

15 February 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](mailto:ipcn@ipcn.nsw.gov.au)**

Dear Mr Kirkby

**Bylong Coal Project SSD 14\_6367 – Submission regarding recent decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7**

1. As you know, we act for the Bylong Valley Protection alliance (**BVPA**).
2. We refer to our client's submission dated 14 November 2018 in respect to the final determination meeting for the Bylong Coal Project (**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 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**attached**), which was handed down on 8 February 2019. In that case, Chief Justice Preston dismissed an appeal against the Rocky Hill Coal Mine's refusal and determined the mine's application by refusal.
4. Our client submits that this judgment requires close scrutiny by the IPC as a number of the circumstances of the Rocky Hill project and the Bylong Coal Project are similar. As such, our client submits that the Court's findings are particularly relevant to the IPC's consideration of the impacts of the Project. These are discussed below.
5. In relation to climate change impacts of the Rocky Hill Coal Mine project, the Court accepted Professor Will Steffen's expert opinion and found, that "the direct and indirect GHG emissions of the Rocky Hill Coal Project will contribute cumulatively to the global total GHG emissions".<sup>1</sup> Significantly, Professor Steffen's evidence was not contested by the Minister for Planning in the Rocky Hill case. In this regard, we note that Professor Steffen has provided the same evidence for the consideration of the IPC in relation to the Project. In addition, we note that Tim Buckley provided expert evidence in the Rocky Hill case on the economics of coal mining, which the Court found very persuasive. Like Professor Steffen, Mr Buckley has also provided

---

<sup>1</sup> [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [515].

similar evidence to the IPC in relation to the Project (we **attach** their Bylong Coal Project reports for your convenience).

6. Moreover, the Court found that there “is a causal link between the [Rocky Hill Coal] Project’s cumulative GHG emissions and climate change and its consequences.”<sup>2</sup> Therefore, the cumulative impact of the Rocky Hill Coal Project’s direct and indirect GHG emissions on global climate change were relevant considerations to be taken into account in the Court’s decision to refuse development consent for the project. Similarly, our client submits that the cumulative impact of the Project’s direct and indirect GHG emissions on global climate change is a relevant consideration to be taken into account by the IPC when assessing the Project.
7. In relation to the total quantity of emissions from the Rocky Hill Coal Project, the Air Quality and Health Risk Assessment for the amended Environmental Impact Statement estimated the Scope 1 and Scope 2 emissions to be about 1.8Mt CO<sub>2</sub>-e over the life of the mine and Scope 3 emissions to be at least 36Mt CO<sub>2</sub>-e.<sup>3</sup> Notably, the Rocky Hill proposal was for a coking coal, not a thermal coal, mine.<sup>4</sup> In contrast, the Project will generate approximately 2.2Mt CO<sub>2</sub>-e of Scope 1 emissions, 1.3Mt CO<sub>2</sub>-e of Scope 2 emissions, and 203Mt CO<sub>2</sub>-e of Scope 3 emissions over the life of the Project.<sup>5</sup> Further, the Project proposal is for a thermal coal mine. Accordingly, the Court’s findings in relation to climate change impacts in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 have even greater force as the emissions to be emitted by the Project are far greater (over 5 times) than the emissions from the Rocky Hill Coal Project. Moreover, the nature of the Project as thermal coal mine render the coal product even more substitutable than if the mine were purely a coking coal mine.<sup>6</sup>
8. Significantly, in the Rocky Hill decision, the Court did not accept the arguments put forward by the proponent that the Rocky Hill Coal Project should be one of the fossil fuel reserves that should be allowed to be exploited.
9. In relation to climate change impacts of the Rocky Hill Coal Mine project, the Court found, amongst other things:

*[487] Although GRL submitted that Scope 3 emissions should not be considered in determining GRL’s application for consent for the Rocky Hill Coal Project, I find they are relevant to be considered.*

*[488] At the most basic level, the consent authority must consider and determine the particular development application that has been made to carry out the State significant development of the proposed coal mine (s 4.38(1) of the EPA Act). For State significant development such as the Rocky Hill Coal Project, the development application is required to be accompanied by an environmental impact statement (s 4.12(1) and s 4.39(1)(a) of the EPA Act and cl 50(1)(a) and Sch 1, cl 2(1)(e) of the*

---

<sup>2</sup> [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [525].

<sup>3</sup> [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [486].

<sup>4</sup> [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [546].

<sup>5</sup> Environmental Impact Statement, p. 187.

<sup>6</sup> [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [546]-[549].

EPA Regulation). The environmental impact statement must address the environmental assessment requirements of the Secretary as well as the content requirements in Sch 1, cl 7 of the EPA Regulation, including the likely impact on the environment of the development and the reasons justifying the carrying out of the development, having regard to biophysical, economic and social considerations, including the principles of ecologically sustainable development (ESD). The principles of ESD are defined to be the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms (cl 7(4) of Sch 1 of the EPA Regulation). As I note below, consideration of the principles of ESD can involve consideration of climate change.

[529] The first reason GRL gave was that the increase in GHG emissions associated with the Project would not necessarily cause the carbon budget to be exceeded, because, as Dr Fisher had argued, reductions in GHG emissions by other sources (such as in the electricity generation and transport sectors) or increases in removals of GHGs by sinks (in the oceans or terrestrial vegetation or soils) could balance the increase in GHG emissions associated with the Project.

[530] I do not accept this reason. It is speculative and hypothetical...

[531] The second reason given by GRL was based on Dr Fisher's argument that "the size of the global abatement task calls for making emissions reductions where they count most and generate the least economic and social harm." (Fisher report [13]). Dr Fisher considered that refusing approval to individual coal mines, such as the Rocky Hill Coal Project, would not achieve this abatement at least cost.

[532] I do not accept this second reason. A consent authority, in determining an application for consent for a coal mine, is not formulating policy as to how best to make emissions reductions to achieve the global abatement task. The consent authority's task is to determine the particular development application and determine whether to grant or refuse consent to the particular development the subject of that development application. Where the development will result in GHG emissions, the consent authority must determine the acceptability of those emissions and the likely impacts on the climate system, the environment and people. The consent authority cannot avoid this task by speculating on how to achieve "meaningful emissions reductions from large sources where it is cost-effective and alternative technologies can be brought to bear" (Fisher Report, [13]). Such emissions reductions from other sources are unrelated to the development that is the subject of the development application that the consent authority is required to determine.

[534] The third reason GRL advanced for approving the Project was that the GHG emissions of the Project will occur regardless of whether the Project was approved or not, because of market substitution and carbon leakage...

[536] I reject this third reason. On carbon leakage, GRL has failed to substantiate, in the evidence before the Court, that this risk of carbon leakage will actually occur if approval for the Rocky Hill Coal Project were not to be granted...

[538] The market substitution argument is also flawed. There is no certainty that there will be market substitution by new coking coal mines in India or Indonesia or any other country supplying the coal that would have been produced by the Project...

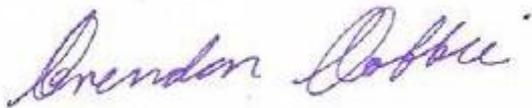
[546] The fourth reason GRL advanced for approving the Project is that the GHG emissions associated with the Project are justifiable. GRL contended that the Project will produce high quality coking coal, not thermal coal, which is needed for the main way of producing steel, by the BOF process; steel is critical to our society; and there are limited substitutes for coking coal in steel production.

*[547] I find that GRL overstates this argument. It may be true that currently most of the world's steel (around 74%) is produced using the BOF process, which depends on coking coal, and although technological innovations might reduce the proportion of steel produced using the BOF process, for the reasons given by Mr Buckley, there is still likely to be demand for coking coal for steel production during the life of the Project.*

*[548] The current and likely future demand for coking coal for use in steel production can be met, however, by other coking coal mines, both existing and approved, in Australia...*

10. As a result, the Court concluded that the Rocky Hill Coal Project's "poor environmental and social performance in relative terms" justified its refusal and that included the "GHG emissions of the [Rocky Hill Coal] Project and their likely contribution to adverse impacts on the climate system, environment and people".<sup>7</sup>
11. Please do not hesitate to contact the solicitor responsible for this matter, Nadja Zimmermann on ph: (02) 9262 6989 or email Nadja.zimmermann@edonsw.org.au.

Yours sincerely,  
**EDO NSW**



Brendan Dobbie  
Acting Principal Solicitor

Our Ref: 1522462

---

<sup>7</sup> [Gloucester Resources Limited v Minister for Planning](#) [2019] NSWLEC 7, [556].