Environmental Defenders Office

BEFORE THE INDEPENDENT PLANNING COMMISSION

PUBLIC HEARING 14, 17 FEBRUARY 2022

FOR THE NARRABRI UNDERGROUND MINE STAGE 3 EXTENSION PROJECT (SSD 10269)

WRITTEN SUPPLEMENTARY SUBMISSIONS FOR LOCK THE GATE

SUBMITTED 8 MARCH 2022

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1. This supplementary submission responds to the submissions of Ashurst dated 25 February 2022 attached to the proponent's letter of 25 February 2022. Paragraph numbers refer to the paragraph numbers of Ashurst's submissions.

2. The proponent accepts that the IPC can consider ESD and the principles associated with it: [13(d)].

3. At [23], the proponent submits that climate change and GHG emissions "are not to be solely determinative of the Project". The concept of a factor being "solely determinative" is not explained. It is undoubtedly correct that climate change impacts and GHG emissions are not the *sole* mandatory or permissible consideration. It does not, however, follow that the IPC could not choose to give the adverse climate change impacts of the Project a weight which results in consent being refused. There would be no error in the IPC refusing consent because it considered that the Project was contrary to the public interest (because of its climate change impacts), or because the climate change impacts of the Project were unacceptable. Conversely, it would be an error for the IPC to accept the submission at [23]

that it is not entitled to refuse consent to the Project because of its adverse climate change impacts.

4. At [24], the *Rocky Hill* decision is addressed. It is not suggested that the *Rocky Hill* decision and the reasoning in that decision are *prohibited* considerations. Plainly, the IPC is entitled to consider the decision *and* to give it weight. To the extent the contrary is submitted, the submission is wrong in law. Moreover, while *Rocky Hill* is not a legal precedent, it is persuasive authority. For example, in the NSW Land and Environment Court (NSWLEC), decisions in the class 1 (merits) jurisdiction often refer to other NSWLEC merits decisions, despite not being legally bound by them: e.g. *Rocky Hill*; *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48. Further, contrary to [24(h)], the IPC *is* obliged to consider the *Rocky Hill* decision: cf [13(h)]. The decision has been placed before the IPC in submissions and is plainly relevant to the IPC's task. It must be considered: s 4.15(1)(d) EP&A Act.

5. The analysis of *Wallarah 2* at [24] is legally erroneous. *Wallarah 2* does not stand for any "binding" legal proposition of the kind suggested at [24]. What *Wallarah 2* stands for is that the specific grounds of legal error asserted in that case (none of which is identified by the proponent) were not established. Indeed, Moore J in *Wallarah 2* stated at [37]: "The greenhouse gas emission merit issues, which led to the conclusion by the PAC that these did not warrant refusal of this project, are not ones which I am considering. To do so would be a fundamental error in my exercise of the Class 4 judicial review jurisdiction of this Court." Moore J further stated at [41]: "Although I have concluded that there was no error in the PAC's processes, that conclusion does not constitute any endorsement, on a merit basis, of the conclusion that that body reached concerning greenhouse gas emissions." Therefore, *Wallarah 2* certainly does not stand for the proposition that the IPC will not commit a legal error if it gives consent to a project having the characteristics set out at [24(c)]. Whether there is legal error will always turn on the material before the IPC and the IPC's reasoning process. The proponent accepts this at [24(g)], and that acceptance wholly undermines any contention that *Wallarah 2* is in some way binding.

6. The submissions at [26] about ***Hunter Environment Lobby*** *Inc v Minister for Planning* [2011] NSWLEC 221 are legally erroneous and, if accepted, would lead the IPC into error.

Evidence given by a representative of the Department of Planning and Environment as to the Department's practices more than ten years ago warrants no weight: cf [29]-[30]. If *any* practices are relevant, they are current practices. And, even then, the issue is one for the IPC, not the Department. In *Hunter Environment Lobby*, Pain J did *not* hold that conditions directed to offsetting scope 2 emissions were invalid: cf [33]. So much is conceded by the proponent at [32], wherein it is acknowledged that her Honour did not decide that issue. Nor did her Honour decide whether conditions directed to offsetting scope 3 emissions would be invalid as no such condition was sought: *Hunter Environment Lobby* at [34]. Indeed, Preston CJ opined in ***Mullaley*** *Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110 that scope 2 emissions could be conditioned (e.g. by using renewable energy) because the proponent "retains a degree of control over its purchase of the electricity from the source of the emissions": *Mullaley* at [105]. Further, Preston CJ opined scope 3 emissions could be conditioned if there is a "relationship or arrangement between the proponent of the development and the end user of the product of the development that affords the proponent a degree of direction or control over the end user and its consumption of the product": *Mullaley* at [106]. Moreover, in ***KEPCO*** *Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216, the Court of Appeal found there was no legal error in the IPC considering that a proponent's failure to proffer conditions regulating Scope 3 emissions was a factor militating against development consent: at [44] per Basten and Payne JJA; [140], [146]-[147] per Preston CJ of LEC. If the proponent wishes to contend that a condition directed to offsetting emissions of any kind (whether scope 2 or otherwise) is impractical and would impose on it obligations to achieve outcomes beyond its control, it is for the *proponent* to establish that by evidence. The proponent has not sought to do so, and no presumptions in its favour should be made.

7. The submission at [36] about *Hunter Environment Lobby* and *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40 is also legally erroneous:

(a) As to [36(a)]. The proponent has placed *no evidence* at all before the IPC that the Commonwealth Government's Safeguard Mechanism will offset the scope 1 emissions of the Project. This is a matter for the proponent to establish by evidence.

(b) As to [36(b)]. The proponent has placed *no evidence* at all before the IPC evidencing any specific intention to use renewable or carbon-neutral energy. The proponent emphasises the words "reasonable and feasible", and, given the absence of any identified plans to use renewable or carbon-neutral energy, it is open to infer that the proponent considers that use of such energy is not reasonable and feasible.

(c) As to [36(c)]. There is no reasoning at all to support the contention that a condition requiring offsetting of scope 3 emissions would breach the *Newbury* test. Indeed, there is no reasoning *at all* to support the proposition that the so-called "*Newbury* test" is even applicable. The *Newbury* test is a "test" developed in England, and the NSW Court of Appeal has observed that the test has not been adopted by either the High Court or the New South Wales Court of Appeal: *Botany Bay City Council v Saab Corp Pty Ltd* (2011) 82 NSWLR 171 at [66]-[69]. The cases also make clear that even if *Newbury* principles are relevant, they do not prescribe a rigid 'test": *Westfield Management Limited v Perpetual Trustee Company Limited* [2006] NSWCA 245 at [78]-[79] (Basten JA). The correct principle is that the scope of the power to impose conditions is a question of *statutory construction*: *Westfield Management Limited v Perpetual Trustee Company Limited* [2006] NSWCA 245 at [84] (Basten JA). Section 4.38(1) of the EP&A Act states that the consent authority is to determine a State significant development application by "granting consent to the application with such modifications of the proposed development or on such conditions as the consent authority may determine" or "refusing consent to the application". The next relevant provision is s 4.17 of the EP&A Act. That section states (inter alia) that "[a] condition of development consent may be imposed if … (a) it relates to any matter referred to in section 4.15(1) of relevance to the development the subject of the consent": s 4.17(1)(a). The proponent concedes that climate change impacts are matters which the IPC can consider under s 4.15(1) and, that being so, s 4.17(1)(a) *expressly* authorises the imposition of conditions relating to climate change impacts. Once that is accepted, there can be no difficulty in the imposition of a condition directed to mitigating the climate change impacts of the development, including by requiring offsetting of the GHG emissions of the Project. This proposition is fortified by cl 14 of the Mining SEPP which *expressly* authorises the IPC to consider the downstream emissions of the development. The proponent's submission involves the absurd proposition that the IPC is authorised to consider the

downstream emissions of the Project but is *not* authorised then to impose conditions directed to mitigating those emissions. Furthermore, *Mullaley* has confirmed that it can be legally valid to impose a condition in respect of scope 2 and 3 emissions and *KEPCO* confirmed that a consent authority will not commit legal error if it takes into account a failure to propose a Scope 3 condition as a factor weighing against grant of development consent: see discussion above at [6].

(d) As to [36(d)]. The IPC gains no assistance from a Bill which has not been enacted. In any event, the issue is not whether conditions of consent can be attached to a development directed to mitigating the effects of the development *outside* New South Wales. The issue is whether conditions of consent can be attached to a development directed to mitigating the effects of the development *within* New South Wales. The proponent accepts that GHG emissions (scope 1, 2 and 3 combined) give rise to likely impacts in New South Wales. That is the nature of climate change.

8. The proponent's submission at [37] that it would be unlawful for an "export control condition" to be imposed must be rejected. The submission is based on the flawed assumptions that the *Newbury* test is applicable, that there is in fact a *Newbury* "test" and that, if there was such a test, it would be consistent with the express power given by s 4.17(1)(a). None of those assumptions is established. These submissions have addressed the *Hunter Environment Lobby* decision above. However, it would be erroneous for the IPC to consider that anything said in *Hunter Environment Lobby* at [94] is against the imposition of an "export control condition". The nub of the observations in *Hunter Environment Lobby* is that one would be cautious before imposing a condition requiring a person to offset impacts caused directly by a third party – because of the limited mechanisms of control one has over those impacts. This is consistent with Preston CJ's statement in *Mullaley* at [104]: "The different scopes of the greenhouse gas emissions, whether direct or indirect, and if indirect, the degree of control that the proponent has over the indirect emissions, will influence the consideration required by cl 14(1) of whether the consent should be issued subject to conditions to ensure that greenhouse gas emissions of these different scopes are minimised to the greatest extent practicable." Those observations do not speak at all to the export control condition. The whole point of the export control condition is that it is directed to ensuring that the proponent controls that which it can control i.e. the persons with whom it contracts. Of course, the degree of control that the

proponent has over indirect emissions may not be the only factor for the consent authority to consider when it decides whether to impose conditions to regulate indirect emissions. Nor is the degree of control determinative of a decision whether to impose conditions to regulate indirect emissions. Ultimately, the consent authority retains a broad degree of discretion under statute: see above discussion at [6].

9. The proponent provides no elaboration of its assertion that an export control condition would be invalid by reason of s 109 of the Constitution. Questions of section 109 inconsistency necessarily require a precise identification of the Commonwealth law said to yield inconsistency. Assertion does not assist the IPC.

10. In fact, the proponent's submissions at [37], if accepted, undermine the case it puts elsewhere. The upshot of the submissions at [37] is that the proponent has no control over where its coal is burned. But elsewhere in its submissions the proponent's case is that the IPC can be satisfied that the coal is likely to be burned in Paris Agreement countries. If the proponent has no control over where its coal is burned, the IPC can have limited confidence in the proponent's assertion that its coal will be burned in Paris Agreement countries. The proponent cannot have it both ways.

11. There is nothing inefficient or inequitable in imposing export control conditions on new developments: cf [37(c)]. That is akin to saying that the IPC is not entitled to act on the evidence before it and may not take into account the rapidly developing appreciation of the grave consequences of GHG emissions. Conditions of consent are not frozen in time, else we would still be living with planning controls of generations past.

12. As to [37(c)(ii)]. The proponent has placed no evidence before the IPC beyond assertion as to the manner in which the global coal market works. Even if it be assumed that some sales of coal are to "traders", the proponent has placed no evidence before the IPC of why it cannot take steps directed to ensuring that traders sell the Project's coal only to certain countries e.g. provisions authorising the termination of the sale agreement if the trader sells to a non-Paris agreement country, provisions imposing liquidated damages if the trader sells to a non-Paris agreement country or even provisions directed to ensuring that title to the coal does not pass. Further, the proponent's evidence as to the nature of the coal market undermines its contention elsewhere that the coal is likely to be exported to Paris

Agreement countries. If (as the proponent asserts) traders will buy some of the coal, intermix it with other coal, and then sell to a country of the trader's choice, it is most difficult to see how any prediction with a high degree of reliability could be made as to the status of the countries of export.

13. The term "Expected Export Countries" is used throughout the submissions. It is defined in [42], and its definition should be carefully noted. The countries defined in that category are "Japan, India, South Korea, China, Taiwan, Vietnam, Indonesia and Malaysia": see [42]. There is a footnote, which should not be overlooked, and which states:

> It should be noted, of course, that there may well be other countries to which the Project's coal is exported from time-to-time during the Project's life of mine. However, given the broad adoption of NDCs, those countries are highly likely also to have submitted NDCs and be in the process of adopting and implementing laws and policies to achieve their NDCs.

14. It may be noted that *elsewhere* in the submissions, the expression "Expected Export Countries" is used to refer to *all* countries to which Project coal will ultimately be exported: e.g. [50]. There is a slide here: the footnote to [42] makes clear that the small list of Expected Export Countries is not definitive and "there may well be other countries to which the Project's coal is exported from time-to-time during the Project's life of mine."

15. A number of points should be made about this what is said at [42]. First, no citation to any material is given for the proposition that the "expected" countries of export are the ones identified. For example, there is no citation to extant contracts of sale, or even negotiations for such contracts. And it is clear from what is said elsewhere that the proponent considers that it has no control at all over the ultimate export destinations. Secondly, the proponent accepts that Taiwan is not a party to the Paris Agreement. Thirdly, the proponent accepts (albeit in a footnote) that there may be other countries of export beyond those identified in the list, and the proponent says nothing as to whether the unspecified countries are parties to the Paris Agreement. Fourthly, no factual basis is identified for the assertion that, in respect of countries that are not in the list, they are "highly likely" (or even just likely or possibly) to have submitted NDCs etc. Fifthly, implicit in the submission made is the proposition that a party to the Paris Agreement is likely to be taking abatement measures

which will ensure that the country meets its NDC. No citation to any material is given for that proposition, and it is of course one for the proponent to establish. In fact, countries are *not* acting in a manner which is likely to result in them complying with their NDCs: Penny Sackett's Expert Report dated 23 February 2022 at [180]; Climate Action Tracker, 'Warming Projections Global Update: Glasgow's 2030 credibility gap: net zero's lip service to climate action; Wave of net zero emission goals not matched by action on the ground' (November 2021), p. ii <https://climateactiontracker.org/documents/997/CAT_2021-11-09_Briefing_Global-Update_Glasgow2030CredibilityGap.pdf> (Accessed on 7 March 2022). Regrettably, announced "intentions" by States (see [44]) have proven to be no more than words. Sixthly, even if countries *were* acting in a manner which was *likely* to result in them complying with their NDCs, the precautionary principle looms large: a likelihood still leaves open the real possibility that they will not. Having regard to the gravity of the consequences here, the precautionary principle dictates giving great weight to the real possibility of non-compliance. Seventhly, also implicit in the submission is the proposition that NDCs are apt to mitigate the impacts of climate change. No citation to any material is given for the proposition, and it is of course again one for the proponent to establish. And, in fact, the evidence is that NDCs are not apt to achieve that outcome: United Nations Framework Convention on Climate Change, 'Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat' (17 September 2021), p.5-6, paragraph 13, <http://unfccc.int/sites/default/files/resource/cma2021_08E.pdf>. And, again, even if there was a likelihood that NDCs would mitigate the likely impacts of climate change, the precautionary principle dictates nevertheless giving substantial weight to the real possibility that the NDCs will not achieve that outcome.

16. At [45]-[57], the proponent makes a number of submissions about what it calls "double counting". Although the proponent does not say so clearly, the implication of the submissions is that the IPC would err by taking into account the scope 3 emissions of the Project because those emissions will be counted in the country in which the coal is burned. This implicit submission invites a number of responses. First, the submission *only* works if there is confidence that the coal will be burned in Paris Agreement countries. But there can be no such confidence having regard to the proponent's own case and footnote 15. Secondly, and more importantly, the implicit submission misses the point. The issue for the IPC, performing its task under the EP&A Act, is the likely impacts of the Project and

the public interest, *not* precisely how the emissions will be accounted for under the Paris Agreement. A contribution to climate change caused by a project remains a contribution to climate change (and an impact on the environment of NSW) whether or not the GHG emissions of the project are scope 1 emissions of another country. The issue of emissions accounting under the Paris Agreement is not germane to the IPC's task in assessing the environmental impact of the Project, as there is no scientific difference in the way the Project's scope 1, 2 and 3 emissions will impact on the environment of NSW. Thirdly, nothing in Lock the Gate's position involves "double counting": Lock the Gate asks only that the GHG emissions of the Project be taken into account.

17. At [58]-[61], the proponent makes submissions about the "carbon budget" approach. The proponent does *not* assert that the IPC would commit a legal error in having regard to "carbon budget" analysis. And in fact, the proponent *concedes* that carbon budget analysis is used by "members of the scientific community and non-governmental organisations" (at [58]), which rather suggests that it *is* a conventional and accepted approach.

    (a) "Carbon budget" analysis *can* be used at the individual project level: cf [60(a)]. Carbon budgets are comprised of a number of significant individual decisions, including for example decisions on whether to permit the development of projects materially contributing to GHG emissions. There is no error in appreciating that to authorise a material contribution to GHG emissions is to authorise GHG emissions which do not assist in achieving a carbon budget.

    (b) In fact, the proponent's argument, if accepted, would mean that NDCs are an inappropriate consideration, but the proponent's argument elsewhere assumes that NDCs are an appropriate consideration. The proponent's argument reduces to the proposition that individual decision-makers should not take into account the contribution of their decision to an overall objective (e.g. a NDC) because that is a matter best left for policy-makers. To accept that proposition is to accept that the IPC has no role at all in forming a view as to whether authorising large-scale coal mines is consistent with the public interest in minimising the impacts of climate change.

(c) "Carbon budget" analysis is not inconsistent with the Paris Agreement. Carbon budget analysis can help achieve the objectives of the Paris Agreement. And, as the proponent concedes, the Paris Agreement does *not* "prescribe the measures by which a particular country is to implement actions to facilitate the achievement of its NDC": see [60(b)(ii)]. It is difficult to see how the Paris Agreement can be inconsistent with the use of a particular measure (e.g. carbon budget analysis) to help ensure that goals of "[h]olding 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" are met if the Paris Agreement does not circumscribe the measures countries can use.

(d) The proponent does not explain beyond assertion how the carbon budget approach leads to "double counting" of emissions: see [60(b)(iii)].

(e) The proponent refers to unspecified "technological advancements": [60(c)]. The precautionary principle does not favour giving weight to hopes of non-specific and unidentified "technological advancements".

(f) Contrary to [61], the Court in *Rocky Hill* accepted the carbon budget approach: *Rocky Hill* at [527], [550]-[556]. The proponent has taken Preston CJ's comments at [552]-[553] out of context. Importantly, at [554]-[555], Preston CJ stated:

> In absolute terms, a particular fossil fuel development may itself be a sufficiently large source of GHG emissions that refusal of the development could be seen to make a meaningful contribution to remaining within the carbon budget and achieving the long term temperature goal. In short, refusing larger fossil fuel developments prevents greater increases in GHG emissions than refusing smaller fossil fuel developments.
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> In relative terms, similar size fossil fuel developments, with similar GHG emissions, may have different environmental, social and economic impacts. Other things being equal, 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.

LTG's submission is that the social, environmental and economic impacts of the Project are sufficiently adverse in both absolute and relative terms such that refusal of development consent is warranted.

18. At [62]-[93], submissions are made about national laws:

(a) That the Paris Agreement and Australia's NDC are not "part of the laws of Australia" does not mean that they are not permissible considerations and to the extent that the contrary is implied at [62] that implication is unsound.

(b) The proponent points to no specific statement in Australia's Long Term Emissions Reduction Plan to the effect that Australia's NDC can be achieved with the approval of new coal mines. Not only that, and perhaps more importantly, the proponent points to nothing in national policy which supports a proposition that climate change impacts can be acceptably minimised or avoided *even if* new coal mines are approved – and that is the real issue for the IPC.

(c) The proponent addresses the Safeguard Mechanism over a number of paragraphs. Missing from the proponent's submissions is any acknowledgement that the Safeguard Mechanism applies only to scope 1 emissions: note http://www.cleanenergyregulator.gov.au/NGER/The-safeguard-mechanism/Coverage. In other words, the mechanism does not speak to the real vice in the Project: its enormous and unacceptable scope 3 emissions.

(d) Lock the Gate has already addressed the NGER Act in its previous submission. However, it may be noted that the proponent accepts that the Act does not regulate scope 3 emissions: [88].

19. At [94]-[99], the proponent addresses State policies. It may be noted that nothing in those policies contains a policy statement to the effect that approval for coal mining should be given where the coal mining has unacceptable climate change impacts.

20. The matters addressed at [100]-[139], concerning global demand for coal and the "quality" of the Project coal, have been addressed by Lock the Gate in other submissions: Tim Buckley's submission dated 24 February 2022 at pp. 34-39 (Appendix 2: IEEFA Report).

21. [140]-[156] address the decision in ***Sharma*** *v Minister for the Environment* [2021] FCA 560. Lock the Gate submits that the duty of care found in *Sharma* similarly applies as a mandatory relevant consideration to the IPC's exercise of consent authority power under the EP&A Act. Lock the Gate submits that the application of the *Sharma* duty of care to the Project is a significant factor militating against approval of the Project. That the Commonwealth Minister for the Environment has approved four coal projects since *Sharma* says nothing as to whether those approvals were valid and/or involved a breach of a duty of care. That could only ever be established in legal proceedings, and the proponent accepts that there have not been legal proceedings: [146]. The proponent suggests that conditions of consent will mitigate climate change impacts: at [156]. Yet it identifies no conditions of consent addressing scope 3 emissions, and in its submissions to the IPC seeks to have the IPC abandon that topic altogether.