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8 March 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**

Dear Mr Kirkby

**Bylong Coal Project SSD 14_6367 ("Project") – Response to letter from Hansen Bailey to the IPC**

1. As you know, we act for the Bylong Valley Protection Alliance.

2. We refer to the letter dated 4 March 2019 from Hansen Bailey, on behalf of the Project's proponent (**Letter**), to the Commissioners of the Independent Planning Commission (**Panel**). We also refer to our letter, sent on behalf of our client, to the Panel dated 15 February 2019 (**attached** for ease of reference).

3. We note that the closing date for written submissions to the Panel's public meeting for the Project was on 14 November 2019. Accordingly, the Letter, which our client notes appears to be an unprompted submission of further information relating to the assessment of the Project's greenhouse gas (**GHG**) emissions, was submitted out of time. In our client's view, if the Letter is to be taking into account by the Panel, the community should be afforded the right to respond to it, and respectfully submits that any such community responses should be considered by the Panel even though they are made after the deadline for written submissions.

4. Accordingly, we are instructed to provide the following submissions in response to the Letter. The submissions relate to the Panel's task in considering the Project's Scope 3 GHG emissions having regard to the Land and Environment Court's (**Court**) recent decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill**), which was the subject of our letter dated 15 February 2019.

**Cumulative GHG emissions should be attributable to the Project**

5. Part 5.1 of the Letter states that the environmental consequences of climate change "*are the result of GHG emissions on a global scale, and are not solely attributable to any particular activity*." The Letter then states that "*the environmental impacts of GHG emissions on a global scale should not be attributed to the Project*."

6. Our client submits that these statements are in direct contradiction to the Court's findings in the Rocky Hill decision. In fact, the Court held that climate change impacts can be attributed (at least indirectly) to particular coal mining projects, such as the Project, because there is a causal link between the cumulative GHG emissions of a coal mining project and climate change and its consequences.[1]

7. In the case of the Rocky Hill Coal Project, the total Scope 1, 2, and 3 emissions would have been approximately 37.8Mt and the Court held that:

> *'It matters not that this aggregate of the Project's GHG emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources...'*[2]

We note that, in contrast, the Project will generate approximately 206Mt in Scope 1, 2 and 3 emissions over the life of the Project.

**Carbon Budget and "double counting" argument**

8. Part 3 of the Letter states that the product coal from the Project will be used in the Republic of Korea and the Scope 3 GHG emissions generated by the use of that coal will be accounted for by the Republic of Korea under its Paris Agreement obligations, and not in Australia. Therefore, the Letter suggests that "double counting" could result from the Panel's consideration of the impacts of GHG emissions produced by the burning of product coal from the Project (Part 5.2).

9. The Letter refers to the Republic of Korea's 2030 target under its Paris Agreement Nationally Determined Contributions (**NDCs**). However, we note this is only a target. Significantly, there is no clear mechanism put forward in the Letter, by which the Republic of Korea might achieve this target. Accordingly, the submission that emissions produced by the burning of product coal will be accounted for by the Republic of Korea is entirely hypothetical.

10. In the Rocky Hill decision the Court rejected a similar argument. In that case the Court held that:

> *'[a] consent authority cannot rationally approve a development that is likely to have some identified environmental impact on the theoretical possibility that the environmental impact will be mitigated or offset by some unspecified and uncertain action at some unspecified and uncertain time in the future.'*[3]

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[1] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [525].
[2] Ibid [515].
[3] Ibid [530].

11. In the Rocky Hill decision, the Court found that no evidence had been provided about the specific actions that the proponent of the Rocky Hill Coal Project proposed could be taken to mitigate or offset the environmental impact of the development in regard to Scope 3 GHG emissions. The Court also provided examples of how a proponent could, in a climate change context, commit to reducing GHG emissions of a development in a concrete way.[4] In the case of the Project, as for the Rocky Hill Coal Project, no concrete evidence has been provided as to how GHG emissions from burning the coal produced by the Project will be reduced, offset or mitigated.

12. In the Rocky Hill decision, the Court also pointed out that the role of a consent authority is not to speculate as to how to achieve emissions reductions from other sources that are not the subject of the development application. Rather, the consent authority's task is to determine whether to grant consent to a particular development application, and where the development application will result in GHG emissions to determine the acceptability of those emissions.[5] Our client respectfully submits that this is the task that is currently before the Panel.

13. Finally, as held in the Rocky Hill decision, our client submits that the exploitation of new fossil fuel reserves, which will increase GHG emissions, cannot assist in meeting the goals of the Paris Agreement, either in Australia or the Republic of Korea.[6] Instead, our client submits, as was held in the Rocky Hill decision, that in order to respect the Global Carbon Budget, and in order to limit global warming to non-dangerous levels, "*most fossil fuel reserves will need to remain in the ground unburned*."'[7]

**Market substitution argument**

14. Part 6.2 of the Letter states that if coal from the Project is not supplied to KEPCO, its power stations will continue to operate on "*lower quality*" substituted coal sourced from elsewhere, which will lead to "*poorer environmental outcomes*". The Letter provides no evidence to support this claim.

15. In the Rocky Hill decision the Court rejected a similar argument that, if the Rocky Hill Coal Project did not proceed, equivalent GHG emissions would still occur due to market substitution and carbon leakage. This argument was rejected because, amongst other things, it was not substantiated by evidence.[8] Further, the Court accepted evidence by Professor Will Steffen and Tim Buckley that countries around the world are taking action to reduce GHG emissions. Therefore, the Court found the market substitution argument to be flawed. In doing so, the Court held that:

[4] Ibid [530].
[5] Ibid [532].
[6] Ibid [527].
[7] Ibid [550].
[8] Ibid [536].

*'If approval for the Project in the developed country of Australia were to be refused, on grounds including the adverse effects of the mine's GHG emissions on climate change, there is no inevitability that developing countries such as India or Indonesia will instead approve a new coking coal mine instead of the Project, rather than following Australia's lead to refuse a new coal mine. Developed countries such as Australia have a responsibility, including under the Climate Change Convention, the Kyoto Protocol and the Paris Agreement, to take the lead in taking mitigation measures to reduce GHG emissions.*[9]

16. In the present case, no convincing evidence has been provided to substantiate the claim that the Republic of Korea will rely on substituted coal to meet its energy demand.

For the above reasons, our clients submits that the information relating to the assessment of the Project's Scope 3 GHG emissions in the Letter is not in line with the current state of the law as established by the Rocky Hill decision, and should be given little weight by the Panel.

Please do not hesitate to contact the writer on (02) 9262 6989 to discuss this advice or any matters arising from this advice

Yours sincerely,
**EDO NSW**

Brendan Dobbie
Acting Principal Solicitor

Enclosure: 190215 Letter to Mr Kirkby

Our Ref: 1522462

[9] Ibid [539].