

13 February 2019

The Chair
Independent Planning Commission of New South Wales
Level 3, 201 Elizabeth Street
Sydney, NSW. 2000

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

Dear Chair

**Bylong Coal Project (SSD 6367)
NSW Climate Change Policy Framework**

1. We act for the Lock the Gate Alliance in relation to this matter.
2. We refer to our 7 December 2018 letter to you. We have received further instructions to raise another matter directly with the IPC in the hope that it can be properly addressed before any determination is made in relation to the Bylong Coal Project ("Project"). Our client otherwise reserves its rights in relation to this matter.
3. As you will be aware, on 8 February 2019 the Land and Environment Court of New South Wales delivered its decision in *Gloucester Resources Limited v Minister for Planning* [2019] LEC 7. The decision clarifies key elements of a consent authority's task when considering a development application, particularly as relates to the assessment of impacts from greenhouse gas (GHG) emissions. Where a particular project will result in GHG emissions, *Gloucester Resources* clarifies the manner in which the consent authority must determine the acceptability of those emissions and the likely impacts on the climate system, the environment and people.¹
4. We are instructed to draw the following matters to the IPC's attention, in light of the *Gloucester Resources* decision:
 - 4.1 It is common ground that the IPC must consider any applicable NSW or national policies, programs or guidelines concerning greenhouse gas emissions in determining the development application for the Project.²

¹ At [532].

² Clause 14(2) of the *State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) 2009* and section 4.15(1)(a) *Environmental Planning and Assessment Act*.

Letter - CB to IPC - 13 February 2019 (00609067)

- 4.2 The *NSW Climate Change Policy Framework* (“CCPF”) was published on 1 October 2016 by the Office of Environment and Heritage.
- 4.3 The CCPF specifically endorses the Paris Agreement on climate change, and commits that NSW will “take action that is consistent with the level of effort to achieve Australia’s commitments to the Paris Agreement.” The CCPF was considered by the Court in *Gloucester Resources*, including at [526]-[527]

The approval of the Project (which will be a new source of GHG emissions) is also likely to run counter to the actions that are required to achieve peaking of global GHG emissions as soon as possible and to undertake rapid reductions thereafter in order to achieve net zero emissions (a balance between anthropogenic emissions by sources and removals by sinks) in the second half of this century. This is the globally agreed goal of the Paris Agreement (in Article 4(1)). The NSW government has endorsed the Paris Agreement and set itself the goal of achieving net zero emissions by 2050. It is true that the Paris Agreement, Australia’s NDC of reducing GHG emissions in Australia by 26 to 28% below 2005 levels by 2030 or NSW’s Climate Change Policy Framework do not prescribe the mechanisms by which these reductions in GHG emissions to achieve zero net emissions by 2050 are to occur. In particular, there is no proscription on approval of new sources of GHG emissions, such as new coal mines.

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)...

- 4.4 Accepted analysis indicates that achieving the 2 degree goal and the more stringent 1.5 degree goal will mean steep reductions in coal use worldwide, and that in the OECD, which includes Australia and South Korea, action consistent with these goals would see all unabated coal burning for electricity cease by 2030.³
- 4.5 It appears that the CCPF was not one of the policies specifically considered in the Planning Assessment Commission’s review or by Department of

³ Climate Analytics. November 2016. *Implications of the Paris Agreement for Coal Use in the Power Sector*.

Planning and Environment (“DPE”) in its Preliminary Assessment Report⁴ or in its Final Assessment Report.

- 4.6 This is notwithstanding the fact that there was a similar requirement to take into account all relevant / applicable NSW Government policies during those earlier phases of assessment and decision-making regarding the development application for the Project. For example:
- (a) The 9 January 2017 terms of reference for the PAC review required the PAC to undertake an assessment of the merits of the project as a whole “*having regard to all relevant NSW Government Policies*” and to “*recommend appropriate measures to avoid, minimise and/or manage significant impacts of the project.*” In our client’s view there can be no doubt that the CCPF is a relevant policy for the purposes of the TOR.
 - (b) The 4 October 2018 referral from DPE contains assurances that DPE’s merit assessment was completed “*in accordance with applicable NSW Government Policy, guidelines and statutory requirements*”. There is no mention of the CCPF in the Final Assessment Report. It appears that DPE took the view that the CCPF was not an applicable NSW Government policy and that therefore it was not required to be considered in the assessment of mining proposals.⁵ *Gloucester Resources* shows this view to be wrong.
5. Our client also notes the significantly greater GHG emissions estimated to be produced by the Project from the downstream burning of coal, as compared to the Rocky Hill project under consideration in the *Gloucester Resources* decision.⁶
6. In our client’s view it is incumbent upon the IPC to act now to remedy the clear deficiency in the assessment process undertaken to date noted in paragraph 4 above. Further information should be sought by the IPC to consider the GHG and

⁴ At page 41 of the report the issue of Scope 3 GHG emissions is noted but there is no mention of the NSW Government’s policy goals under the CCPF or an assessment of the Project’s impacts against the goals of the Paris Agreement.

⁵ As appears from the transcript of the IPC’s meeting with DPE officers on 29 October 2018 at page 29:

Clearly, mining – inherent in mining, both the extraction processing and ultimate use of the coal, be it in Australia or overseas – results in, you know, significant quantities of greenhouse emissions. We do a comparative analysis of those emissions compared to emissions at the state, national and international levels. There is a –there are climate change or greenhouse gas policies at both the Commonwealth and state levels, but those are broader matters, really, than the assessment of a particular project whilst we assess it in that. There’s a climate change framework that New South Wales government has published that aims to – for zero emissions by 2050. However, that is really more focused on government procurement and government initiatives, as opposed to projects per se.

Obviously, there’s international agreements, such as Paris and so forth, that – and the international treaties that the New – that the Australian government has signed up to, and, you know, the New South Wales government seeks to contribute to those matters, but it’s not – it’s something that is considered in the assessment of mining proposals, but it’s really a broader policy issue, both at the state and Commonwealth level – that we leave consideration of those aspects to those levels.

⁶ 202Mt over 25 years in the case of the Bylong project (per Appendix O, table 12.1 of the EIS), as compared to 37.8Mt over the projected life of the proposed Rocky Hill mine (at [515] of the judgment).

climate change impacts of the mine (particularly from Scope 3 emissions) and the acceptability of those impacts in light of the CCPF and the Paris Agreement.

7. After receiving further information, it would then be incumbent upon the IPC to:

7.1 consider whether "*the refusal of the project could be seen to make a meaningful contribution to remaining within the carbon budget and achieving the long term temperature goal*"⁷.

7.2 otherwise "*recommend appropriate measures to avoid, minimise and/or manage significant impacts of the project*" in light of the CCPF and the Paris Agreement goals.

Please confirm receipt of this letter.

We would appreciate your early response to the matters raised, prior to any determination in relation to the Project.

Yours faithfully,
CHALK & BEHRENDT



PP.
James Walkley
Director

⁷ Gloucester Resources at [554]-[555]