon the continued viability of the Namoi River floodplains and have raised concerns about the impact of mining on future groundwater quality, including from the long-term groundwater impacts potentially arising from the final void. Like the NSW Government agencies, Dr Currell, in his report dated 12 February 2019 opined that there remains significant uncertainty regarding the impacts of the Project on groundwater and surface water quality and quantity. Those uncertainties remain 18 months later and the IPC cannot have confidence that the development will not have adverse impacts on the underground water system and aquifers in the Namoi floodplain.
64. LTG adduces further expert evidence from Associate Professor Matthew Currell of RMIT University. In his opinion, key issues are
- a. more in-depth assessment of risks to Groundwater Dependent Ecosystems (GDEs), incorporating more detailed studies of inter-aquifer connectivity and analysis of current and potential future hydraulic gradients under different modelling scenarios are still needed to ensure a full consideration of impacts to GDEs, alluvial groundwater and surface water.
 - b. the information before the IPC still lacks detail on the full range of plausible impacts to groundwater arising from issues associated with the hydraulic parameters, inter-aquifer connectivity and potential effects on

the Namoi Alluvium. This prevents the IPC from developing informed judgements as to the full possible scope and consequences of the project for GDEs and other water users.

- c. further detailed analysis of existing groundwater monitoring data and more extensive analysis of modelling outputs is still required. The Department propose that these issues could be addressed by conditions of consent. However, conducting such work following commencement of the project would leave open the prospect of significant unforeseen impacts occurring, and it is unclear whether the proposed conditions of consent could be achieved.
- d. concerns in relation to an incomplete understanding of the geochemical conditions in groundwater and surface water, required to properly understand possible water quality impacts, remain. Much of the discussion of water quality impacts and geochemistry appears to focus on post-mining impacts, whereas the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development advice specifically related to the development of a more comprehensive understanding of potential water quality impacts during project operation.
- e. given the high degree of water stress experienced in the Namoi catchment in recent times, the apparent inability of the mine to source sufficient water for operation during dry times is of concern. Without further details, it is difficult to judge whether additional proposed management measures are feasible. Questions about the long-term viability and sustainability of the project, from the perspective of its ongoing water requirements, thus remain unresolved.
- f. the potential for water quality impacts resulting from the placement of mine waste on the Namoi Alluvium, at an embayment of the river in the northwest of the project area, remains of concern.

D. EUROPEAN HERITAGE

- 65. The property 'Kurrumbede' is formerly the home of the Mackellar family and is closely associated with the poet Dorothea Mackellar who was a frequent visitor to the property. She based a number of poems on her experiences of the environment and pastoral practices there. Kurrumbede also has links to Andrew 'Boy' Charlton

who worked as a jackaroo there for over 8 years.

66. Evidence adduced by LtG from Ms Anderson identifies that the retention and preservation of the homestead and rural environs of Kurrumbede is valuable in the context of the literary history of our nation.
67. The Project will impact the visual and aesthetic amenity of the homestead, garden, outbuildings and broader rural aspect. As Ms Anderson opines, the Project is “inimical to the sense of place Dorothea Mackellar created in her poetry, for all Australians, for all time.”

CONCLUSION

68. For the reasons set out above, the Project should be refused.

Environmental Defender’s Office

1 July 2020
