Court of Appeal
Supreme Court

New South Wales

Case Name:	Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd
Medium Neutral Citation:	[2025] NSWCA 163
Hearing Date(s):	26 May 2025
Date of Orders:	24 July 2025
Decision Date:	24 July 2025
Before:	Ward P at [1]; Adamson JA at [129]; Price AJA at [245]
Decision:	1. Set aside Order 1 made by the primary judge on 19 August 2024. 2. Subject to order 3, declare that the development consent is invalid for failure to consider a mandatory consideration. 3. Remit the matter to the Land and Environment Court for consideration as to whether pursuant to s 25B or s 25C orders can or should be made which, if complied with, will validate the development consent. 4. Order that the first respondent pay the appellant's costs of the appeal. 5. Order that the costs of the proceedings at first instance be determined on the remittal of the matter to the Land and Environment Court.
Catchwords:	ENVIRONMENT AND PLANNING – development applications – judicial review – whether development consent validly granted – mandatory considerations under s 4.15 of the Environmental Planning and Assessment Act 1979 (NSW) and cl 2.20 of the State Environmental Planning Policy (Resources and Energy) 2021 (NSW) – whether Independent Planning Commission failed to consider whether to impose

conditions to minimise Scope 3 greenhouse gas emissions resulting from the development – whether Independent Planning Commission failed to consider the likely impact on the locality of Scope 3 greenhouse gas emissions resulting from the development

JUDGMENTS AND ORDERS – where judicial review proceedings dismissed in Land and Environment Court and orders under Pt 3 Div 3 of the Land and Environment Court Act 1979 (NSW) not there considered – whether to remit matter subject of appeal brought pursuant to s 58 of the Act – whether to make orders under Pt 3 Div 3 of the Act

COSTS – where matter remitted to Land and Environment Court – order sought as to costs of first instance proceedings

Legislation Cited:

Building and Construction Industry Security of Payment Act 1999 (NSW)
Environmental Planning and Assessment Act 1979 (NSW), Pt 4 Div 2.6, Pt 4 Div 4.7, ss 1.3, 1.4, 2.21, 2.22, 2.23, 2.9, 4.15, 4.36, 4.38, 4.40, 4.59, Sch 1 Pt 1, cl 20, Sch 2 Pt 2, cl 6
Land and Environment Court Act 1979 (NSW), Pt 3 Div 3, ss 4, 20, 25B, 25C, 25D, 25E, 58
State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) 2017 (NSW), cl 14
State Environmental Planning Policy (Resources and Energy) 2021 (NSW), cl 2.20
Supreme Court Act 1970 (NSW), ss 48, 69

Cases Cited:

Bell v Minister for Urban Affairs and Planning (1997) 95 LGERA 86
Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd [2024] NSWCA 205; (2024) 260 LGERA 297
Bushfire Survivors for Climate Action Inc v Narrabri Coal Operations Pty Ltd [2023] NSWLEC 69
Cameron v Woollahra Municipal Council (2024) 115 NSWLR 239; [2024] NSWCA 216
Ceerose Pty Ltd v A-Civil Aust Pty Ltd (2023) 112 NSWLR 225; [2023] NSWCA 215
DBWG v Minister for Immigration, Citizenship, Migrant

Services and Multicultural Affairs (2024) 301 FCR 344; [2024] FCAFC 3
Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd [2024] NSWLEC 86
Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7
GPT RE Ltd v Belmorgan Property Development Pty Ltd (2008) 72 NSWLR 647; [2008] NSWCA 256
Hoxton Park Residents Action Group Inc v Liverpool City Council (2011) 81 NSWLR 638; [2011] NSWCA 349
KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc [2021] NSWCA 216; (2021) 250 LGERA 39
LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2024) 280 CLR 321; [2024] HCA 12
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40
Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594; [2011] HCA 1
Minister for Planning v Walker (2008) 161 LGERA 423; [2008] NSWCA 224
Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd [2021] NSWLEC 110; (2021) 252 LGERA 221
New South Wales Land and Housing Corporation v Orr (2019) 100 NSWLR 578; [2019] NSWCA 231
Plaintiff MI/2021 v Minister for Home Affairs (2022) 275 CLR 582; [2022] HCA 17
Rossi v Living Choice Australia Ltd [2015] NSWCA 244
Rossi v Living Choice Australia Ltd (No 2) [2015] NSWCA 301
The Queen v Hunt; Ex parte Sean Investments Pty Ltd (1979) 180 CLR 322; [1979] HCA 32
Zhang v Canterbury City Council (2001) 51 NSWLR 589; [2001] NSWCA 167

Category: Principal judgment

Parties: Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc (Appellant)
MACH Energy Australia Pty Ltd (First Respondent)

	Independent Planning Commission of NSW (Second Respondent)
Representation:	Counsel: N Sharp SC with M Thompson (Appellant) J Emmett SC with D Hume (First Respondent) Solicitors: Johnson Legal (Appellant) Ashurst Australia (First Respondent) Submitting Appearance (Second Respondent)
File Number(s):	2024/00364143
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Land and Environment Court
Jurisdiction:	Class 4
Citation:	[2024] NSWLEC 86
Date of Decision:	19 August 2024
Before:	Robson J
File Number(s):	2022/00367759

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant (Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc) challenges the dismissal by Robson J in the Land and Environment Court (LEC) of its challenge to the decision by the Independent Planning Commission of NSW (the Commission) granting consent in favour of the first

respondent (MACH Energy Australia Pty Ltd) for a state significant development (the IPC Decision) approving the optimisation of the Mount Pleasant Coal Mine (Project) in the Hunter Valley, extending the existing development consent in respect of that Project for a period of 22 years.

The Commission published its statement of reasons approving the development application on 6 September 2022. In those reasons, the Commission: adopted the NSW Department of Planning and Resources' May 2022 Assessment Report; referred to the receipt of submissions that raised greenhouse gas (GHG) emissions and the impact the increase in coal mining would have on climate change; and said that "[s]ubmissions noted the cumulative impact that GHG emissions would have and noted that while Scope 3 emissions are not counted towards NSW's emissions under the Paris Agreement, the impact is still felt globally". The Commission referred to Australia's obligations under the Paris Agreement, noting that the Project's Scope 3 emissions would be "accounted for" in the consumer countries' GHG emissions. The Commission stated that it had considered the matters specified in cl 2.20 of the State Environmental Planning Policy (Resources and Energy) 2021 (Resources SEPP) and the mandatory considerations under s 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW) (*EPA Act*), including the likely impacts of the development. The Commission determined that the Project should be approved subject to stringent conditions of consent, none of which expressly addressed Scope 3 emissions.

The appellant commenced judicial review proceedings in the LEC, contending that the Commission had failed to act in accordance with the structured exercise of discretion provided for by s 4.15(1) of the *EPA Act* by failing to take into account certain mandatory considerations. The primary judge dismissed the proceedings, finding that the grounds of review had not been made out.

Pursuant to s 58(1) of the *Land and Environment Court Act 1979* (NSW) (*LEC Act*), the appellant appealed to this Court challenging the decision of the primary judge and seeking an order for its costs of the proceedings in the LEC. In summary, the two grounds of appeal were that the primary judge erred in concluding that the Commission did not fail to consider the following mandatory

considerations: first (ground 1(a)), as to whether conditions could be imposed to minimise Scope 3 emissions (as required by cl 2.20 of the Resources SEPP, by operation of s 4.15(1)(a)(i) of the *EPA Act*); and, second (ground 1(b)), as to the likely environmental impacts of the Project on the natural and built environment in the locality (as required by s 4.15(1)(b) of the *EPA Act*).

The Court held (Ward P, Price AJA agreeing, Adamson JA agreeing as to orders but writing separately), **allowing the appeal and remitting the matter to the LEC for consideration under Div 3 of Pt 3 of the *LEC Act***:

As to Ground 1(a):

(1) The fact that the Commission accepted that Scope 3 emissions were "regulated" as well as accounted for elsewhere is a sufficient indication that the Commission considered there to be no need to impose minimisation conditions in relation to the Scope 3 emissions. That there was no reference to the raft of potential conditions for minimising the effects of Scope 3 emissions of the kind that the appellant now suggests could have been considered is readily understandable since no party suggested any such conditions: [81]-[85] (Ward P), [245] (Price AJA).

> *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225; [2023] NSWCA 215 applied. *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1; *DBWG v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 301 FCR 344; [2024] FCAFC 3 cited.

(2) Clause 2.20 of the Resources SEPP required the Commission to 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 that greenhouse gas emissions are minimised to the greatest extent possible. While the Commission did not expressly consider what conditions it could have imposed on Scope 3 emissions, it addressed the controls which applied to Scope 3 emissions. The effect of the Commission's consideration of how Scope 3 emissions would be controlled under international law regimes is that it cannot be inferred that the Commission failed to consider whether conditions ought be imposed on Scope 3 emissions: [224], [229] (Adamson JA), [245] (Price AJA).

LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2024) 280 CLR 321; [2024] HCA 12 considered. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40;*GPT RE Ltd v Belmorgan Property Development Pty Ltd* (2008) 72 NSWLR 647; [2008] NSWCA 256; *The Queen v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322; [1979] HCA 32; *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225; [2023] NSWCA 215 cited.

(3) All that is required by cl 2.20 of the Resources SEPP is that the Commission consider whether to impose conditions on Scope 3 emissions and, if so, what conditions ought be imposed. What weight the Commission places on any given factor is a matter for the Commission and not for this Court: [232] (Adamson JA), [245] (Price AJA).

Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594; [2011] HCA 1; *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 cited.

As to Ground 1(b):

(4) The Commission was required to take into account the "likely impacts of the Project, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality". This required the Commission to consider the causal connection between the Project and its impacts on the environment in the locality of the Project. There is nothing in the Commission's reasons to indicate that the Commission, having accepted that the Scope 3 emissions would contribute to global climate change, went on to consider the impact of climate change on the locality. While the absence of reference to a matter will not necessarily mean that the matter was not considered, the combination of the statement that the effects of climate change will still be "felt globally" and the absence of reference to the impact of this on the locality specifically is a powerful indicator that the Commission did not consider the impact of climate change on the locality: [106]-[110] (Ward P), [245] (Price AJA).

Ceerose Pty Ltd v A-Civil Aust Pty Ltd (2023) 112 NSWLR 225; [2023] NSWCA 215 applied. *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Bushfire Survivors for Climate Action Inc v Narrabri Coal Operations Pty Ltd* [2023] NSWLEC 69 considered.

(5) The fact that the impacts of climate change may have been "uncontroversial" or not in dispute before the Commission does not mean that the Commission was not required to consider those impacts nor that it can be

inferred that the Commission did so. The Commission failed to consider a mandatory consideration in this regard: [106], [108] (Ward P), [245] (Price AJA).

(6) The evident legislative intention of the relevant provisions is that a planning authority such as the Commission is obliged to take into account the likely environmental impact of the development in the locality and the views of the community in deciding whether to grant or refuse development consent and to explain in its reasons how those views and that likely impact have been taken into account. The Commission's obligation to consider the likely impacts of the development on the natural and built environment in the locality of the mine, as required by s 4.15(1)(b) of the *EPA Act*, required it to address the potentially adverse effects of climate change in the locality. This obligation could not be discharged by general references to the effects of global warming on the planet generally. The Commission failed to comply with s 4.15(1)(b), [235], [236] (Adamson JA), [245] (Price AJA).

As to appropriate relief and costs:

(7) It is not impossible that the primary judge could make conditions pursuant to Div 3 Pt 3 of the *LEC Act* which, if satisfied, would validate the consent. Depending on how a condition of that kind were to be framed it may well be that compliance with the specified terms will (as opposed to may) validate the consent. It is not appropriate that this Court presuppose what may occur when the matter is remitted. The appellant should be bound by the forensic course it took in not opposing the deferral of consideration of the Div 3 Pt 3 issue until after determination of the grounds of review. The matter should be remitted to the LEC for consideration of the issue left undetermined: [119]-[125] (Ward P), [245] (Price AJA).

> *Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd* [2024] NSWCA 205; (2024) 260 LGERA 297; *GPT Re Limited v Belmorgan Property Development Pty Limited* [2008] NSWCA 256; *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349 considered. *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244; *Rossi v Living Choice Australia Ltd (No 2)* [2015] NSWCA 301 cited.

(8) In light of how the hearing was conducted in the LEC, this Court is obliged to remit the matter to the Court below for consideration of whether to make an

order under Div 3 Pt 3 of the *LEC Act*: [239]-[243] (Adamson JA), [245] (Price AJA).

(9) Given that the matter will be remitted to the LEC for consideration of the Div 3 Pt 3 issues, it is appropriate that any debate as to the incidence of costs of the first instance proceedings take place before the LEC. Costs of the appeal should follow the event: [128] (Ward P), [245] (Price AJA).

JUDGMENT

1 **WARD P**: In this matter, the appellant (Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc) challenges the dismissal by Robson J in the Land and Environment Court (*Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2024] NSWLEC 86, the primary judgment) of its application for judicial review of a decision made by the second respondent (the Independent Planning Commission of NSW) on 6 September 2022.

2 The impugned decision (the IPC Decision) was for the grant by the Commission of consent in favour of the first respondent (MACH Energy Australia Pty Ltd) for a state significant development (SSD 10418), approving the optimisation of the Mount Pleasant Coal Mine (Project) in the Hunter Valley and thus extending the existing development consent in respect of that Project for a period of 22 years.

3 The appeal to this Court is pursuant to s 58(1) of the *Land and Environment Court Act 1979* (NSW) (*LEC Act*) and does not extend to a merits review of the IPC Decision. Hence the caution expressed in *Minister for Planning v Walker* (2008) 161 LGERA 423; [2008] NSWCA 224 (*Walker*) at [35] that a challenge based on a failure to consider (in the present case, mandatory considerations) "should not be turned into an assessment of the adequacy of the consideration accorded in a particular case" and such challenges should not be framed in a way that encourages what was there referred to as a "slide into impermissible merit review". The appellant here disavows any attempt at a merits review (although the tenor of some of the appellant's submissions (such as to the catastrophic and existential impacts of climate change and criticism of the understatement by the first respondent or others of those impacts) might well

suggest otherwise (see, for example, the opening paragraph of the submissions in chief)). Rather, the appellant maintains that the focus of its appeal is on the process by which the IPC Decision was made. In reply submissions, the appellant insists that the appeal is not a challenge to the "adequacy" of the Commission's consideration of a mandatory consideration (rather, the appeal is based on the proposition that the Commission did not consider at all whether it should impose measures to reduce Scope 3 emissions and did not consider at all the likely impacts on the environment of climate change on the local community and NSW); and that this is not an appeal about adequacy of reasons or requiring a finding that not sufficiently comprehensive reasons were given (rather, the appellant says that it points to features of the reasons, in a particular statutory context and in view of the material before the Commission, to prove that certain mandatory considerations were not considered).

4 In that regard it is also relevant to note the further observations in *Walker* at [35] that "[t]he relevant considerations ground is concerned essentially with whether the decision maker has properly applied the law. It is not a ground that is essentially concerned with the process of making the particular findings of facts upon which the decision maker acts" and that, where a failure to take into account a mandatory consideration is concerned, "the statute must expressly or impliedly oblige the decision maker to enquire and consider the subject matter at the level of particularity involved in the appellant's submission".

5 In the present case, what the appellant contends is that the Commission failed to act in accordance with the structured exercise of discretion provided for by s 4.15(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (*EPA Act*) in two respects: first, by failing to consider whether conditions could be imposed to minimise Scope 3 emissions (those being indirect emissions that are the consequence of the Project but arising from sources not owned or controlled by that facility, such as those from the extraction and production of purchased materials and the transportation of purchased fuels) and, second, by failing to consider the likely environmental impacts of the Project on the natural and built environment in the locality.

Background

6 The background to the present dispute is set out at [6]-[15] of the primary judgment, as is the applicable legislative framework, and will only here be briefly summarised.

7 As adverted to above, the Project (a state significant development under s 4.36 of the *EPA Act*, being a development for the purpose of coal mining) was the subject of development consent expiring in 2026. The first respondent lodged a development application for the optimisation of that consent to extend the operation of the open cut coal mine to 2048. That development application was accompanied by an Environmental Impact Statement (EIS), as required by s 4.12(8) of the *EPA Act*, under cover of a letter dated 22 January 2021.

8 The EIS addressed greenhouse gas (GHG) emissions in section 7.21, including sub-sections dealing with: a description of relevant GHG policies (section 7.21.1) and GHG emission scopes (section 7.21.2); a quantitative assessment of potential direct and indirect GHG emissions of the Project and comparison of Project emissions to Australian and NSW GHG emissions (section 7.21.3); a summary of mitigation and abatement measures (section 7.21.4); a summary of potential impacts of climate change on the Project (section 7.21.5); and a summary of adaptive management measures (section 7.21.6).

9 Appendix S to the EIS assessed the potential GHG emissions and climate change impacts of the Project and potential impacts of climate change on the Project (see sections 4 and 5 of Appendix S). Relevantly, section 5 addressed assessment of potential impacts of climate change under separate headings for climate change projections globally, for Australia and for New South Wales (and, under the last, with specific reference to the Hunter Region, the locality of the Project); and addressed potential impacts both of the Project and on the Project. Pausing here, criticism is made by the appellant of statements contained in the EIS that are described as “pretty vanilla” but, as noted above, the issue is not as to the adequacy or accuracy of statements in the EIS or the acceptance or otherwise by the Commission of the conclusions there expressed. What the appellant is required to show is that the Commission

failed to consider what were mandatory considerations (not whether its reasons were adequate or its conclusions were correct).

10 At section 5.4.2 of Appendix S, it was noted that the Project's Scope 1 and 2 emissions would be significantly less than the Scope 3 emissions produced by customers using Project produced coal. (The appellant more than once emphasised on the appeal that the estimated Scope 3 emissions comprised 98% of the Project emissions.) The environmental impacts identified as associated with climate change included more prevalent bushfire activity, change to a warmer and drier climate, changes to rainfall patterns, runoff patterns and river flow, threats to biodiversity, changes to temperature and rainfall affecting the distribution and abundance of species.

11 Appendix O to the EIS contained an Economic Assessment of the potential costs and benefits of the Project, including a local effects analysis of the net benefits that the Project would deliver to the local region.

12 The NSW Department of Planning and Environment (Department) publicly exhibited the EIS from 3 February 2021 until 17 March 2021, in response to which the Department received a large number of submissions from the public on the Project.

13 On 9 September 2021, the then Minister for Planning and Public Spaces issued a request to the Commission for it to conduct a public hearing into the Project prior to determining the development application and to complete the public hearing and make its determination within twelve weeks of receiving the Department's assessment report in respect of the Project (unless the Planning Secretary agreed otherwise).

14 On 31 May 2022, the NSW Department of Planning and Resources forwarded its Assessment Report (DAR) to the Commission (it being stamped as received by the Commission on 1 June 2022). The Department concluded that, on balance, the benefits of the Project outweighed its costs. In the course of the DAR, the Department acknowledged a number of times community concerns as to GHG emissions and costs associated with climate change. The Department identified GHG emissions as one of the "key assessment issues". The Department said that it had "carefully considered the additional emissions

over the life of the mine, including post mining, in the context of international, Commonwealth and State policy settings". (I note that the Department wrongly referred to the State Environmental Planning Policy (Resources and Energy) 2021 (NSW) (Resources SEPP) as the State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) 2017 (NSW) (Mining SEPP) but the appellant accepts that nothing turns on this – see AT 24.45-49).

15 The Department noted that the majority (98%) of the emissions generated by the Project would comprise Scope 3 emissions arising from the downstream consumption of coal by end users and, when considering the GHG emissions, noted that the Scope 3 emissions represented a very small proportion (approximately 0.06%) of yearly global emissions (see at [198]).

16 The Department noted (at [200]) that the Climate and Atmospheric Science Branch within the EES (the Environment, Energy and Science group within the Department) had recommended that the first respondent provide a more detailed consideration of Scope 1 and Scope 2 GHG mitigation measures and referred to the first respondent's response thereto. At [208], the Department emphasised that Scope 1 and Scope 2 emissions associated with the Project had been "accounted for" in the NSW GHG's emissions projections in the NSW Government's Net Zero Plan. At [209], the Department went on to say that on balance it considered that "the residual GHG impacts of the project" were acceptable "particularly as the project represents a continuation of existing mining activities, and would make use of considerable existing infrastructure". Pausing here, while the appellant says that only proposed conditions for Scope 1 and Scope 2 emissions were here considered, the first respondent submits that there is no reason to read [208] and [209] as ignoring or excluding consideration of Scope 3 emissions.

17 In section 7 of the DAR (headed "Evaluation") it was again noted that the majority of GHG emissions generated by the Project would be Scope 3 emissions arising from downstream consumption by end users ([332]). The conditions recommended by the Department (see [338]) do not in terms address Scope 3 emissions.

18 In Appendix G to the DAR, headed Statutory Considerations, the Department noted that it had recommended a number of conditions "aimed at ensuring that the Project is undertaken in an environmentally responsible manner, including but not limited to, conditions in relation to water resources, threatened species and biodiversity and greenhouse gas emissions". There were no conditions recommended by the Department in relation to Scope 3 emissions (from which the appellant infers that the Department did not consider whether such conditions should be imposed).

19 In accordance with a direction from the Minister, the Commission held public hearings on 7-8 July 2022 in relation to the proposed extension of the development consent. Professor Penny Sackett, a climate change expert briefed by the appellant, gave oral evidence on 8 July 2022 on the likely impacts on the environment of climate change.

20 The appellant provided written submissions to the Commission on 20 July 2022, together with expert reports of a number of eminent scientists and researchers including Professor Sackett. In addition, the appellant filed (as Attachment J) a collection of 22 recent publications of leading national and international research bodies regarding greenhouse gas emissions and the predicted impacts of climate change, the relevance of which was not disputed. (The appellant provided to the primary judge a detailed summary of the climate change evidence before the Commission (MFI 4).)

IPC Decision

21 The Commission (which was the consent authority by reason of the number of unique public submissions that had been made by way of objection – see IPC Decision at [3]), issued its statement of reasons on 6 September 2022. At [35], under the heading "Mandatory Considerations", the Commission set out in a table (Table 1) a list of mandatory considerations (having referred to s 4.15(1) of the *EPA Act*, and its comments in relation to each). As to the relevant environmental planning instruments (EPIs), the Commission identified, among others, the Resources SEPP, and recorded that it agreed with the Department's assessment of EPIs set out in Appendix G.3 of the DAR; and said that it therefore adopted the Department's assessment (i.e., of the relevant

EPIs). As to the likely impacts of the development, the Commission stated that these had been considered in section 5 of the reasons.

22 In section 4, headed “Community Participation & Public Submissions”, the Commission recorded the inspections conducted at the site on 23 June 2022 and 12 July 2022, the public hearing on 7/8 July 2022 and the public submissions that had been received. In sub-section 4.3.3, the Commission identified the key issues raised, the first of which was GHG emissions and climate change. At [70], the Commission referred to the receipt of submissions that raised GHG emissions and the impact the increase in coal mining would have on climate change and said that “[s]ubmissions noted the cumulative impact that GHG emissions would have and noted that while Scope 3 emissions are not counted towards NSW’s emissions under the Paris Agreement, the impact is still felt globally”. The appellant complains that this does not go far enough, noting that it does not refer to the likely impacts of climate change on the locality. That said, it must be remembered that at this point of the reasons the Commission is simply identifying the import of the submissions that had been received.

23 Section 5 was headed “Key issues”. GHG emissions were considered at sub-section 5.3 ([125]-[161]). At [126]-[127], the Commission referred to Australia’s obligations under the Paris Agreement, noting at [127] that the Project’s Scope 3 emissions would be “accounted for” in the consumer countries’ GHG emissions; at [128]-[130], the Commission referred to national policies (the National Greenhouse and Energy Reporting Scheme, the Emissions Reduction Plan and the commitment to a 43% reduction in GHG emissions by 2030); and at [131]-[138], the Commission referred to State policies (including various NSW government targets, the NSW Climate Change Policy Framework, and the Net Zero Plan Stage 1: 2020-2030).

24 At [137]-[138], the Commission expressly referred to the requirements of cl 2.20 of the Resources SEPP at [137]-[138]. Relevantly, cl 2.20(1) of the Resources SEPP provides that:

> 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.

25 In sub-section 5.3.1, the Commission addressed the Project's GHG emissions, referring (from [139]-[142]) to the DAR and the EIS, and setting out at [141] a table of the estimated Scope 1, Scope 2 and Scope 3 emissions for the Project.

26 The Commission addressed Scope 1 and Scope 2 emissions at [143]-[149] before separately turning to Scope 3 emissions (at [150]-[151]). The Commission there said:

> 150. The Commission acknowledges that the mining of coal and its combustion is a major contributor to anthropogenic climate change, which has the potential to impact future generations. The Commission acknowledges that although the Project's Scope 3 emissions would contribute to anthropogenic climate change, these are appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement).
>
> 151. The Commission notes that the GHG emissions associated with burning coal to produce energy are accounted for at the international powerplants where that combustion takes place. The Commission agrees with the Department and acknowledges that under the Paris Agreement accounting rules and Australian legislation, Scope 3 emissions are not included in Project emission reporting, to avoid double counting. However, the Commission has considered all emissions associated with the Project (including Scope 3 emissions) in its assessment and determination.

27 As already noted, the appellant complains that this does not go far enough; that the causal enquiry requires the Commission to look at the likely impacts of climate change on the locality. As to the last sentence of [151], the appellant argues that it was not sufficient simply to state that the Commission had considered all Project emissions. The first respondent, on the other hand, submits that the last sentence of [150] is a rationally articulated reason why conditions should not be imposed in relation to Scope 3 emissions.

28 At sub-section 5.3.2, the Commission set out its findings in relation to GHG emissions ([152]-[161]), noting the concerns raised as to Project GHG emissions and the impact that the increase in mining would have on climate change and future generations and that some submissions recognised that

while Scope 3 emissions are not counted towards NSW emissions, the cumulative effect of GHG emissions was still felt globally (at [152]). The Commission expressly recognised those concerns but went on to note that under the Paris Agreement Scope 3 emissions were attributed to the country within which they are emitted and that "with the adoption of the Paris Agreement, almost all countries have committed to reduce global emissions and to track their progress in doing so" (at [153]).

29 The Commission stated at [154] that it had considered the matters in clauses 2.20(1) and 2.20(2) of the Resources SEPP (in addition to the mandatory considerations under s 4.15 of the *EPA Act*). The appellant criticises this statement as mere lip service.

30 At [155]-[160], the Commission referred to international, national and State policies aimed at reducing GHG emissions "particularly those associated with fugitive methane" (the reference to fugitive methane clearly being relevant to Scope 1 and Scope 2 emissions) but went on to refer to the current strategic direction of the NSW Government seeking to continue coal exploration, extraction and export (the latter clearly applying to Scope 3 emissions).

31 After considering conditions in relation to Scope 1 and Scope 2 emissions (at [156]-[160]) the Commission concluded at [161] that the GHG emissions for the Project had been adequately assessed and said that "[s]ubject to the imposed conditions, the Commission is satisfied that the Project can achieve the requirements of the Resources SEPP, the EP&A Act and the relevant Commonwealth and NSW policy positions with respect to the reduction of fugitive emissions and the recognition of the importance of the continuation of the extraction and exportation of coal to the NSW economy".

32 At [293], the Commission determined that the Project should be approved subject to stringent conditions of consent, for the reasons there set out, which included that GHG emissions for the Project had been adequately estimated and were permissible in the context of the current climate change policy framework and that opportunities existed for the applicant throughout the life of the Project to deploy existing, emerging and future technologies to improve the

abatement of GHG emissions. Again, the appellant points out that there was no reference there to Scope 3 emissions.

Application for judicial review

33 The appellant then brought an application in the Land and Environment Court seeking judicial review of the Commission's decision (raising a number of grounds of review, including as to the Commission's findings in respect of issues not raised on this appeal, such as the allegedly threatened "legless lizard" and air quality issues). Relevantly, the grounds of review in the Amended Summons filed 30 October 2023 included ground 1 (only the first limb of which is now relevant) and ground 2 as set out by the primary judge at [17] of the primary judgment:

> 1. In purporting to consider s 4.15(1)(a)(i) of the EPA Act, the Commission failed to consider whether the consent should be issued subject to conditions aimed at ensuring that greenhouse gas emissions are minimised to the greatest extent practicable as required by cl 2.20(1) of the [Resources SEPP] [this being the so-called "first limb" of Ground 1]; and, further, failed to assess downstream emissions, or Scope 3 emissions, of the Project having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions as required by cl 2.20(2) and thereby failed to have regard to mandatory considerations [this being the so-called "second limb" of Ground 1, which is not relevant to this appeal] …
>
> 2. The Commission failed to consider the likely impacts of Scope 3 emissions, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality, and by that omission misconstrued the expression "likely impacts of the development…" in s 4.15(1)(b) of the EPA Act by treating that expression as encompassing an "accounting" treatment of Scope 3 emissions instead of considering the direct and indirect impacts of the Project. The Commission thereby either failed to take account of the mandatory considerations stipulated in s 4.15(1)(b) of the EPA Act …

34 Those grounds of review obviously correspond with the issues raised on appeal (other than the belated addition of an order sought as to costs of the proceedings at first instance).

35 The primary judge dismissed what was referred to as the first limb of ground 1 of review (i.e., the asserted failure to consider whether the consent should be subject to conditions as required by cl 2.20(1) of the Resources SEPP), though not without some concern (see [71]; and also [72], [81]).

36 His Honour found that it could not be inferred that the Department did not give consideration to conditions relating to the reduction of GHG emissions

(including Scope 3 emissions) ([72]) and said that the failure to recommend conditions relating to Scope 3 emissions did not "on its own" establish they were not considered ([76]). His Honour noted that the Commission acknowledged that Scope 3 emissions are not reported to avoid "double counting" ([77]; [80]). (The appellant says that it is not clear how this last point assisted in the conclusion that the Commission had considered whether there were conditions which minimised emissions to the greatest extent practicable.)

37 His Honour considered (see [78]-[79]) that, reading the Commission's reasons as a whole and particularly [150]-[151] and [154]-[161] of the reasons, the Commission made a permissible evaluative judgment not to impose conditions directed to Scope 3 emissions.

38 At [81], his Honour said that, while the Commission's reasons did not show that specific consideration was given to whether conditions could be imposed on Scope 3 emissions, in light of "uncontroversial" matters (such as emissions, including Scope 3 emissions, contributing to climate change), such consideration *was* given. The primary judge emphasised that the Commission had expressly stated that it considered Scope 3 emissions in its overall assessment and his Honour considered that this was not "lip service".

39 His Honour also dismissed the second ground of review.

40 At [68], his Honour said that it was uncontroversial before the Commission that climate change poses global environmental risks; and his Honour accepted (at [69] and [100]-[101]) that the existence of climate change (and its negative impact on the environment) was something that did not need to be resolved (a similar submission here being made on appeal). His Honour considered that this provided context for the Commission's decision. Similarly, at [110], his Honour said that bushfire risk, changes in precipitation patterns and the like were acknowledged.

41 His Honour was satisfied that the Commission understood the centrality of the issues relating to GHG emissions (including Scope 3 emissions) and said that the Commission did not disregard them simply by saying they were accounted for by the end user ([104]).

42 At [105], his Honour said that the Commission's approach was similar to that of a differently constituted Commission (referring to the decision the subject of appeal in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110; (2021) 252 LGERA 221 (*Mullaley*)). The appellant argues that that decision was not apposite, including because the Department in that case had explained why it did not propose conditions to minimise Scope 3 emissions and the Commission expressly accepted this recommendation in its reasons (citing *Mullaley* at [37], [42] and [58]).

43 His Honour again noted (at [106]) the statement of the Commission that it had considered all emissions, including Scope 3 emissions (see [151] of its reasons). (The appellant says that this disregards the fact that s 4.15(1) of the *EPA Act* provides for the structured exercise of a discretion and argues that it is not enough to merely refer to a topic without referring to the manner of its consideration when a statutory power confers such a discretion.)

44 His Honour concluded that it was sufficient that the Commission said the impact of Scope 3 emissions was "felt globally" and would have a cumulative impact on climate change which will impact future generations (see [104]; [106]; [109]; [110]).

Appeal

45 The appellant, by amended notice of appeal, challenges the primary judge's decision on the following grounds:

> 1. The primary judge erred in concluding that the Independent Planning Commission (Commission) complied with s 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW) in approving the Mount Pleasant Optimisation Project (SSD 10418) because the Commissioner did not take into consideration, in the manner required by s 4.15:
>
> a. cl 2.20 of the State Environmental Planning Policy (Resources and Energy) 2021 as a provision of an environmental planning instrument (s 4.15(1)(a)(i)); and/or
>
> b. the likely impacts of the development including environmental impacts on both the natural and built environments, and social and economic impacts in the locality (s 4.15(1)(b)).

46 The appellant seeks an order that the first respondent pay the appellant's costs of the appeal as well as the proceedings in the Land and Environment Court (though Senior Counsel for the appellant accepted that if the appellant was

unsuccessful on the appeal, there would be little basis for it successfully to appeal the first instance costs order, that being Order 1 made by Robson J on 9 September 2024).

Ceerose Pty Ltd v A-Civil Aust Pty Ltd

47 Before turning to the respective errors that the appellant contends his Honour made, it is convenient to note what was said in *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225; [2023] NSWCA 215 (*Ceerose*) as to the inferences that can be drawn where there is a failure to identify a particular matter in reasons for a decision. In *Ceerose*, an adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW) did not refer in his reasons to certain submissions placed before him. The issue was whether an inference could be drawn from the absence of reference to the submissions that the adjudicator had not considered a relevant consideration under the Act. At [62], Payne JA said that the failure to identify a particular matter in reasons will not "of itself" demonstrate it was not considered, noting that the "challenge" is to "identify a basis on which it could be said that consideration did not occur".

48 At [66], his Honour said the following as to what inferences may be drawn from a lacuna in a decision maker's reasons:

> … [T]here is a question as to what specific inference is to be drawn from the absence of reference to a particular submission or contention in a set of reasons. There are a range of possible explanations, only one of which is that the material was not considered. Another is that the claim was readily seen to be well-founded and the submissions to the contrary as lacking in substance. However, the latter would be a good reason to omit reference to the issue in the reasons. If the submission had been misunderstood, the facts mistaken or the law wrongly identified, that might explain absence from the reasons of something expected to be addressed, but not lack of consideration. Of course, the duty to consider a submission is separate from the absence of any duty to deal with it correctly, whether in law or in fact. The point is rather that an unreviewable error may explain why the reasons do not advert to a particular matter.

49 The appellant emphasises the requirements under the *EPA Act* for community participation and transparency of decision-making (from which it is submitted it can be inferred that the Commission did not take into account mandatory considerations to which reference is not made (see AT 7)). In that regard, the appellant points to: one of the objects of the *EPA Act* being the provision of increased opportunity for community participation (see s 1.3(j)); s 2.22(1) of the

EPA Act; cl 20(2)(d) in Schedule 1, which requires notification of "how community views were taken into account in making the decision"; s 2.23(2)(g) of the *EPA Act* which requires the applicable community participation plan to provide for planning decisions to be made in an open and transparent way, and for the written reasons to include "how community views have been taken into account"; s 2.23(2)(h) of the *EPA Act*, which requires an authority preparing a participation plan to consider that reasons for planning decisions "should be appropriate having regard to the significance and likely impact of the proposed development".; and cl 6(2) in Schedule 2, which requires the Commission's reasons to contain a summary of any submissions in relation to the subject-matter of the public hearing". In these circumstances, the appellant argues that it may be concluded that the decision-maker's reasons are intended to be a complete record of the reasoning for the decision in question.

50 Further, the appellant says that s 4.15(1) calls for the Commission to conduct a complex multifactorial balancing exercise and stipulates a "required process of reasoning"; i.e., that it provides for a structured exercise of discretion. Section 4.15(1) of the *EPA Act* relevantly required the Commission as consent authority to "take into consideration" such of the following matters as are of relevance to the development:

> (a) the provisions of –
>
> (i) any environmental planning instrument, and
>
> ….
>
> (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,
>
> …
>
> (d) any submissions made in accordance with this Act or the regulations,
>
> (e) the public interest.

51 The duty imposed by s 4.15(1) is, in terms, a duty to take the identified matters "into consideration".

Ground 1(a)

Appellant's submissions

52 As extracted above, by this ground of appeal the appellant contends that the primary judge erred in failing to find that the Commission had not considered as required under cl 2.20(1)(c) of the Resources SEPP whether conditions should be imposed aimed at ensuring GHG emissions are minimised to the greatest extract practicable. The appellant notes that in *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216; (2021) 250 LGERA 39 (*KEPCO*), where the precursor to cl.2.20 (namely cl 14 of the Mining SEPP) was considered, the expression "greenhouse gas emissions" in cl 14(1)(c) was held to include Scope 3 emissions (and that "downstream emissions" in cl 14(2) included Scope 3 emissions).

53 The appellant notes that no minimisation conditions in relation to Scope 3 emissions were proffered by the first respondent or the Department; and that neither claimed that any such conditions were impracticable or not feasible (see AT 14). While this might explain why there was no specific reference to such conditions by the Commission, the appellant emphasises that this is a mandatory consideration. The appellant accepts that it did not itself put forward any such potential conditions but emphasises that it is not the appellant's role to do so; it being the burden on the applicant for the development consent – here, the first respondent – or the Department (see AT 14).

54 That said, on this appeal, the appellant did suggest a number of possible minimisation conditions (that the coal be washed before export; that only coal of a certain high calorific content be exported; that export only be permitted to countries with a materially determined commitment under the Paris Agreement to reduce emissions; that there only be export to power stations which use technology such as carbon capture and storage or fluidised bed construction; or a requirement that the proponent implement some offsets to those emissions) (see AT 15). That rather leads one to conclude that the appellant took a forensic decision not to put forward to the Commission any potential minimisation conditions for Scope 3 emissions.

55 The appellant's submissions on appeal as to the failure to consider minimisation conditions were summarised by the appellant in oral argument as follows (AT 27): the reasons must be understood against the requirements for transparency and to explain how community participation has been taken into account; neither the first respondent nor the Department told the Commission that it needed to consider minimisation conditions for Scope 3 emissions (nor did they suggest that they were not feasible); there is no reference in the reasons to any conditions or proposed conditions in relation to Scope 3 emissions (in contrast with the detailed attention given to conditions in relation to Scope 1 and Scope 2 emissions); and, given that the vast majority of the emissions from the Project will be Scope 3 emissions, one would expect them to be dealt with in the reasons (AT 27). The appellant refers to *Plaintiff MI/2021 v Minister for Home Affairs* (2022) 275 CLR 582; [2022] HCA 17 at [25] as emphasising the need to understand the context and circumstances in which the reasons must be understood.

56 The appellant also points out that it submitted that the Commission needed to consider whether to impose conditions in relation to Scope 3 emissions (AT 53.48-50 to 54.1-4).

57 The appellant maintains that the Commission's statement that it had considered all emissions associated with the Project including Scope 3 emissions (at [151]) was insufficient, in the context of the structured exercise of discretion provided for in s 4.15(1) of the *EPA Act*, to indicate that the topics referred to in that provision were considered in the manner required by that provision; and, as earlier noted, the appellant says that the statement (at [154]) that the Commission had considered the matters in cl 2.20 of the Resources SEPP was mere lip service. As to what was said by the Commission at [161], the appellant says that the reference to fugitive emissions is a firm indication that the Commission misdirected itself, since fugitive emissions are associated only with Scope 1 emissions.

58 To the extent that the Commission adopted the Department's approach in the DAR, the appellant says that any errors in that approach become errors of the

Commission. The appellant's complaint in that regard is that the DAR did not refer in any way to conditions for minimising Scope 3 emissions.

59 The appellant accepts that the mere fact that a matter was not expressly adverted to in the IPC Decision does not necessarily establish that the matter was not considered. However, the appellant says that that omission should be given some weight, and in context (having regard to the matters referred to above), the appellant says that on the balance of probabilities the Commission did not discharge its obligation to consider under cl.2.20(1)(c) of the Resources SEPP. In that regard, the appellant also says that the reference to Scope 3 emissions being counted in the country burning the coal stands as firm evidence that the Commission impermissibly read down the expression "greenhouse gas emissions" to exclude Scope 3 emissions or otherwise did not consider Scope 3 minimisation conditions. The appellant submits that whether Scope 3 emissions were accounted elsewhere had no bearing whatsoever on whether those emissions could be minimised.

First respondent's submissions

60 The first respondent submits that the Commission's reasoning in relation to GHG emissions, and the application of cl 2.20, must be understood in the context of the Commission's acceptance of three propositions that were treated as uncontroversial (namely, that anthropogenic climate change poses global environmental risks and additional GHG emissions anywhere exacerbate the problem; that regulatory settings (including through the Paris Agreement) involve seeking to limit the extent of climate change and moving away from emissions activities; and that there is nevertheless an ongoing demand for coal in the context of a managed transition (not inconsistent with the Paris Agreement) away from fossil fuels). The first respondent says that therefore there was no substantial factual controversy to resolve on the question of likely impacts ([69]).

61 As to the mandatory consideration required by cl 2.20, the first respondent points out that the Commission: identified the Resources SEPP as a mandatory consideration ([35]); confirmed that it had read, and agreed with, the Department's assessment in respect of the Resources SEPP ([35]); set out, in

full, the text of cl 2.20(1) ([137]); identified different kinds of emissions, including Scope 3 emissions ([125]) and referred to evidence as to the quantum of emissions from the project, including Scope 3 emissions ([141]); recognised that the Scope 3 emissions of the project would contribute to anthropogenic climate change, found that Scope 3 emissions are "appropriately regulated and accounted for through broader national policies and international agreements", and emphasised that it had still considered all emissions associated with the Project in its determination ([150]-[151]); said that it had considered the matters in cl 2.20(1) of the Resources SEPP ([154]); found that, under the Paris Agreement, Scope 3 emissions are attributed to the country within which they are emitted and that "with the adoption of the Paris Agreement, almost all countries have committed to reduce global GHG emissions and to track their progress in doing so" ([153]); found that the project was not inconsistent with key governmental policies on GHG emissions, including the NSW Climate Change Policy Framework, the New Zero Plan and the Paris Agreement ([154]); and also found that the "current strategic direction of the NSW government … seeks to continue coal exploration, extraction and export" ([155]; [161]).

62 The first respondent submits that, in these circumstances, it is clear that the Commission in fact considered cl 2.20(1) of the Resources SEPP, including so far as it was directed to downstream GHG emissions. The first respondent says that the proper inference to be drawn is that the Commission considered the possibility of attaching conditions (including as to Scope 3 emissions specifically) but exercised its discretion not to do so.

63 In any event, the first respondent submits that cl 2.20(1) did not require the IPC to consider whether to impose conditions directed to minimising Scope 3 emissions as such; rather, it applied at a higher level of generality (referring to a duty to consider whether to impose conditions directed to minimising "greenhouse gas emissions"). The first respondent submits that the appellant's case involves the error exposed in *Walker* at [35], namely, that what must be shown is not only a failure to consider but a failure to consider at the level of particularity required by the relevant instrument.

64 The first respondent notes that the appellant does not dispute that the Commission turned its mind to the question whether conditions directed to reducing GHG emissions should be imposed; rather, the appellant's complaint is that the Commission did not address that topic at a further level of particularity, namely, Scope 3 emissions. The first respondent says that the appellant's argument fails on the facts but that it is also legally flawed because it assumes a specificity to the obligation which is not supported by the *EPA Act* or the Resources SEPP.

65 The first respondent emphasises that the question whether or not conditions should be attached was an evaluative question for consideration and determination by the Commission; and says that there may be many reasons why the Commission might permissibly choose not to attach conditions (for example, that it might be of the view that Scope 3 emissions might appropriately be reduced through Paris Agreement mechanisms and existing national regulations or policies applying to domestic customers in Australia; or it might be of the view that reducing Scope 3 emissions at the project level is not practicable, and that Scope 3 emissions are best addressed as a global issue or otherwise by the end user who has control over those Scope 3 emissions). The first respondent argues that this is implicitly reflected in the findings made by the Commission at [150] of the reasons.

66 The first respondent submits that, read fairly, the Commission considered whether or not to attach conditions in respect of Scope 3 emissions, and decided not to do so because it was of the view that Scope 3 emissions were better and more appropriately addressed by other means, including as a global issue via Paris Agreement mechanisms and because State (and Commonwealth) policy still encouraged coal mining and export despite the inevitable Scope 3 emissions. The first respondent submits that this was also the gist of the Department's reasoning in the DAR, which concluded in light of government policy that after conditioning Scope 1 and Scope 2 emissions the "residual GHG emissions of the project [were] acceptable" (DAR at [209]).

67 Thus, the first respondent submits that there was thus no error in his Honour's conclusion at [78] that the Commission "elected to exercise its discretion not to

attach conditions specifically directed to Scope 3 emissions". In any event, the first respondent maintains that it cannot be inferred that the Commission did not consider cl 2.20(1).

68 Insofar as the appellant submits that, if the Department erred in its own consideration of cl 2.20(1), then the error infects the IPC Decision (see its submissions at [36]), the first respondent argues that this overstates the significance of the Commission's statement that it adopted the Department's assessment of the applicable EPIs. The first respondent says that, in any event, the Commission provided reasoning beyond the material in the Department's report (primary judgment at [77]).

69 The first respondent cavils with the contention that the Commission's statement that it had considered the matter in cl 2.20(1) of the Resources SEPP was "mere lip service". The first respondent accepts that a decision-maker cannot recite itself into compliance with its duties simply by saying it has complied with them but argues that this is not the case here. The first respondent submits that where a decision-maker: directs itself to a mandatory consideration, indicates that it has complied with it and gives reasons indicative of having turned its mind to the mandatory consideration, there is no sound basis to find a failure to consider.

70 As to the appellant's argument that it should be inferred that the Commission failed to consider cl 2.20(1) because the Commission specifically addressed conditions relating to fugitive emissions, which are associated only with Scope 1 emissions, the first respondent says that the fact that conditions were attached in respect of one category of emissions does not mean that consideration was not given to whether or not conditions should be attached in respect of another category of emissions.

71 Further, the first respondent says that the fact that the Commission did not in fact attach conditions directed to minimising Scope 3 emissions does not make good the alleged failure to consider, noting that any duty under cl 2.20(1) was to consider whether or not to attach conditions and pointing to the caution by the High Court against reasoning on the basis that a matter was not considered because if it had been considered, the decision-maker would have acted in a

particular way (that bordering on merits review) (see *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1 at [89] (Gummow J) (Heydon J agreeing at [91]) (Crennan J agreeing at [92])).

72 The first respondent says that the appellant's contention that the Commission's reasons say nothing "about the possibility of conditions for minimising scope 3 emissions" overlooks what is implicitly dealt with in the reasons (reading them fairly and as a whole). The first respondent says that the Commission plainly turned its mind to the Project's Scope 3 emissions, their acceptability and what, if anything, should be done about them. It is submitted that the gist of the Commission's reasons was that: the Project would cause considerable Scope 3 emissions; those emissions would contribute to climate change; and that emissions at point of combustion were (having regard to the Paris Agreement and State and Commonwealth policies) not appropriately addressed via conditioning of the extraction project but instead were more appropriately addressed and regulated via other means. The first respondent says that the fact that no person making submissions to the Commission proposed conditions minimising Scope 3 emissions does not indicate that the Commission failed to comply with cl 2.20(1) (rather, it helps explain why that possibility was not the subject of more detailed consideration).

73 The first respondent submits that there was no error in the Commission indicating that, under the Paris Agreement, Scope 3 emissions were counted in the country of consumption (that being an accurate statement of the legal position); nor did this statement suggest that the Commission had impermissibly read down the expression "greenhouse gas emissions" to exclude Scope 3 emissions. The first respondent argues that this statement pointed to the Commission adopting, as a step in its reasoning, that it was not necessary or appropriate to attach conditions directed to minimising Scope 3 emissions, because the question of how to regulate those emissions was better addressed by the end user and country of consumption.

74 Finally, the first respondent submits that the appellant's reference to the decision in *Mullaley* does not assist the appellant. The first respondent points to the observation that "[f]indings of fact may cast light on legal principle, but

whether in a particular case a decision-maker has lawfully given consideration to matters that must be addressed is not to be decided by relying on judicial observations on the particular facts of other cases" (citing *DBWG v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 301 FCR 344; [2024] FCAFC 3 at [64] (Wigney, Wheelahan and Halley JJ)). The first respondent argues that *Mullaley* supports the primary judge's conclusions, noting that in that case the Department had said that it was not proposing conditions to minimise Scope 3 emissions, because State and Commonwealth policy did not require the phasing out of gas (*Mullaley* at [37]). The first respondent says that this was consistent with the Commission's approach in this case. Further, the first respondent says that there is no suggestion in the reasons in *Mullaley* that the Commission's reasons in that case explicitly addressed whether or not to attach conditions in respect of Scope 3 emissions (rather, what the Commission did was simply to accept the conditions proposed by the Department which did not address Scope 3 emissions – the first respondent here referring to *Mullaley* at [38]).

75 The first respondent says that, in the present case, the Commission went further and explained in some detail why it was imposing conditions in respect of Scope 1 and Scope 2 emissions (at [157]-[160]). The first respondent submits that this does not point to there being error in the Commission's consideration of GHG emissions.

Reply submissions

76 In reply submissions, the appellant argues that the first respondent's proposition that the Commission's references to international treaty frameworks that regulate global emissions means that it can be inferred that the Commission considered whether to impose conditions on Scope 3 emissions but that the Commission chose not to do so is speculation. The appellant emphasises that nowhere in the reasons does the Commission expressly say that it has considered conditions for Scope 3 emissions; nor was it even presented with options.

77 Insofar as the primary judge at [78] pointed to [154] to [161] of the Commission's reasons to support the inference that the Commission positively

elected to not impose Scope 3 conditions, the appellant says that that entire section of the reasons is focused on emissions in Australia (i.e., not Scope 3 emissions) and contains a detailed discussion of whether conditions should be imposed on Scope 1 and 2 emissions. The appellant argues that the disjunct between the detailed consideration of Scope 1 and 2 conditions compared to the total absence of any consideration of potential conditions for Scope 3 emissions further supports an inference that Scope 3 conditions were not considered at all.

78 The appellant submits that the correct inference to draw from the Commission's reasons is that the Commission misdirected itself because it sought to carve out from consideration Scope 3 emissions by reasoning that, because they are emitted overseas and counted elsewhere, they were therefore not a matter with which the Commission had to grapple. Again, the appellant reiterates that this was not a matter where the proponent made the submission, or the Department made the recommendation, that conditions to minimise Scope 3 emissions would be impracticable.

79 The appellant says that *KEPCO* stands for the proposition that cl 2.20(1)(c) imposes a duty to consider conditions with respect to all emissions, not just Scope 1 and 2. The appellant says that it is not a matter of "generality" as contended by the first respondent but instead a positive obligation of the Commission to consider each of the different categories of emissions arising from the Project. The appellant argues that the Resources SEPP invited specificity in what was required to be considered.

80 The appellant submits that it is not a matter of whether the imposition of conditions on Scope 3 emissions should have been the subject of more "detailed" consideration, rather, it is the appellant's contention that there was no consideration on that point at all.

Determination

81 I do not accept that error has been shown as contended for in Ground 1(a). The Commission was clearly cognisant of the distinction between the three categories of emissions. The fact that the Commission accepted that Scope 3 emissions were "regulated" as well as accounted for elsewhere is a sufficient

indication that the Commission considered there to be no need for the imposition of minimisation conditions in relation to the Scope 3 emissions.

82 That there was no reference to the raft of potential conditions for minimising the effects of Scope 3 emissions of the kind that the appellant now suggests could have been considered is readily understandable since no party suggested any such conditions. It was not for the Commission independently to come up with suggested ways of minimising the effect of Scope 3 emissions (particularly if it accepted that they were regulated elsewhere); and no doubt had it done so without providing an opportunity for the parties to make submissions on any such potential conditions it would have been accused of a denial of procedural fairness.

83 I accept that the appellant had no evidentiary or legal obligation to proffer potential conditions for the Commission's consideration. However, the consequence of its apparent forensic decision not to do so is that the appellant cannot now complain about the Commission's ultimate conclusion that the Scope 3 emissions were regulated elsewhere and that the conditions it had imposed on the Scope 1 and 2 emissions were sufficient for the purposes of cl 2.20.

84 That conclusion means that it is unnecessary to consider the argument between the parties as to the level of specificity required for the purposes of compliance with cl 2.20 (i.e., whether it required consideration of minimisation conditions for all kinds of emission specifically or would be satisfied by consideration of such conditions for emissions more generally).

85 Ground 1(a) is not made good.

Ground 1(b)

Appellant's submissions

86 As to ground 1(b), the appellant contends that the primary judge erred by failing to find that the Commission did not consider the likely impacts of the Project in the nature of the likely impacts of climate change (such as increased mega bushfires, prolonged droughts) on the built and natural environment in the locality when it came to consider s 4.15(1)(b) and to engage in the complex balancing exercise called for by s 4.15(1).

87 The appellant says that the assessment of likely impacts requires a causal enquiry with reference to the impact on the built and natural environment of the locality (referring to what was said by Preston CJ at LEC in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 *(Gloucester)* at [513] and [525]). The appellant submits that it was not enough to identify that the Project would contribute to "climate change" without also considering the likely impacts of climate change on the environment in the locality; and hence without considering such impacts it was impossible for the Commission to conduct the complex balancing exercise required by s 4.15 of the *EPA Act*.

88 The appellant in its submissions appears to accept that it was not in dispute between the parties that impacts on the environment caused by climate change (such as increased frequency of bushfire, prolonged dry periods and storm surges) were likely impacts of the Project (although the appellant criticises the statements in the EIS as being understated and in anodyne terms) but maintains that the Commission was required to consider those likely impacts on the environment in the locality.

89 The appellant submits that the primary judge erred in finding that the appellant had not established that the Commission failed to consider likely impacts of the Project for the following reasons.

90 First, that the primary judge was in error in asserting that the Commission had accepted that "contributional anthropogenic climate change has negative impacts on the environment" (referring to the primary judgment at [104], [106], [109] and [110]). The appellant says that the high point in the Commission's reasons as to this was the Commission's reference to emissions being "felt globally".

91 Second, the appellant repeats its argument that, in the context of the statutory requirements for community participation and transparency in decision-making, the Commission's failure to refer to any likely impacts of climate change on the locality is significantly probative of the conclusion that these likely effects were not considered. Third, the appellant repeats its argument that, given the centrality of the likely impacts of climate change in the decision-making process and the gravity of those likely impacts, one would have expected they

would have been referred to had they been considered by the Commission. Fourth, that the Commission misdirected itself in its consideration of likely impacts flowing from GHG emissions by focusing on Scope 3 emissions being elsewhere.

92 Fifth, the appellant says that the clear focus of the Commission was only on the likely impact of emissions causing climate change; and that its reasons show no recognition that the causal enquiry required by s 4.15(1)(b) required it to take a further causal step and consider the likely impacts of climate change on the natural and built environment in the locality.

93 The appellant argues that the result of the Commission's failure to consider the likely effects of climate change was to disable it from properly completing the balancing exercise called for under s 4.15(1) of the *EPA Act*. The appellant says that it was necessary for the Commission to evaluate the significance of each factor; and that it was not enough for the Commission to recognise that there would be some unquantified adverse environmental impacts. The appellant submits that the Commission was required to identify what those likely impacts would be so it could weigh the quality and magnitude of those impacts (and that only once those matters had been assessed and weighed could the balancing exercise called for by s 4.15(1) be undertaken).

First respondent's submissions

94 The first respondent argues that the gist of the appellant's complaint in relation to the second ground of appeal is that there was evidence before the Commission as to the specific impacts of climate change and that it should be inferred, from the fact that the Commission did not refer to those impacts in its reasons, that the Commission did not consider them.

95 The first respondent says that the error in this complaint is that before the Commission it was "uncontroversial" that "anthropogenic climate change poses global environmental risks and that additional GHG emissions exacerbate the problem irrespective of where they occur" ([68]). The first respondent accepts that there was essentially uncontradicted evidence before the Commission as to the specific potential impacts of climate change; and notes that it drew the Commission's attention to climate change projections (including the

Intergovernmental Panel on Climate Change Reports relied on by the appellant) and to the threats posed by climate change to global, national, state and regional ecosystems and biodiversity.

96 The first respondent says that in this context the Commission was entitled to proceed on the basis that, in setting out and addressing the "key issues" that needed to be resolved, there was no need to spell out what was commonly accepted. The first respondent submits that the whole premise of the Commission's reasons in section 5.3 was that GHG emissions were likely to have serious negative impacts; and says that the central issue with which the Commission grappled was the one which *was* controversial, namely, whether the Project should be approved despite those emissions and their impacts.

97 The first respondent argues that it is unlikely (and illogical) that the Commission, having discharged its duty under cl 2.20 and having considered an assessment of Scope 3 emissions and applicable policies addressing those emissions, nevertheless failed to consider the impacts of those emissions.

98 As to the submission that there was error in the primary judge concluding that the Commission found "that there would be negative impacts associated with all emissions (including scope 3 emissions)" ([106]; cf appellant's submissions at [48] and [51]), the first respondent argues that, in context, what the Commission was referring to at [150] and [152] were the recognised negative impacts that underpinned the various policies that the Commission was addressing. The first respondent says that there is no tension between the Commission stating that the impacts of climate change were "central" to its decision and the absence of an explicit series of findings about what particular impacts are expected to arise from climate change. Similarly, the first respondent says that no adverse inference arises (from the fact that the Commission did not repeat the submissions put to it addressing the specific impacts of climate change) that those impacts were not considered. Again, the first respondent emphasises that the Commission's reasons were not intended to be (and were not required to be) "comprehensive" or a "complete record". It is submitted that the fact that the specific impacts were not set out in the reasons is explicable by the process of selection, inherent to the task of

preparing reasons. The first respondent says that there was no duty on the part of the Commission to "identify" in its reasons all of the potential impacts and that no inference can be drawn (from the fact that it did not do so) that the Commission did not consider the likely impacts on the environment (referring to *Bushfire Survivors for Climate Action Inc v Narrabri Coal Operations Pty Ltd* [2023] NSWLEC 69 (*Bushfire Survivors*) at [86]).

99 The first respondent submits that the Commission did not misdirect itself by observing that Scope 3 emissions were, under the Paris Agreement, attributable to the country of consumption; that this was a correct statement of the legal position; and that the Commission linked that point to the (also correct) position that Paris Agreement countries had committed to reducing the GHG emissions attributed to them ([127]). The first respondent submits that this was a logical part of the Commission's reasoning for deciding not to attach conditions linked to Scope 3 emissions, and for concluding that the Project was acceptable despite the impacts associated with Scope 3 emissions. The first respondent submits that there is nothing unreasonable in such an approach, nor is it logically suggestive of a failure to consider the impacts (referring to *Bushfire Survivors* at [98], [152]). The first respondent emphasises that the Commission expressly said that it had considered all emissions associated with the Project (at [151]) (the first respondent here referring to *Bushfire Survivors* at [112]).

Reply submissions

100 In reply submissions, the appellant cavils with the proposition that the likely impacts of climate change were "uncontroversial" or were subject to a "common appreciation" or were "commonly accepted", such that it was unnecessary for the Commission to refer to them. The appellant says that there was no unequivocal acceptance in the EIS or the DAR of the magnitude and likelihood of climate change impacts on the environment; and the appellant points to the denials at [13]-[14] in the first respondent's response in this regard.

101 The appellant submits that it follows that the Commission was faced with competing positions on an acknowledged key issue in the matter, which was

the subject of "substantial and clearly articulated argument" by the appellant and a number of other interested parties; and says that, in this context, the Commission's "ambiguous and anodyne" statements that climate change had "the potential to impact future generations" (at [150]) and that the cumulative impact of GHG emissions was "felt globally" (at [152]) cannot give any comfort in reaching a conclusion that the Commission considered the likely impacts of climate change on the environment in the locality and in NSW more generally.

102 The appellant says that the task imposed on the Commission by s 4.15(1)(b) of the *EPA Act* relevantly required the Commission to consider the likely environmental impacts of the development on the natural and built environments in the locality and NSW. The appellant says that this was the level of specificity required by the statute. The appellant points to the definition of environment in this context (by reference to s 1.4(1) of the *EPA Act*) as including all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social grouping, which definition must, it says, be understood in light of the fact that one of the objects of the *EPA Act* is, in s 1.3(e), to protect the environment. The appellant maintains that the task required the Commission to undertake a causal analysis; and the appellant submits that no such causal analysis was undertaken by the Commission, which the appellant says stopped short at the point that GHG emissions cause climate change.

103 The appellant's central contention is that the Commission misdirected itself by focusing on how the Project will increase global emissions (and the regulation of those emissions), without taking the next required causal steps of considering the likely impact of climate change (such as rising average temperatures) on the environment in the locality of the Project and in NSW. The appellant complains at the first respondent's suggestion that the significant impacts of climate change on NSW did not require mention because they were uncontroversial, contrasting this with the Commission's detailed 3 page discussion of the uncontroversial topic of how Scope 3 emissions are measured and regulated under international, domestic and state legal regimes.

104 While the appellant accepts that Scope 3 emissions are acknowledged in the Commission's reasons (at [150]-[151]), the appellant says that the extent of the Commission's acknowledgment is that those emissions are "regulated and accounted for" under different domestic and international frameworks and that those emissions will contribute to anthropogenic climate change. The appellant reiterates its complaint that the next required step (how climate change will impact NSW) is not considered. The appellant says that it is insufficient to say merely that the impact of climate change will be "felt globally" because there was extensive evidence before the Commission that showed that Australia and NSW were especially vulnerable to climate change and that the impacts of climate change would be felt more severely in NSW than elsewhere in the world. The appellant argues that the fact that the Commission's reasons suggest climate change will have a uniform global impact is further suggestive of a failure to consider the very specific and unique impact that climate change will have on NSW.

105 Finally, while the appellant accepts that it is a true (and uncontroversial) statement that Scope 3 emissions are attributable to the country of consumption, the appellant maintains that the legal position as to how countries party to an international agreement account for GHG emissions is irrelevant to the consideration of the impact climate change will have on the environment in the locality and NSW. The appellant says that the Commission's thorough analysis of how Scope 3 emissions are accounted for helps demonstrate the error that underlies Ground 2 of this appeal (i.e., that the Commission only considered the Project's likely impact on global emissions and did not take the next causal step of considering the likely impact of climate change on the environment in the locality and NSW).

Determination

106 In my opinion Ground 1(b) is made good. I do not accept that references to the effect of climate change "still being felt globally" can be taken to comply with the requirement to consider the impacts of the Project on the built and natural environment in the locality (i.e., that the greater can be taken to include the lesser area in this context). Nor do I accept that it is unlikely and illogical (as the first respondent submits) that the Commission considered whether to

impose Scope 3 emissions but did not consider the effect of those emissions on the environment in the locality of the Project. Those are two separate matters for consideration under s 4.15 (s 4.15(1)(a) and the Resources SEPP and s 4.15(b), respectively). It is entirely possible that the Commission simply proceeded on the basis of an acceptance that there would be climate change impacts felt globally as a result of the Project emissions but determined that the recommended conditions were sufficient for the purposes of cl 2.20(1) without addressing the specific impacts on the locality.

107 The Commission was required to take into account the "likely impacts of the Project, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality". This required the Commission to consider the causal connection between the Project and its impacts on the environment in the locality of the Project. In *Gloucester*, the fact that the Project would only minimally contribute to global GHG emissions did not affect the need to consider the effects of those emissions in the locality (see Preston CJ at LEC at [514]-[515]).

108 There is nothing in the Commission's reasons to indicate that the Commission, having accepted that Scope 3 emissions would make up 98% of the Project's GHG emissions and that those emissions would contribute to global climate change, went on to consider the impact of climate change on the locality (which was the required causal enquiry). I accept that the absence of reference to a matter will not necessarily mean that the matter was not considered but the combination of the statement that the effects of climate change will still be "felt globally" and the absence of reference to the impact of this on the locality specifically is to my mind a powerful indicator that the Commission did not (as required) consider the impact of climate change on the locality. The fact that the impacts of climate change may have been "uncontroversial" or not in dispute before the Commission does not mean that the Commission was not required to consider those impacts nor that it can be inferred that the Commission did so.

109 The language of s 4.15(1)(b) requires the consideration of the causal relationship between the Project and its effects on the locality. By simply

referring to the fact that the impacts of the Project on climate change would be felt globally, without reference to the specific impacts on the locality, I have concluded that the Commission failed to engage with the essential matter with which s 4.15(1)(b) is centrally concerned – the impacts of the proposed development on the locality of the development. A causal enquiry as to the impacts on the locality was required. The Commission in its reasons did not address this. Thus, I consider that it has been established that the Commission failed to consider a mandatory consideration in this regard.

Relief

110 The appellant submits that if the appeal is allowed, Order 1 made by the primary judge (on 19 August 2024) should be set aside. The appellant says that there should either be certiorari to quash the IPC Decision or there should be a declaration that it is invalid; and the first respondent should pay the appellant's costs of the appeal and at first instance.

111 The first respondent submits that, in the event that there was error in the granting of the consent, there is a duty to consider making an order under Div 3 of Pt 3 of the *LEC Act* (referring to s 25E of the *LEC Act*). The first respondent says that the litigation in the Land and Environment Court was conducted on the common basis that, first, the operation of Div 3 of Pt 3 would turn on the reasoning adopted by the Court and, second, the Court would and should only turn to consider the application of Div 3 of Pt 3 in the event that the Court concluded that the consent was invalid and after receiving further assistance from the parties on that issue.

112 The first respondent says that, having regard to the outcome below, it became unnecessary for the primary judge to consider Div 3 of Pt 3, and no submissions or evidence were called (and no findings made) on that topic. The first respondent submits that in the event that it is found that there was jurisdictional error in the consent, the proper course is for this Court to give its reasons without making orders of invalidity, and for the matter to be remitted to the Land and Environment Court for discharge of the duty imposed by s 25E (with the benefit of this Court's reasons and (if appropriate) with the benefit of further evidence and submissions). Alternatively, the first respondent argues

that this Court could give its reasons without making orders and direct that the matter be listed before the Court of Appeal Registrar for the making of directions to facilitate a hearing in this Court on the application of Div 3 of Pt 3.

113 The first respondent maintains that, apart from the procedural fairness issue, there may be a need to consider evidence as to the s 25B/25C issue and the first respondent says that those are matters that are quintessentially matters for the Land and Environment Court to determine (AT 46-47).

114 The appellant, however, invokes what was said in *Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd* [2024] NSWCA 205; (2024) 260 LGERA 297 at [114] (per White JA, Adamson JA agreeing) to the effect that where there has been a failure by the consent authority to take into account a mandatory consideration under s 4.15(1), it is difficult to see how the Court could be satisfied that compliance with specified terms "will validate the consent" unless the breach is of a technical nature. There, the relevant failure was to take into account the likely impacts of a power line (the route for which had not yet been determined) when assessing the likely impacts of the mine in question as required by s 4.15(b). White JA considered that, without a reopening of the submissions on the development application it was difficult to see how it could be said that terms that had been proposed by the respondent in that case would, if complied with, validate the consent, emphasising that it was the cumulative effect of the impact of the power transmission line with the impact of the development of the mine itself that should be determined. Price AJA, in dissent, accepted that there was nothing in ss 25B or 25C that confined their application to technical breaches and considered that there was no good reason why s 25B should not apply to that case which arose out of the misapprehension involved in the development application.

115 In reply submissions, as to the suggestion that the duty imposed by s 25E of the *LEC Act* required the primary judge to consider making an order under, relevantly, s 25B of the *LEC Act*, the appellant argues that no orders could practically be made to restore the validity of the development consent, again pointing out that neither here nor in the Land and Environment Court has the first respondent suggested appropriate restorative steps.

116 The appellant submits that, in view of the jurisdictional errors involved and their materiality, the Commission disabled itself from conducting the balancing exercise required by s 4.15 of the *EPA Act* in determining whether to grant the development consent. The appellant thus submits that the only appropriate course for the primary judge was to declare that the development consent was wholly invalid and it would therefore be futile now to remit the matter to the Land and Environment Court (see AT 56-57).

117 As to the proposition that there was a concession by the appellant when the matter was before the primary judge that it would be appropriate for the Court to consider submissions from the parties in relation to ss 25B and 25C of the *LEC Act*, the appellant submits that there was no concession; rather that "it was a side wind in literally the last minute of the submissions to put this proposition by rejoinder" (AT 57). The first respondent, however, points out the proposition was put in submissions filed 27 October 2023; that there was nothing said against this in the reply filed on 1 November 2023; and that in oral submissions the appellant had informed the primary judge that there was "no response to that point".

Determination

118 But for the fact that the parties proceeded before the primary judge on the basis that consideration should be deferred (until the outcome of the grounds of review were known) of the question whether (if the development consent were invalid) there could or should be conditions imposed to validate the consent, I would have concluded that the IPC Decision should be quashed for failure to consider a mandatory consideration (i.e., the Ground 1(b) consideration). However, I am troubled by the fact that, forensically, the appellant did not oppose deferral of argument on the s 25B/25C issue when the matter was before the primary judge.

119 Section 25E of the *LEC Act* places a duty on the court to consider making an order under s 25B of the Act (which allows the Land and Environment Court to make orders suspending a development consent in whole or in part and ordering that it will be validated by compliance with specific terms). Section 25C allows the relevant consent authority to apply to the Land and

Environment Court for orders declaring the consent valid once there has been substantial compliance with the terms specified in an order under s 25B.

120 Here, that process has not been followed (it having been effectively deferred pending the outcome of the judicial review application).

121 In a somewhat similar situation, in *GPT Re Limited v Belmorgan Property Development Pty Limited* [2008] NSWCA 256, where the parties at trial had agreed to postpone questions of relief until after it had been ascertained whether there had been a failure to comply with the *EPA Act*, Basten AJA considered whether it was open to this Court to make final orders in circumstances where the Land and Environment Court had not considered the exercise of power under Part 3, Div 3 (see [94]-[108]) and concluded that it was appropriate to remit the matter to the Land and Environment Court (at [107]) for the following reason:

> … because it cannot be said that, as a matter of law, that Court would not permit it [the respondent] to call some evidence with respect to the possibility of an alternative order under s 25B, it is appropriate for this Court to stay its hand and make orders short of a declaration of invalidity…

122 In *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349 (Basten JA, Macfarlan and Giles JJA agreeing), where the appellant was successful in challenging the grant of development consent on the basis that the Council (the consent authority) had failed to take into account the impact of the development (a mandatory consideration under s 79C of the *EPA Act*, the precursor to s 4.15), the matter was remitted to the Land and Environment Court for consideration of the issue as to whether the respondent should obtain the relief it sought or whether the Court would make an order of conditional validity under s 25B of the *LEC Act*. See also *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244 and *Rossi v Living Choice Australia Ltd (No 2)* [2015] NSWCA 301, where the matter was remitted to the Land and Environment Court for the making of any appropriate ameliorative orders.

123 I am not persuaded that in the present case it is impossible that the primary judge could make conditions which, if satisfied, would validate the consent. By way of example, it might be that the primary judge could consider the imposition of a condition requiring the remission to the Commission for

consideration of the likely impacts of the extension of the Project on the built and natural environment in the locality (or for articulation of the consideration it may have already given to that issue) and as to the question whether that affected its recommendation, with specified consequences depending on the conclusion reached by the Commission in those circumstances. Depending on how a condition of that kind were to be framed (and it is not appropriate here to engage in such a drafting exercise) it may well be that compliance with the specified terms will (as opposed to may) validate the consent. It is not appropriate that this Court presuppose what may occur when the matter is remitted.

124 In my opinion, the appellant should be bound by the forensic course it took in not opposing the deferral of consideration of the s 25B/25C issue until after determination of the grounds of review and the matter should be remitted to the Land and Environment Court for consideration of the issue left undetermined. As indicated above, I am not persuaded that such a remittal will inevitably be of no utility.

Costs

125 As noted, at the outset of the hearing of the appeal leave was granted for the notice of appeal to be amended to include an appeal as to the costs order made in the proceedings at first instance. The appellant explained that this was put in essence on the basis that costs would follow the event (AT 48). The first respondent submitted that if there were to be consideration by this Court of an adverse costs order in relation to the hearing in the Land and Environment Court, the first respondent would seek the opportunity to be heard (noting that there had been a lack of success on a number of issues in that Court including as to the legless lizard and air quality grounds). The first respondent submitted that if the matter were to be remitted then the question of costs of the first instance proceedings should await the outcome in the Land and Environment Court (AT 47).

126 The appellant did not raise any further appeal ground as to costs, simply seeking an order as to costs of the proceedings before the Land and Environment Court (as indicated above).

127 In my opinion, given that I consider that the matter should be remitted to the Land and Environment Court for consideration of the s 25B/25C issues, it is appropriate that any debate as to the incidence of costs of the first instance proceedings take place before that Court. Costs of the appeal should follow the event.

128 Accordingly, I propose the following orders:

(1) Set aside Order 1 made by the primary judge on 19 August 2024.

(2) Subject to order 3, declare that the development consent is invalid for failure to consider a mandatory consideration.

(3) Remit the matter to the Land and Environment Court for consideration as to whether pursuant to s 25B or s 25C orders can or should be made which, if complied with, will validate the development consent.

(4) Order that the first respondent pay the appellant's costs of the appeal.

(5) Order that the costs of the proceedings at first instance be determined on the remittal of the matter to the Land and Environment Court.

129 **ADAMSON JA**: I have had the benefit of reading the reasons of Ward P in draft. I agree with the orders proposed by her Honour, substantially for the reasons given, but would prefer to express my reasons separately.

Introduction

130 On 6 September 2022, the second respondent, the Independent Planning Commission of NSW (the Commission) approved an extension of the existing development consent in respect of the Mount Pleasant Coal Mine (the mine) in the Hunter Valley for 22 years (the project) to 2048. The first respondent, MACH Energy Australia Pty Ltd (MACH), operates the mine and applied for the extension to the project. The applicant, Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc (Denman), challenged the approval in the Land and Environment Court (the Court below) in its Class 4 jurisdiction.

131 On 19 August 2024, Denman's challenge was dismissed by Robson J (the primary judge): *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2024] NSWLEC 86 (J).

132 In the Court below, Denman relied on eight grounds to impugn the approval. In this Court, Denman relies only on two: the Commission's alleged failure to comply with s 4.15(1) of the *Environmental Planning and Assessment Act 1979*

(NSW) (the EPA Act) by failing to consider the following mandatory relevant considerations:

(1) cl 2.20 of the State Environmental Planning Policy (Resources and Energy) 2021 (the Resources SEPP) which required it to consider, relevantly, whether to impose conditions on Scope 3 emissions (in broad terms, greenhouse gas emissions caused by burning the coal mined by MACH); and

(2) the likely impacts of the development on the natural and built environment in the locality of the mine, as required by s 4.15(1)(b) of the EPA Act.

133 In respect of (1), Denman argued that the absence of reference to the placing of conditions on Scope 3 emissions indicated that the Commission had failed to consider whether conditions ought be imposed on such emissions.

134 In respect of (2), Denman argued that, while the Commission had considered the global effect of the additional carbon emissions which would be generated as a consequence of the project as causing climate change, it had failed to consider the effect of those emissions and of that climate change on the locality of the project. Denman submitted that these effects included heat waves and violent winds leading to extreme bushfires; erratic precipitation leading to severe droughts and floods; and a rise in sea level leading to coastal erosion in Newcastle being the closest coastal area to the project and the port from which coal mined as a result of the project will be shipped to purchasers.

135 On these two separate bases, Denman submitted that the approval was legally erroneous and, therefore, invalid. MACH sought to defend the approval but submitted, in the alternative, that if either or both of the grounds were made out, the matter ought be remitted to the Land and Environment Court for determination of whether the approval ought be validated pursuant to Division 3 of Part 3 of the *Land and Environment Court Act 1979* (NSW) (the LEC Act).

136 All references to legislation in these reasons are, unless otherwise indicated, references to the EPA Act.

The factual background

137 On 22 December 1999, development consent was granted for the construction and operation of the mine (J[7]). MACH purchased the mine in 2016 and began mining operations in 2018 (J[7]). That consent as modified authorises the

extraction of up to 10.5 million tonnes per year (Mtpa) of “run-of-mine” (ROM) coal until 22 December 2026 and infrastructure, including to transport the coal by rail to the Port of Newcastle (J[8]).

138 On 19 January 2021, MACH applied to extend the life of the mine by 22 years to 22 December 2048. If granted, the extension would enable the extraction of an additional 406Mt of coal and increase the mine’s peak annual production rate from 10.5 Mtpa to 21 Mtpa of ROM coal (J[9]). On 22 January 2021, MACH lodged an environmental impact statement (EIS) with the Department of Planning and Environment (the Department), which, together with its State Significant Development Application (SSD 10418), was publicly exhibited in February and March 2021 (J[10]).

139 On 9 September 2021, the relevant Minister requested that the Commission conduct a public hearing into the project under s 2.9(1)(d) within 12 weeks of receiving the Department’s Assessment Report (DAR) to the Commission “unless the Planning Secretary agrees otherwise”.

140 The DAR, dated 31 May 2022 and received by the Commission on 1 June 2022, concluded that the proposed development was “approvable” (J[11]). It referred SSD 10418 to the Commission for determination. A public hearing was conducted on 7 and 8 July 2022. The Commission received approximately 1,000 written submissions and heard 49 oral submissions. Denman made submissions and adduced evidence from its expert, Professor Penny Sackett, as well as providing expert reports and publications relating to greenhouse gas emissions and the effects of climate change (J[13]).

141 On 6 September 2022, the Commission granted development consent to SSD 10418 on conditions and published its reasons (J[15]).

The material before the Commission

142 It is not necessary to summarise all of the material which was before the Commission. I propose to make brief reference to MACH’s EIS; the report of the Department’s Climate and Atmospheric Science branch dated 10 December 2021 (the CAS report); the DAR; and the expert evidence adduced by Denman.

MACH's EIS

143 In its executive summary of the EIS, under the heading, "Key Project Outcomes", MACH addressed "Greenhouse Gas" as follows:

> It is acknowledged that (subject to the efficacy of national and international greenhouse gas abatement measures) all sources of greenhouse gas emissions in NSW, irrespective of their scale, will contribute in some way towards the potential global, national, state and regional effects of climate change.
>
> The Project's potential contribution to global climate change would be proportional to its contribution to global greenhouse gas emissions.
>
> Approximately 96% of the estimated total Scopes 1, 2 and 3 emissions are associated with the end use of the Project product coal by customer organisations (i.e. primarily for electricity generation).
>
> **Emissions associated with the end use of Project coal would be managed under the Nationally Determined Contributions of relevant customer countries.**
>
> MACH would manage its contribution to Australian greenhouse gas emissions inventories through participation in applicable government initiatives and policies implemented to manage emissions at the national level under Australia's progressive Nationally Determined Contributions.
>
> Due to the inherent uncertainties associated with climate change projections, the potential impacts of climate change on the Project cannot be determined with a high degree of confidence.
>
> Notwithstanding, climate change projections indicate average temperatures are likely to rise in the vicinity of the Project, and extreme temperature events may increase in frequency.
>
> MACH has considered the key potential climate change risks to the Project (namely increased frequency of bushfires, water reliability during dry periods and storm surges) in the design of the Project.
>
> The potential implications of climate change with regard to rainfall (e.g. prolonged dry periods and storm surges) have also been considered in the Groundwater Assessment and the Surface Water Assessment.
>
> MACH would continue to assess climate change risks on an ongoing basis via implementation of an adaptive management approach.
>
> (Emphasis in original.)

144 In section 7.21 of the EIS, MACH addressed greenhouse gas emissions and said, of present relevance:

> An assessment of the potential greenhouse gas emissions and climate change impacts of the Project, and potential impacts of climate change on the Project, is provided in Appendix S. The assessment is supported by a Greenhouse Gas Calculations report prepared by TAS (2021). A summary of the assessment is provided below.
>
> The following sub-sections provide:

…

● a summary of potential impacts of climate change on the Project (Section 7.21.5)

…

Further consideration of greenhouse gas emissions from the Project in the context of the *Paris Agreement* and ESD is provided in Sections 8.3.5 and 8.4.1 and Appendix S.

145 In section 7.21.2 of the EIS, MACH addressed each of Scope 1, Scope 2 and Scope 3 emissions. It said, of Scope 3 emissions:

> *Scope 3 - Other Indirect Greenhouse Gas Emissions*
>
> Scope 3 emissions are those emissions that are the consequence of the activities of an entity, but which arise from sources not owned or controlled by that entity. Some examples of Scope 3 emissions provided in the GHG Protocol are those from the extraction and production of purchased materials, transportation of purchased fuels, and use of sold products and services (WBCSD and WRI, 2020).
>
> The GHG Protocol notes that reporting Scope 3 emissions can result in double counting of emissions. For example, greenhouse gas emissions from the burning of coal to produce energy are the Scope 3 emissions of the mines approved to produce the coal, as well as the Scope 1 emissions of the businesses that burn the coal to generate electricity. Those emissions will also be the Scope 2 emissions of the businesses that purchase the electricity.

146 In section 7.21.3, entitled "Quantitative Assessment of Potential Greenhouse Gas Emissions", under the heading "Potential Impacts of Greenhouse Gas Emissions on the Environment", MACH said, relevantly:

> The Project greenhouse gas emissions would make some contribution to global greenhouse gas emissions. The Project's contribution to climate change, including the associated environmental impacts, would be in proportion with its contribution to global greenhouse gas emissions.
>
> The Project's Scope 1 and 2 emissions would be significantly less than the Scope 3 emissions produced by customers using Project product coal. The estimated Scope 3 emissions would represent approximately 0.065% of the total anthropogenic greenhouse gas emissions globally (excluding land use change) in 2017 (Appendix S). It is anticipated that a significant majority of the Scope 3 emissions from the use of Project coal would occur overseas.

147 At 7.21.5, entitled "Potential Impacts of Climate Change on the Project", MACH said:

> Due to the inherent uncertainties associated with climate change projections, the potential impacts of climate change on the Project cannot be determined with a high degree of confidence.
>
> Notwithstanding, climate change projections indicate average temperatures are likely to rise in the vicinity of the Project, and extreme temperature events may increase in frequency. This suggests that bushfire activity may become

> more prevalent in the region. In addition, rainfall has the potential to both increase and decrease, particularly seasonally, with heavier rainfall events likely to become more frequent.

148 The second paragraph of this extract was relied upon by MACH in support of the submission that MACH in identifying the effects of climate change on the project, by necessary implication identified the effects of climate change on the locality of the project. MACH submitted that, because the Commission expressly took into account the EIS, it ought be taken to have considered this aspect of the EIS and therefore complied with s 4.15(1)(b). In response, Denman submitted that, by concentrating on the effects of climate change on the project, MACH did not actually address the effects of climate change on the locality for the purposes of s 4.15(1)(b). These submissions will be addressed below in the context of ground 1(b).

149 Section 8.3.4 of the EIS, entitled "Potential Implications of Climate Change" is to similar effect. MACH said:

> The Project's contribution to global climate change effects would be proportional to its contribution to global greenhouse gas emissions.
>
> The Project's Scope 1 and Scope 2 emissions have together been estimated at approximately 0.54 Mt CO2-e per year, which represents approximately 0.4% of the estimated total greenhouse gas emissions in NSW from 2017 and approximately 0.1 % of Australia's annual greenhouse gas emissions from 2017 (Appendix S).
>
> The estimated annual average Scope 3 emissions due to the combustion of coal produced by the Project by its customers would be approximately 0.065% of the total anthropogenic greenhouse gas emissions globally in 2017 (excluding land use change).
>
> The potential contributions of Project greenhouse gas emissions to national and international emissions are further considered in Section 7.21 and Appendix S.
>
> MACH has considered the key potential climate change risks to the Project (namely increased frequency of bushfires, water reliability during dry periods and storm surges) in the design of the Project, and would continue to assess climate change risks on an ongoing basis via implementation of an adaptive management approach.

150 Under the heading, "Greenhouse Gas Emissions, Biological Diversity and Ecological Integrity", MACH noted the effect of climate change on natural ecosystems, without particularising any local effect. It said, of groundwater:

> The potential implications of climate change on local groundwater and surface water resources are addressed in Appendices C and D, respectively.

151 In section 8.4.1 of its EIS, MACH identified “Potential Indirect Adverse Impacts” and said, in part:

> However, consultation has also identified concerns regarding Scope 1 and Scope 2 greenhouse gas emissions from NSW coal mining developments, and Scope 3 greenhouse gas emissions (e.g. overseas greenhouse gas emissions from the use of Project product coal) potentially contributing to global climate change effects (Appendix N).
>
> It is acknowledged that (subject to the efficacy of national and international greenhouse gas abatement measures) all sources of greenhouse gas emissions will contribute in some way towards the potential global, national, state and regional effects of climate change (Section 8.3.5).

152 It was common ground that MACH did not propose that any conditions be imposed with respect to Scope 3 emissions.

153 Section 5.3, entitled “Climate Change Projections for New South Wales” said, in part:

> The Project is located within the Hunter Region of the NARCliM Project domain. NARCliM projections are generated with the Weather Research and Forecasting Model, which has been demonstrated to be effective in simulating temperature and rainfall in NSW and provides a good representation of local topography and coastal processes (Evans and McCabe, 2010).
>
> Mean temperatures in the Hunter Region are projected to rise by 0.7°C by 2030 and 2°C by 2070 (NARCliM, 2015). Summer and spring will experience the greatest changes in temperatures, with maximum temperatures increasing by 2.3°C by 2079. These increases are projected to occur across the region, with a slightly greater increase in the Upper Hunter (NARCliM, 2015).
>
> Changes to annual rainfall are predicted to vary across the Hunter Region, with rainfall projected to increase in autumn and decrease in winter (NARCliM, 2015) (Table 4).

154 Section 5.4, entitled “Potential Impacts of the Project”, addressed Scope 3 emissions in section 5.4.2 and said that “a significant majority of the Scope 3 emissions from the use of Project coal would occur overseas”. MACH referred to the Paris Agreement (the United Nations Framework Convention on Climate Change), which has been adopted by over 190 parties which have committed to pursuing efforts to limit global warming by reducing their greenhouse gas emissions, known as Nationally Determined Contributions (NDCs). It said:

> Under the *Paris Agreement*, each Party is required to prepare, communicate and maintain NDCs that will contribute to the long-term goals of the *Paris Agreement* (UNFCCC, 2020d).

155 In Table 5 of the EIS, MACH listed the then current NDCs of “key potential customer countr[ies]”: Japan, India, South Korea, China, Vietnam, Malaysia

and Thailand, each of whom it identified as being party to the Paris Agreement. It also listed Taiwan which has not been recognised as an independent sovereign nation and therefore cannot be a party to the Paris Agreement. MACH identified Taiwan's "Intended NDC".

156 In section 5.5, MACH identified "Potential Impacts on the Project" and said:

> Due to the inherent uncertainties associated with the climate change projections described in Sections 5.1 to 5.3, the potential impacts of climate change on the Project cannot be determined with a high degree of confidence.
>
> Notwithstanding, the projections presented in Sections 5.1 to 5.3 indicate average temperatures are likely to rise in the Project area, and extreme temperature events may increase in frequency. This suggests that bushfire activity may become more prevalent in the region.
>
> In addition, rainfall has the potential to increase and decrease, particularly seasonally, with heavier rainfall events likely to become more frequent.

157 Appendix S of the EIS, entitled "Greenhouse Gas Assessment" addressed the effects of global warming by reference to global effects, effects on Australia, effects on New South Wales and the project itself. In identifying the global effects, MACH said:

> Extreme climatic events (e.g. hot extremes, heavy rainfall events and droughts) are projected to be more frequent if global warming reaches 1.5°C above pre-industrial levels, and even more frequent if global temperatures are raised to 2°C above pre-industrial levels (IPCC, 2018).

158 Included in Appendix S of the EIS was a report prepared for MACH by Todoroski Air Sciences entitled "Greenhouse Gas Calculations". It said, of Scope 3 emissions:

> Scope 3 emissions can be a significant component of the total emissions inventory; however, these emissions are often not directly controlled by the operation. These emissions are understood to be considered in the Scope 1 emissions from other various organisations related to the Project.
>
> Scope 3 emissions also arise from a number of various other sources indirectly associated with the operation of the Project such as emissions generated by employees travelling to and from the site. The relatively minor individual contributions that are difficult to accurately quantify due to the diversity and nature of the sources, have not been considered further in this assessment.
>
> …
>
> It is also noted that some of the coal produced by the Project may be consumed in Australia. For this assessment, the total Scope 3 emissions assume all of the product coal is transported overseas and hence these estimates are conservative as there would be no emissions generated from the shipping for the coal consumed in Australia.

…

> The Scope 3 emissions from the Project include the use of coal by other parties. It is reasonable to expect that there may be future policy changes in the countries which receive Australian coal due to the Paris agreement or other influencing factors. As such it is also reasonable to expect that Project would monitor such changes and adjust accordingly to any new policy, guidelines, carbon pricing, coal demand and trade contracts.

The CAS report

159 The CAS report identified the reason for its production as follows:

> We were requested to consider measures to minimise the Scope 1 and 2 emissions of the project and any additional measures that could be implemented to mitigate Scope 1 and 2 emissions to the greatest extent practicable over the life of the project. …

160 It was common ground that there was no reference to Scope 3 emissions in the CAS report. This is understandable since CAS was only asked to address Scope 1 and Scope 2 emissions.

The DAR

161 In its executive summary, the DAR said:

> *Greenhouse Gases*
>
> The Department recognises that GHG emissions and climate change is a matter of interest to many members of the broader community, and was raised in many public submissions.
>
> The assessment indicates that the majority (98%) of GHG emissions generated by the project comprise Scope 3 emissions that would arise from the downstream consumption of coal by end users. Under the Paris Agreement accounting rules and Australian legislation, Scope 3 emissions are not included in Project emission reporting, to avoid double counting.

162 It was common ground that the DAR did not recommend that any conditions be imposed in relation to Scope 3 emissions. The following statement in its report applies solely to Scope 1 and Scope 2 emissions:

> The Department has recommended a comprehensive and precautionary suite of conditions to ensure that the project would comply with acceptable criteria and standards, that the impacts would be consistent with MACH's predictions, and that residual impacts would be effectively minimised, managed and/or at least compensated.

163 The DAR listed "mandatory matters for consideration" in section 4.4, including "the provisions of any environmental planning instruments" (which includes the Resources SEPP) and "the likely impacts of the project, including the environmental impacts on both the natural and built environments, and social

and economic impacts in the locality". It said that it had considered all of these matters in its assessment and provided a summary as well as including further consideration in Appendix G.

164 The DAR said, in Appendix G.3:

> Under Section 4.15 of the EP&A Act, the consent authority is required to consider, amongst other things, the provisions of the relevant EPI's, including any exhibited draft EPI. Section 4 of the PIR provides a summary of the Department's consideration of the relevant EPI's and notes MACH's consideration of applicable provisions of relevant EPI's in its EIS. Further consideration is provided in the Department's assessment (see **Section 6**) and below.

165 Appendix G.3 contains a reference to the predecessor of cl 2.20 of the Resources SEPP and said:

> The Department has recommended a number of conditions aimed at ensuring that the Project is undertaken in an environmentally responsible manner, including but not limited to, conditions in relation to water resources, threatened species and biodiversity and greenhouse gas emissions.

166 In section 6.3, entitled "Air Quality and Greenhouse Gas", the DAR included, under the heading "Greenhouse Gas Emissions":

> 198 The project's Scope 1 and 2 GHG emissions represent approximately 0.1 % of Australia's annual GHG emissions and 0.5% of NSWs annual GHG emissions, and the **Scope 3 emissions represent a very small proportion (approximately 0.06%) of yearly global emissions**.
>
> 199 The Climate and Atmospheric Science (CAS) Branch within the EES has also confirmed that the project has been accounted for in the NSW GHG emissions projections in the Department's Net Zero Stage 1: 2020-2030 Implementation Update. The projections used in CAS's net zero emissions modelling for the project are conservatively higher than MACH's projections.
>
> 200 Nonetheless, CAS did recommend that MACH be required to provide a more detailed consideration of Scope 1 and 2 GHG mitigation measures, particularly in regard to diesel consumption, fugitive methane emissions (including feasibility of methane pre-drainage and beneficial re-use), and the feasibility of purchasing offsets for emissions.
>
> …
>
> 208 Importantly, as detailed above, the Scope 1 and Scope 2 emissions associated with the project would have a relatively low emissions intensity compared to other coal mining projects and, importantly, these emissions have been accounted for in the NSW GHG emissions projections in the NSW Government's Net Zero Plan.
>
> 209 On balance, the Department considers that the residual GHG impacts of the project are acceptable, particularly as the project represents a continuation of existing mining activities, and would make use of considerable existing infrastructure.

> 210 To ensure that GHG emissions are minimised to the greatest extent practicable, the Department has recommended conditions requiring MACH to:
>
> - limit GHG emissions to no greater than predicted in the EIS and subsequent additional information (see **Appendix F**), through strict Scope 1 and 2 performance measures; and
>
> - regularly review new technologies and other options to further reduce Scope 1 and 2 GHG emissions, and implement these measures where reasonable and feasible to continually reduce GHG emissions over the duration of the project.
>
> (Emphasis added to indicate the portion which referred to Scope 3 emissions which was relied on by MACH to indicate that they had been taken into account, and by implication, the Department had decided not to recommend conditions, a recommendation which had been accepted by the Commission.)

Denman's evidence and submissions to the Commission

167 Denman relied on considerable material before the Commission, including the expert report of Professor Sackett dated 14 July 2022.

168 In section 5.2.4 of her report, Professor Sackett identified five "subcluster regions" in New South Wales, including the "East Coast" cluster where the project is located. She explained that the severity of the impacts of climate change depended on the level of global warming. She said, of the impact of global warming on the locality of the project:

> 223) Joint work by the CSIRO and BoM **projects future climate conditions** by combining several global climate simulations with fine resolution "downscaled" data appropriate to local regions. **All five subclusters of NSW can expect the following in future**:
>
> a) **Temperatures increase in all seasons, with fewer frosts in winter.**
>
> b) **Substantial increases in the temperature on hot days, the frequency of hot days, and the duration of warm spells.**
>
> c) **Less cool season rainfall and increased intensity of extreme rainfall events.**
>
> **224) In addition, the East Coast South subcluster** containing the Muswellbrook – Singleton region **in which the proposed Project would be sited, and its intended export port of Newcastle, can expect harsher fire weather and an increasing height of extreme sea-level events**.
>
> 225) **For many areas of NSW, runoff, that is the water available to feed dams and rivers, will decrease markedly with the multiple effects of climate change**. This is because runoff depends not only on precipitation, but also soil moisture content and soil permeability, and vegetation cover, all of which can be affected by increased surface temperature.
>
> 226) It is estimated that **for every one degree of global warming, runoff will be reduced by 15%**, which matches current experience. With current

global policies (see Section 6.1) leading to a possible additional 2°C to 3°C of temperature increase (for a total increase of 3°C to 4°C), the NSW region could be faced with water runoff reductions of 45 - 60%, compared to mid-last century. This has **profound consequences for water availability for human and environmental use**.

227) Figure 23 shows the changes in runoff in 2085 projected to affect the region surrounding the proposed Project, **if global emissions follow a trajectory similar to RCP 4.5** (see Section 5.2.1), which would place global warming around 2.5 or more by 2100. All of the region **is expected to experience runoff reductions, with most areas experiencing at least a reduction of 25% per year** compared to the 30-year period 1976-2005, **and over half of the area experiencing up to 50% reductions compared to the recent past**.

228) The difference in global warming between 1.5°C and 2.0°C greatly increases the frequency of extreme temperatures over many regions. For southern Australia, a median of 4-8 extra heatwave days per year is projected for every additional degree of warming. Consequently, **in a world with 1.5°C of warming, NSW can expect about 2-4 more heatwave days than currently, and 4-8 more with 2°C of global warming**. Should global warming reach **3°C or more**, as indicated by current policy settings in Australia and elsewhere in the world, **NSW will incur one or two more weeks in heatwave every year in addition to what it now endures**.

229) The non-linear complexity of Earth's climate system is such that the most extreme of extreme temperature events do not scale simply with an additional amount of warming. One study from 2017 (before Black Summer) **concluded that major Australian cities, such Sydney or Melbourne, could therefore incur maximum summer temperatures of 50°C under 2°C of global mean warming**.

230) It is important to note that Penrith recorded 48.9°C (whilst many other sites in metropolitan Sydney exceeded 47°C) on 4 January 2020, **at a time when global warming was about 1.1°C**. This raises the possibility that **current models may be underestimating the extreme heat that NSW will feel at 1.5°C, let alone, at 2°C of global warming**.

(Bold in original and footnotes omitted.)

169 Professor Sackett's evidence to the Commission included the following (by reference to a power point presentation):

> … The fraction of New South Wales that has experienced maximum annual temperatures in the top 10 per cent of all records since 1910 is shown in this part, and clearly the years since 2000 have been dramatically different than anything previous. Certainly the hottest years on record for the globe have been the past seven years, the hottest 20 years on record, 19 of which have all occurred since the year 2000 and this global heating drives extreme weather. For example, the extreme rainfall that Sydney is now experiencing, cumulative you see that dark line, it's from January up until July 5th, it's far above the historical maximum going all the way back to 1859, and that's why regions of New South Wales have seen three to four major flood events in four months. This is not the kind of war[m]ing that those of us over 40 grew up in, and the more we know the more we realise how dangerous even a small amount of warming can be.

…

What does that mean for New South Wales? Well, we've had record drought followed by record fires, followed by record floods in three years. 47 per cent of all local extinctions in the world are now caused by climate change, that's at 1.2 degrees of warming. At 1.5 only 0.3 degrees Celsius more which is virtually inevitable by the late 2030s. What used to be once-in-30-year heatwaves will occur every three years and that very hot summer of 2019/2020 will be an average summer. At two degrees [of warming], should we reach that, you can expect 50-degree summer days in Sydney, essentially all of the world's coral reefs will be destroyed, and 13 per cent of the earth's surface will undergo a complete ecosystem transformation. And if we should possibly reach three degrees or more, which I only mention because that is where world and Australian inaction is taking us now, the New South Wales run-off water that feeds agriculture and streams will be reduced by 45 to 60 per cent in many areas.

170 Denman's written submissions to the Commission included the following with respect to the impacts of the emissions from the project on the locality of the project:

> 141 In Professor Sackett's view, unabated climate change is likely to be the greatest overall threat to the environment and people of NSW because it is comprehensively dangerous, global, fundamental, rapid, compounding, self-reinforcing, has delayed effects and, in some cases, including effects currently underway, is irreversible.
>
> 142 Professor Sackett advises that GHGs emitted by human activities are responsible for essentially all of the global warming driving climate change. The primary anthropogenic GHGs are carbon dioxide (CO2), methane (CH4) and nitrous oxide (N2O). Atmospheric concentrations of all these gases have risen dramatically since the 1960s at an accelerating rate. The level of CO2, the most important GHG driving current climate change, is now higher than at any other time humans have inhabited Earth and about 90% of the CO2 emitted by humans per year is from the burning of fossil fuels: coal, gas, and oil.
>
> 143 The current level of global warming is about 1.2°C above pre-industrial times. For comparison, the temperature difference between ice ages and the intervening periods is about 4°C – 6°C. Climate impacts are hitting harder and sooner than previous scientific assessments have expected. **Most of the climate change impacts experienced by Australia are being felt in NSW**. Continued warming increases the risk that some subsystems of the Earth will cross "tipping points" that would cause irreversible changes. Some subsystems already show signs of approaching these transitions, which could accelerate climate change and greatly intensify its impacts, perhaps irreversibly.
>
> (Emphasis added and footnotes omitted.)

171 Denman also submitted that the Department had failed to consider the full environmental, social and economic impacts of greenhouse gas emissions caused by the project. It relied on an economic assessment of the project by

Nicki Hutley who concluded: “there is a high degree of risk that the Project will deliver a net cost to NSW, rather than a benefit”.

The Commission’s reasons

172 Having regard to the limited challenges made to the approval, I propose to concentrate, when addressing the Commission’s reasons, on the references to cl 2.20 (regarding greenhouse gas emissions and climate change) and to the likely impacts of the development in the locality of the project.

173 In its executive summary, the Commission said in part:

> A Public Hearing was held over two days on 7 July 2022 and 8 July 2022. The Commission heard from community members at the Public Hearing and received written submissions on the Application. Concerns raised in submissions included air quality, noise, greenhouse gas (GHG) emissions and climate change, visual impacts, and land use conflicts, including impacts to the equine industry. The Commission also received submissions in support of the Application, noting the importance of stability of local area employment and commenting on the benefits of job creation and job security through both direct and indirect employment.
>
> …
>
> Key issues which are the subject of findings in this Statement of Reasons include: air quality, noise, GHG emissions, economics, biodiversity, water, Aboriginal and historic heritage, visual impact, rehabilitation and final landform. After consideration of the material and having taken into account the views of the community, the Commission has determined that development consent should be granted for the Application, subject to conditions. The Commission finds that the Application is consistent with the Objects of the *Environmental Planning* & *Assessment Act 1979* and would achieve an appropriate balance between relevant environmental, economic and social considerations, with the likely benefits of the Project warranting the conclusion that an appropriately conditioned approval is in the public interest.

174 In [16] of its reasons, the Commission listed the material which it had considered, which included the submissions which had been made to it, orally and in writing.

175 At [35] of its reasons, in Table 1 under the heading “Mandatory Considerations”, the Commission listed the considerations identified as mandatory and its “comments” on those considerations. Beside the box labelled “Relevant EPIs” (Environmental Planning Instruments), it identified the Resources SEPP (which contains cl 2.20) and said:

> The Commission agrees with the Department’s assessment of EPIs set out in Appendix G.3 of the [D]AR. The Commission therefore adopts the Department’s assessment.

176 Table 1 also included a row entitled “Likely Impacts of the Development”. The Commission’s comments were:

> The likely impacts of the Application have been considered in section 5 of this Statement of Reasons.

177 Section 4, entitled Community Participation & Public Submissions, included, in 4.3.3 a summary of “Key Issues Raised”, as follows:

> 69 Submissions to the Commission raised a number of key issues, which are outlined below. The Commission notes that the submissions referred to below are not an exhaustive report of the submissions considered by the Commission, they are reflective and illustrative of what the Commission regards as the key issues that emerged from the submissions.
>
> *Greenhouse gas emissions and climate change*
>
> 70 The Commission received submissions that raised GHG emissions and the impact the increase in mining would have on climate change. Submissions noted the cumulative impact that GHG emissions would have and noted that **while Scope 3 emissions are not counted towards NSW’s emissions under the Paris Agreement, the impact is still felt globally**.
>
> 71 Submissions were received by the Commission that noted that while they were concerned for environmental impacts and climate change, they were also concerned that, should the mine close, nearby towns, communities and families would suffer. Some submissions commented that the reliance on coal would continue to be important over the next 20 years until appropriate alternative energy supplies are available to Australia, noting a need for a transition period away from coal.
>
> 72 The Commission received submissions that put forward their support for the Application, stating that high-quality and low emission coal from the mine results in overall lower GHG emissions.
>
> (Emphasis added to indicate the passage relied on by Denman to show that the Commission did not consider the effects on the locality, as required by s 4.15(1)(b) of the *EPA Act* but rather limited its assessment of the effects of climate change to its overall global effect.)

178 In Section 5 of its reasons, the Commission addressed “Key Issues”. Under 5.3, entitled “Greenhouse Gas Emissions”, the Commission, at [125], referred to and defined (in accordance with the definitions set out above) Scope 1, 2 and 3 emissions. The Commission described Scope 3 emissions as:

> Scope 3: indirect GHG emissions other than scope 2 emissions that are generated in the wider economy. They occur as a consequence of the activities of a facility, but from sources not owned or controlled by that facility’s business.

179 This passage was relied on by MACH as indicating that the likely impacts on the locality had been considered (this will be addressed below).

180 Of Scope 3 emissions, the Commission said, at [127]:

> The Commission notes that the Project's Scope 3 emissions will be accounted for in the consumer countries' GHG emissions. The Commission also notes that with the adoption of the Paris Agreement, almost all countries have committed to reduce their GHG emissions and track their progress in doing so.

181 At [137]-[138] of its reasons, the Commission set cl 2.20 out in terms. Table 4 set out at [141] said as follows:

GHG	**Estimated GHG Emissions (MtCO2-e)**	
	Annual Average	**Total**
Scope 1	0.54	13.9
Scope 2	0.08	2.17
Scope 3	33.1	860
Total (excluding Scope 3)	**0.62**	**16.07**
Total (including Scope 3)	**33.72**	**876.07**

(Emphasis in original.)

182 The effect of Table 4 was summarised in [142]:

> With respect to Scope 3 emissions, the Department notes the assessment indicates that 98% of the total GHG emissions generated as a consequence of the project are those associated with the downstream burning of product ([D]AR para. 194).

183 Under the heading "Scope 3 Emissions", the Commission said:

> 150 The Commission acknowledges that the mining of coal and its combustion is a major contributor to anthropogenic climate change, which has the potential to impact future generations. The Commission acknowledges that although the Project's Scope 3 emissions would contribute to anthropogenic climate change, **these are appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)**.
>
> 151 The Commission notes that the GHG emissions associated with burning coal to produce energy are accounted for at the international powerplants where that combustion takes place. The Commission agrees with the Department and acknowledges that under the Paris Agreement accounting

rules and Australian legislation, Scope 3 emissions are not included in Project emission reporting, to avoid double counting. **However, the Commission has considered all emissions associated with the Project (including Scope 3 emissions) in its assessment and determination**.

5.3.2 Commission's Findings

152 The Commission received submissions that raised concerns regarding the Project's GHG emissions and the impact the increase in mining would have on climate change and future generations. Some submissions recognised that while Scope 3 emissions are not counted towards NSW emissions, the cumulative impact of GHG emissions is still felt globally.

153 The Commission recognises the concerns expressed in these submissions, however the Commission notes that under the Paris Agreement, Scope 3 emissions are attributed to the country within which they are emitted. **The Commission notes that with the adoption of the Paris Agreement almost all countries have committed to reduce global GHG emissions and to track their progress in doing so**.

154 The Commission has considered the matters in clauses 2.20(1) and 2.20(2) of the Resources SEPP (in addition to the mandatory considerations under section 4.15 of the EP&A Act) and finds that the Project's Scope 1 and Scope 2 emissions have been estimated using the recommended methodologies consistent with the current national and NSW policy settings and commitments. In the absence of clear policy guidance on performance criteria or offsets, the Commission is of the view that the Project is not inconsistent with the CCPF, the Net Zero Plan or Australia's current obligations under the Paris Agreement in respect of Australia's current NDC's.

155 **The Commission notes there is a growing body of international, national and State policy that is aimed at reducing GHG emissions (see paragraphs 126 - 138 above), particularly those associated with fugitive methane**. **The Commission is required to have regard to such applicable polices at the national and State level (under clause 2.20 of the Resource SEPP)**. The Commission also notes that current national and State policy recognises the ongoing demand for coal and its importance to the NSW (and Australian) economy and the regions it is located in. The current strategic direction of the NSW government, as set out in its policies, seeks to continue coal exploration, extraction and export. Instead of prescribing the refusal of development for projects such as the Project under consideration, the body of policy considered by the Commission (particularly the Commonwealth's Australia's Long-Term Emissions Reduction Plan and NSW's Net Zero Plan Stage 1: 2020-2030) indicates that the deployment of existing, emerging and future technologies to minimise and/or beneficially use fugitive methane is an important part of reducing GHG emissions from developments such as the Project.

(Emphasis added to indicate the passages relied on by MACH as indicating that the Commission took into account cl 2.20 in coming to its approval decision.)

184 In its reasons at [157]-[160], the Commission addressed the conditions which were imposed in relation to Scope 1 and Scope 2 emissions (these conditions are set out in B31-B37). The Commission expressed its conclusion at [161] as follows:

> For the reasons set out above, the Commission finds that the GHG emissions for the Project have been adequately assessed. Subject to the imposed conditions, **the Commission is satisfied that the Project can achieve the requirements of the Resources SEPP, the EP&A Act and the relevant Commonwealth and NSW policy positions with respect to the reduction of fugitive emissions and the recognition of the importance of the continuation of the extraction and exportation of coal to the NSW economy**. The Commission recognises that at this stage there is an ongoing demand for coal and that in line with the NSW Strategic Statement, the Project would not be located in any of these 'no-go' areas, but would be located in an area where coal exploration and mining titles already exist. The Commission acknowledges the Project's positive economic contribution to the local area through the provision of jobs and flow on economic benefits to local business (paragraph 247 below). The Commission also acknowledges that mining plays an important part of the NSW economy into the future as set out in the Net Zero Plan and that mining needs to be undertaken sensitively to minimise impacts on the environment.
>
> (Emphasis added to indicate the passage relied upon by MACH to indicate that the Commission addressed emissions and the effect on the locality.)

185 Under the heading for Section 6, "The Commission's Findings and Determination", the Commission said:

> 292 The views of the community were expressed through public submissions and comments received (as part of exhibition and as part of the Commission's determination process), as well as in oral presentations to the Commission at the Public Hearing. The Commission carefully considered all of these views as part of making its decision.
>
> 293 The Commission has carefully considered the Material before it as set out in section 3.1 of this report. Based on its consideration of the Material, the Commission finds that the Project should be approved subject to stringent conditions of consent for the following reasons:
>
> …
>
> • the GHG emissions for the Project have been adequately estimated and are permissible in the context of the current climate change policy framework;
>
> • **opportunities exist for the Applicant throughout the life of the Project to deploy existing, emerging and future technologies to improve the abatement of GHG emissions**;
>
> …
>
> (Emphasis added.)

186 MACH accepted that the highlighted dot point in the extract related solely to Scope 1 and Scope 2 emissions.

The question of relief in the Court below

187 In its written submissions in the Court below dated 14 September 2023, Denman submitted:

> 133 There is an open question as to whether materiality will need to [be] shown in respect of each and every error assert in the grounds above. In any case, each of the errors identified above were both material and jurisdictional. If any of the grounds are made out, there would have been a realistic possibility that, if the error had not happened, the Commission could have made a different decision. For each of the grounds, the Court will consider the counterfactual (namely that the respective mandatory consideration was taken into account or that there was no relevant irrationality within the decision), in order to determine whether there was such a realistic possibility. However, the threshold for proving a realistic possibility is not high, with that test essentially excluding those cases where the possibility of a different outcome is merely fanciful or improbable.
>
> I. CONCLUSION
>
> 134 The application should be upheld and the following orders made:
>
> (a) A declaration that the Decision is invalid.
>
> (b) An order in the nature of certiorari setting aside the Decision.
>
> (c) First Respondent pays the Applicant's costs.
>
> (Underlining in original and footnotes omitted.)

188 In its written submissions in the Court below dated 27 October 2023, MACH responded to that submission as follows:

> In the event that the Court finds that the Consent is invalid by reason of one or more of the grounds advanced by the Applicant, the Court is obliged to consider making an order under Div 3 of Pt 3 of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**): LEC Act s 25E. Whether orders under Div 3 of Pt 3 are appropriate and, if so, the form of those orders is likely to depend on the Court's reasons. MACH suggests that, in the event that the Court is of the view that the Consent is invalid, the appropriate course is to publish reasons and hear from the parties as to the application of Div 3 of Pt 3.

189 Denman's submissions in reply in the Court below did not take the matter further.

190 The hearing in the Court below took place over four days: 7, 8, 9 and 10 November 2024. At the conclusion of the fourth day, immediately before the primary judge reserved his decision, the following exchange occurred:

> FREE: … If your Honour has our written submissions, at the very end we made the point that if your Honour was minded to invalidate the consent, of course we would say you won't reach this point, but if you were, you would have a duty under s 25E of the Land and Environment Court Act, to consider whether or not to make a conditional order under div 3 of pt 3. What we've suggested in the written submissions there, was that if your Honour reached that position, before making final orders to that effect, you would invite any submissions from the parties. I don't understand from the reply that there's any issue taken with that.
>
> HIS HONOUR: There was no response to that point?

SHARP: No, your Honour.

FREE: I'm grateful to my learned friend. Nothing further, your Honour.

191 The effect of this exchange was the subject of argument in this Court (see below).

The primary judge's reasons

192 In J[68], the primary judge identified "three uncontroversial matters before the Commission": first, that "anthropogenic climate change poses global environmental risks and that additional greenhouse gas emissions exacerbate the problem irrespective of where they occur"; second, that, through the Paris Agreement, many countries seek to limit the extent of climate change; and, third, that there is an ongoing demand for coal which is not inconsistent with the Paris Agreement. At J[69], the primary judge said that, at least in respect of those three matters, there was "no substantial factual controversy for the Commission to resolve."

193 Denman argued that, although these three matters might be regarded as uncontroversial, there was an issue about the effects of climate change on the locality of the project, which the Commission was required, and failed, to determine or refer to in its reasons for decision.

Whether the Commission considered whether to impose a condition to address Scope 3 emissions

194 In substance, the primary judge considered that, although the Commission had not specifically addressed any conditions that could have been imposed with respect to Scope 3 emissions and although the Department had not proposed any conditions relating to such emissions, it could be inferred that the Commission had elected to exercise its discretion not to attach conditions specifically directed to Scope 3 emissions (J[68]-[81]).

195 At [105], the primary judge referred to *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* (2021) 252 LGERA 221; [2021] NSWLEC 110, in which the Department had explained to the Commission why it did not propose conditions to minimise Scope 3 emissions: see [37], [42] and [58] (Preston CJ). This distinction from the present case was not addressed by the primary judge.

Whether the Commission considered the likely impacts on the locality

196 The primary judge addressed the material which was before the Commission about the effects of climate change as follows:

> 100 The Commission received extensive material in relation to the likely impacts of Scope 3 emissions. The evidence before this Court comprised over 9,000 pages of material (not all of which related to greenhouse gas emissions) and the Court was assisted by [Denman]'s compilation of specific references to material before the Commission relating to the likely impacts of Scope 3 emissions recording the uncontroversial evidence that was before the Commission (which became MFI 4). The specific material before the Commission (to which I was discretely directed) dealt with the likely impacts of Scope 3 emissions under various headings including "Current impacts on global warming", "Future warming trajectories based on emission scenarios", and material in relation to the remaining global carbon budget (to which some reference has been made above) primarily comprising information from the report of Prof Sackett; the Department AR; the EIS; the Emissions Reduction Plan; and MACH's various submissions (and further reports and assessments) provided to the Commission, as well as further submissions made to the Commission by various parties.
>
> 101 The fact that the existence of climate change (and its negative impact on the environment) was something that did not need to be "resolved", provides context for the manner in which the Commission went about its assessment. It is clear that much of the material before it was predicated on an acceptance that greenhouse gas emissions, regardless of the characterisation of the scope ascribed to such emissions, would have an adverse impact on anthropogenic climate change.

197 These paragraphs were challenged by Denman, which submitted that, while the global effects of climate change were common ground, there was significant controversy about the effects of climate change on the locality of the project which was neither addressed by the Commission nor appreciated by the primary judge.

198 The primary judge's reasons for dismissing this ground are summarised as follows:

> 109 Moreover, I find that the Commission recognised the environmental impacts of greenhouse gas emissions (including Scope 3 emissions) and took those matters into account. This is clear from the Commission's findings detailed in its Reasons (at pars (152) and onwards) where the Commission accepts that greenhouse gas emissions (including Scope 3 emissions) have a cumulative impact on climate change and will impact negatively on future generations. The Commission effectively concluded, through the polycentric nature of its decision-making, that the likely impacts of the Project (including the likely impacts of Scope 3 emissions, particularly in light of the Paris Agreement) is not reason enough to refuse approval.
>
> 110 To the extent [Denman] submits that the Commission failed to take into account the direct impact of Scope 3 emissions because the Reasons had no

> reference to certain discrete aspects of climate change such as bushfire risk, increased precipitation, changes in precipitation patterns and the like, **I accept MACH's position that, given the evidence before the Commission, the negative effects of climate change were acknowledged and there was no need to articulate those specific impacts which are largely impacts of climate change generally**. While there is a legal requirement to take into account impacts, clear acceptance by the Commission (as was the case in *Mullaley*), that contributional anthropogenic climate change has negative impacts on the environment, is sufficient to deal with the legal obligation to "consider".
>
> (Emphasis added.)

199 As the primary judge was not persuaded that any of the errors alleged had been made out, his Honour did not need to consider whether the approval ought be validated under Division 3 of Part 3 of the LEC Act, notwithstanding the alleged errors of law.

The statutory framework as judicially construed

The EPA Act

200 Division 2.6 provides for community participation and applies to the Commission (s 2.21(1)(d)) in the exercise of its development consent functions under Part 4 of the Act (s 2.21(2)(b)).

201 Section 2.22 provides that "the mandatory requirements for community participation by planning authorities with respect to the exercise of relevant planning functions" are set out in Part 1 of Sch 1 of the Act. Clause 20 of Sch 1 applies to the determination by the Commission of an application for development consent: cl 20(1)(c). Clause 20 also provides:

> (2) The mandatory notification requirement in relation to a decision to which this clause applies is public notification of—
>
> (a) the decision, and
>
> (b) the date of the decision, and
>
> (c) the reasons for the decision (having regard to any statutory requirements applying to the decision), and
>
> (d) how community views were taken into account in making the decision.
>
> (3) The requirement in subclause (2)(c) may be satisfied by reference to any document that contains the reasons for decision.

202 Section 2.23 relevantly provides:

> **2.23 Community participation plans—preparation**

(1) A planning authority to which this Division applies is required to prepare a community participation plan about how and when it will undertake community participation when exercising relevant planning functions (subject to this section).

Note.

Schedule 1 requires a proposed plan to be publicly exhibited for at least 28 days.

(2) A planning authority is to have regard to the following when preparing a community participation plan—

(a) The community has a right to be informed about planning matters that affect it.

(b) Planning authorities should encourage effective and on-going partnerships with the community to provide meaningful opportunities for community participation in planning.

(c) Planning information should be in plain language, easily accessible and in a form that facilitates community participation in planning.

(d) The community should be given opportunities to participate in strategic planning as early as possible to enable community views to be genuinely considered.

(e) Community participation should be inclusive and planning authorities should actively seek views that are representative of the community.

(f) Members of the community who are affected by proposed major development should be consulted by the proponent before an application for planning approval is made.

(g) Planning decisions should be made in an open and transparent way and the community should be provided with reasons for those decisions (including how community views have been taken into account).

(h) Community participation methods (and the reasons given for planning decisions) should be appropriate having regard to the significance and likely impact of the proposed development.

…

203 Part 2 of Sch 2 makes provision for public hearings and procedure of the Commission. If the Commission conducts a public hearing, it is obliged, by cl 6, to prepare a final report containing its findings and recommendations and a summary of any submissions it has received in relation to the subject matter of the public hearing.

204 The project was declared to be a State significant development under s 4.36 of the EPA Act. Under s 4.38, the consent authority is to determine a development application in respect of a State significant development by

granting consent with such modification or on such conditions as the consent authority may determine, or refuse to consent to the development. Section 4.15 applies, subject to Division 4.7, to the determination of the development application: s 4.40.

205 Section 4.15(1) relevantly provides:

> **4.15 Evaluation**
>
> (1) **Matters for consideration—general** In determining a development application, a consent authority is to take into 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 that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
>
> (iii) any development control plan, and
>
> (iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and
>
> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),
>
> …
>
> 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.
>
> (Emphasis added to indicate the matters alleged not to have been taken into account.)

206 In *Zhang v Canterbury City Council* (2001) 51 NSWLR 589; [2001] NSWCA 167 at [71]-[76], this Court said, of the statutory predecessor to s 4.15, that it prescribed the focal points by reference to which the decision ought be made.

207 The level of particularity with which "environmental impact" and the matters such as those specified in s 4.15(1)(b) (or its predecessor) are to be considered is demonstrated by *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86 at 95-97. Bignold J said, at 96:

> In my opinion the "environmental impact" of the proposed development (Stage 3 of Kooragang) within the meaning of s 90(1)(b) of the EP&A Act means "the effects" or "influence" on the environment of the carrying out of the proposed development, and those effects include what I might for convenience refer to as "noise and vibration problems" likely to be caused to residents adjoining the Northern Railway Line by coal trains passing along the line in the course of a continuous 24 hour period per day to and from Kooragang.

208 In *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638; [2011] NSWCA 349 (*Hoxton Park*), this Court considered the ambit of the words, "the likely impacts of the development" in s 79C(1)(b) of the EPA Act and whether they included indirect as well as direct impacts. The Council (which was the respondent to the appeal) sought to defend the decision of the Court below by contending that the impact of the construction of a bridge was not a matter required to be taken into account in determining the development application. This was because, according to the Council, the construction of the bridge was not a likely impact of the development.

209 This Court held that where access to a school (the subject of a development application under Part 4) was by a road passing over a bridge to be constructed by the developer on council land, the likely impacts of that development (within s 79C(1)(b)) included the environmental impacts of the construction of the bridge. This was the case even though construction of the bridge did not itself require consent under that Part and that its environmental impacts were to be the subject of separate environmental assessment under Part 5 of that Act.

210 In the present case, MACH did not submit that increased global warming (as a result of the Scope 3 greenhouse gas emissions produced by the project) was not a "likely impact" of the project. As Basten JA (Giles and Macfarlan JJA agreeing) said in *Hoxton Park*, of present relevance, at [46]:

> "Likely" in this context has the meaning of a "real chance or possibility" rather than more probable than not …

The LEC Act

211 Under s 20(1)(e) and s 20(2) of the LEC Act, the Land and Environment Court has the same jurisdiction as the Supreme Court would have, but for s 71, to hear and dispose of proceedings for, in effect, judicial review of administrative decisions made under planning or environmental laws. This includes decisions made under the EPA Act: s 20(3) of the LEC Act. This jurisdiction is equivalent in kind to the jurisdiction conferred on the Supreme Court by s 69 of the *Supreme Court Act 1970* (NSW): *Cameron v Woollahra Municipal Council* (2024) 115 NSWLR 239; [2024] NSWCA 216 at [56] (Payne JA, White JA and Price AJA agreeing).

212 Section 4.59 requires that any proceedings challenging a development consent be brought within 3 months of the public notice of its granting.

213 An appeal against a decision made in Class 4 of the Land and Environment Court's jurisdiction is heard by this Court (the Court of Appeal): s 58 of the LEC Act and s 48(1)(a)(i) of the *Supreme Court Act*. It is, thus, necessary for the challenger to an administrative decision to establish either a jurisdictional error or an error of law on the face of the record. If the decision-maker is a tribunal, the record includes the reasons given: s 69(4) of the *Supreme Court Act*.

214 Division 3 of Part 3 of the LEC Act is entitled "Orders of conditional validity for certain development consents". It applies to the present development consent and relevantly provides:

> **25B Orders for conditional validity of development consents**
>
> (1) The Court may, instead of declaring or determining that a development consent to which this Division applies is invalid, whether in whole or in part, make an order—
>
> (a) suspending the operation of the consent in whole or in part, and
>
> (b) specifying terms compliance with which will validate the consent (whether without alterations or on being regranted with alterations).
>
> (2) Terms may include (without limitation)—
>
> (a) terms requiring the carrying out again of steps already carried out, or
>
> (b) terms requiring the carrying out of steps not already commenced or carried out, or

(c) terms requiring acts, matters or things to be done or omitted that are different from acts, matters or things required to be done or omitted by or under this Act or any other Act.

...

25D Power to grant another development consent

Nothing in this Division prevents the grant of another development consent in relation to the same matter, during or after the period of suspension, pursuant to a development application duly made.

25E Duty of Court

It is the duty of the Court to consider making an order under this Division instead of declaring or determining that a development consent to which this Division applies is invalid, whether in whole or in part.

215 The "Court" is defined by s 4 of the Act to mean "the Land and Environment Court constituted under this Act."

The Resources SEPP

216 The Resources SEPP was the relevant planning instrument for the purposes of s 4.15(1)(a)(i). Of present relevance, cl 2.20 provides:

2.20 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**—

(a) that impacts on significant water resources, including surface and groundwater resources, are avoided, or are minimised to the greatest extent practicable,

(b) that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable,

(c) **that greenhouse gas emissions are minimised to the greatest extent practicable**.

(2) Without limiting subsection (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.

(Emphasis added.)

217 In *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216; (2021) 250 LGERA 39 (*KEPCO*), this Court considered the statutory predecessor to cl 2.20 and held that the reference to greenhouse

gas emissions in the equivalent of cl 2.20(1)(c) included all three types of emissions, namely:

(1) Scope 1 (emissions arising from fuel consumption during mining operations and consumption and release of fugitive CH4 during and post mining);

(2) Scope 2 (indirect emissions associated with purchased electricity brought in to the organisational boundary to supplement the on-site electricity generation); and

(3) Scope 3 (indirect emissions associated with the production and transport of fuel, emissions from coal transportation and emissions from the use of the product coal).

218 In *KEPCO*, this Court (Basten and Payne JJA) held at [44] that it was open to the Commission to take into account that KEPCO had not put forward any conditions to address the Scope 3 emissions to persuade the Commission that the "greenhouse gas emissions are minimised to the greatest extent practicable."

Consideration

The relevant principles

219 The relevant statutory provisions and subordinate instruments referred to in the legislation govern and determine the process which the decision-maker is obliged to undertake when making a decision. Thus, if the decision-maker fails to consider a matter which the legislature requires the decision-maker to take into account, this amounts to an error of law which, subject to limited exceptions, (including the operation of Division 3 of Part 3 of the LEC Act), vitiates a decision: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J); [1986] HCA 40. It is well settled that matters referred to in s 4.15(1)(b) are mandatory relevant considerations: *GPT RE Ltd v Belmorgan Property Development Pty Ltd* (2008) 72 NSWLR 647; [2008] NSWCA 256 at [15] (Basten JA, Bell JA and Young CJ in Eq agreeing).

220 A legislative directive that the decision-maker have regard to a particular matter requires the decision-maker to take the matter "into account and to give weight to [the matter] as a fundamental element in making [the] determination": *The Queen v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 (Mason J, Gibbs CJ agreeing); [1979] HCA 32.

221 In *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321; [2024] HCA 12, the appellant argued that Ministerial Direction 90 had not been complied with and, accordingly, the delegate's decision to refuse his application for revocation of the cancellation of his visa was invalid. Ministerial Direction 90 required the Administrative Appeals Tribunal to take into account various considerations, some of which were identified as "primary" and others which were identified as "secondary". The High Court upheld the appeal and set aside the Tribunal's decision on the basis that the Tribunal had failed to engage in the process of reasoning required by the statute. The plurality (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ) said, at [33]:

> The error of the Tribunal was a breach by a statutory decision-maker of a condition governing the process of reasoning to be undertaken in exercising the decision-making power under s 501CA(4). The condition imposed by s 499(2A) by reference to Direction 90 required the Tribunal to take into account, as mandatory considerations, the primary considerations identified in para 8 and the other considerations in para 9, where those considerations were relevant to the decision. Fulfilment of the condition required the Tribunal to identify which of those mandatory considerations were relevant to the particular circumstances of the particular applicant. Then, having identified the *relevant* mandatory considerations, the exercise of the discretion under s 501CA(4) required the Tribunal to engage in an evaluative assessment involving the weighing of those relevant mandatory considerations with other relevant considerations.

222 The reasons of a decision-maker generally indicate whether the decision-maker has taken into account a mandatory relevant consideration. However, where a mandatory relevant consideration is not referred to in the reasons or is referred to in such a way as not to provide a clear indication one way or the other as to whether it was taken into account, the court engaged in judicial review of the decision is required to determine, by inference if need be, whether it was taken into account. The reasons ought be read fairly and as a whole. It cannot necessarily be inferred from the failure to address a mandatory relevant consideration in terms that it has not been taken into account: *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225; [2023] NSWCA 215 at [66] and [69].

223 It is for the party seeking to impugn the decision under review to persuade the Court that a matter has not been considered.

Ground 1(a): alleged error in failing to take into account cl 2.20 of the Resources SEPP

224 Clause 2.20 required the Commission to 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 that greenhouse gas emissions are minimised to the greatest extent possible. As is plain from the data, about 98% of these emissions will be generated from burning the coal at locations convenient to the purchasers, who are assumed to be outside Australia. The effect on global annual emissions for the life of the extension to the mine, 0.065% per annum, could not on any view be regarded as other than very significant in terms of its effect on global warming. It was common ground that the Commission did not impose any conditions which affected Scope 3 emissions, although it imposed conditions which affected Scope 1 and Scope 2 emissions.

225 It was common ground that MACH did not identify and the Department in the DAR did not recommend any conditions which were relevant to Scope 3 emissions, although the DAR made recommendations about conditions which could be imposed on Scope 1 and Scope 2 emissions. Nor did Denman propose conditions which could be imposed for Scope 3 emissions. Instead, it made the forensic choice to submit that, having regard to MACH's failure to propose conditions for Scope 3 emissions, the Commission could not be satisfied that the development was to be undertaken in an environmentally responsible manner, nor that greenhouse gas emissions would be minimised to the greatest extent practicable, as required by cl 2.20(1)(c) of the Resources SEPP.

226 Denman submitted that, in effect, the Commission adopted the error in the Department's submissions, by not addressing conditions on Scope 3 emissions. Further, Denman relied on the absence of any submission by MACH or the Department that it was not *feasible* to impose conditions on the approval to mitigate Scope 3 emissions.

227 The question is whether the Commission's reasons ought be read:

(1) (as MACH contended) as indicating that the Commission considered whether conditions ought be imposed on the consent to address Scope

3 emissions and decided that the minimisation of Scope 3 emissions ought be left to the countries in which the Scope 3 emissions would be generated and emitted (being determined by the purchasers of the coal and assumed to be outside Australia), having regard to international agreements requiring likely purchasers to limit greenhouse gas emissions; or

(2) (as Denman contended) as indicating that the Commission failed to consider whether to impose conditions on Scope 3 emissions because conditions which might have been imposed on Scope 3 emissions had neither been proposed by MACH nor recommended by the Department.

228 MACH relied on the word "regulated" in the phrase "regulated and accounted for" in [150] of the Commission's reasons in support of its submission that the Commission *had* considered whether conditions with respect to Scope 3 emissions ought be imposed and had determined that "broader national policies and international agreements (such as the Paris Agreement)" were sufficient to "regulate" Scope 3 emissions. Denman responded to this submission by arguing that the words "regulated *and accounted for*" comprised a "compound expression" which did not separately address regulation and that the reading for which MACH contended was not an open one.

229 The Commission, in its reasons, expressly considered Scope 3 emissions. It made reference to international controls on Scope 3 emissions. It acknowledged that about 98% of the emissions generated by the project would be Scope 3 emissions. While it did not expressly consider what *conditions* it could have imposed on Scope 3 emissions (and whether it was feasible to impose such conditions), it addressed the controls which applied to Scope 3 emissions, at least if the coal from the project were purchased and burned in nations which are parties to the Paris Agreement or entities which have otherwise committed themselves under international law to reducing greenhouse gas emissions (such as Taiwan). I am persuaded that the effect of the Commission's consideration of how Scope 3 emissions would be controlled is that it cannot be inferred that the Commission failed to consider whether conditions ought be imposed on Scope 3 emissions.

230 No ground of legal unreasonableness is relied on in this Court. This is to be contrasted with the submission made by Denman to the Commission that "there is no rational basis on which the Commission can approve the project" . I

infer that Denman accepted, by the time the matter came before the primary judge, that it was *open* to the Commission to decide to impose no conditions on Scope 3 emissions.

231 This Court's jurisdiction (and that of the Court below) does not extend to assessing the merits of the Commission's decision. There was plainly much more that the Commission *could* have done by imposing conditions in relation to the 98% of emissions which would be generated by the project. It could, for example, as Ms Sharp SC, who appeared with Mr Thompson for Denman, submitted, have imposed conditions such as requiring the coal to be washed before it is exported; limiting the coal that is exported to coal of a certain high calorific content or that the coal be exported only to those countries which have NDCs under the Paris Agreement (or equivalent in the case of an entity such as Taiwan); requiring that coal exported from the project only be used in power stations which use technology such as carbon capture and storage or fluidised bed combustion; or requiring that MACH implement offsets to the emissions caused by the coal. I note that it was not suggested to the Commission by MACH, Denman, or the Department, that any of the postulated conditions ought be imposed.

232 However, the Commission was the body which was chosen to make that decision and it chose not to adopt any of the conditions for which Denman contended. It is important that judicial review not trench beyond its proper boundaries and be used as a decoy to review the merits of a decision: *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1 at [89] (Gummow J, Heydon and Crennan JJ agreeing). All that is required by cl 2.20 of the Resources SEPP is that the Commission consider whether to impose conditions on Scope 3 emissions and, if so, what conditions ought be imposed. What weight the Commission places on any given factor is a matter for the Commission and not for this Court: see the authorities referred to in *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 at [35] (Hodgson JA, Campbell and Bell JJA agreeing).

233 For these reasons, I agree with Ward P that ground 1(a) has not been made out.

Ground 1(b): alleged failure to consider the likely impacts in the locality of the project

234 As summarised above, the EPA Act requires a community participation plan to be prepared and publicly exhibited. A public hearing may be conducted. Section 4.15(1)(b) requires the effect of the project on the locality to be considered. The decision-maker, in this case the Commission, is required to give reasons. One of the purposes of the requirement for reasons is to demonstrate that the Commission has complied with the law, including that it has taken into account mandatory relevant considerations: see generally *New South Wales Land and Housing Corporation v Orr* (2019) 100 NSWLR 578; [2019] NSWCA 231 at [65]-[77] (Bell P, Ward JA agreeing).

235 The evident legislative intention of the provisions identified above is that a planning authority such as the Commission is obliged to take into account the likely environmental impact of the development in the locality and the views of the community in deciding whether to grant or refuse development consent and to explain in its reasons how those views and that likely impact have been taken into account. It can be inferred from their content that the purpose of these provisions is to indicate to those most affected by the development (being those in the locality) that their views and the likely impact on their surrounds have been taken into account by the decision-maker and to explain why the decision has been made.

236 The evidence before the Commission established that the effects of global warming on New South Wales and, in particular, in the locality during the life of the project and beyond, were such as to cause, and increase the incidence of, extreme weather events (flood, bushfire, drought, reduced run-off etc), increased temperatures (in excess of global averages) and rising sea levels which would compromise residences and business in the locality (and potentially lead to evacuation) and cause significant economic and personal harm to the population, both human and non-human, and the environment which may be irreparable. These effects were acknowledged by MACH in its EIS (although not in the detail provided by Denman's evidence and submissions). The Commission's obligation to consider the likely impacts of the development on the natural and built environment in the locality of the mine, as required by s 4.15(1)(b), required it to address these potentially adverse effects

in the locality. This obligation could not be discharged by general references to the effects of global warming on the planet generally.

237 The evidence indicated that there were features of the locality which made the locality particularly susceptible to the effects of global warming. These features included the greater than average temperature increases in the locality as a result of global warming, as compared with average increases for the planet; the lack of altitude of coastal areas, with the consequence that any increase in sea level would have an immediate impact on the land in the vicinity; and the increased susceptibility of the locality to extreme weather events as a consequence of global warming.

238 The Commission's report did not deal with any of these matters. Nor did it seek to distinguish between the effects of global warming generally and the effects of climate change in the locality of the project. While the Scope 3 emissions did not "count" against Australia's NDC under the Paris Agreement, the evidence indicated that their impact would be disproportionately felt in the locality of the project. For these reasons, it failed to comply with s 4.15(1)(b) of the EPA Act. This omission was not only material but also highly significant having regard to the evidence before the Commission. Ground 1(b) has been made out.

Relief

239 Ms Sharp submitted that there would be no utility in referring this matter back to the Court below because the failure to consider even one of the matters identified in the grounds completely infected the balancing exercise called for under s 4.15.

240 Mr Emmett SC, who appeared with Mr Hume for MACH, submitted that it was not open to Denman to oppose the matter being remitted to the Court below, having regard to the way the hearing was conducted in the Court below (see above) and because Division 3 of Part 3 of the LEC Act applied. He submitted that the Court below did not need to consider making an order under Division 3 of Part 3 of the LEC Act because it had not found error. However, he submitted that if this Court found either or both of the grounds made out, it ought remit the matter to the Court below to permit it to hear submissions on whether an order under Division 3 of Part 3 ought be made as, by s 25E, the Court below was

obliged to consider making an order under the Division instead of declaring a development consent to be invalid.

241 In this Court, Ms Sharp accepted that she had not responded to Mr Free's submission in the Court below. However, she submitted that it had been raised late and was a "side wind in literally the last minute of the submissions".

242 The submissions which Ms Sharp made in the Court below as to the consequences which ought ensue from the Court finding error did not expressly refer to Division 3 of Part 3 of the LEC Act, which had been the subject of express submission by MACH. Section 25E of the LEC Act requires the Court below to consider making an order under the Division instead of declaring a development consent to be invalid.

243 In these circumstances, I consider that this Court is obliged to remit the matter to the Court below to enable it to consider whether to make an order under Division 3 of Part 3 or whether to declare the development consent invalid and remit the matter to the Commission for reconsideration in accordance with law. I accept Mr Emmett's submission that it would not be appropriate for this Court to make this decision since the Court below has not yet had an opportunity to consider whether an order ought be made and has a statutory obligation to do so. Further, as a matter of procedural fairness, it is desirable and may be necessary that the Court below, in the first instance at least, make that judgment.

Conclusion

244 For the reasons given above, I agree with the orders proposed by Ward P.

245 **PRICE AJA**: I agree with Ward P and Adamson JA.

****

Amendments

14 August 2025 - [109] the word "locally" amended to "globally"

material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.